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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 3, 2016

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

v.

OAK GROVE RESOURCES, LLC and
DONNY BIENIA, employed by OAK
GROVE RESOURCES, LLC

Docket Nos. SE 2010-1236
SE 2011-782

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

DECISION

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

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). These matters involve an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oak Grove Resources alleging a failure to comply with a safeguard notice, and a related individual penalty issued to Oak Grove foreman Donny Bienia pursuant to section 110(c) of the Act.[1]

The safeguard notice in question requires that only approved equipment such as track motors be used to move supply cars on a track. The order alleges that Bienia was using a winch and cable on a scoop to move supply cars, in violation of the safeguard, when the cars broke

[1] Safeguard notices effectively function as mine-specific mandatory standards. *Wolf Run Mining Co.*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011), *aff'g*, 32 FMSHRC 1228 (Oct. 2010). They are issued pursuant to section 314(b) of the Act, which states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

Section 110(c) of the Act states in relevant part 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, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon [the operator]." 30 U.S.C. § 820(c).

loose and rolled approximately 3,900 feet.[2] The cited condition was designated as "significant and substantial" ("S&S") and the result of an unwarrantable failure.[3] The Judge found the safeguard to be valid, affirmed the order in its entirety, found Bienia personally liable, assessed the $50,700 penalty proposed by the Secretary against Oak Grove, and assessed a reduced penalty of $500 against Bienia. 35 FMSHRC 842 (Apr. 2013) (ALJ).

Oak Grove and Bienia challenge the validity and applicability of the safeguard notice, and the Judge's unwarrantable failure and personal liability determinations. For the reasons below, the Judge's decision is affirmed.

I.

Factual and Procedural Background

A. Factual Background

The relevant events occurred on May 12, 2010, at an Oak Grove underground coal mine in Jefferson County, Alabama. A miner, Andrew Teel, asked foreman Bienia for assistance moving some supply cars a short distance down the track to the crosscut for unloading. Oak Grove refers to this as "spotting." The six cars were coupled together on a track which sloped outby the mine.[4] The fourth car was resting against a car stop, and another car stop was located approximately 30 feet down the slope. Bienia and Teel decided to use the winch, cable and hook on a nearby scoop that Bienia had been operating. They planned to winch the cars a few feet uphill to take the weight off the car stop, remove the stop, then lower the cars down the track to the crosscut. Bienia testified that this method was used at a mine where he was previously employed. *Id.* at 844, 851.

Teel attached the winch hook to a side rail, which was normally used to tie down and secure loads, on the third car. Bienia began winching the cars uphill, and Teel removed the car stop which the fourth car had been resting against. At that point the weld attaching the third car's

[2] A scoop is a piece of "[d]iesel- or battery-powered equipment with a scoop attachment for cleaning up loose material, for loading mine cars or trucks, and hauling supplies." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 484 (2d ed. 1997). The winch, which was "like the winch on a pickup truck," was mounted behind the bucket of the scoop. Tr. 50. Counsel for the operator noted that not all scoops have winches. Tr. 17.

[3] The "significant and substantial" and "unwarrantable failure" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significant and substantially contribute to the cause and effect of a . . . mine safety and health hazard," and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." Oak Grove does not contest the Judge's finding of a significant and substantial violation.

[4] "Outby" refers to areas "away from the face . . . toward the mine entrance." *Dictionary of Mining*, 383.

side rail to the car broke, the hook and cable came loose, and all the cars started to roll. Bienia attempted to halt their movement by turning the bucket of the scoop into the fourth car, but doing so caused the third and fourth cars to become uncoupled. The scoop held the last three cars, while the first three kept moving. Bienia left the scoop and ran alongside the cars, hoping to find some way to derail them, but was not able to keep up as the cars gained speed. The cars ran over the outby car stop without halting or derailing, and ultimately travelled approximately 3,900 feet before coming to a stop. No miners were injured, although one miner had to run to take refuge in a spur track to avoid being hit as the cars went by. Oak Grove investigated the incident during the following two days. *Id.* at 845, 852-53.

On May 24, 2010, an MSHA inspector received an anonymous handwritten complaint regarding the incident and conducted an investigation. The inspector concluded that the method used to move the supply cars violated previously issued Safeguard No. 3013658, which states:

> The two longwall utility men were observed moving 3 flat cars of supplys [*sic*] on the longwall section track with a diesel powered scoop. (Note) They were pulling the cars with a 5/8" dia. wire rope.
>
> This notice to provide safe guard [sic] requires only equipment such as track motors or other approved equipment be used in moving supply cars on the track in the mine.

Gov. Ex. 4. Accordingly, the inspector issued the following order pursuant to section 104(d)(2) of the Act:

> On 5-12-2010 at approximately 11:30pm an incident occurred at this mine that endangered the lives of miners working underground. A Section Foreman was using the winch of a scoop to move 3 supply cars; with 1 of the cars being loaded with 20 foot sections of 2 inch metal water pipe. The supply cars were located at the end of the Main North 3 track. The 3rd car inby was attached to the winch cable. The hook on the end of the cable became disconnected from the supply car causing the 3 most outby supply cars (coupled together) to roll outby. There was a positive stop located approximately 30 feet from the cars, that when contacted by the cars, fell over allowing the supply cars to continue to gain momentum and travel outby with no one in control of the cars. The cars came to rest at crosscut 20 on 11 West track. The distance traveled by the supply cars was 3,900 feet.

Gov. Ex. 2. In explaining why he determined Bienia had not been using "approved equipment," the inspector testified that supply cars are typically moved along a track using rail-mounted equipment (locomotives or mantrips) equipped with couplers, and that such a method (rather than a winch and scoop) is widely considered to be the only safe way to move supply cars on a track. Tr. 73-74. The inspector stated that he designated the alleged violation as an unwarrantable failure because a miner in a management position (Bienia) was directly involved. Tr. 119.

Bienia testified that at the time of the incident he believed his method of "spotting" supply cars to be a safe procedure, and was unaware of the concept of safeguards or of any "rule" prohibiting the use of a rope and winch to move supply cars. Tr. 145, 154-55, 163. Oak Grove's safety manager at the time, John Henry Hedrick III, testified that he believed the safeguard did not prohibit using a winch to spot supply cars (where the winch is powering the move), but rather prohibited using a scoop and rope to pull cars move cars (where the scoop is powering the move). Tr. 172-75, 190-91.

B. The Judge's Decision

In finding Safeguard No. 3013658 to be valid, the Judge relied on *American Coal*, 34 FMSHRC 1963 (Aug. 2012). In that case, the Commission held that a safeguard notice is valid if it describes a hazardous condition and specifies a remedy; it need not articulate a specific risk or harm to miners. *Id.* at 1969-70. The Judge determined that the safeguard at issue here "implicitly specifies the hazardous condition and explicitly provides the remedy for it." 35 FMSHRC at 861. The Judge then found that the safeguard notice applied to the cited condition. He noted that both involve the use of a scoop and wire rope to move supply cars, and found no meaningful distinction between pushing or pulling the cars, or between powering the move with a winch or the scoop itself. *Id*. at 861, 861 n.39.

The Judge concluded that the violation was the result of an unwarrantable failure, based on the direct involvement of supervisory personnel and the gravity of the cited condition. *Id.* at 863. He rejected Oak Grove's claim of an objectively reasonable and good faith belief that the cited conduct was not violative. In rejecting the claim, he stated that Bienia's lack of awareness of the safeguard's requirements was "inexcusable," and emphasized the inspector's testimony that the method employed by Bienia was well-understood to be unsafe. *Id.* The Judge was also unpersuaded by allegedly mitigating factors such as Bienia's experience moving cars with a winch and rope at another mine, the presence of the outby car stop, and Oak Grove's subsequent investigation. He found these factors to be irrelevant or non-determinative. *Id*. at 851, 854 n.27, 862 n.41, n.43.

Finally, the Judge found Bienia personally liable under section 110(c) of the Act. He noted that Bienia had a duty to know of the mine's safeguard notices, and thus had reason to know that his actions ran contrary to the requirements of the safeguard and were unsafe. However, the Judge assessed a penalty of $500 rather than the proposed penalty of $6,500. *Id.* at 865. In finding personal liability, the Judge rejected Oak Grove's argument that section 110(c) does not apply to agents of LLCs. *Id*. at 867.

III.

Disposition

A. Validity of the Safeguard

We conclude that the Judge properly held Safeguard No. 3013658 to be valid. The safeguard notice describes flatcars being pulled by a scoop and wire cable (the hazardous condition) and directs that only approved equipment such as track motors be used to move

supply cars on a track (the remedy). As discussed further below, we reject Oak Grove's claim that the safeguard is invalid because it fails to identify a hazard.

Oak Grove argues that the Commission's holding in *American Coal* is in error, but fails to offer any new reasons that would justify reconsidering the principle adopted therein.[5] We reaffirm our holding in *American Coal* that a notice of safeguard identifies a hazard for purposes of section 314(b) by identifying a hazardous condition, and need not specify a particular harm or risk to miners. 34 FMSHRC at 1969-70.

Oak Grove additionally contends that the safeguard notice fails to identify a hazardous condition because the nature of the hazard is not evident from the condition described (moving supply cars with a scoop and rope). The Commission, however, has looked to both common sense and industry standards to determine whether a condition described in a safeguard notice is hazardous. *See, e.g., American Coal*, 34 FMSHRC at 1976 ("it requires only common sense to know that it is unsafe to travel in a hoist with an open gate"); *Oak Grove Resources, LLC*, 35 FMSHRC 2009, 2012-13 (July 2013) ("it has long been commonly recognized that pushing cars on the main haulage roads of an underground mine is a hazardous practice").

Here, the inspector testified that using track-mounted equipment and couplers provides a "sure way of holding the cars," and that conversely, Bienia's method is considered unsafe and is "not a common practice . . . because of exactly what happened," i.e., runaway cars. Tr. 73-74. As the inspector reasonably explained, a scoop and rope does not provide the same level of control as track-mounted equipment which is "in line with . . . [and] rigidly coupled to the cars." Tr. 84. Even Oak Grove safety manager Hedrick conceded that "cars could run over you" when using a scoop and rope to move cars. Tr. 174-75. Common sense and industry practice demonstrate that the condition described in the safeguard raises concerns regarding stability and control. Accordingly, we find that the condition described in the safeguard – use of a scoop to pull cars – is hazardous.

Oak Grove claims that it is unclear whether the safeguard notice is directed toward preventing runaway cars, a car riding into the scoop, or some other danger. However, as we noted in *American Coal*, "many potential risks" can flow from a single condition, and "it would be unreasonable to require the inspector to identify each and every one." 34 FMSHRC at 1970; *see also Oak Grove*, 35 FMSHRC at 2014 (a valid safeguard notice "need not foreshadow the events that may occur if the safeguard is not implemented"). A safeguard notice is not invalid because it describes a hazardous condition that could result in multiple specific harms; indeed, a

[5] Oak Grove relies on earlier Commission caselaw and the use of the term "hazard" in MSHA's Program Policy Manual ("PPM"). These were already considered by the Commission in *American Coal*. The caselaw was found to be consistent with our holding, and the discussion of hazards in the PPM was found not to be persuasive. 34 FMSHRC at 1967-71. Oak Grove also claims that the Commission in *American Coal* did not consider testimony from a former MSHA district manager that inspectors were told to include hazards when issuing safeguards. Resp. Ex. 4 at Tr. 127-28. However, the testimony indicates that MSHA was simply attempting to comply with Commission caselaw, and the Commission has since held that safeguard notices need not identify a specific harm.

multiplicity of potential specific harms arising from the identified hazardous condition emphasizes that the safeguard notice does identify a hazardous condition.[6] Here, Safeguard No. 3013658 describes a hazardous condition and specifies a remedy. Within the framework of *American Coal*, the safeguard is valid.

B. Applicability of the Safeguard

The Judge found that the cited condition "clearly falls within [the safeguard notice's] purview." 35 FMSHRC at 861. We agree. The purpose of the safeguard notice is to ensure that only approved equipment is used to move supply cars on a track. Oak Grove moved supply cars on a track using a scoop and wire rope rather than approved equipment, and was cited for doing so.

Oak Grove claims that the safeguard notice is not applicable to the cited condition.[7] Oak Grove would distinguish pulling cars using a scoop and rope, as described in the safeguard notice, from using a winch to spot cars a short distance, as described in the order. We have recognized that a citation should be vacated if the conditions "differ fundamentally in nature, cause and remedy" from those in the underlying safeguard, such that the operator lacked notice that the cited conduct was prohibited. *Bethenergy Mines, Inc.,* 15 FMSHRC 981, 986 (June 1993); *see also Southern Ohio Coal Co.*, 7 FMSHRC 509, 512-13 (Apr. 1985) ("SOCCO I"). However, we see no such fundamental dissimilarity here.

The only potentially relevant difference here is the use of the winch.[8] We do not find this to be a meaningful distinction. While the use of a winch may change the mechanics of the process to some degree, it does not alter the nature of the hazardous condition. As the inspector testified, approved equipment (track-mounted equipment with couplers) provides control because it is in-line with and rigidly attached to the supply cars. Tr. 84. Using non-approved equipment that is not track-mounted – whether a rope attached to a scoop, or a winch and rope attached to a scoop – creates a danger of loss of control and runaway cars, which is avoided by using only approved equipment. The safeguard put Oak Grove on notice that using non-approved equipment to move supply cars on a track is prohibited. Limiting prohibited conduct to the exact scenario in the safeguard notice, i.e., the use of a scoop and rope but no winch, would unduly narrow the scope of the hazardous condition identified in the safeguard notice, and allow the use of equipment which is clearly non-approved.

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[6] Conceivably, an operator could be cited for conduct which is hazardous in a way truly not contemplated by the underlying safeguard notice. However, that would affect the validity of the citation rather than the validity of the safeguard notice, and regardless, is not the situation here.

[7] Oak Grove also contends that the violation cannot be sustained because the safeguard notice does not clearly identify the condition to which it is directed. This involves the validity, rather than the applicability of the safeguard notice, and has already been addressed.

[8] Oak Grove also suggests a substantive distinction between pulling cars and spotting them a short distance. Tr. 173, 190-91. However, the safeguard notice addresses *moving* cars generally.

C. Unwarrantable failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Because supervisors are held to a higher standard of care, the involvement of supervisory personnel in violative conduct may support an unwarrantability determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). Conversely, if an operator has acted on an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law, such conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator's belief was in error. *IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009) (citing *Kelly's Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997).

The Judge found that the violation was the result of an unwarrantable failure, based primarily on the direct involvement of Bienia, a supervisor. The Judge rejected Oak Grove's claim of an objectively reasonable and good faith belief that the cited conduct was not violative. He acknowledged Bienia's apparent good faith belief that his method of moving cars was not prohibited, but considered such ignorance of the mine's safeguard notices inexcusable, stating that "[a]s supervisors are held to a heightened standard of care regarding safety matters, and as there was an intentional, though inexcusably unwitting, violation of the safeguard involved here, the conclusion that the violation was unwarrantable is inescapable." 35 FMSHRC at 863. Oak Grove claims the Judge erred in finding that Bienia's belief in compliance was not objectively reasonable, and in rejecting certain other mitigating factors.[9] For the reasons below, we find that the Judge properly rejected such arguments.

In claiming an objectively reasonable and good faith belief in compliance, Oak Grove relies on Bienia's testimony that the same method of moving cars was used at the mine where he was previously employed. While this may support Bienia's good faith belief that the method was compliant, it does not make the belief objectively reasonable. The inspector testified that the method used by Bienia is commonly understood to be unsafe. Tr. 73-74. Furthermore, safeguard notices are mine-specific. A belief that a method of moving supply cars is compliant is not objectively reasonable simply because a miner used it in an undescribed instance(s) at some unidentified time(s) and, most importantly, without testimony that MSHA was aware of such

[9] In determining whether aggravated conduct has occurred, a Judge must consider all relevant factors, including the extent of the violative condition, the length of time the condition has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in abating the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal*, 31 FMSHRC at 1350-57. Although the Judge did not address all the relevant factors here, Oak Grove does not challenge the unwarrantable failure determination on those grounds.

purported use.[10] The record does not detail the extent of this experience. It may have been a single instance as far back as 1975 and there was no evidence that MSHA ever knew of Bienia's use of this method. Tr. 135-36.

Oak Grove has a duty to ensure that its supervisors are aware of the proper way to move supply cars at Oak Grove Mine. Here, it apparently failed to do so; Bienia could not recall any training as to this particular safeguard notice. Tr. 154, 162-64. However, the "general principle that ignorance of the law is no defense" applies in the negligence context. *Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (citing *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996)). Neither Bienia's experience at another mine, nor his unfamiliarity with the requirements of the safeguard notice, is a valid ground for finding his belief objectively reasonable.

Oak Grove also argues more generally that the text of the safeguard notice can reasonably be interpreted as applying only to pulling cars along the track with a scoop and rope, rather than spotting them with a winch.[11] As discussed above, such an interpretation focuses on a distinction without a difference, and is not objectively reasonable.

As for other allegedly mitigating factors, we do not find the presence of the outby (downslope) car stop to be relevant. Bienia stated that he only became aware of the car stop after he began winching the cars. Tr. 140. Therefore, the car stop is irrelevant to his state of mind when deciding to engage in the cited conduct. Moreover, car stops are intended to prevent cars from beginning to move, rather than safely stopping cars that are already moving. Tr. 44, 76-77. Awareness of a car stop 30 feet away that would not be expected to (and in fact did not) stop the runaway cars, does not affect the relevant standard of care.

We are also unpersuaded by Oak Grove's contention that its investigation and remedial actions taken after the incident are mitigating factors. The record does not indicate that any *relevant* remedial actions were taken, as nothing in the investigation summary or the safety manager's testimony indicates that Oak Grove implemented any changes to ensure the use of

[10] The Commission has recognized that prior inconsistent enforcement by MSHA can be relevant with regard to negligence and reasonableness of belief. *See IO Coal*, 31 FMSHRC at 1358; *see also King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981). However, safeguard notices are mine-specific, and there is no indication that MSHA has inconsistently enforced *this* safeguard notice at this mine.

[11] Oak Grove notes the safety manager's testimony that this is what he believed. Aside from the fact that a mere statement of belief does not make that belief reasonable, he was not the agent acting on the operator's behalf in this instance, so his beliefs are not relevant to the determination of reasonable and good faith belief. *See Excel Mining, LLC*, 37 FMSHRC 459, 468 (Mar. 2015) (the negligence of an agent is imputed to the operator for the purpose of making an unwarrantable failure determination).

approved equipment such as track motors when moving supply cars.[12] *See* Resp. Ex. 8; Tr. 178-80. In sum, we are not persuaded by the mitigating factors offered by Oak Grove. The Judge's unwarrantable failure finding is affirmed.

D. Personal Liability of Donny Bienia

Section 110(c) provides that whenever a corporate operator violates a mandatory standard or any order under the Act, "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Liability under section 110(c) only requires that an agent knowingly acted, not that the individual knowingly violated the law. *See, e.g., McCoy Elkhorn Coal Corp. and Robinson,* 36 FMSHRC 1987, 1996 (Aug. 2014), *citing Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1131 (July 1992). A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." 3 FMSHRC at 16.

As an initial matter, we reaffirm our holding in *Simola* that section 110(c) applies to agents of LLCs. *Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 548-49 (Mar. 2012), *followed in Sumpter, employed by Oak Grove Resources LLC,* 763 F.3d 1292, 1298-99 (11th Cir. Aug. 2014). Oak Grove contends that the plain language of section 110(c) explicitly and exclusively refers to agents of corporate operators, and therefore cannot be applied to Bienia, an agent of an LLC. However, as we explained in *Simola*, LLCs did not exist when section 110(c) was drafted. 34 FMSHRC at 542. Because the intent of the provision is to pierce corporate liability, and the limited liability shield is a key characteristic of LLCs, section 110(c)

[12] The parties disagree as to whether remedial actions taken after the cited event, but prior to the issuance of a citation, can be considered mitigating factors with respect to an unwarrantable failure determination. As we find no such relevant actions occurred, we need not address this issue. We note that Oak Grove had 13 days from the incident until MSHA issued the order within which to investigate the incident and make meaningful changes in its practices. It had this much time because MSHA did not learn of the incident until the inspector received an anonymous handwritten note from a miner in his lunch box, which the inspector properly regarded as a complaint under section 103(g) of the Mine Act. 35 FMSHRC at 843.

applies to agents of LLCs. Oak Grove fails to offer any new theories that would justify reconsidering this principle.[13]

Turning to Bienia's liability, he not only knew that supply cars were being moved using a scoop, winch, and cable, but actually directed such activity. Furthermore, as foreman, he had a duty to be aware of the requirements of the mine's safeguard notices.[14] For the reasons discussed above, slip op. at 7-8 *supra*, we find that Bienia did not have an objectively reasonable belief that his conduct was in compliance. Bienia had direct knowledge of the condition (moving supply cars with unapproved equipment). As an agent of Oak Grove, he authorized and carried out

[13] Oak Grove relies on caselaw stating that section 110(c) does not apply to partnerships and distinguishing LLCs from corporations for jurisdictional purposes, and notes the relatively recent creation and hybrid nature of LLCs. The Commission in *Simola* considered the caselaw, and found it distinguishable. 34 FMSHRC at 544-45, 548 n.13. Noting that LLCs have the corporate characteristic of limited liability and that Congress had a clear intent to pierce the corporate veil, the Commission concluded that "Congress, if given the opportunity, would have explicitly included LLCs, within the scope of section 110(c)." *Id.* at 549, 550-51.

[14] If the record established that Bienia had not received any training regarding the safeguard requiring the use of approved equipment, it could be argued that he did not have reason to know that his conduct was violative. While a foreman has a duty to know what is required by the mine's safeguard notices, an operator has as great a duty to ensure that knowledge by proper training. However, the record only reflects that Bienia was unfamiliar with the term "safeguard" and did not recall whether he was trained as to this particular requirement. He did admit knowledge of other requirements and "rules" addressed in safeguard notices in place at the mine. Tr. 154, 162-64.

Commissioner Cohen adds that Bienia's defense was conducted jointly with Oak Grove's defense. The defense for the section 110(c) citation against Bienia personally was identical to Oak Grove's defense against the allegation of unwarrantable failure – that Bienia had a good faith belief that what he did was proper. No evidence was offered by the defense as to the training Bienia received from Oak Grove regarding the safeguards applicable at the mine. If, in fact, Bienia had not been trained regarding Safeguard No. 3013658, his defense would have been stronger. However, such evidence would also have weakened Oak Grove's defense against the unwarrantable failure designation. Thus, Bienia may have been ill-served by linking his defense with Oak Grove's defense.

conduct which he knew or should have known created a violative condition. Accordingly, we affirm the finding of liability under section 110(c) of the Act.

III.

Conclusion

For the foregoing reasons, the Judge's Decision is affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Young, concurring:

I continue to believe that the Commission's expansive view of *American Coal Company*, 34 FMSHRC 1963 (Aug. 2012), in some previous decisions is contrary to our precedents and the safety purposes of the Act. However, I join the majority's opinion in this case in its entirety, writing separately only to ensure my position on safeguards generally is not misinterpreted.

I joined the opinion in *American Coal* because common sense supported the conclusion that there is no need to state the obvious in authoring a safeguard notice to specify the harm that would foreseeably result from a prohibited, patently hazardous practice. The case before us clearly falls within the parameters of our decision in *American Coal.*

Powered haulage is a significant cause of miner deaths and injuries.[1] It is thus an area where improvisational misjudgments are especially likely to have fatal consequences. Simple matters of physics and engineering should make obvious the need to avoid using equipment other than track motors or other approved means to move equipment.

This case presents a perfect example. Not only was the motivating force applied through an untested wire rope and side rail that was never designed to bear it, the force moved in more than one direction by pulling the load laterally, and not straight down the tracks as a properly-coupled connection would have allowed. There was no track motor in place to provide controlled power through an approved connection, and the result was a foreseeable loss of control over the cars.

This, then, is unlike the circumstances in *Oak Grove Resources, LLC*, 37 FMSHRC 2687 (Dec. 2015) and *Black Beauty Coal Company*, 38 FMSHRC 1 (Jan. 2016). In the former case, there was no description of the hazard, and despite there being a fatal accident at issue, the Secretary was unable even to make a case that the violation was S&S. *Oak Grove*, 37 FMSHRC at 2692-94. In the latter case, a safeguard modification requiring travelways to be "free of mud and water" failed to specify a hazard or the degree or type of accumulations so that the hazard would be clearly discerned, and failed to relate the modification to the conditions which prompted the original safeguard. *Black Beauty*, 38 FMSHRC at 10-15 (Young and Althen, dissenting). Again, the cited breach was found not to be S&S.

I have some misgivings about finding Mr. Bienia liable under section 110(c) of the Act. That discomfort arises from the fact that neither MSHA nor this operator has taken steps to incorporate safeguards into the mine's hazard training. While I suspect this is a general problem, and should be considered along with other compelling reasons why safeguards should not be used to address hazards common to all mines, in our opinion today, Commissioner Cohen

[1] *See* MSHA – Coal End of Year 2015 Fatality Report and Metal/Nonmetal End of Year 2015 Fatality Report, http://arlweb.msha.gov/stats/charts/chartshome.htm (from the years 2011-2015, 21 of 87 total fatalities in coal mines, and 29 of 100 total fatalities in metal/nonmetal mines, involved powered haulage); MSHA Summary Fatal Accidents with Preventative Recommendations, http://arlweb.msha.gov/fatals/summaries/previoussummaries.asp ("The leading cause of fatalities in the U.S. mining industry during 2012 was powered haulage . . . .").

correctly notes that Bienia provided no argument or evidence concerning a lack of training. Slip op. at 10, n.14.

The patchwork nature of regulation-by-safeguard may explain why Mr. Bienia believed it might be permissible to move cars with a scoop, as was done in this case. Nevertheless, he was in a supervisory position with the mine and had a duty to know all governing standards, including the applicable safeguards. It would not be logical to hold both that the practice was patently dangerous – as I believe it to be – and that a foreman, removed from the operational pressures inherent in the situation that confronted Mr. Bienia in this case, would not have known this.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 2016

OAK GROVE RESOURCES, LLC v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. SE 2009-261-R SE 2009-487

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

DECISION APPROVING SETTLEMENT

BY THE COMMISSION:

These proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve a citation issued by the Department of Labor's Mine Safety and Health Administration to Oak Grove Resources, LLC following a fatal accident at its mine. The Secretary of Labor issued the citation for a violation of a notice of safeguard which had been previously issued to the mine pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b).

Oak Grove contested the citation and the associated civil penalty before a Commission Administrative Law Judge. The Judge vacated the citation; he concluded that the underlying safeguard had not been validly issued. 33 FMSHRC 846, 852-54 (Mar. 2011) (ALJ).

The Secretary filed a petition for discretionary review, which we granted. The Commission reversed the Judge, concluded that the safeguard notice was valid, and remanded the cases to the Judge for further proceedings. 35 FMSHRC 2009, 2015 (July 2013).

On remand, the Judge concluded that Oak Grove violated the safeguard, the violation was significant and substantial ("S&S"), and the violation was the result of a moderate degree of negligence on the part of Oak Grove. 35 FMSHRC 3422, 3431 (Nov. 2013) (ALJ).

Oak Grove then filed a petition for discretionary review, which we granted. On review, the Commission affirmed the Judge's decision that Oak Grove violated the safeguard, but concluded that the Judge's determination that the violation was S&S was not supported by substantial evidence in the record. 37 FMSHRC 2687, 2695 (Dec. 2015). The Commission remanded the proceedings to the Judge for an assessment of an appropriate penalty.

On remand, the Judge applied the statutory penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and assessed a $50,000 penalty. In determining "whether the operator was negligent," as required by the penalty criteria, the Judge revised his finding that Oak Grove was moderately negligent, and determined that the violation was the result of Oak Grove's high negligence. 38 FMSHRC __, slip op. at 17-19 (April 6, 2016).

The parties subsequently filed a joint petition for discretionary review. Included in the joint petition for discretionary review is a motion requesting that the Commission approve a settlement agreement between the parties. The Commission has granted the petition for discretionary review in a separate order, and now disposes of these cases.

The parties' joint request for approval of settlement was filed in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which provides, in relevant part, that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Commission Procedural Rule 31 provides that a "proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion." 29 C.F.R. § 2700.31(a). The movant is required to provide "facts in support of the penalty agreed to by the parties." 29 C.F.R. §§ 2700.31(b)(1), (c)(1).

In their joint filing, the parties contend that the Judge exceeded his authority when he revised his negligence finding from moderate negligence to high negligence, given that the original determination of moderate negligence had not been appealed, and had become law of the case. PDR at 3 (citing *Manalapan Mining Co*., 36 FMSHRC 849, 852-54 (Apr. 2014)). The parties represent that a total penalty of $35,000, rather than the $50,000 ordered by the Judge, is appropriate based upon the Judge's original conclusion that Oak Grove was moderately negligent.

The parties' joint request for approval of settlement is granted. We determine that the parties have justified that a reduction of the penalty is appropriate considering the Judge's original finding that Oak Grove was moderately negligent. *See* 30 U.S.C. § 820(i) ("In assessing civil monetary penalties, the Commission shall consider . . . whether the operator was negligent . . ."). Oak Grove is ordered to pay the civil penalty of $35,000 within 30 days of the issuance of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 8, 2016

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

v.

KNIFE RIVER CONSTRUCTION

Docket Nos. WEST 2013-827-RM
WEST 2013-828-RM
WEST 2013-829-RM
WEST 2013-1009-M

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involve an imminent danger order issued pursuant to section 107(a) of the Act[1] by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Knife River Construction. The order required a scraper that was in operation to be immediately removed from service.

Knife River contested the order before a Commission Administrative Law Judge. The Judge affirmed the order. Knife River then filed a petition for discretionary review with the Commission, which we granted.

For the reasons that follow, we conclude that substantial evidence supports the Judge's decision to affirm the order because the inspector reasonably believed that the continued operation of the scraper represented an imminent danger to miner safety. Accordingly, we affirm the decision of the Judge.

I.

Factual and Procedural Background

In May 2013, MSHA inspector Bryan Chaix arrived at Knife River Construction's Vernalis Plant to begin a regular inspection. The Vernalis Plant is a sand and gravel mine located in California.

[1] Section 107(a) of the Mine Act, 30 U.S.C. § 817(a), provides an MSHA inspector with the authority to order the withdrawal of miners if he observes a condition or practice that he reasonably believes represents an imminent danger to miner safety or health.

Chaix was accompanied on his inspection by two representatives of Knife River: the foreman, George Muraoka, and the safety manager, Kevin Smudrick. Chaix observed a scraper that was in the process of moving clay material to the waste dump.[1] He stopped the vehicle for an inspection. Inspector Chaix asked the operator to demonstrate that the vehicle was capable of stopping and holding on a grade while it was carrying a load. The operator gathered a full load of material (approximately 70,000 pounds) and began to descend a steeply graded access road at a slow speed. Inspector Chaix and Smudrick followed on foot.

The scraper failed to come to a stop on the graded portion of the road. It stopped briefly after it reached the bottom, however, and then continued to travel toward the waste dump.

As the scraper drove away, Chaix issued an oral order pursuant to section 107(a) of the Mine Act that the vehicle be immediately stopped and removed from service. The written order was issued shortly thereafter and stated in relevant part:

> [A scraper] did not stop on a grade when tested. The equipment was in service at the time of inspection, handling both raw feed and waste. The grade on which it was tested measured approximately 12-14%.

Gov. Ex. 1.

The inspector also issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for a violation of the mandatory safety standard at 30 C.F.R. § 56.14101(a)(1), which provides that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The citation stated that the violation was "significant and substantial" ("S&S").[2] After the issuance of the citation, a mechanic traveled out to the scraper and fixed the brakes on site.

Knife River contested the citation and the order before a Commission Administrative Law Judge. The Judge affirmed the section 107(a) order, concluding that the Secretary demonstrated that the inspector reasonably believed that the continued operation of the scraper represented an imminent danger to miner safety. 36 FMSHRC 2176, 2178-79 (Aug. 2014) (ALJ). The Judge concluded that the inspector acted within his discretion to issue the order based on the facts known and available to him at the time. *Id*. The Judge also affirmed the associated citation that alleged a violation of the mandatory safety standard at 30 C.F.R. § 56.14101(a)(1), but deleted the citation's S&S designation. *Id*. at 2180.

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[1] A "scraper" is a "digging, hauling, and grading machine having a cutting edge, a carrying bowl, a movable front wall (apron), and dumping or ejecting mechanism." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 485 (2d ed. 1997).

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 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." 30 U.S.C. § 814(d)(1).

Knife River petitioned for review of the Judge's decision to affirm the section 107(a) order, but did not seek review of the section 104(a) citation. The Commission granted the petition.

On review, Knife River argues that the Judge erred in finding that the Secretary demonstrated that the inspector reasonably believed that the defective brakes on the scraper constituted an imminent danger. Knife River also argues that the Judge's decision to affirm the section 107(a) order contradicts, and is otherwise incompatible with, his conclusion that the violation of the mandatory standard was not S&S.

II.

Disposition

Section 107(a) of the Mine Act provides that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). Section 3(j) of the Act defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

An inspector's issuance of a section 107(a) order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-46 (Mar. 1993). The order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed. *Id.* at 346. The Commission has explained that a Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed. *Id*. We review the Judge's determination of whether the inspector abused his discretion under a substantial evidence standard. *See, e.g., Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014).

While the danger justifying an imminent danger order need not be immediate, the danger must be such as to require the immediate withdrawal of miners because it could reasonably be expected to cause death or serious harm before the danger can be abated. *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 743-45 (7th Cir. 1974); *see also Connolly- Pacific*, 36 FMSHRC at 1555 (citing *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008)); *Blue Bayou Sand and Gravel, Inc*., 18 FMSHRC 853, 858 (June 1996). In addition to the withdrawal of miners, an issuing inspector may also require that dangerous equipment be immediately removed from service. *See Utah Power and Light Co.,* 13 FMSHRC 1617, 1619 (Oct. 1991).

The Mine Act's legislative history reflects Congress's view that "the authority under [section 107(a)] is essential to the protection of miners and should be construed expansively by inspectors and the Commission." S. Rep. No. 95-181, at 38 (1977), *reprinted in* Senate Subcomm. On Labor, On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978).

A. Substantial evidence supports the Judge's decision that the inspector acted within his discretion when he issued the order pursuant to section 107(a).

The Judge affirmed the section 107(a) order, specifically noting that it was issued immediately after the inspector observed the scraper fail to stop on a steep grade while carrying a heavy load. 36 FMSHRC at 2178. Accordingly, the Judge concluded that the inspector did not abuse his discretion. *Id*. The Judge correctly limited his analysis to whether the inspector's belief was reasonable at the precise time he issued the order. *See Jim Walter Res., Inc.*, 37 FMSHRC 1968, 1971-72 (Sept. 2015); *see also Wyoming Fuel Co*., 14 FMSHRC 1282, 1292 (Aug. 1992) ("the appropriate focus is on whether the inspector abused his discretion when he issued the imminent danger order.").

We conclude that the Judge's decision – that the inspector reasonably believed that the scraper operator risked serious physical harm by continuing to drive to the waste dump – is supported by substantial evidence in the record.[3]

At the time he issued the oral order, the inspector was aware that the scraper was carrying a full 70,000 pound load. Tr. 146, 155. The inspector had just witnessed that the scraper was not able to stop on a grade. Tr. 41. Despite the defective brakes, the scraper continued to travel toward the waste dump[4], an area of the mine with multiple grades.[5] Tr. 43-45. In addition, the inspector was aware that an embankment was under construction at the waste dump. Tr. 34, 40. The inspector testified that his *primary concern* was that the scraper would depart that embankment because it was traveling to the dump site without fully functioning brakes. Tr. 39, 41 ("Primarily my concern [was] about departing the embankment.").[6] The operator's

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[3] "Substantial evidence is '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)).

[4] Knife River's safety manager Kevin Smudrick, testified that the scraper exited the graded road, stopped on level ground, and then "took off again." Tr. 175-76. Smudrick also stated that the inspector asked him where the scraper was going and that Smudrick responded: "[w]ell, evidently, you know, he doesn't see us walking down. He's probably going to go dump his load and come back up to the top." *Id.*

[5] The dissent suggests that the inspector's testimony that the area contained "multiple grades" is insufficient. *See* slip op. at 16. Notably however, Knife River did not challenge the inspector's characterization of the area surrounding the dumpsite in its Post-Hearing Brief, nor did any of its three witnesses provide alternative evidence. Accordingly, the inspector's testimony was not contradicted.

[6] Our dissenting colleagues ignore the issuing inspector's testimony. Instead, without citing any evidence, they independently conclude that there was no possibility that a scraper with inadequate brakes could depart the embankment.

representatives were not able to stop the driver nor communicate the order to him as they did not have their radios at that moment.[7] Tr. 42, 84-86, 177.

Inspector Chaix understood that although there were alternative methods available to abruptly stop the vehicle, such as the emergency brake or lowering the cutting tool, using either method would put the driver at risk for injury. Tr. 49-50. The inspector succinctly explained why he believed this was an imminent danger, stating "[t]hat's a big piece of equipment and . . . some pretty big distances and some steep grades involved. It's the kind of thing that gets people killed." Tr. 44. When asked who he expected to be injured by this condition, he responded, "[p]rimarily the equipment operator themselves, but anybody else nearby in the traffic pattern of the scraper." Tr. 44.

We conclude that the testimony above supports the Judge's conclusion that the inspector reasonably believed that an imminent danger existed.[8] Accordingly, we affirm the Judge's conclusion that the inspector did not abuse his discretion in issuing the section 107(a) order.[9]

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[7] Our dissenting colleagues conclude that because the scraper's brakes were tested at a low speed and because the scraper eventually came to a stop on level ground, the inspector could not have reasonably believed that its driver was in any serious danger during the test. *See* slip op. at 9-10. Their analysis is flawed as it entirely ignores context; the order was issued as the scraper drove away from the inspector toward the dumpsite after demonstrating that its brakes were defective. Hence, the inspector's inquiry as to whether an imminent danger existed was not confined to the testing conditions (involving a slow-moving truck on a grade with barricades), but also properly took into account the fact that after leaving the grade, the truck would travel at a faster speed in locations where it would not be protected from overtravel by barriers. Tr. 39-41.

Our colleagues also ask (somewhat ironically): "why did the inspector not ensure that the scraper remained at the bottom of the grade once it stopped, instead of allowing [it] to continue traveling through the mine with defective brakes?" Slip op. at 11. Of course, the answer is that he did do something; the inspector ordered the representatives of the operator to stop the driver immediately, pursuant to the authority provided by section 107(a) of the Mine Act. The representatives of the operator simply failed to halt the driver as they did not have their radios available at the time the order was issued.

[8] We note that no one disputes the outcome of the imminent danger order (that the scraper be removed from service) and that the scraper operator, unaware of the imminent danger order, parked the scraper and removed it from service for repairs. KR Reply Br. at 9.

[9] We are troubled by the dissent's contention that "[h]ere, there is also a real question of whether an abuse of discretion may be found where an inspector issues an imminent danger order but does nothing to prevent the continued operation of the subject machinery." Slip op. at 8. This statement appears to suggest that no inspector should issue an imminent danger order without first trying to singlehandedly abate the potential danger, and that the Secretary must put on evidence of such efforts in order to sustain an imminent danger order, a contention we categorically reject. The issuance of an imminent danger order *is* the tool a mine inspector uses to withdraw miners from danger.

B. The Judge's conclusions with respect to the section 107(a) order and his conclusions with respect to the S&S designation on the section 104(a) citation are not irreconcilable.

Knife River also argues that the Judge's ruling on the imminent danger order should be overturned because it is allegedly inconsistent with his ruling that the related citation was not S&S. We disagree.

The Secretary did not petition for review of the deletion of the S&S designation from the citation issued pursuant to section 104(a), and accordingly the Judge's conclusions regarding the citation are not before the Commission. Therefore, we take no position on the legality of his findings regarding the S&S designation.[10] However, we observe that the Judge's ruling on the imminent danger order and his ruling on the S&S designation in the citation involve different evidentiary considerations.

It is well-established that an inspector has the discretion to issue a section 107(a) order if he reasonably believes there is an imminent danger, even if the imminent danger at issue does not violate a mandatory safety standard. *See Utah Power & Light*, 13 FMSHRC at 1622. In evaluating the issuance of the order, a Judge necessarily considers the evidence from an objectively reasonable inspector's perspective at the time of issuance. The key question is whether the inspector abused his discretion.

In contrast, violations of mandatory safety standards must be proven by the Secretary by a preponderance of the evidence at a hearing before a Commission Judge. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Judge considers the evidence of the violation *de novo*; he does not view the evidence from the inspector's perspective. The key question is whether the Secretary satisfied his burden of proof.

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

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

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

With respect to the citation issued to Knife River for inadequate brakes, the Judge credited the testimony of Kevin Farewell, the scraper operator, who stated that even if the brake did not bring the scraper to a stop on the grade, he was able to rely on the engine retarder to remain in control of the vehicle. *See* 36 FMSHRC at 2180; Tr. 148, 161. After considering Farewell's testimony, the Judge deleted the S&S designation. Even assuming *arguendo* that the Judge's action was appropriate, it would not preclude a finding that the inspector, upon observing the driver's inability to bring the scraper to a stop on grade, could reasonably believe such failure amounted to an imminent danger.

Because the Judge's conclusions were made after appropriately using different standards of review, we hold that his conclusions are not irreconcilable.

III.

Conclusion

For the foregoing reasons, we conclude that the Judge's decision is supported by substantial evidence in the record, and, therefore, we affirm it.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Althen, dissenting:

The majority summarily affirms the decision below sustaining an imminent danger order. However, a full and fair exposition of the record demonstrates that substantial evidence does not support an objectively reasonable basis for the inspector to have reasonably expected a death or serious injury before abatement. Inspectors must act quickly when they see an imminent danger, but the evidence in this case does not come close to providing an objectively reasonable basis for issuance of an imminent danger order. For that reason, we respectfully dissent.

DISCUSSION

An imminent danger is "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Unquestionably, inspectors must have a substantial amount of authority to issue imminent danger orders and we must uphold orders unless we conclude that inspector abused his discretion. *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals,* 523 F.2d 25, 31 (7th Cir. 1975); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989). Here, there is also a real question of whether an abuse of discretion may be found where an inspector issues an imminent danger order but does nothing to prevent the continued operation of the subject machinery. This inaction is untenable where an inspector holds a reasonable belief that death or serious injury would reasonably result if the activity at issue did not immediately cease.

Four factors comprise the existence of an imminent danger. These are, (1) a condition or practice in a mine (2) that could reasonably be expected to cause (3) death or serious physical harm (4) before such condition or practice can be abated. The Commission has rejected any notion that a judge or the Commission must accept the subjective perception of an inspector. Instead, we are to review the facts determining instead "whether it was objectively reasonable for the inspector to conclude that an imminent danger existed." *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1389 (July 2015) (citing *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993)). The inspector here did not even evince a *subjective* belief in an imminent danger. Therefore, it is impossible for the inspector's belief to be found *objectively* reasonable if we review the Judge's determination looking at the objective facts presented at the hearing. *See, e.g.*, *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014).[1]

[1] The Commission requires that an inspector make a reasonable investigation that permits the Judge and Commission to determine whether the facts known to him, or reasonably available to him, support the issuance of the imminent danger. *Island Creek*, 15 FMSHRC at 346 (citing *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992)). That element does not particularly come into play in this case. This case boils down to whether the inspector acted in an objectively reasonable manner by issuing and maintaining an imminent danger order when he observed a scraper creep down a grade at two miles-per-hour and come to a complete stop at the bottom of the grade.

In *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991), the Commission observed that, if any hazard that has the potential to cause a serious injury qualifies as an imminent danger, the distinction between an imminent danger and a significant and substantial violation is lost. The outcome-determinative difference is that, for an imminent danger, the expectation must be for serious injury or death "before the condition or practice can be abated." The objective facts presented at the hearing must provide substantial evidence in support of the inspector's determination.[2]

The majority correctly but only partially defines substantial evidence in its opinion. *See* slip op. at 4 n.4. Importantly, in assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that "fairly detracts" from the finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The record in this case, when fully reviewed, contains overwhelming evidence detracting from the imminent danger finding. In particular, the Judge failed to take into account his own findings that establish a slow (two mph) rate of speed, the ability of its operator to use other means besides the brakes to stop the scraper at any time, the absence of any other persons who might have been injured during the event, the impossibility of overtravel on the enclosed grade, the protective measures shielding the operator from hazards arising from a low-speed collision, and the inspector's own inconsistent testimony in the face of all of these facts.

Among the detracting evidence, the inspector eventually concedes that, with the scraper moving at two mph, he knew, or should have known, that the scraper operator could have stopped almost immediately at any time and at the operator's discretion, including during the descent down the grade. Tr. 49. Having made that telling admission, the inspector does not provide any evidence to support a finding that such stopping would be expected to cause serious injury or death. Indeed, the evidence confirms that the section 104(a) citation issued for the defective brakes would have resulted in abatement just as quickly and as efficiently as the section 107(a) order. Moreover, these errors are only a portion of the detracting evidence that we now review.

It is uncontested that the maximum speed of the scraper throughout its descent was approximately two miles per hour. Tr. 155, 167. As explained by the scraper operator, Mr. Farwell, the scraper was equipped with a "retarder" that slows the transmission and engine thereby slowing the rate of descent, to guard against a runaway. Tr. 148, 156. The retarder automatically engages at speeds greater than two to three miles per hour. In this case, the scraper was moving so slowly that the retarder did not even engage. Tr. 156. The scraper operator explained that he never was in any danger, (Tr. 155), and, had he felt any danger, he with certainty could have stopped the scraper virtually immediately (from its two mph speed) by lowering the cutting tool. Tr. 148. More importantly for our review of the inspector's order, the inspector's testimony, though inconsistent, shows that the inspector himself realized that the scraper was not out of control and had come to a complete stop at the bottom of the grade.

Prior to the inspection on the date of the imminent danger order, the scraper operator had been working in a relatively flat area of the mine, Tr. 153, and the scraper's brakes were fully

[2] Here, the Judge determined the violation was not significant and substantial.

operational. Tr. 154. The inspector asked the scraper operator how the operator wanted to demonstrate the brakes were working. The operator himself responded that he was heading to a new work area and the inspector could watch his performance in that new area. The inspector agreed. Tr. 34.[3]

The inspector testified that no equipment or people were down the grade from where the brake test occurred. Tr. 74. Thus, at the suggestion of the scraper operator, the inspection occurred on the first run by the scraper, fully loaded, down a new and steep grade. Tr. 154-55. From this point, the record demonstrates conclusively that an imminent danger did not exist as the scraper crawled down the slope at two mph with the operator able to stop it at any moment.[4]

First, the inspector's testimony was inconsistent in critical areas related to his actions. On direct examination, the inspector testified he could not recall whether he saw the scraper stop at the bottom of the grade. He testified that it continued its loop back to the work place from which it started downhill. Tr. 38. The inspector testified that the reason he could not recall if the scraper stopped was because he "was engaged in a discussion with agents of the operator at that time." Tr. 38. If this testimony were correct, then the inspector did not watch the scraper complete its descent down the grade.

This questionable and unreliable testimony contrasts sharply with Knife River's case, wherein all of its witnesses, including the scraper operator, testified that the scraper completely stopped at the bottom of the grade when it reached the flat area. After that testimony, the Secretary recalled the inspector. The inspector then testified that he had started walking toward the bottom of the grade but turned around because the scraper was "way out ahead of me, and [it] kept going after reaching the bottom of the grade." Tr. 205. This testimony varies from his earlier testimony that he was talking to Knife River's employees so he did not see what

[3] During his testimony, the inspector seemed to emphasize that the scraper operator had not tested the brakes on that specific grade before the inspector observed him. However, the inspector acknowledged that the scraper operator had told him that the operator had tested the brakes at the start of his shift and they were working fine where he was then operating the scraper. Tr. 48, 154. The inspector also testified that: (1) the scraper operator told him that he was going to start working a new area; (2) the scraper operator himself suggested that grade as the appropriate place for a test; and (3) the appropriate method of testing is for a fully loaded scraper to travel the grade and attempt to stop. Tr. 33-34. Because this was the first run of the day on that area, the absence of a prior "test" of the brakes in that area with a full load before the inspector watched is a meaningless distraction.

[4] The inspector's testimony demonstrates that he had little understanding of how a scraper operates. The inspector did not know about, or at least did not identify, the important safety assistance provided by the equipment's "retarder." The retarder slows the transmission and engine. Tr. 148. The retarder works automatically if the scraper exceeds three mph. In this case, the retarder did not come into play because the scraper never reached a speed at which it would automatically operate. The inspector either did not know or, at least, did not testify that he was aware that the retarder works as an auxiliary braking system on the scraper.

happened, but it is generally consistent with his earlier testimony that he did not see the scraper stop.

After the Secretary completed his case, however, the Judge asked the inspector whether the scraper stopped at the bottom of the grade and the inspector had a change of heart, mind, or memory and equivocally testified, "[y]ou know, I think it might have stopped briefly." Then, the Judge honed in and directly asked, "[b]ut he did stop? He was able to stop on flat ground?" The inspector finally remembered clearly and responded with a simple "yes." Tr. 208. The inspector actually knew the scraper had stopped completely when it reached the bottom of the grade. This fact raises an obvious question not accounted for by the Judge or the majority: why did the inspector not ensure that the scraper remained at the bottom of the grade once it stopped, instead of allowing the purported menace to continue traveling through the mine with defective brakes?

From this testimony, inconsistent and changing as it was, we see that the inspector, though at first denying the knowledge, actually knew that the scraper stopped promptly and properly while still carrying the 70,000 pound load that it would soon drop as it took the 2 to 3 minute trip back to the starting point.[5] It is uncontested that the scraper returned to the top of the grade in a matter of 2 to 3 minutes, and the inspector knew it was completing a loop and returning to the top of the ramp. This means that the scraper could have continued carrying the 70,000 pounds for only a very brief period in the open drop area depicted in photographs entered into the record by MSHA before dropping the load and returning to the top of the ramp. The majority makes no effort to explain why, during the very brief period, the operator could not have used the same techniques that the majority does not contest could have been used to quickly stop the scraper on the 14% grade.

The majority does not deal with the inspector's inconsistent testimony and, therefore, does not account for the fact that the inspector grudgingly and only with a judicial push admitted he had seen the scraper come to a complete stop at the bottom of the steep grade. Further, the evidence is clear that the scraper's job was to move material from the top of the grade to the flat area at the bottom and then return to the top of the grade. The inspector himself testified that the scraper would continue its loop upward to the top of the grade, (Tr. 38, 54), — a process that took only a couple of minutes. Tr. 116.

Second, uncontested facts contradict the inspector's assertion of danger. The inspector stated his primary concern was the safety of the scraper operator and when the Secretary's counsel asked the inspector about any danger to the scraper operator, the inspector responded that he was concerned that he might "over-travel the roadway." Tr. 38-39. That testimony is obviously incorrect; indeed, it is incredible. Operator witnesses and photographs of the site

[5] The majority asserts the ground was level when the scraper stopped; no testimony supports that assertion. However, if the ground was level, or if the grade had diminished only minimally but the scraper was able to stop, as the record establishes it did, there is no reasonable explanation for the inspector's failure to have the scraper remain at its stopping point in the face of what he asserts was an imminent danger arising from its continued operation.

demonstrate that there were significant barriers on each side of the roadway. Mr. Farwell, the scraper operator, testified that overtraveling the roadway was not possible:

> I had a 30-foot wall on one side and about 100-foot wall on the other side. At the very bottom, I've still got the 100-foot wall, and I've got a berm that is mid-axel height on the -- on the scraper. So I -- I had no problems.

Tr. 157.

The inspector's testimony that the scraper could have dangerously left the roadway is objectively and tellingly wrong. Either the inspector did not recognize the physical conditions at the site or, despite his testimony, he could not actually have had concerns of overtraveling the roadway. Indeed, Mr. Farwell graphically explained the virtual walls on the sides of the roadway, the area to which he was heading, the speed of the scraper, and the braking mechanisms. All this led to Mr. Farwell's testimony that he never was in any danger and never considered stopping the scraper although he could have at any moment. Tr. 155-60.[6]

Further, the inspector did not testify from the photographs or otherwise how the scraper operator could have overtraveled the dumpsite.[7] He did not point to any dangerous "embankment" that the operator could overtravel. Further, as noted above, the inspector eventually acknowledged that the scraper came to a complete stop at the bottom of the grade.

Third, when the Secretary's counsel asked if there was a way of stopping the scraper other than the brake system, the inspector first testified, "I guess you could run into something . . . ." Tr. 49. We must attribute this remarkable statement to the inspector's lack of any objective knowledge regarding the operation of a scraper. Mr. Farwell, the scraper operator, testified quite clearly that you can slow and stop a scraper without "running into something," (Tr. 148), and eventually the inspector agreed he also knew that the scraper could have stopped immediately. Tr. 49-50.

This acknowledgment alone should have been fatal to any pretense of appropriate concern and discretion, especially after the inspector's ludicrous testimony about "running into something." The inspector, in fact, testified that he knew that, relying upon the parking brake or emergency brake, the scraper operator actually could stop the scraper immediately through means other than the brakes if danger arose. Tr. 50. Regardless of the inspector's overall

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[6] Of course, a miner may not perceive the danger. In this case, however, the inspector testified that the scraper operator was his primary concern. Tr. 44-45. Therefore, the scraper operator's testimony is important because he identifies many objective reasons that were, or should have been, known by the inspector, thus showing any alleged concern for the operator was wholly and objectively misplaced.

[7] A scraper drops its load by opening doors underneath the scraper so the loaded material falls directly below it. Tr. 146. The equipment does not lift a bed to dump material.

unfamiliarity with a scraper, he knew the operator could stop the scraper immediately. That recognition demolishes the need for an imminent danger order.

The inspector's recognition that the scraper operator could easily have stopped the scraper in case of any perceived danger creates an insoluble and undiscussed conundrum for the majority. If the inspector knew, or should have known, that the scraper operator could stop the scraper virtually immediately to avoid any danger from continuing movement, then there can be no reasonable expectation of serious injury or death.

Despite this, the majority endorses the inspector's literally incredible, unreasonable belief, without any assertion of expertise or reasoning, that stopping from two mph could reasonably be expected to seriously injure or kill the scraper operator, who was wearing a seatbelt inside the cab.[8] Tr. 50. Aside from the inspector's testimony that is unsupported, non-expert, and clearly runs counter to the human experience of equipment drivers, the Secretary presented absolutely no evidence of how a stop from a speed of two mph could reasonably be expected to seriously injure a driver wearing a seatbelt.[9] Without any evidence, it is impossible for the Secretary to overcome the obvious and commonsense understanding that seat-belted drivers are completely uninjured, let alone not seriously or fatally injured, when stopping their vehicles traveling at two mph.

Fourth, under the facts of this case, the inspector's issuance of the section 104(a) order clearly precludes any reasonable basis for issuance of an imminent danger order. Upon observing defective brakes in operation, it was entirely proper for the inspector to issue a section 104(a) citation and to order immediate abatement. He took that action. Having received such a citation, it was incumbent upon Respondent to cause the scraper to stop and to remove it from service until completion of brake repair. In this case, it had a duty to take that action as quickly under the 104(a) citation as under the imminent danger order. Knife River took that action. That being so, there is no basis to find that the brakes that slowed the scraper to two mph under extremely high stress would be reasonably expected to cause a fatality or serious injury before the citation could be abated. In other words, with the issuance of the 104(a) citation, there was no basis to find an objectively reasonable expectation of death or injury before abatement.

Fifth, we must again note — and in fact cannot stress enough — that the inspector's actions belie any notion of an imminent danger. Having seen the scraper completely stop at the bottom of the hill and then continue, there is no evidence that the inspector took or ordered emergency action to try to get in touch with the driver. There would be no excuse for such inaction if the inspector actually thought the driver was in imminent danger of death or serious injury. The inspector himself testified that the operator's representatives were only a few yards away from the truck where they had left their radios. Tr. at 85. While the majority suggests we

[8] The inspector testified that he knew the driver was wearing a seatbelt. Tr. 76.

[9] It should be noted that the scraper, a fairly-long piece of equipment, was in an enclosed roadbed and thus could not logically have even encountered the walls containing its travel head-on. It seems even less likely that any serious consequences could fall upon the driver from an *oblique* low-speed collision.

believe the inspector should have "[tried] first to singlehandedly abate the potential danger," slip op. at 6 n.10, nothing in the record explains why he did not order the operator's representatives to run to retrieve their radios and order the scraper to stop immediately, if he believed an imminent danger existed.

The imminent danger provision in section 107(a) exists for one purpose: to prevent serious injuries or loss of life by empowering an inspector to order immediate withdrawal and cessation of mining activity until the danger no longer exists. An inspector who fails to follow through under such circumstances is either derelict or does not believe that an imminent danger truly exists, because a reasonable person would never permit the continuation of the activity giving rise to the danger. Whether the inspector should have single-handedly sought to abate the violation is immaterial: it is beyond argument that the Act conferred on him the power — and the duty — to take the steps necessary to protect miners from the immediate risk of serious injury or death, if such danger reasonably appeared to exist. It is also beyond argument that the inspector not only failed to take any immediate action, he let the scraper continue its loop through the mine.

Here again the majority stumbles over inconvenient facts. If the inspector was truly concerned about the scraper imperiling its operator at the site of the embankment, there can certainly be no argument whatsoever that the inspector should have used whatever time was available — as the machinery ponderously made its way to the dump site — to ensure the equipment was stopped and removed from service at once so that the danger could be abated. Thus, the majority entirely ignores the immediacy component essential to the issuance and enforcement of imminent danger orders.

Of course, as noted above, the inspector actually knew the driver was returning upgrade to the top of the slope and so waited at the top of the grade for the driver to return, i.e., he took no action at all despite his purported belief that the scraper operator was in mortal peril. Such action, or rather inaction, is wholly inconsistent with a finding of an imminent danger of death or serious injury to the driver.

Finally, in an effort to support an unsustainable decision, the majority turns to incorrectly characterizing the testimony and imagining areas and events not supported by any evidence. The testimony could not be clearer that the inspector decided to issue the imminent danger order when and because he observed the scraper crawling down the ramp at two mph.[10]

As the testimony turned out, it became clear that movement down the 14% grade at two mph did not present an imminent danger. By focusing on the two or three minute trip after the scraper stopped, the majority effectively concedes that the condition for which the inspector issued the order, the scraper crawling down the grade at two mph and capable of stopping at any moment, did not constitute an imminent danger.

Rather than vacating the unwarranted order, the majority attempts to shift the focus away from the reason for which the inspector issued the order — the controlled descent down the ramp. To do so, they create a rationale for which there is no evidence. Not only does the evidence show the order was issued for the passage down the ramp, but also there is no meaningful testimony or other evidence to support an imminent danger when the scraper resumed travel after stopping at the bottom of the ramp.

Every witness testified that the scraper came to a complete stop at the bottom of the ramp. Indeed, the inspector, albeit after initially refusing to admit it, saw this complete stop. Further, the inspector also testified that he knew the scraper would then complete an upgrade "loop" to the top of the grade from where he departed — a loop that took all of 1.5 to 3 minutes. Tr. 39, 42, 159. Thus, the inspector knew from his personal observation both that the scraper stopped even when it was transporting a 70,000 pound load at the bottom of the grade. He further knew the operator would drop the load and return to the top of the grade within a couple of minutes.

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[10] Q. Inspector, I'd like to start with the order numbered 8699159 behind GX1 [imminent danger order]. Why did you issue this order?
A. I issued this order when I observed a scraper unable to stop on a grade.

Tr. 30.

Q. When the service brakes didn't stop the scraper on the ramp, what did you do?
A. I turned to the agents of the operator and explained that if I was seeing what I thought I was seeing -- in other words, a scraper not stopping on a grade -- that was clearly an eminent [*sic*] danger-type situation and that they needed to get that piece of equipment stopped immediately and remove it from service so that the condition could be corrected to protect people.

Tr. 41.

To build its theory for an imminent danger order, the majority cites a passage in the transcript where the inspector testified that an embankment was under construction. Slip op. at 4 (citing Tr. 34). The majority does not take into account the fact that the embankment was under construction.[11] Embankments are not built from the top to the bottom. The scraper was transporting material to build the embankment or to provide a base for its construction. There is no possibility that the scraper could overtravel an embankment when it was transporting material to build the embankment, and the inspector did not offer any such testimony. The majority notes the inspector testified that the scraper could "depart" the embankment. It is impossible to fathom the meaning of that statement. If the inspector simply means the scraper would leave the area to which it was bringing material for construction then it is nothing more than saying he knew the scraper would continue its two-minute loop to the starting point. If it is expressing some sort of concern about overtraveling an embankment, then it is simply a demonstration that the inspector failed to grasp that the material was being used to build the embankment so the scraper was not in any danger of falling from an embankment. This error, however, is only the beginning of the fatal flaws in the majority's effort to save the order.[12]

In one passage the inspector, while focusing on the ramp, mentions "multiple grades." He said, "[t]he equipment's in operation in that condition; the equipment's on a grade not stopping -- not able to stop in an area with multiple grades." Tr. 43-44. The majority attempts to use this passing reference for which no evidence was presented to sustain its theory. Nowhere in the inspector's testimony or the exhibits is there evidence of multiple grades. Other than this passing reference there is no testimony by any witness about multiple grades in the area. Were any such grades actually present? The inspector focused only on the ramp for which he did a test to

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[11] An embankment is

> A linear structure, usually of earth or gravel, constructed so as to extend above the natural ground surface and designed to hold back water from overflowing a level tract of land, to retain water in a reservoir, tailings in a pond, or a stream in its channel, or to carry a roadway or railroad; e.g. a dike, seawall, or fill.

Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 186 (2d ed. 1997). The drop area is the place where the scraper deposits material for the floor of the impoundment or for use in constructing the embankment

[12] The inspector did testify to a fear that the scraper might depart the drop site. However, he did not provide any testimony about what that meant. Obviously, the scraper had to leave the drop site to return to the top of the ramp. That does not support an imminent danger. The inspector does not say how a scraper can overtravel a wide open area from which an embankment is being constructed. The majority uses scraps of testimony to support an unsustainable conclusion. Even assuming for argument's sake that this was the inspector's primary concern, he obviously had more time available for intervention between the issuance of the order and the scraper's arrival at the embankment site. While the inspector's testimony about what happened in that time is somewhat cloudy, it is clear that he did not use the time to order the operator to intercept the scraper on its way to the embankment site.

measure the percent slope. There is no evidence of grades in the drop area or any imminent danger from any grades after the scraper left the 14% ramp because there is no evidence about any such grades.

There are photographs in the record that show the area below the ramp and the area where the embankment was going to be constructed. Those photographs do not depict any discernable grades and, again, the inspector did not offer any testimony about the drop area such as the existence, size, spacing, slope, etc. of any grades. The inspector did not testify that he saw the drop area, knew what it looked like, or of what it consisted. His testimony was that he stopped watching after the scraper reached the bottom of the ramp. In any event, neither the inspector nor anyone else suggests that there was anything even minimally approaching the 14% grade of the ramp.[13]

There is no testimony about the speed of the scraper after it reached the bottom of the ramp.[14] There is no testimony asserting that the scraper could not have easily stopped at any place on its return to the start area. The majority has accepted that the scraper operator could stop the scraper immediately after descending a 14% ramp carrying 70,000 pounds, but then fabricated a proposition that it presented an imminent danger on the return to the top of the grade. If, as the majority essentially admits, the failure to stop when traveling with 70,000 pounds down a 14% grade is not an imminent danger, it defies logic to suggest that an imminent danger existed on its return trip with the scraper empty and traveling upgrade. However, even if such a theory might be plausible, there is not substantial evidence in the record to support it.

In short, there is no evidence about grades in the drop area or on the return trip, there is no evidence about speed, there is no evidence contending that the scraper could not stop, there is much evidence that it could quickly stop, and there is no evidence about the effect of such a stop. Indeed, the testimony shows that the scraper stopped by using brakes alone while still carrying the 70,000 pound load and had stopped effectively all morning in areas off the 14% ramp. Further, as noted, there is no testimony about any grade including the length or steepness of a

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[13] The majority complains that operator witnesses did not testify about the drop area. That is unsurprising. As noted at the outset of our dissent, the testimony demonstrates that the inspector based his order on the transit down the ramp. The majority's reliance upon a passing and unsupported reference to unknown "grades" in the drop area is simply part of its effort to reassign the issuance of the order to an area of land that clearly played no role in the inspector's decision to issue the order while the scraper was on the ramp.

[14] The majority asserts the scraper would travel at faster speeds. Slip op. at 5 n.8. Although it is logical to think the speed would increase, the Secretary presented no evidence of the speed at which the scraper drops its load or that the brakes would not work at such unknown speed for the brief period until it dropped its load. Nor does it explain why the same measures that could have slowed or stopped the scraper on the ramp would not work in the drop area. They also assert the scraper would not be protected by overtravel barriers. Perhaps, this comes from their misperception of how an embankment is constructed. In fact, there is no evidence about the drop area (its dimensions, topography, total size, perimeter, etc.) or how it could be "overtraveled." As elsewhere in its opinion, the majority does its own construction — it constructs theories for which there is no evidence.

grade. Finally, there is no evidence that if a grade actually existed, why the same techniques useable on the 14% ramp would not have worked as effectively.

Here, the majority rejects the real reason the inspector issued the imminent danger order but creates out of whole cloth an alternate theory for which the Secretary did not present any evidence. The majority is simply unwilling to overturn a clearly meritless order.

CONCLUSION

In closing, we affirm that an inspector should not hesitate in issuing an imminent danger order when he perceives a reasonable expectation of death or serious injury before a dangerous condition can be abated. However, in this case, the imminent danger order, without doubt, is not objectively reasonable. The Commission should not summarily affirm such clearly erroneous orders based upon inconsistent testimony and obvious post-hoc rationalizations. Here, a review of the record as a whole demonstrates there was no objectively reasonable basis for the issuance of an imminent danger order. We respectfully dissent.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 16, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. LAKE 2009-410 LAKE 2009-412 LAKE 2009-413 LAKE 2009-414 LAKE 2009-415
v.	
BLACK BEAUTY COAL COMPANY	

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). They involve three citations and two orders which were issued to Black Beauty Coal Company ("Black Beauty") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 8414923, in relevant part, alleges a violation of a safeguard notice and its subsequent modification. Citation No. 8414910 alleges a "significant and substantial" ("S&S")[1] violation of the safety standard in 30 C.F.R.§ 75.370(a)(1), which concerns ventilation in mines. Citation No. 6680994 and Order Nos. 8414938 and 8414939 allege three S&S violations of the safety standard in 30 C.F.R. § 75.400, which concerns accumulations of combustible materials in mines. The two orders also alleged that the violations were a result of the operator's unwarrantable failure to comply.[2]

The Administrative Law Judge affirmed the citation issued for a violation of the safeguard notice. The Judge also affirmed the violations alleged in the other two citations and the two orders. However, he did not find the other citations or either order to be S&S and did not

[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."

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

find that the orders constituted unwarrantable failures to comply. 36 FMSHRC 1821-59 (Mar. 2014) (ALJ).[3]

The parties filed cross petitions for discretionary review, which we granted.

For the reasons that follow, we affirm the Judge's decision that Black Beauty violated the safeguard notice. However, we vacate and remand the Judge's decision that the ventilation and accumulations violations were not S&S. We also remand the Judge's decision that the violations subject to the two orders were not the result of the operator's unwarrantable failure to comply with a mandatory safety standard.

I.

Factual and Procedural Background

A. Citation No. 8414923 - Violation of a Safeguard Notice

In May 2003, an MSHA inspector issued Black Beauty a notice to provide safeguard at its Air Quality No. 1 Mine which stated, in relevant part:

> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide [to] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor. [4]

Safeguard No. 7591942; Ex. G-87.

In August 2007, an MSHA inspector issued the following modification: "[t]his is to modify the safeguard requiring a clear travel way of at least 24 inches along both side[s] of all conveyor belts. The above referenced safeguard is hereby modified to require [ ] that the 24 inch travel way shall be clear of mud and water." Ex. G-87 at 3.

In January 2009, MSHA Inspector Franklin issued Citation No. 8414923 at the Air Quality #1 Mine for an alleged violation of 30 C.F.R. § 75.1403-5(g). Ex. G-86. The citation alleged that a clear 24-inch walkway was not provided on either side of the 2-B belt line at crosscut numbers 22 to 23 as water accumulated to a depth of 2 to 14 inches in the entry for a distance of 55 feet. The citation was based on Safeguard No. 7591942, as modified in 2007. Ex. G-87.

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[3] The Judge's decision was issued in March 2014, but is set forth in the Commission Bluebook for July 2014.

[4] Section 314(b) of the Act states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

The Judge found that Safeguard No. 7591942 as modified by No. 7591942-03 was valid on its face and that the Secretary had established a violation of this safeguard notice. 36 FMSHRC at 1842-44.

B. Citation No. 8414910 - Ventilation Violation

In January 2009, Inspector Franklin issued Citation No. 8414910 to Black Beauty for an alleged violation of 30 C.F.R. § 75.370(a)(1).[5] The citation alleged that the operator was not complying with the approved ventilation plan in the number 1 active section. Specifically, the citation claims that a continuous miner being operated in the number 7 entry did not have adequate ventilation to dilute, render harmless and carry away flammable explosive gasses, dust, and fumes while mining. In this regard, the inspector noted that the air velocity at the inby end of the wing curtain was approximately 4,982 cubic feet per minute ("CFM") and that the plan requires a minimum of 7,000 CFM.[6] The inspector determined that the violation was S&S. Ex. G-59. Equipment on the section included a number of safety features intended to minimize the hazards from dust and explosive gasses, including a methane monitor on the continuous miner (which was set at 2%), a scrubber on the continuous miner (which included water sprays to keep the dust down), and a fan that would pull air across the duct work, faces and the miner itself. Tr. III 8; 36 FMSHRC at 1851.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge based his non-S&S finding partly on the presence of a safety measure, the methane monitor on the continuous miner, which would "have shut the operation down if methane reached 2%." 36 FMSHRC at 1851.

C. Citation No. 6680994 - Accumulations Violation

In February 2009, MSHA issued Citation No. 6680994 at Black Beauty's Riola Mine Complex for an alleged violation of 30 C.F.R. § 75.400.[7] The citation alleged that oil, oil-saturated coal fines, and brake fluid were present on a mantrip located in Unit #1. Specifically, the accumulations were in the transmission, brake caliper and muffler compartments, and ranged from a film of oil to a quarter of an inch in depth. The inspector determined that the violation was S&S. Ex. G-9. The mantrip was equipped with safety measures, including a heat-activated fire suppression system and a "murphy switch" that automatically shuts down the mantrip if engine temperatures exceed 230 degrees. Tr. I 129-31.

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[5] 30 C.F.R. § 75.370(a)(1) states that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

[6] The approved ventilation plan, in a supplement filed June 17, 2008, provides that the mine "will maintain 7000 cfm of air at the end of the line curtain without the scrubber running." Ex. G-63.

[7] 30 C.F.R. § 75.400 requires, in part, that "[c]oal . . . 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."

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge based his non-S&S finding partly on the presence of a safety measure, the fire suppression system, which he believed reduced the likelihood of a fire. 36 FMSHRC at 1827-28.

D. Order No. 8414938 – Accumulations Violation

In February 2009, Inspector Franklin issued Order No. 8414938 at the Air Quality #1 Mine for an alleged violation of 30 C.F.R. § 75.400. The order stated that there was float coal dust deposited on rock dusted surfaces from the belt tail going outby for three crosscuts. The inspector alleged that the violation was S&S and a result of the operator's unwarrantable failure to comply with the standard. Ex. G-24. The inspector testified that a "traveling roller was rubbing very hard against the frame, causing an ignition source." Tr. I 207. Witnesses testified about safety measures present in the area, including fire suppression devices and carbon monoxide ("CO") monitors, which would notify the firefighting brigades of the presence of a fire. Tr. I 208-09, 221. Each member of the firefighting brigades at the mine was equipped with a breathing device, foam generator and a foam cannon. Tr. I 221, 256-57.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge examined whether a confluence of factors existed to create the likelihood of a fire, citing in part *Texasgulf, Inc.*, 10 FMSHRC 498, 500-03 (Apr. 1988). During his S&S analysis, the Judge considered the presence of safety measures such as water sprays, CO monitors, fire suppression devices, a fire brigade, breathing devices and turnout gear for firefighters. The Judge stated that "while [he] considered the presence of water sprays, CO monitors and other protections, [his] non-S&S holding [was] not based solely on these protections. The risk of fire was quite low taking into consideration continued mining operations, including the operator's practice of frequent examinations and cleaning." 36 FMSHRC at 1834-35.

The Judge also ruled that the violation was not a result of the operator's unwarrantable failure to comply with the standard. While the Judge found that the violation was obvious and the operator had been put on notice that greater efforts were necessary for compliance, he found that the violation did not exist over several shifts, was not extensive, did not present a high degree of danger and that the operator did not have knowledge of the existence of the violation. *Id.* at 1835.

E. Order No. 8414939 – Accumulations Violation

In February 2009, MSHA issued Order No. 8414939 charging a violation of 30 C.F.R. § 75.400. The order alleged that a thin coating of float coal dust on rock dusted surfaces, was allowed to accumulate upon the energized main south belt from head to tail. Float coal dust and fine coal had also been allowed to accumulate in crosscuts 8 and 9. The inspector determined that the violation was S&S because there were many rollers in the area and testified that "[a]ll it takes is one of the rollers malfunctioning, going out, dropping down in this material, and the hot bearings igniting the fuel source." Tr. I 212. The inspector also alleged that the violation was a result of the operator's unwarrantable failure to comply with the standard. Ex. G-25.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge did not explicitly base his non-S&S finding on the presence of safety measures, but did conclude that, "as stated above with respect to [Order No. 8414938] an injury would be unlikely if fire would start." 36 FMSHRC at 1837-38. Given the Judge's discussion of safety measures during his S&S analysis for Order No. 8414938, it is unclear as to whether the Judge implicitly considered safety measures during his S&S analysis for Order No. 8414939.

The Judge also found that the violation was not a result of the operator's unwarrantable failure to comply with the standard. The Judge found that the violation was extensive and obvious and that greater efforts were necessary for compliance. However, he also held that the violation did not present a high degree of danger, that there was no evidence that the violative condition had existed for a long period of time, and that the operator had no knowledge of the existence of the violation. 36 FMSHRC at 1837-38.

II.

Disposition

Black Beauty contends that the Judge erred in affirming a violation of the modified safeguard. In particular, the operator argues that the modified safeguard is invalid because it fails to identify a hazard with specificity. Black Beauty recognizes, however, that the validity of the safeguard and the modification at issue here were the subject of another docket pending on appeal before the Commission when the petitions for review were filed in the instant case.

In his petition, the Secretary maintains that the Judge erred by considering the presence of safety measures when ruling that the ventilation and accumulations violations were not S&S. The Secretary also argues that the Judge's unwarrantable failure rulings related to the two orders may have been affected by his erroneous S&S analyses. The Secretary requests that the Commission remand the S&S and unwarrantable failure issues to the Judge.

A. Validity of Safeguard No. 7591942, as Modified

On January 28, 2016, after the parties had filed their petitions, we issued a decision affirming modified Safeguard No. 7591942. *Black Beauty Coal Co.*, 38 FMSHRC 1 (Jan. 2016). Our decision in that case specifically addressed the same issue before us in this case , *i.e.* whether the safeguard, as subsequently modified, identified a hazard with specificity. We rejected the operator's challenge and affirmed the safeguard:

> Because the validity of . . . safeguard notice and modification is a purely legal issue, we review the judge's decision *de novo* . . . We conclude that when the original issuance and its modification are read in conjunction, the modified safeguard notice identifies a hazardous condition and modified remedy with sufficient specificity to provide the operator with notice as to the conduct

> that is prohibited or required. Accordingly, we find that the original safeguard notice and its modification are valid.

Id. at 4.

The operator did not seek judicial review of that decision. Therefore, the validity of the modified safeguard has been established as a matter of law by Commission precedent.[8]

B. S&S Issues

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. We have 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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec. of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission evaluates the reasonable likelihood of injury assuming that normal mining operations will continue. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. *Texasgulf,* 10 FMSHRC at 501; *see Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (Feb. 1991). Some of the factors to be considered include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03.

It is well settled that safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res., LP,* 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.,* 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek,* 52 F.3d at 135; *Brody Mining, LLC,*

[8] Commissioners Althen and Young dissented from the Commission's decision in the *Black Beauty* case referenced above. They recognize the decision in that case represents the law of the case here and governs the finding on the same safeguard in this case but continue to believe the safeguard should be found invalid for the reasons set forth in their earlier dissent.

37 FMSHRC 1687, 1691 (Aug. 2015); *Cumberland Coal Res., LP,* 33 FMSHRC 2357, 2369 (Oct. 2011).

In *Cumberland*, the D.C. Circuit confirmed that safety measures are irrelevant to the S&S analysis. 717 F.3d at 1028-29. The operator argued that the Commission erred in finding that certain violations were S&S by failing to consider evidence of preventative measures that would have rendered both the occurrence of an emergency and the resulting injuries less likely. The D.C. Circuit concluded that consideration of redundant safety measures is inconsistent with the language of section 104(d)(1) of the Mine Act and broadly held that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Id*. at 1029. By using the phrase "significant and substantial inquiry" rather than referring to a specific step in the S&S analysis, the court made clear that safety measures are irrelevant to all elements of the S&S analysis.

The Court also indicated that all types of safety measures are "irrelevant to the significant and substantial inquiry" because the focus of the significant and substantial inquiry is the nature of the violation. "By focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards." *Id.* at 1029, *citing Sec'y of Labor v. FMSHRC,* 111 F.3d 913, 917 (D.C. Cir. 1997).

Similarly, the Fourth Circuit recently held in *Knox Creek* that safety measures, at least those that are required by mandatory standards, are irrelevant to the S&S analysis. 811 F.3d at 162. '"If mine operators could avoid S&S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply.' Such a policy would make such standards 'mandatory' in name only." *Id.* The Fourth Circuit also approvingly cited the D.C. Circuit ruling in *Cumberland* that safety measures, without any qualification, are irrelevant to the S&S analysis.

In *Brody Mining,* we held that "[w]hen deciding whether a violation is S&S, courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation." 37 FMSHRC at 1691 (citing *Cumberland,* 33 FMSHRC at 2369). Therefore, in *Brody* we interpreted the decision of the D.C. Circuit in *Cumberland* as applying to all safety measures without qualification or exception.

Black Beauty nevertheless argues that safety measures must be considered as part of the S&S analysis. The operator claims that two court of appeals decisions stating that safety measures are irrelevant to the S&S analysis are very limited in scope and thus not applicable to this case.

First, Black Beauty contends that the D.C. Circuit's decision in *Cumberland*, holding that safety measures are irrelevant to the S&S analysis, was limited to the specific facts at issue in that case, *i.e.,* violations involving emergency safety standards. However, nothing in the D.C. Circuit's decision limits the ruling to the circumstances of that case. Although the court

recognized that emergency standards under the Mine Act are different from other Mine Act standards for purposes of S&S determinations, that part of the decision had nothing to do with whether safety measures must be considered in the S&S analysis.

The court later rejected, on two separate grounds, the operator's argument that safety measures must be considered. The court pointed out that for an emergency to occur, one must assume that all the redundant safety measures have failed. *Id.* at 1028-29. Importantly, the court also concluded that "consideration of redundant safety measures is inconsistent with the language of [section 104(d)(1)]." *Id. at* 1028-29. It explained that Congress intended that the focus of the S&S inquiry be "the nature of the violation," not the surrounding conditions. *Id.* at 1029. The D.C. Circuit also cited with approval the Seventh Circuit's decision in *Buck Creek,* 52 F.3d at 136, for the proposition that safety measures "are irrelevant to the significant and substantial inquiry." *Id.* Accordingly, we reject the operator's argument.

Second, Black Beauty argues that the Seventh Circuit's decision in *Buck Creek* – that the presence of safety measures "to deal with a fire does not mean that fires do not pose a serious safety risk to miners" – did not explicitly hold that safety measures are irrelevant to all elements of the S&S analysis. 52 F.3d at 136. We note that the Seventh Circuit's decision is consistent with our practice of finding that safety measures are irrelevant to all elements of the S&S analysis, including the likelihood that a fire would occur. For example, prior to *Buck Creek,* we had clarified that the exercise of caution by miners is irrelevant to the S&S analysis, including the portion of the S&S inquiry that seeks to determine the likelihood of injury from a hazard. *See Eagle Nest, Inc.,* 14 FMSHRC 1119, 1123 (July 1992). This principle applies equally to the relationship between safety measures and the S&S analysis.

Thus, the Judge erred in considering safety measures when determining that the ventilation and accumulation violations were not S&S. Specifically, the methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters are the sort of safety measures that we, and the appellate courts, have held to be irrelevant to the S&S analysis under the Act. We remand to the Judge to reconsider his S&S findings for these violations in light of our ruling in this decision.

C. Unwarrantable Failure Issues

The Judge held that the accumulations violations underlying the two orders before us were not a result of the operator's unwarrantable failure to comply with a standard, partly because the violations did not pose a high degree of danger.[9] 36 FMSHRC at 1835, 1838. The Secretary claims that the Judge's erroneous non-S&S findings for these orders led him to view

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

the available safety measures as a mitigating factor and influenced his findings as to the degree of danger, and consequently, his determinations as to unwarrantable failure.

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Brody Mining,* 37 FMSHRC at 1691; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1351-57 (Dec. 2009).[10]

In particular, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"). The Commission has specifically noted that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining,* 35 FMSHRC at 294.

As discussed above, the Judge's determinations that the violations in these orders were not S&S may have been flawed due to consideration of redundant safety measures. We further conclude that the Judge's non-S&S findings might have influenced his view of the degree of danger, and consequently his unwarrantable failure determinations for these orders. [11]

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[10] A judge may determine, in his or her discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *Brody Mining,* 37 FMSHRC at 1692.

[11] Of course, S&S violations are not synonymous with unwarrantable failures. An S&S inquiry centers on whether a "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). An unwarrantability determination, on the other hand, involves an analysis similar to gross negligence or reckless disregard. *Sec'y of Labor v. FMSHRC*, 111 F.3d at 919 ("the Secretary and the Commission interpret the words 'unwarrantable failure' to require a culpability determination similar to gross negligence or recklessness"). The Judge must analyze the relevant factors to determine whether the operator engaged in aggravated conduct constituting an unwarrantable failure. *Emery Mining,* 9 FMSHRC at 2001, 2003-04. On remand, therefore, the Judge's consideration of the S&S issue and unwarrantability issue will require separate analyses.

Accordingly, we remand this case to the Judge to reconsider his unwarrantable failure findings for these violations in light of our ruling in this matter.

III.

Conclusion

We affirm the Judge's determination that the modified safeguard is valid and that the operator failed to comply with it.

We remand the Judge's S&S and unwarrantable failure findings at issue for reconsideration in light of our decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HOPKINS COUNTY COAL, LLC	Docket No. KENT 2009-820-R KENT 2009-821-R KENT 2009-822-R KENT 2009-1441

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These contest and 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"). Hopkins County Coal, LLC ("HCC") appeals an Administrative Law Judge's decision upholding the validity of two citations and one failure to abate order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The violations were issued in response to HCC's refusal to release personnel records to inspectors as part of a MSHA discrimination investigation. The Secretary of Labor requires the records to determine whether there was a violation of the anti-discrimination provisions of the Act.

The issues before us are: (1) whether section 105(c) of the Mine Act authorizes the Secretary to investigate a miner's complaint of discrimination filed with MSHA if the complaint does not state a specific protected activity; (2) whether the Secretary has the authority under sections 103(a) and (h) of the Mine Act to demand access to personnel records in furtherance of a discrimination investigation; (3) whether the personnel records sought in the subject proceedings were "reasonably required" under section 103(h); (4) whether the "reasonable" standard of section 103(h) mandates notice of the protected activity as a prerequisite to the Secretary's power to demand records; (5) whether the Secretary's demand for personnel records violates the operator's Fourth Amendment rights; and (6) whether the section 104(b) order issued to HCC was valid.

For the reasons discussed below, we affirm the Judge. We hold that pursuant to the plain language of section 105(c) of the Mine Act, the Secretary did not exceed his authority by investigating allegations of discrimination and that HCC's compliance with the investigation was required in spite of the unidentified protected activity. We hold that section 103(h) of the Mine Act permits the Secretary to demand access to the disputed personnel records and conclude that the records were reasonably required to enable the Secretary to perform his function of determining HCC's compliance with the anti-discrimination provisions of the Act. We also find that section 103(h)'s "reasonabl[e]" standard does not require notice of the protected activity to the operator as a prerequisite to the Secretary's investigation or an operator's compliance.

Finally, we conclude that the Secretary's demand for records does not violate the Fourth Amendment rights of HCC and that the section 104(b) order was properly issued.

I.

Factual and Procedural Background

A. The Factual Background

Robert Gatlin was employed as a belt examiner at HCC's Elk Creek Mine in Madisonville, Kentucky. On January 8, 2009, Gatlin was fired by HCC after he refused to perform a pre-shift examination. With the assistance of a complaint processor,[1] Gatlin filed a discrimination complaint form with MSHA on January 20, 2009, and alleged that he was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c).[2] Specifically, the complaint stated:

> I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Gov. Ex. 1 at 1-2. The complaint did not set forth a protected activity as outlined in section 105(c)(2). Gatlin also requested temporary reinstatement. MSHA Supervisory Special Investigator Kirby Smith interviewed Gatlin the next day and determined that Gatlin may have engaged in protected activity and may have suffered adverse action.[3] 34 FMSHRC 789, 790 (Apr. 2012) (ALJ).

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[1] A complaint processor is an MSHA employee who assists miners with filling out the MSHA complaint form.

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

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners . . . of an alleged danger or safety or health violation . . . .

[3] At the time of the trial, Smith had been a special investigator for approximately five years, routinely investigating section 105(c) discrimination complaints. He had investigated approximately 75 discrimination complaints while serving in this position. Tr. 32-33.

On January 26, 2009, the MSHA District Manager, Carl E. Boone, II, advised HCC by letter that MSHA wanted to interview five named miners in response to Gatlin's discrimination complaint "during the fact-finding segment of this investigation." Gov. Ex. 2. Boone requested that HCC contact MSHA Special Investigators Smith or Rodney Adamson by February 6 "with a convenient date and time to conduct these interviews." *Id.* In a letter dated February 6, counsel for HCC refused to arrange the requested interviews unless MSHA identified the protected activity alleged in the complainant's discrimination claim. Gov. Ex. 3.

On February 23, 2009, Boone sent HCC's counsel a letter requesting a number of documents, including Gatlin's personnel file and the "personnel files of all employees at the Elk Creek Mine who were disciplined, reprimanded or terminated during the period of January 1, 2004 – January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin." Gov. Ex. 4. This request would later be clarified. MSHA requested that the documents be provided to Smith by the close of business on March 2, 2009. After the exchange of several letters, HCC eventually agreed to provide the requested documents, except for the personnel files.

In letters discussing MSHA's document request, HCC made repeated requests for clarification of the protected activity alleged by Gatlin, and declared in its March 23 letter that if MSHA could not provide the protected activity, which HCC was entitled to know, "then the agency has no case to investigate, no jurisdiction, no entitlement and no basis upon which to make any request." Gov. Ex. 9. MSHA never responded.

On March 23, Investigators Smith and Adamson arrived at the mine. After reviewing the examination books, the investigators requested the personnel files, which the mine's general manager, William Adelman, refused to provide on the grounds that the request was vague and that privacy concerns prevented release of the files. Tr. 119-20. Smith then issued section 104(a) Citation No. 6694904 alleging that HCC violated sections 103(a) and (h) of the Act by failing to produce the requested records.[4]

Smith gave HCC until 9:00 a.m. (45 minutes) to abate the violation, but at 8:50 a.m. Adelman informed Smith that he had spoken to counsel and he did not intend to comply. Smith waited until 9:00 a.m. and then issued section 104(b) withdrawal Order No. 6694905, stating that: "The [operator's] agent . . . refused to comply with Citation No. 6694904 requiring the operator to produce/provide records requested by MSHA Special Investigators during the performance of their official duties in the investigation activities under [section] 105(c) of the Mine Act." Gov. Ex. 11. The order was designated "No area affected," and no miners were withdrawn.

After another five minutes, the requested documents still were not produced and at 9:05 a.m., Smith issued another section 104(a) citation, No. 6694906, to HCC for continuing to work in the face of a section 104(b) withdrawal order. He set an abatement time of 10:00 a.m. When

[4] Sections 103(a) and (h) of the Mine Act provide the Secretary with broad authority to inspect and investigate mines and to request records of mine operators. 30 U.S.C. § 813(a) and (h).

the citation was not abated, HCC became subject to the provisions of section 110(b)(1) of the Act, which imposes daily civil penalties of up to $5,000 a day. 30 U.S.C. § 820(b)(1).

Later that day, HCC filed notices of contest with the Commission and shortly thereafter, a motion requesting an expedited hearing, which the Secretary opposed. The following day, in a conference call with a Commission ALJ, HCC received clarification that MSHA sought the personnel records of similarly situated miners who had been disciplined for insubordination. Tr. 56, 91, 156-58, 161-62. On March 26, HCC produced Gatlin's personnel file and the redacted files of four other employees. In a March 27 conference call, the parties informed the Judge that abatement of the citations and order had occurred one day prior, thereby ending HCC's continuing liability under section 110(b)(1) and obviating the need for an expedited hearing. The Judge then issued an order denying HCC's motion to expedite. The parties then filed cross-motions for summary decision.

B. The Judge's Decision

In his April 2, 2012 decision, the Judge upheld the citations and order. 34 FMSHRC at 789. He rejected HCC's argument that section 103 of the Act does not authorize the Secretary to request personnel files during a discrimination investigation. He determined that because investigating discrimination claims is a function of the Secretary, information relevant to assessing the merits of those claims is "reasonably required." The Judge found the Secretary's interpretation of sections 103(a) and (h) reasonable and entitled to deference. 34 FMSHRC at 803. He determined that the requirement in section 103(h) that the information sought be "reasonably required" obligates the Secretary to have a reasonable understanding of the complainant's claim prior to making a document request. He found that Smith had credibly testified that he had a reasonable understanding of Gatlin's claim before making the request, and rejected HCC's claim that the request was a fishing expedition. *Id*. at n.15. [5]

The Judge rejected HCC's Fourth Amendment challenge on the grounds that under *Donovan v. Dewey*, 452 U.S. 594, 604 (1981), warrantless inspections under the Mine Act are permissible because the mining industry is pervasively regulated, and the certainty and regularity of the Act's inspection scheme provide an adequate substitute for a warrant. He further stated that the Secretary's interest in promoting miner safety outweighs HCC's general interest in its personnel records. 34 FMSHRC at 798-99.

[5] Investigator Smith testified that by February 6, he had not yet established a protected activity, but based on allegations made by Gatlin in the interview, Smith began looking into the possibility of a protected activity related to determining and reporting safety hazards. Tr. 46-48. Specifically, Gatlin alleged that as a belt examiner he had been required to perform work beyond his regular job duties, which made his job so burdensome that he did not have enough time to correct the safety hazards he found. He alleged that as a result, he began citing more hazardous conditions in the pre-shift and on-shift exam books. Gatlin stated that he had been told that he did not necessarily have to record a hazard if it was corrected. Tr. 47-48.

The Judge disagreed with HCC's contention that section 104(b) orders cannot be issued for violations where there is no "area affected." He concluded that the provision's language as to whether an affected area must be identified and whether miners must be withdrawn is unclear. He accorded deference to the Secretary's interpretation that he may exercise his discretion in deciding to designate an order as "no area affected" and in declining to withdraw miners. *Id*. at 804-05.

II.

Disposition

A. Whether the Secretary had authority to investigate Gatlin's complaint of discrimination although it failed to identify a protected activity.

HCC argues that because Gatlin's MSHA complaint failed to allege a specific protected activity, the Secretary had no basis, and therefore no authority, to carry out an investigation on the miner's behalf.[6] The Secretary counters that the Mine Act authorizes MSHA to investigate every discrimination complaint filed by a miner, regardless of whether it alleges every element of a prima facie case of discrimination.[7]

We first turn our attention to the language of the statute. In considering the question of statutory construction, our first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue ("*Chevron I*" analysis). *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). If a statute is ambiguous or silent on a point in question, deference is accorded to the interpretation of the agency charged with administering the provision in question, provided that the interpretation is reasonable *(Chevron II*" analysis). *See Chevron*, 467 U.S. at 843-44; *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

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[6] The Secretary argued in his response brief that the Commission should decline to consider this argument because HCC raised it for the first time on appeal. However, based on our review of the record, we conclude that the argument was adequately raised below and that the Judge had an opportunity to pass on the question. Accordingly, we will consider the issue.

[7] In order to establish a prima facie case of discrimination under section 105(c), a complainant must present evidence demonstrating that (1) the individual engaged in protected activity, (2) that there was an adverse action, and (3) that the adverse action complained of was motivated in any part by that activity. *See Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980); *UMWA o/b/o Franks & Hoy v. Emerald Coal Res*., *LP*, 36 FMSHRC 2088, 2093 (Aug. 2014).

Section 105(c)(2) of the Mine Act authorizes the Secretary to investigate a complaint of discrimination upon the filing of a complaint. Specifically, the Act states that:

> *Any miner* or applicant for employment or representative of miners *who believes that he has been discharged, interfered with, or otherwise discriminated against . . . may . . . file a complaint with the Secretary alleging such discrimination*. *Upon receipt of such complaint, the Secretary* shall forward a copy of the complaint to the respondent and *shall cause such investigation to be made as he deems appropriate*. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . .

30 U.S.C. § 815(c)(2) (emphasis added).

According to the statutory language, a miner's mere *belief* that he or she has been discriminated against and the filing of the MSHA complaint form expressing that belief are sufficient grounds to trigger an investigation of discrimination by the Secretary. The statute does not include a requirement that the miner state the protected activity that allegedly motivated the adverse action, nor that he proclaim any other element of a prima facie case of discrimination. In fact, beyond the miner alleging his belief of discrimination, the provision says nothing of form or content of the miner's charging complaint. *Compare* Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(b) (requiring through regulation that a charge contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3)).[8] The statutory provision here is silent on whether the miner's charging complaint must specifically identify a protected activity.

Although the legislative history is equally silent in this regard, it does provide a useful context for the proper consideration of protected activity, as well as how section 105(c) should be administered. Specifically, Congress was clear that "[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive, and that "the scope of the protected activities be broadly interpreted by the Secretary." S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). It further stated that section 105(c) was to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36. It went on to say that "[i]t is the Committee's intention to protect miners

[8] *EEOC v. United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002), relied upon by our dissenting colleagues for the proposition that the Seventh Circuit will not enforce administrative subpoenas absent a cognizable claim of discrimination, is inapposite. Slip op. at 8. In that Title VII case, alleging discrimination on the basis of national origin and sex because of the airline's failure to make contributions to the French social security system, the threshold sufficiency of the charge was not at issue. 287 F.3d at 651 ("UAL does not point to any infirmities in the charge."). Rather, the Court rejected a records request that extended far beyond the inquiry into the airline's social security payments and that would have taken five full-time employees more than a year to satisfy. *Id*. at 648, 655. That is not the situation here. *See* Tr. 130.

against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . . The bill requires the Secretary to rigorously enforce these rights with discrimination complaints receiving high priority." *Id*.; *Pasula*, 2 FMSHRC at 2789 ("[T]he 1977 Mine Act is remedial legislation, and is therefore to be liberally construed."). Therefore, even if the complainant does not assert a protected activity expressly protected under the Act, the activity may still be protected if it furthers the purpose of the legislation. *Pasula*, 2 FMSHRC at 2789.

The Act does not prohibit the commencement of the Secretary's investigation until a protected activity or actionable cause can be articulated. Instead, the Act *requires* that the Secretary investigate "upon receipt" of the complaint, "as he deems appropriate." 30 U.S.C. § 815(c)(2); *see also* S. Rep. No. 95-181 at 36-37 (1977) ("The Secretary's investigation of matters alleged in the complaint must commence within fifteen days of receipt of the complaint.").[9] The statutory language and the legislative history together make clear that an investigation deemed appropriate by the Secretary should be afforded to every "miner . . . who

[9] Our dissenting colleagues' reliance on *Wilson v. Farris,* 38 FMSHRC 341 (Feb. 2016)(ALJ), is misplaced. Slip op. at 4-5. *Wilson* was a discrimination case, in which MSHA had determined, after investigation, that a violation of section 105(c) had not occurred. The complainant then filed an action under section 105(c)(3), and subsequently requested discovery from the respondents. As the dissent notes, the administrative law judge denied the discovery request and granted summary decision to the respondents because the complainant had not alleged a cognizable claim of discrimination. The clear difference between *Wilson* and the present case is that here the document request is being made by MSHA in carrying out its statutorily-mandated duty to investigate the complaint.

Likewise, our dissenting colleagues' reliance on *Hatfield v. Colquest Energy, Inc.,* 13 FMSHRC 544 (Apr. 1991) is misplaced. In *Hatfield*, the Commission reviewed a judge's order denying a motion to strike a miner's amended 105(c)(3) complaint. The dissent cites *Hatfield* for the proposition that a miner's private complaint filed with the Commission pursuant to section 105(c)(3) is limited by the terms of the miner's initial complaint filed with MSHA. Slip op. at 4. We read *Hatfield* somewhat differently. The Commission remanded the case to the Judge to determine if the protected activities cited in the miner's amended section 105(c)(3) complaint "[were] investigated by the Secretary in connection with Hatfield's initial discrimination complaint to MSHA." 13 FMSHRC at 546. Although Hatfield's initial complaint was "general in nature" and "allege[d] no specific protected activities" the Commission reasoned that the statutory scheme of the Mine Act "provides to miners a full administrative investigation and evaluation of an allegation of discrimination" prior to the miner's private right of action. *Id*. Thus, the Commission held that it was not the terms of the initial complaint to MSHA that controlled whether the amended complaint could go forward, but the Secretary's investigation of the initial complaint. This holding acknowledges that the Secretary has the authority to investigate possible discriminatory acts, even if the miner's initial complaint is deficient.

believes that he has been discriminated against" and has "file[d] a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2).[10]

There may be instances where a protected activity cannot be set forth because the miner does not actually engage in protected activity, but may nonetheless experience adverse action as a result of the operator's erroneous suspicion that the miner has engaged in such activity. *See Moses v. Whitley Dev. Corp*., 4 FMSHRC 1475 (Aug. 1982), *aff'd,* 770 F.2d 168 (6th Cir. 1985). In such situations, the miner is hardly the best person to draw the necessary legal distinction between a claim where he has exercised his rights and one in which he has not exercised them, but where his employer has sought to interfere with his ability to do so. He may not understand that such interference is still prohibited under the Mine Act.

Indeed, Supervisory Special Investigator Smith testified that "[a] lot of times in the fact finding segment [of the investigation], miners don't even know their miner's rights. They don't know what to tell you. They don't know the key phrases, and when we go and investigate and talk with them, we try to pull that." Tr. 52-53. He further testified that the majority of discrimination claims that cross his desk do not clearly set forth a protected activity. Tr. 37. Thus, in cases where a miner is uninformed or unclear about what constitutes a protected activity but believes that he or she has been wronged by an employer, the Secretary's investigation into this "belief" serves as a necessary safety mechanism that ensures the miner has the opportunity to fully develop his possible claim of discrimination.[11]

The dissent expresses concern that MSHA "was seeking to find a basis for a claim that had not been made by the miner." Slip op. at 2. However, Investigator Smith testified that based on allegations made by Gatlin in the interview, he began looking into the possibility of a protected activity related to determining and reporting safety hazards. Tr. 46-48. Specifically, Gatlin alleged that as a belt examiner he had been required to perform work beyond his regular job duties, which made his job so burdensome that he did not have enough time to correct the safety hazards he found. Gatlin alleged that as a result, he began citing more hazardous conditions in the pre-shift and on-shift exam books. Gatlin stated that he had been told that he did not necessarily have to record a hazard if it was corrected. Tr. 47-48. Thus, based on the

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[10] Investigator Smith testified that MSHA formerly had a practice of assessing whether protected activity had occurred in section 105(c) complaints based solely on what the complainants initially reported. This resulted in some complainants being turned away without an investigation if protected activity was not apparent. After miners complained to Congress that they were being turned away without an investigation on the merits, MSHA changed the practice, and discovered that complainants did not know their rights as miners (for example, to complain to management about hazardous conditions), and thus sometimes did not articulate protected activity in their complaints although it had occurred. Tr. 110-11.

[11] MSHA's initial interview with the miner can provide the investigator with much needed clarity regarding the allegations, and can possibly lead to the discovery of other violative conduct the miner did not know to allege or had trouble articulating in his charging complaint. *See* Tr. 53, 80.

interview, MSHA determined that it had a basis to investigate Gatlin's allegations as a possible violation of section 105(c), even though protected activity was not specifically alleged in Gatlin's written complaint. This is precisely what the Mine Act contemplates in section 105(c)(2) by creating a provision for MSHA to investigate a complaint made upon a miner's "belie[f]." The judge credited the investigator's testimony, finding that he had an understanding of the miner's claim and "did not . . . embark on a 'fishing expedition.'" 34 FMSHRC at 803 n.15. The dissent's contention that the inspector failed to describe Gatlin's possible protected activity or how it could have related to adverse action, slip op. at 6, n. 7, is incorrect.[12]

The Act requires that the Secretary's investigation "commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C.A. § 815(c)(2). In its discussion of the provision, Congress explained that "[u]pon determining that the complaint *appears to have merit*, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation." S. Rep. No. 95-181 at 36-37 (1977) (emphasis added). Thus, it is during this preliminary investigation that the Secretary must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was "not frivolously brought." *See Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), *citing* S. Rep. No. 95–181.[13]

It appears that HCC confuses the minimal requirements that must be satisfied to trigger the Secretary's section 105(c) investigative power with the threshold requirements that must be met before the Commission in order to establish that a miner's case is not being frivolously

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[12] Commissioner Cohen notes that our dissenting colleagues also state: "It is difficult to believe that the majority actually thinks MSHA has authority to investigate every adverse employment action in the mining industries through sweeping document demands about uninvolved employees without any alleged basis in section 105(c). Yet that is the inevitable outcome of its decision." Slip op. at 3-4. The short answer is that we don't believe that MSHA has authority to investigate "every adverse employment action in the mining industries through sweeping document demands," nor does MSHA. The document demands were made in this case only after Inspector Smith determined, based on his interview with Gatlin, that discrimination under the Act may have occurred. As noted above, the Judge found that MSHA's document request was not a "fishing expedition."

[13] In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214-16 (1946), the Supreme Court upheld an administrative subpoena issued by the Secretary of Labor seeking records during investigation to determine whether a company was violating the Fair Labor Standards Act. In relying on the statute which conferred subpoena power to aid the Department of Labor in enforcement and in investigations to determine compliance, the Court rejected the company's argument that without charge or complaint, Labor's subpoena amounted to a fishing expedition to secure information on which to base a charge. It stated that "[t]he very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Id*. at 201.

brought. The "not frivolously brought standard" has been deemed the functional equivalent to the "reasonable cause to believe" standard. *Id*. at 748, n.10. As one Commission Judge has noted, in practice, in order to prevail on this very low burden of proof, the Secretary need only establish protected activity and one of the circumstantial indicatives of motive. *Comunidad Agricola Bianchi, Inc*., 32 FMSHRC 206, 211 n.9 (Feb. 2010) (ALJ). However, the threshold for initiating the Secretary's investigative power is even lower. It only requires the filing of a complaint with MSHA. It does not require that the Secretary establish protected activity before it may investigate, because whether or not a protected activity exists is determined during the preliminary investigation, not before.[14]

HCC's theory that the Secretary's investigative authority rests solely on the initial statements of the complaining miner is contrary to the statute's language, Congressional intent, and the purpose of the provision.[15]

B. Whether the Secretary's records demand was authorized under section 103 of the Act.

1. The Secretary has the right to obtain records an operator is not legally required to maintain.

HCC maintains that section 103(a) does not grant the Secretary the right to compel the production of documents, and that his authority under section 103(h) is limited to records that an operator must keep to allow the Secretary to conduct his functions under the Mine Act. We disagree.

In *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012-13 (May 2012), *aff'd,*715 F.3d 631, 638 (7th Cir. 2013), we upheld the Secretary's right to inspect and copy records, (including personal medical information) not required by law to be maintained, in order for the Secretary to determine compliance with Part 50 accident reporting requirements. We emphasized that the Secretary has broad authority to conduct inspections and investigations under section 103(a). *See Big Ridge*, 34 FMSHRC at 1012; *Tracey & Partners*, 11 FMSHRC 1457, 1464 (1989). That

[14] *See United States v. Powell,* 379 U.S. 48, 58 (1964) (holding that agency need not meet any standard of probable cause to obtain enforcement of administrative summons); *In re Subpoena Duces Tecum*, 228 F.3d at 348, *citing Oklahoma Press*, 327 U.S. at 213 (finding that if the issuance of investigative subpoenas were based upon showings of probable cause, "the result would be the virtual end to any investigatory efforts by governmental agencies . . . .").

[15] The Commission has previously held that "the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to [him], and not merely on the initiating complaint itself." *Sec'y o/b/o Callahan* v. *Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998); s*ee Sec'y o/b/o Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

provision states in relevant part that "the Secretary . . . shall make . . . investigations in . . . mines . . . for the purpose of . . . determining whether there is compliance with the mandatory health or safety standards . . . or other requirements of this chapter." 30 U.S.C. § 813(a). Thus, the language of section 103(a) generally authorizes the Secretary to verify, through investigation, operator compliance with the anti-discrimination requirements of section 105(c) of the Act.

Section 103(h) states that:

> In addition to such records as are specifically required by this chapter, *every operator of a . . . mine shall* establish and maintain such records . . . and *provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions* under this chapter.

30 U.S.C. § 813(h) (emphasis added). We held in *Big Ridge* that the plain language of section 103(h) provides a broad Congressional grant of authority to the Secretary to carry out his functions under the Act. 34 FMSHRC at 1012, *aff'd,*715 F.3d at 638; *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457 (D.C. Cir. 1994) (recognizing broad scope of section 103(h)).

Section 103(h) does not restrict the Secretary's access to records that are specifically required to be maintained by the Act and regulations. *Big Ridge,* 34 FMSHRC at 1012, *aff'd* 715 F.3d at 641-42; *see also BHP Copper, Inc*., 21 FMSHRC 758, 766 (July 1999). In fact, "Congress rejected earlier proposed versions of this section, which had limited the Secretary's access to operators' records to those specific records which the Secretary had 'prescribe[d] by regulation.' S. 717, 95th Cong., at 20, *reprinted in Leg. Hist*. at 129; H.R. 4287, 95th Cong., at 20, *reprinted in Leg. Hist*. at 207." *Big Ridge,* 34 FMSHRC at 1013.

In its decision in *Big Ridge*, the Seventh Circuit stated that section 103(h) provides that "MSHA may 'reasonably require' mines to produce non-required records when the additional information would enable MSHA 'to perform [its] functions' under the Act. This text permits MSHA to make information demands for a wide range of purposes—any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act." *Big Ridge*, 715 F.3d at 641; *see also* S. Rep. No. 95-461, at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1325 (1978) ("the House amendment . . . authorized the Secretary to require records, reports, and other information not otherwise specified by the Act.").

Accordingly, we conclude that section 103(h) broadly authorizes the Secretary to request access to records not required to be kept by operators, as long as the records are "reasonably require[d]" to enable him to perform his function under the Mine Act.

2. <u>The personnel records were "reasonably required."</u>

We now consider whether the Secretary's demand satisfies the requirements of section 103(h). We conclude that the personnel records requested by the Secretary are "reasonably

require[d] . . . to enable him" to carry out his investigative "functions" under sections 105(c) and 103 of the Act. 30 U.S.C. § 813(h).[16]

The request for personnel records by the Secretary was reasonable because it met the standard set forth by the Seventh Circuit in *Big Ridge*, as it was "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 715 F.3d at 646 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). [17]

First, the records demand was sufficiently limited in scope, as it was tailored to capture only records of employees who had been disciplined, reprimanded, or terminated for engaging in the same or similar conduct as Mr. Gatlin. The scope was further limited by the time frame covered and the manner of inspection. Specifically, the time period was limited to records from the last five years. This is a reasonable window of time for capturing any relevant information given that the records sought would contain a discrete type of employee conduct. The manner was limited to MSHA's request to inspect and copy the records and did not include the agency rummaging through the files of HCC.

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[16] Contrary to the operator's assertion at oral argument (Oral Arg. Tr. 12-19), the "relevant and necessary" standard applied in *Big Ridge* is not applicable here. That standard was imposed by regulation and applies to the Secretary's power to demand records in the context of Part 50 audits. There is no applicable regulation here; thus, there are no regulatory requirements the Secretary's record demand must satisfy.

[17] The Seventh Circuit used this well-established standard for purposes of determining if the Secretary of Labor's demand for information from a mine operator was in accordance with the Fourth Amendment. *Big Ridge, Inc.,* 715 F.3d at 646 (citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967). The Circuit adopted this standard because it recognized that the Secretary's request for information and records from an operator pursuant to section 103(h), for Fourth Amendment purposes, "amounts to an administrative subpoena in substance." *Id*. In order to create a test for determining whether a request by the Secretary under section 103(h) is "reasonably required . . . to enable him to carry out his investigative functions," it is appropriate for the Commission to apply the standard used to evaluate subpoenas under the Fourth Amendment.

In *Warrior Coal*, *LLC,* the Commission therefore applied this standard when determining that the Secretary's request was "reasonable" as required by section 103(h). *Warrior Coal, LLC*, 38 FMSHRC ___, slip op. at 5-8, KENT 2011-1259-R et al. (May 17, 2016), *appeal docketed*, No. 16-3646 (6th Cir. June 15, 2016). The limitations placed on the Secretary's information requests by the application of this standard appropriately balances the Secretary's authority against the burden of compliance placed on the mine operator and the possibility of government overreach.

Second, these specific directives also made compliance with the request manageable and not unreasonably burdensome, which is evidenced by Adelman's statement that it only took them "a few hours" to gather the requested files. Tr. 130; *see also infra* at 15.

Third, the personnel records were relevant to the purpose of a discrimination investigation. 34 FMSHRC at 803. They were critical aids in the Secretary's determination of disparate treatment, which is relevant to a finding of discrimination. Investigator Smith testified that Gatlin's personnel file would show his work history, including any disciplinary action taken against him, to find any information corroborating Gatlin's allegations and to determine his general credibility. Tr. 56, 68. The personnel files of other similarly situated employees were requested in order to determine whether there was evidence of disparate treatment. Tr. 56, 91; 34 FMSHRC at 792.

Further, the request enables the Secretary to carry out his investigative functions under sections 105(c) and 103(a). *See Big Ridge*, 34 FMSHRC at 1017. Verifying operator compliance with the Mine Act is one of the express purposes for which section 103(a) authorizes MSHA to inspect and investigate mines, see *Big Ridge*, 715 F.3d at 642, and verifying HCC's compliance with section 105(c) falls squarely within this function. This type of inquiry is particularly important because the Act protects miners against discrimination in order to encourage their active role in improving mine safety. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

Congress specifically stated that: "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. . . . [I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181 at 35, Leg. Hist. at 623. "The [discrimination] complaint procedure, therefore, serves an important function in accomplishing the legislation's broader goals of improving mine safety and protecting miners." *Vulcan Const. Materials, LP v. FMSHRC*, 700 F.3d 297, 302 (7th Cir. 2012). As the Judge stated, "[w]here the Secretary's function is the evaluation of a discrimination claim, information that is relevant to assessing the merits of that claim, including evidence of protected activity, adverse action or discriminatory intent may be 'reasonably required.'" 34 FMSHRC at 803.

Accordingly, we hold that records that tend to establish or disprove an element of a prima facie case of discrimination generally are, in our view, reasonably required to enable the Secretary to perform his investigative function under section 105(c) of the Mine Act.

3. HCC is not entitled to "notice" prior to MSHA commencing an investigation.

HCC also asserts that MSHA was required to provide it with a threshold level of "notice" of the protected activity so that HCC could determine whether a colorable claim was being alleged and whether its compliance was required. We disagree. The statute does not entitle HCC to "notice" of the protected activity, and therefore, "notice" is not a prerequisite to the Secretary's investigation or to an operator's compliance with the investigation.

We first begin by noting that HCC misconstrues its authority. The Mine Act does not permit the operator to determine the scope or dictate the direction of an MSHA compliance investigation. According to section 105(c), the Secretary "shall cause such investigation to be made *as he deems appropriate*." 30 U.S.C. § 815(c) (emphasis added). Thus, this duty is committed to the sole discretion of the Secretary. The Mine Act also does not allow the operator to determine if a colorable claim has been alleged. That initial determination is also made by the Secretary and only reached after he has investigated to an extent that he has deemed appropriate.

Section 105(c)(2) requires that once a miner who believes that he has suffered discrimination files a complaint with MSHA, "[u]pon receipt of such complaint, *the Secretary shall forward a copy of the complaint to the respondent* and shall cause such investigation to be made as he deems appropriate." 30 U.S.C. § 815(c)(2) (emphasis added). The language says nothing about providing "notice." Under a plain reading, the Secretary is only required to forward a copy of the complaint, as filed by the miner, to the operator. As previously noted, the provision contains no guidance on what a charging complaint must include. There is also no language that suggests the Secretary must provide to the operator anything more than a "copy" of what the miner has filed before he may commence his investigation into the complaint.[18] Congress did, however, intend for section 105(c) to be construed broadly to ensure that miners would not be hindered in any way in exercising their rights. Consequently, we have no basis to read conditions into the Act that might further complicate a miner's process for exercising his rights under this section.

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[18] In similar instances, Congress has chosen not to impose specific content requirements on a charging complaint or a service of notice requirement on the agency involved. *See, e.g.*, *United States v. Woerth*, 130 F. Supp. 930, 943 (N.D. Iowa 1955), *aff'd*, 231 F.2d 822 (8th Cir. 1956) ("There is no provision in the [Packers and Stockyards] Act or in any of the regulations promulgated thereunder that the contents of a complaint against a registrant be made known to him before an investigation may be made of his records in connection therewith."); *Solis v. Laborer's Int'l Union of N. Am*., 775 F. Supp. 2d 1191, 1212 (D. Haw. 2010) (rejecting respondent's argument that prior to release of any records the Secretary of Labor must provide the nature of and identify specific allegations of the election challenge, and concluding that "[i]t is evident from reading the LMRDA that Congress intended that the Secretary exercise broad authority in investigating labor unions, such that '[t]he Secretary is not required to demonstrate probable cause exists to launch a LMRDA investigation.' *McLaughlin*, 880 F.2d at 174."); *EEOC v. Merrill Lynch, Pierce, Fenner & Smith*, 677 F. Supp. 918, 926 (N.D. Ill. 1987) (holding that the EEOC was not required to give employer Title VII notice of sex discrimination charge before commencing investigation or requesting disputed report from employer under Equal Pay Act and Fair Labor Standards Act).

In contrast, certain other statutes specifically impose a notice requirement. For instance, Title VII originally required that the EEOC simply provide a copy of a charge to the employer accused of discrimination. Pub.L. 88-352, § 706(a), 78 Stat. 259. However, in 1972, the provision was amended to require that the Commission "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the] employer . . . within ten days" of the charge being filed. 42 U.S.C. § 2000e-5(b); *see also EEOC v. Shell Oil Co*., 466 U.S. 54, 63 (1984).

HCC additionally asserts that notice is required here because it is analogous to the notice to service of process in a civil suit, which is to give the party notice of a claim or charge being filed against it. Oral Arg. Tr. 9. However, this is not the proper context in which to view the miner's complaint to MSHA or the Secretary's investigatory power. HCC erroneously seeks to apply the procedures associated with formal court proceedings to the Secretary's pre-proceeding investigation.

The miner's charging complaint here is not a pleading and does not initiate a formal section 105(c)(2) proceeding before the Commission. The miner's complaint only serves as the mechanism by which the Secretary's investigative function is activated. It is the predicate to, and not the result of, the Secretary's determination that the Mine Act has been violated. *See U.S. v. Morton Salt Co.,* 338 U.S. 632, 641-43 (1950) (drawing distinction between the judicial process and the administrator's function of investigating). In this regard, we find NLRB precedent helpful:

> A charge does not initiate a formal . . . proceeding against a party. [It] is filed by a private party and "serves merely to set in motion the investigatory machinery of the Board." *Texas Indus., Inc. v. NLRB,* 336 F.2d 128, 132 (5th Cir. 1964). . . . The charge "is not designed to give notice to the person complained of . . . Once . . . filed, the Board decides whether to issue a complaint, terminate the investigation as unfounded, or dispose of the matter through informal methods. Before [filing] a complaint, the action remains purely investigatory; no parties or judicial hearings exist.

NLRB v. H.P. Townsend Mfg. Co., 101 F.3d 292, 294-95 (2d Cir. 1996) (internal citations omitted); *see also Russell-Newman Mfg. Co. v. NLRB*, 407 F.2d 247, 249 (5th Cir. 1969).

Consistent with our holding in *Big Ridge*, we conclude that section 103(h) broadly authorizes the Secretary to request access to personnel records not specifically required to be kept by operators, as long as the records are "reasonably require[d]" to allow the Secretary to perform his function of investigating complaints of discrimination made pursuant to section 105(c) of the Mine Act.

C. Whether the Secretary's demand violates HCC's Fourth Amendment rights.

HCC argues that MSHA infringed upon its constitutional rights by seeking to conduct a warrantless search of operator records that are not required to be kept under the Mine Act and that are not reasonably required by MSHA to perform its functions under the Act. It also asserts that MSHA's demand was unreasonable because the records were not necessary to determine compliance, the records were irrelevant to the statutory scheme, and the request was overbroad and burdensome.

1. **The inspection was reasonable under *Donovan v. Dewey*.**

Recognizing that mining is a pervasively regulated industry, the Supreme Court has upheld warrantless inspections under the Mine Act using a three-part test. *Donovan v. Dewey*, 452 U.S. 594, 599, 601-05 (1981). The Court held that an inspection is reasonable if it is: (1) authorized by law; (2) necessary for the furtherance of federal interests; and (3) the occurrence is not "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* at 599; *see also Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *Marshall v. Barlow's, Inc*., 436 U.S. 307, 323 (1978).

The instant case satisfies the *Donovan* test. First, the document request was authorized by sections 105(c) and 103 of the Mine Act. Second, as stated above, the document request furthered the anti-discrimination provisions of the Act, which serve as an integral component in the enforcement of the Act's health and safety regulations. Specifically, the Secretary has a substantial interest in protecting miners against discrimination and deterring operators from engaging in discriminatory conduct so that miners remain actively engaged in improving health and safety conditions at mines. Finally, the Act charges the Secretary with the function of investigating complaints of discrimination made against mine operators. These investigations are not uncommon, and presumably anticipated by operators upon being notified that a discrimination claim has been filed.

2. **The request satisfied the Fourth Amendment requirements for an administrative subpoena.**

Recently, in reviewing the Commission's decision in *Big Ridge*, the Seventh Circuit decided that, although "highly instructive," the *Donovan* analysis "does not fully answer the Fourth Amendment question," for *Donovan* concerned physical safety inspections of mines, not demands for production of medical and personnel files in mine custody. 715 F.3d at 645. The court further observed that the investigation at issue did not involve an intrusion in which government inspectors personally opened file cabinets and examined computer hard drives, but rather required mine operators to allow MSHA to review and keep copies of records. *Id*; *see also Donovan v. Lone Steer, Inc*., 464 U.S. 408, 415 (1984).

Focusing its Fourth Amendment analysis on the substance of MSHA's inspection request, the Seventh Circuit determined that MSHA's document review authority under section 103(a) and (h) amounts to an "administrative subpoena" in substance rather than a search or seizure. *Big Ridge*, 715 F.3d at 646. Such a subpoena implicates the Fourth Amendment to the extent that it requires the demand for information be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Id*., *citing See v. City of Seattle*, 387 U.S. at 544. Once an agency has satisfied the requirements for an administrative subpoena, the respondent carries the burden of showing that the request is overbroad, unduly burdensome, irrelevant, or otherwise an abuse of the court's process. *See United States v. Whispering Oaks Resid. Care Facility, LLC,* 673 F.3d 813, 817-19 (8th Cir. 2012) (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)); *NLRB v. N. Bay Plumbing, Inc.,* 102 F.3d 1005, 1008-09 (9th Cir. 1996); *F.T.C. v. Invention Subm. Corp.,* 965 F.2d 1086, 1090 (D.C. Cir. 1992); *F.T.C. v. Texaco, Inc.,* 555 F.2d 862, 882 (D.C. Cir. 1977).

We conclude that the Secretary's request satisfies the "administrative subpoena" requirements of the Fourth Amendment. First, the parameters of the request are sufficiently limited in scope because its reach is restricted to the personnel records of employees who were "disciplined, reprimanded or terminated" within the last five years for engaging in the same conduct that led to Mr. Gatlin's termination.

Second, these records would corroborate or undermine Gatlin's allegations of disparate treatment. These records are relevant to the Secretary's overall purpose of identifying and abolishing the culture of intimidation and retaliation aimed at miners who may want to report safety hazards. Protecting miners from reprisals for their participation in the safety process plays a vital role in the improvement of safety conditions in mines.

Finally, the request was specific and clear enough that it was not unreasonably burdensome for HCC to produce the targeted records. Once HCC received clarification from MSHA on the exact reach of the records demand, the request, as already noted, was specific in scope in that it involved employee disciplinary records that were restricted to a particular type of employee conduct, time frame, and manner of inspection. Searching within such well-defined confines would not be burdensome. In fact, General Manager Adelman testified that after the clarification, HCC only needed to search through "just those terminated employees," and that it took him only five hours to locate the five relevant records that were ultimately produced. Tr. 130, 159.

Nonetheless, we recognize that MSHA's original request was hardly a model of clarity. We also acknowledge that given the irrelevant and private information contained therein, in the interest of time and fairness, the agency should have informed the operator at the outset that it would accept redacted copies of the files. However, as this is not HCC's first exposure to an MSHA discrimination investigation, there is no reason to believe that HCC was not already aware that redaction was an option.

Although the Secretary's request would have captured private information that was not relevant to the discrimination claim, we nonetheless conclude that this is not a legitimate basis upon which an operator can rest its refusal to cooperate with an authorized demand for records. *See Woerth v. United States*, 231 F.2d at 824 ("It may be that the records requested pertain to transactions not within the scope of the Act and which are irrelevant to the investigation in question. However, the fact that the respondent may have intermingled irrelevant information in the records in question cannot serve to defeat the right of the Secretary of Agriculture to examine those records as to transactions which had their origin in the activities of the respondent as a registered dealer."). At the very least, HCC could have released the relevant portions of the records.

We also hold that the burden was on HCC to raise its concerns regarding the reasonableness of the section 103(h) records request prior to issuance of any citation.[19] Had HCC properly raised these concerns regarding the terms of the request, MSHA would have had a duty to discuss the concerns with HCC in good faith. Courts have held that before they will conclude that a subpoena is "arbitrarily excessive," they expect the person served "to have made reasonable efforts . . . to obtain reasonable conditions" from the government. *United States v. Morton Salt,* 338 U.S. 632, 653 (1950); *In re Subpoena Duces Tecum*, 228 F.3d 341, 349, 351 (4th Cir. 2000) ("as a condition to maintaining the argument that an investigative subpoena is overly broad and oppressive, [the subpoenaed party] would have to be able to point to reasonable efforts on his behalf to reach accommodation with the government").

Had HCC taken minimal steps early on to negotiate with MSHA, the imposition of daily penalties might have been avoided. After providing HCC with clarification, the Secretary accepted the records in redacted form with no objections and terminated the violations on March 26, 2009.

D. Whether the section 104(b) order was valid.

Finally, HCC argues that the section 104(b) order issued to it is invalid on its face because the Secretary failed to follow the statutory requirements that he determine an affected area and withdraw miners. We disagree.

1. <u>The Secretary's interpretation of section 104(b) was reasonable.</u>

Section 104(b) of the Act provides that, if on an inspection following the issuance of a section 104(a) citation, the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, *he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator . . . to immediately cause all persons . . . to be*

[19] Beyond demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand. It failed to raise concerns about the vagueness or broadness of the language or seek a revision of the request until the March 24 conference call with the assigned Judge. This was one month after MSHA first requested the documents, a week after being notified by MSHA that Investigator Smith would visit on March 23, and one day after the citations and order had been issued and the daily penalties began to accrue. *See* Gov. Exs. 4, 6. Mine Manager Adelman testified that he did not seek clarification of the request because he felt that the personnel files were "off limits anyway," but indicated that if it had been clarified he "may have been able to determine what part of a [] file might be needed" and they "could have worked that out." Tr. 119-20; *see also* ALJ Dec at 17-18.

withdrawn . . . until . . . the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b) (emphasis added).

The first clause of the provision plainly sets out two enumerated conditions the Secretary must establish before he can issue a withdrawal order: (1) that the underlying violation has not been totally abated within the set abatement time, and (2) the abatement time should not be extended. If those two conditions are satisfied, clause two, the center of our controversy, mandates that the Secretary must determine the extent of the area affected by the violation, and then issue an order which requires the withdrawal of all persons from that area. HCC's reading of the provision would have us treat clause two as an additional finding the Secretary must make before he is authorized to execute a section 104(b) order. We reject this interpretation.

When the Mine Act is silent on an issue, the Secretary's interpretation which reasonably effectuates the health and safety goals of the Act is controlling. *Sec'y of Labor ex rel. Wamsley v. Mutual Mining, Inc*., 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844).

We conclude that the Mine Act is silent on this issue, and that the Secretary's interpretation of the statute, which permits an MSHA inspector to issue a section 104(b) order upon a determination that there is no area affected and/or no miners to physically withdraw, is a reasonable interpretation of the provision. It is significant that nothing in the language of section 104(b) prohibits the Secretary from issuing a "no area affected" order. The language indicates that, if the two conditions above are met, the MSHA inspector "shall determine the extent of the area affected by the violation" and order the appropriate withdrawal of miners from "such area" until it is determined that the violation has been abated. Thus, if no specific area of the mine is affected by the violation, it is reasonable to read the statute as requiring the inspector to state that determination and issue a corresponding section 104(b) order.

The Secretary's authority to issue a section 104(b) failure to abate order is not predicated on proving that an affected area exists, but on showing that the underlying violation was not properly abated and that the time should not be extended. Indeed, Congress stated that "[s]ection 10[4](b) provides the Secretary with such authority upon a determination that the violation has not been totally abated within the original or subsequently extended abatement period, and that the abatement period should not be further extended." S. Conf. Rep. No. 95-181, at 30 (1977), *reprinted in Legis. Hist*. at 618. The language of section 104(b) also makes clear that if the pre-conditions are met, the Secretary is statutorily required to issue an order regardless of the extent of the area affected. *See* 30 U.S.C. § 814(b) ("*If* . . . the Secretary finds that a violation . . . has not been totally abated . . . and that the period . . . should not be further extended, *[then] he* shall determine the extent of the area affected . . . and *shall promptly issue an order*") (emphasis added).

The purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. A "no area affected" order provides an important

deterrent to operators who fail to abate violations in a timely fashion. *See Thunder Basin Coal Co*., 16 FMSHRC 671 (Apr. 1994) (acknowledging the Secretary's practice of issuing "no area affected" section 104(b) orders). The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply. *See* 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

While an operator's continued refusal to turn over records may not present an immediate safety risk, it is nonetheless hazardous in that it hinders the Secretary's investigations, which are intended to ensure operator compliance with the Act's safety measures. Consequently, the rapid abatement of *all* violations, not only those that present immediate physical hazards, is essential for the protection of miners. Otherwise, absent our approval of the Secretary's interpretation, MSHA would have no remedy or leverage to force timely compliance should an operator refuse to comply with a reasonable request for information in furtherance of an investigation.

Accordingly, we conclude that the Secretary's interpretation of section 104(b) is reasonable and entitled to *Chevron II* deference. We hold that an operator's failure to abate any violation is a sufficient basis for the issuance of a section 104(b) order.

2. <u>The Secretary has met his burden of proof regarding the section 104(b) order.</u>

Lastly, having determined that MSHA's issuance of a section 104(b) order was proper under the circumstances, we now decide whether the Secretary has met his burden of proof regarding the validity of the withdrawal order issued to Hopkins due to its failure to abate.

In general, to establish a prima facie case that a section 104(b) order is valid, the Secretary must prove by a preponderance of the evidence that the underlying violation has not been abated within the time fixed or extended for abatement. *Martinka Coal Co*., 15 FMSHRC 2452, 2455-56 (Dec. 1993), *citing Mid-Continent Res*., 11 FMSHRC 505, 509 (Apr. 1989). The operator may also challenge the reasonableness of the time period set for abatement, or the Secretary's refusal to extend the time period. *Energy West Mining Co.*, 18 FMSHRC 565, 568 (Apr. 1996).

In the instant case, it is undisputed that HCC refused to turn over the personnel records within the 45-minute abatement time. Investigator Smith determined that the abatement time was reasonable and should not have been extended because there was no justification to do so. 34 FMSHRC at 793. Smith's refusal was not unreasonable considering that just prior to expiration of the abatement period, mine General Manager William Adelman indicated that he had no intention of complying. 34 FMSHRC at 793; Tr. 72. Adelman then continued to refuse after the section 104(b) order had been issued, which then led to issuance of a section 104(a)

citation for continuing to work in the face of the section 104(b) order. HCC made it clear that regardless of the time set for abatement, it would not comply.[20]

Accordingly, we conclude that the Judge did not err in finding that the section 104(b) Order No. 6694905 was validly issued.

IV.

Conclusion

For the reasons set forth herein, we conclude that the Judge did not err in finding that the citations and order were validly issued. Accordingly, Citation Nos. 6694904 and 6694906 and Order No. 6694905 are all affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[20] It has been HCC's position from the beginning that the Secretary is not entitled to the requested personnel records as part of its investigation. *See* Gov. Ex. 7 at 2 (refusing to release records on ground that "there has been no basis established for such request, given that no protected activity exists in this case"). HCC did not provide the parts of the record that were clearly relevant, while withholding the objectionable parts. In fact, HCC's counsel stated at the oral argument that the personnel records were not necessary because the Secretary could have obtained the disparate treatment information through other means, such as interviews. She stated that even if a protected activity had been provided, it was HCC's position that the Secretary was not entitled to the requested personnel records because they were not "relevant and necessary" to his investigation. Oral Arg. Tr. 19. Therefore, a longer abatement time would not have changed the outcome.

Commissioners Young and Althen, dissenting:

In this case, neither the miner nor MSHA alleged or identified any basis for a claim of discrimination under section 105(c). The miner's complaint asserted insubordination as the reason for his discharge, and MSHA failed and refused to identify any basis for a claim of discrimination. Nonetheless, the majority upholds imposition of a civil penalty arising from MSHA's demand that the operator search and then produce five years of personnel records unrelated to any activity by the claimant miner. The Secretary utterly failed to carry his burden of proof of showing a reasonable basis for the document demand. We respectfully dissent.

Disposition[1]

Section 103(a) of the Mine Act authorizes the Secretary to make inspections and investigations for, *inter alia*, "determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." 30 U.S.C. § 813(a). Additionally, section 103(h) requires that operators "provide such information, as the Secretary or the Secretary of Health and Human Services may *reasonably require* from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h) (emphasis added). Here, the Secretary pursues a function under section 105(c) of the Mine Act. 30 U.S.C. § 815(c). The ultimate issue, therefore, is whether the Secretary reasonably required disclosure of five years of personnel records of uninvolved mine employees when the miner has not alleged discrimination based on protected activity and MSHA did not identify any alleged basis for a claim of discrimination.

Section 105(c) permits a miner who believes he has been discharged "in violation of this section" to file a "complaint" with MSHA. The miner initiates the investigation by filing a written complaint alleging that he/she suffered adverse employment action because of the exercise of a right protected by the Mine Act. There are three prerequisites to a Mine Act discrimination case: protected activity, adverse employment action, and a motivational connection (a link) between the protected activity and the adverse action. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Therefore, a cognizable claim of discrimination exists when a miner or MSHA alleges that the miner engaged in protected activity and suffered adverse employment action that was at least partly motivated by the identified protected activity.

Here, MSHA did not base its demand for five years of personnel records upon any factual allegation made by the miner or MSHA to the operator that the miner might have suffered

[1] Commissioner Young also disagrees with the majority's analysis of the request here as an "administrative subpoena" and incorporates in this opinion his dissent in *Warrior Coal, LLC*, 38 FMSHRC ___, slip op. at 15-21, KENT 2011-1259-R et al. (May 17, 2016), *appeal docketed*, No. 16-3646 (6th Cir. June 15, 2016). An MSHA request for documents under section 103(h) is not an administrative subpoena. Commissioner Althen continues to agree with observations in Commissioner Young's dissent in *Warrior Coal* regarding the nature of an administrative subpoena versus an MSHA document request as set forth in his separate opinion in *Warrior Coal*.

adverse employment action based upon protected activity. Neither the miner nor MSHA ever made any allegation of even possibly unlawful discrimination. The miner himself alleged his discharge resulted from his own insubordination and MSHA, without saying more, demanded five years of personnel records for employees not connected in any way to the complaining miner.

Robert Gatlin, filed a complaint (Gov't Ex. 1) and, as required by section 105(c), MSHA served that document upon the operator. The alleged complaint, however, is factually defective. It plainly did not assert a violation of section 105(c). The so-called complaint did not allege either protected activity or any adverse action motivated by unnamed protected activity. In its entirety, it alleged:

> I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged.
>
> I would like my job back, any negative comments deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Gov't Ex. 1-2.

Gatlin's claim was that he insisted upon doing work on weekends for extra pay. In short, he simply refused to do assigned work on a weekday. He does not admit insubordination; he proclaims it. In doing so, he does not allege either protected activity or any adverse action motivated by protected activity. Thus, he fails to allege even implicitly two out of the three elements of a violation of section 105(c). He actually alleges that the operator discharged him for a legitimate reason—insubordination. Our colleagues in the majority completely agree that Gatlin's claim did not assert discrimination because of protected activity. Indeed, they devote many pages to discussing a specific heading of whether MSHA could "investigate Gatlin's complaint of discrimination although it failed to identify a protected activity." Slip op. at 5. Thus, they concede that the miner's complaint did not state either protected activity or a nexus to adverse action.[2] They further concede, therefore, that from the very outset of MSHA's investigation, it was seeking to find a basis for a claim that had not been made by the miner.

[2] Miners may initially fail to assert in precise legal terms the elements of a discrimination claim in their written complaint. When, as here, a miner's complaint is facially invalid, MSHA is entitled to ask questions and investigate whether any facts asserted by the miner at that point might support a discrimination claim—that is, can the miner allege the elements of protected activity and adverse action because of such activity. Here, MSHA conducted such a further inquiry of Gatlin's complaint even though Gatlin did not make a claim of protected activity or nexus to adverse action. The right to conduct such follow-up to a facially invalid complaint is not at issue at this point. Here, the miner, admittedly by the majority, did not at any point state a claim of protected activity. Thereafter, MSHA was not investigating a claim; it was hunting to

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Nor does the majority contend that MSHA ever identified any potential claim of discrimination because of protected activity. When asked by the operator what the claim was – that is, what the protected activity was and what the nexus to discharge was, MSHA failed to reply. Plainly, neither the miner nor MSHA ever alleged or otherwise notified the operator of any cognizable claim of section 105(c) discrimination as a basis of the need for five years of personnel records of other miners.

Despite the absence of any basis for a discrimination claim, MSHA demanded six categories of records from the operator. Of course, the operator only knew that the miner complained that insubordination was the reason for his discharge. Through counsel, therefore, the operator responded reasonably to the facially unreasonable demand by requesting a statement of any alleged protected activity and discrimination asserted by the miner that would serve as a reasonable basis for the sweeping document demand. MSHA flat out failed and refused to provide any reason for the demand.[3]

Nowhere in the record do we find any allegation of the basic elements of a violation of section 105(c), by inference or otherwise, from the miner or from MSHA. The miner did not even testify at the post-citation hearing. Therefore, without a doubt, Gatlin never alleged a cognizable claim. He certainly provided no basis for a reasonable need for years of personnel records unrelated to the reason for his discharge. We must accept that this miner knew and honestly expressed his objection to his discharge. The miner's expression of discontent was only that the operator did not schedule the miner's work to permit extra pay on Saturday. Without a claim of protected activity or nexus to an adverse action, the miner's complaint is simply that the operator fired him for insubordination.

For its part, MSHA never supplemented the miner's complaint with any basis for a claim of discrimination or reason that, given the absence of a discrimination claim, it was reasonable to demand five years of personnel files. This is particularly important because the requested records did not even go to the complaining miner's conduct. It is difficult to believe the majority actually thinks MSHA has authority to investigate every adverse employment action in the mining industries through sweeping document demands about uninvolved employees without any alleged basis in section 105(c). Yet, that is the inevitable outcome of its decision.

In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the Commission recognized that the miner's complaint establishes the contours for subsequent action. When

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[2] (…continued)
see if it could find a claim. The question here is whether an MSHA demand for disclosure of five years of confidential company records is reasonable when no one, neither the miner nor MSHA, has provided the respondent with any reasonable legal basis for the disclosure of the records.

[3] Eventually, notwithstanding MSHA's refusal to identify any basis for a claim of protected activity, the operator capitulated with respect to all the demanded documents except the five years of personnel records. Upon this refusal, MSHA issued the citation for violation of section 103(a).

MSHA found no merit in Hatfield's initial complaint, he filed a pro se action. The operator moved to dismiss the complaint for failure to state a claim, and the Judge issued a Show Cause Order. *Id*. In response, Hatfield filed an amended complaint. *Id.* at 545. The Judge denied the motion to dismiss, and the Commission granted a petition for interlocutory review. *Id.* at 544.

On review, the Commission described the structure of section 105(c). It found that Hatfield's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint. *Id.* at 546. The Commission held that the initial complaint formed the basis of MSHA's investigation. *Id.* After MSHA refused to act on that initial complaint, the miner could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. The Commission remanded the case to the Judge to determine if the activities alleged in the amended complaint were part of matters investigated by MSHA in connection with the initial complaint. Thus, the miner's subsequent pro se complaint was limited by the terms of his initial complaint.

The recent case of *Wilson v. Farris*, 38 FMSHRC 341 (Feb. 2016) (ALJ), *pet. for discretionary rev. denied*, Unpublished Notice, KENT 2015-672-D (Mar. 11, 2016), relies upon *Hatfield* to find correctly that, absent a cognizable discrimination claim, there is no reasonable basis for permitting sweeping discovery. There, a miner's representative filed a section 105(c) complaint against three rank-and-file miners asserting the miners asked a federal inspector how they could get rid of him as a miner's representative. *Id.* In a well-reasoned opinion, the administrative law judge denied the complainant's request for discovery and granted summary judgment for the respondents. *Id.* at 353. The miner's complaint did not state a cognizable claim of discrimination. Discovery was thus not warranted.

> In ruling upon Respondents' Motion for Summary Decision, the Court works from the proposition that each of Wilson's allegations in his complaint is taken to be true. Thus, the Court is left 'only with the question of whether, as a matter of law, Complainant has alleged a cognizable claim of discrimination under section 105(c) of the Mine Act.'

Id. at 350. In *Wilson*, the claimant did not allege the necessary element of adverse action in his complaint. The Judge did not allow depositions to be taken in the mere hope of finding some element of support for a cognizable claim of discrimination—a type of claim not made in his Complaint. More specifically, the Judge found, "[h]aving failed to establish any adverse action, it would be entirely inappropriate to saddle Respondents with the expense and time attendant to such discovery in Complainant's attempt to see if he can manufacture a claim, when the four corners of Wilson's complaint utterly fall short." *Id.* at 353. The Commission declined to hear Wilson's petition for discretionary review on March 11, 2016.

Throughout the proceedings in this case, MSHA never made any effort to expand upon or in any way provide the operator with any claim of an adverse action motivated in any part by

protected activity that could support the reasonableness of its document demand.[4] It is similarly inappropriate here to saddle Respondent with the expense and time attendant to responding to MSHA's fishing expedition in hopes it can manufacture a claim for a miner, when the miner's complaint failed to state one, and the agency after its investigation cannot and/or does not articulate any alleged basis for a discrimination claim.

The majority holds that "the burden was on HCC to raise its concerns regarding the reasonableness of the section 103(h) records request prior to issuance of any citation.[19] *Had HCC properly raised these concerns regarding the terms of the request, MSHA would have had a duty to discuss the concerns with HCC in good faith.*" Slip op. at 17-18 (emphasis added.) In footnote 19, the majority evinces a compelling sense of irony saying, "Beyond demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand."

The operator's concern with whether there existed a cognizable claim of protected activity – that is, whether there was any basis for a claim of discrimination – goes directly to the heart of the "reasonableness" of a document request. That is the critical "concern" raised by the operator.[5] In the absence of a cognizable claim, there simply was no reasonable basis for a

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[4] The majority relies upon irrelevant dicta in *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292 (2d Cir. 1996). Slip op. at 15. The majority fails to acknowledge that the National Labor Relations Act grants the NLRB the authority to issue administrative subpoenas enforced by court order. 29 U.S.C. § 161(1)-(2). Nor does the majority note that the genesis of the cited case was a motion to quash a subpoena duces tecum. *H.P. Townsend*, 101 F.3d at 293-94. Further, the case did not even involve the review of an administrative subpoena but instead whether an individual could be bound to an order when the NLRB failed to serve an amended complaint naming him as a respondent. *Id.* at 293. The court distinguished between a charge and a complaint in the context of considering a necessary precursor to imposing an order upon a private citizen. *Id.* at 294. In this matter, MSHA seeks to impose a fine upon a private citizen without any notice of a cognizable claim to which the demanded documents could be relevant and in advance of any judicial determination of the propriety of the document demand.

[5] On February 6, 2009, the operator's attorney wrote MSHA "we fail to grasp, and would appreciate your identifying, what the alleged protected activity is under this Mine Act discrimination complaint." Gov't Ex. 3. On February 23, 2009, MSHA sent its document demand. Gov't Ex. 4. On March 16, 2009, MSHA sent a brief follow-up demand for the documents. Gov't Ex. 6. The operator quickly responded, as the majority would require. By letter dated March 18, 2009, the operator responded to the demand for five years of personnel files, stating, "Hopkins County Coal objects to this request on the basis that there has been no basis established for such request, given that no protected activity exists in this case, that the company does not release personnel files as requested absent consent from the individual employee, and that, otherwise, no employee other than Mr. Gatlin was disciplined, reprimanded or terminated for engaging in the conduct which led to his own termination." Gov't Ex. 7. This request did not result "in good faith discussion" by MSHA. Instead, in action directly contrary to the majority's holding, MSHA sent a one-page letter on March 20, 2009, without any information whatsoever regarding any basis for a discrimination claim that would make the

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demand of five years of personnel records. MSHA did not even offer to discuss the operator's legitimate concern.[6]

Having held that MSHA had a legal obligation to discuss the operator's concerns, the majority does not, and cannot, cite any evidence that MSHA was willing to engage in any such good faith discussions with the operator notwithstanding the operator's requests. MSHA never addressed in any way other than through citation the operator's legitimate concern that MSHA demanded confidential documents even though neither the miner nor MSHA claimed even any possible basis for finding adverse action because of protected activity. Clearly, that was an "operator concern." Yet, MSHA refused to discuss it. The majority's own holding completely undercuts its decision.

Unable to provide a colorable basis for its document request, MSHA simply stonewalled the operator's counsel's request for a charge of protected activity within the scope of section 105(c) or any nexus with adverse employment action. The only attempt made by MSHA to allege protected activity occurred at the hearing—that is, after the operator necessarily had to decide whether to capitulate or assert its rights and face a civil penalty. Even then, the hearing record fails to identify any allegation of any connection between any protected activity and an adverse employment action.[7]

The records demanded by MSHA do not go to the complainant's performance or any actions with respect to him. The majority states the "records would corroborate or undermine

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[5] (…continued)
request reasonable, but instead advising that inspectors would be at the mine on March 23 and a terse, "We expect that the personnel files will be provided to Investigators Smith and Adamson at this time." Gov't Ex. 8. The final two steps are a letter from the operator's counsel dated March 23, 2009 stating, "[L]et me again reiterate that the agency has repeatedly delayed and refused to answer a simple question to which my client *is entitled*: What is the protected activity in this case? If that question cannot be answered, then the agency has no case to investigate, no jurisdiction, no entitlement and no basis upon which to make any request." Gov't Ex. 9. That same day MSHA issued the citation. Gov't Ex. 10. We search the record in vain for any evidence of a willingness of MSHA to engage, let alone actual engagement, in good faith discussions over the request. This failure is especially compelling because the requested documents do not even go to whether the miner engaged in any protected activity.

[6] Footnote 19 also begs the question: What could the operator do to "remedy the deficiencies in the MSHA's demand"? The deficiency was that MSHA did not provide any reasonable basis for it. Only MSHA could remedy that deficiency.

[7] In a footnote, the majority complains that other than "demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand." Slip op. at 17 n.19. The operator's request to find out the basis for an assertion of a cognizable claim of discrimination was an effort to remedy a deficiency in the demand—namely, the demand did not relate to any cognizable claim. The majority fails to explain how the operator could "remedy" the principal deficiency that no cognizable claim of protected activity existed.

Gatlin's allegations of disparate treatment." Slip op. at 17. However, there is no evidence in this record that Gatlin ever made any allegation of disparate treatment. Further, there is no evidence anywhere in the record that MSHA had any reason to investigate disparate treatment or asserted to the operator that possible disparate treatment was a reason it wanted records. By manufacturing an unspoken reason for demanding the records, the majority essentially acknowledges that the demand was a fishing expedition by MSHA to see if it could find a basis for a claim that had not been made by the miner.

Remarkably, the miner did not testify at the hearing. Only one inspector testified for MSHA. He admitted that the demanded personnel records would *not* be helpful in determining whether the miner engaged in protected activity. Tr. 95. The inspector also admitted that 21 days after the filing of the complaint (the target date for filing a Request for Temporary Reinstatement), he had no idea of protected activity by Gatlin. Tr. 86, 89. The inspector further agreed that MSHA did not notify the operator of any protected activity. Tr. 88. Indeed, the inspector conceded that on the very day he issued the citation—March 23, which was 62 days after the miner filed the complaint—the inspector still did not know of any protected activity by the complaining miner other than insubordination. Tr. 101-02.[8] Therefore, prior to the citation and even the hearing, MSHA neither had nor had presented the operator with any claim of protected activity that might form the first predicate for a section 105(c) claim.[9]

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[8] The Inspector's testimony was,

> Q. Okay, now, as of March 23rd, had you determined what the protected activity was?
> A. No.
> Q. Okay. So you still don't know what conduct it is you're looking for?
> A. I do know what the conduct was, insubordination.

Tr. 101-02. The inspector testified only that Gatlin was a belt examiner and that he had unidentified "suspicions" of protected activity. He did not describe what those suspicions were or how those suspicions could have related to adverse action. Hundreds of miners are examiners. Every mining position entails duties that may result in the miner engaging in protected activity. Having a job in a mine does not constitute "protected activity" within the meaning of section 105(c).

[9] The majority emphasizes that when, as here, a miner requests temporary reinstatement, MSHA's preliminary investigation "must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was 'not frivolously brought.'" Slip op. at 9 (emphasis in original). MSHA did not seek temporary reinstatement for the miner within the 62 days between the filing of the demand for documents unrelated to protected activity of the claimant and the issuance of the citation. Therefore, according to our colleagues, MSHA had not even determined the miner's complaint was not frivolous. Yet, MSHA penalized the operator for refusing to provide documents unrelated to the claimant's conduct while MSHA also refused to explain the basis for the need for such documents despite the operator's repeated requests.

(continued…)

MSHA's failure was fundamental; it refused to provide any reason-based claim of any alleged protected activity upon which the miner could base a complaint under section 105(c).[10] Further, neither the miner nor MSHA ever stated any connection between any of the unidentified protected activity and any adverse employment action. MSHA simply insisted upon production of the documents without providing any legal basis for its request, beyond strong-arming the operator with demands and threats. This is not an issue of an operator having a right to know the full extent of a miner's contentions; it is an issue of MSHA failing to provide any reasoned basis for the mandatory production of records.

Without an assertion of protected activity and nexus to adverse action, there is no "complaint of discrimination" upon which to base a "reasonable" request for years of personnel records. It is only a complaint that "I got fired and I do not like it." The Secretary's position, stated most succinctly, is that there need not be an allegation of a section 105(c) violation in order to compel delivery of extensive files. The Secretary asserts, and the majority would wrongly grant MSHA, a *carte blanche* right to records under section 105(c) even when neither MSHA nor the complainant alleges that there is an actual claim of discrimination on the table. Our colleagues accept that position as reasonable. We vigorously disagree.

Under the majority's reasoning, the statutory requirement that the miner file a "complaint" that is served on the operator has no purpose. It is merely a notice that a miner has asked MSHA to investigate an adverse employment action without an actual claim of section 105(c) discrimination. Then, MSHA—without a claim of, or any basis for a claim of, any possible protected activity or any possible nexus to adverse action—may demand whatever it wishes including five years of personnel records that have nothing whatsoever to do with whether the subject miner engaged in protected activity. Effectively, under the majority's reasoning, MSHA may make a plenary demand for documents without demonstrating there has been an actual claim of discrimination.

To the majority, MSHA has absolute authority to investigate through extensive document demands the possibility of disparate treatment although neither the miner nor MSHA had

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[9] (…continued)
MSHA never provided any evidence that it even had a colorable claim of discrimination and, certainly, never provided the operator with any reasonable basis for disclosure of years of personnel records.

[10] At most, the inspector stated that the complainant "alluded" to some things that "did not pan out." Tr. 112. Attempting to cover this defect, the Secretary's counsel implicitly suggested that the inspector should testify without identifying any claim of protected activity because MSHA prefers not to let the respondent know the nature of the claim against it. Tr. 48. Consequently, MSHA seeks to impose a monetary penalty for a failure to produce records claiming that it need not even support its demand to the adjudicatory body evaluating whether to assess the demanded penalties. Apparently, even at the adjudication stage, the majority asks that we simply assume there might have been a basis for the inspector's unsupported "suspicions" of some unidentified protected activity.

articulated any claim of protected activity or a nexus between protected activity and an adverse action. That is nonsense.

Even when agencies are empowered with the right to issue administrative subpoenas, federal courts do not permit fishing expeditions in the absence of an actual claim. For example, the Seventh Circuit will not enforce an administrative subpoena for documents when that claimant has not made a cognizable claim of discrimination. *EEOC v. United Air Lines, Inc.,* 287 F.3d 643, 654-55 (7th Cir. 2002) ("Nothing in the charge suggests systemic discrimination on the basis of national origin or sex with respect to life, health, disability and leave benefits."). Similarly, nothing in this miner's charge or MSHA's conduct suggests discrimination based on protected activity.

The majority fails to come to grips with the fundamental problem in this case. Section 103 requires that document requests be "reasonable." This means that MSHA must provide a reasonable basis for the request for the demand. The majority focuses on irrelevancies such as specificity, quantity, and five-year period without ever dealing with the actual problem. MSHA never explained why, or identified any claim with respect to which, the records were reasonably necessary. Without an explained connection between an even possibly cognizable claim of discrimination and the requested documents, the demand is simply an unfettered investigation to see if MSHA can manufacture a claim when no claim has been made. Federal courts reviewing administrative subpoenas do not permit fishing expeditions such as MSHA undertook in this case.[11] *See, e.g.*, *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (company-wide information need not be produced in connection with investigation of allegation by specific individual); *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (court refused to enforce broad subpoena in charge filed by two complainants); *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001) (EEOC not entitled to subpoena information about gender of employees as part of investigation of employer on race discrimination charge under Title VII); *In re McVane*, 44 F.3d 1127 (2d Cir. 1995); *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982) ("[T]he subpoena cannot be so broadly stated as to constitute a 'fishing expedition.'").

In *EEOC v. Kronos Inc.*, 620 F.3d at 300-02, the Third Circuit refused to enforce a subpoena by the Equal Employment Opportunity Commission seeking files relative to possible race discrimination when the complaint before it was for discrimination on the basis of disability. As here, no facial claim of the type of discrimination the agency sought to investigate was pending before the agency. There, at least, there was a cognizable charge of another form of discrimination. Nonetheless, a demand for documents to support an investigation into a form of discrimination for which there was not a cognizable complaint was not reasonable. It was a fishing expedition. Fishing expeditions simply are not reasonable.

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[11] This is especially important under the Mine Act because MSHA does not have the authority to issue administrative subpoenas. As a result, the Mine Act does not afford any pre-disclosure hearing rights to challenge a request in the first instance. MSHA's power to enforce document requests through issuance of penalty is a powerful coercive weapon. It is especially important, therefore, for the Commission to be scrupulous in requiring that MSHA provide a reasonable basis for document demands that an operator may refuse only at significant immediate peril.

There simply is nothing in the allegations by Gatlin or MSHA's preliminary investigation that alleged protected activity or adverse action based on protected activity and nothing MSHA said changes that fatal fact. When there is not even a claim of protected activity or adverse action based on protected activity by the miner or MSHA, a request for five years of personnel records is a fishing expedition not authorized by the statute as a reasonable request.

The miner filed an honest statement that he refused to do work unless he could do it for more pay on weekends. He suffered the predictable consequences from a refusal to work—discharge. That claim, without any subsequent information or explanation by MSHA alleging protected activity or such activity as a motivating factor for adverse action, does not provide a reasonable basis for an invasive document request under section 105(c).

We respectfully dissent.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 30, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BIG RIDGE, INC.	Docket Nos. LAKE 2013-66 LAKE 2012-506 LAKE 2013-251 LAKE 2013-252 LAKE 2013-307 LAKE 2012-896

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

DECISION APPROVING SETTLEMENT

BY THE COMMISSION:

These proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve Order No. 8445268 in Docket No. LAKE 2013-66, which was issued by the Department of Labor's Mine Safety and Health Administration to Big Ridge, Inc. Big Ridge contested the order and associated civil penalty before a Commission Administrative Law Judge, who issued a decision in the case on April 16, 2014. 36 FMSHRC 999 (Apr. 2014) (ALJ).

Order No. 8445268 was issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), for a violation of the electrical equipment examination requirements set forth in 30 C.F.R. § 75.512. The Secretary alleged that the violation was an unwarrantable failure to comply with a mandatory standard that resulted from the operator's high negligence, and proposed a penalty of $25,810. The Judge removed the unwarrantable failure designation, determined that Big Ridge had acted with moderate negligence, and assessed a penalty of $15,000 for this violation. 36 FMSHRC at 1024-25, 1046. The Secretary of Labor filed a petition for discretionary review ("PDR"), which we granted. The Secretary's PDR sought to reverse the Judge's changes to the unwarrantable failure and negligence designations for this order, as well as a higher penalty. Neither party sought review of the remaining citations, orders, or their associated penalties.

The Secretary and Big Ridge subsequently filed a joint motion requesting that the Commission approve a settlement agreement between the parties. The request for approval of settlement was filed in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which provides, in relevant part, that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Commission Procedural Rule 31(a) provides that a "proposed penalty that has been contested before the Commission may be settled only with the approval of

the Commission upon motion." 29 C.F.R. § 2700.31(a). The movant is required to provide "facts in support of the penalty agreed to by the parties." 29 C.F.R. §§ 2700.31(b)(1), (c)(1).

In their joint filing, the parties seek to settle this matter for the $15,000 penalty assessed by the Judge for Order No. 8445268. This amount is a reduction from the Secretary's original penalty proposal of $25,810. 36 FMSHRC at 1025. The parties have also agreed that the Secretary's original unwarrantable failure and high negligence designations will be restored.

The parties' joint request for approval of settlement is granted. In light of the factual justifications provided by the parties, we determine that the penalty is appropriate under the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). We further find that the terms of the settlement are supported by the record, in accordance with Commission case law. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012), *citing Knox Ct.y Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981). Finally, we note that the Willow Lake Portal Mine, where the violation took place, has been permanently closed. 36 FMSHRC at 1037. Because the operator has paid the assessed penalties in full, Big Ridge owes no further payment in executing the terms of the settlement.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 2016

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

v.

TUNNEL RIDGE, LLC

Docket No. WEVA 2014-962
A.C. No. 46-08864-345488

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 21, 2014, the Commission received from Tunnel Ridge, LLC ("Tunnel Ridge") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 19, 2014, and became a final order of the Commission on April 18, 2014. Tunnel Ridge asserts that it failed to timely contest the proposed assessment because it currently has only a part time safety director. Tunnel Ridge says that it will hire a full-time safety director in the near future to ensure that future

penalty assessments are timely contested. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision to reopen this proceeding, and conclude that Tunnel Ridge has not established good cause for its failure to timely respond. The crux of the operator's motion is that it failed to timely file because it did not have a full-time Safety Director on staff. I conclude that a large coal mine's failure to timely file a notice of contest is not excused because the mine lacks a full-time Safety Director.

In its motion to reopen, Tunnel Ridge represents that beginning in January 2014, it began to phase out the Safety Director's responsibilities while it searched for a new Safety Director. Thus, its Safety Director worked in this capacity only on a part-time basis. MSHA's proposed assessment was received on March 19, 2014. The part-time Safety Director did not discover that the proposed assessment had gone uncontested until May 5, 2014, and attempted to file a contest of some of the proposed penalties then. After MSHA rejected the attempted contest as untimely, the motion to reopen was filed on May 20, 2014. Tunnel Ridge states that at the time it filed the motion with the Commission it was still seeking to hire a full-time Safety Director. Mot. at 2. Apparently, the mine had lacked a full-time Safety Director for a period that stretched for almost five months.

Tunnel Ridge operates a large coal mine. At the time the citations were issued, the mine produced over two million tons of coal annually, and its controlling entity produced over ten million tons of coal annually.[1]

Tunnel Ridge's decision to phase out the responsibilities of its Safety Director before a new Safety Director was hired was a self-imposed problem that does not justify relief pursuant to Rule 60(b). The prolonged absence of a full-time Safety Director at a large coal mine demonstrates a complacency toward the operator's responsibilities under the Mine Act that should neither be condoned nor deemed "excusable neglect" by the Commission.

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

[1] The Proposed Assessment reflects that MSHA assigned the mine 15 out of 15 "Mine Points" and 10 out of 10 "Controller Points." Proposed Assessment Case No. 000345488; *see also* 30 C.F.R. § 100.3.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. RIVER VIEW COAL, LLC	Docket No. KENT 2016-26 A.C. No. 15-19374-389074

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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June 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ESSROC SAN JUAN	Docket No. SE 2016-23-M A.C. No. 54-00120-388990

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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June 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BAILLIO SAND COMPANY, INC.	Docket No. VA 2015-300-M A.C. No. 44-06068-384434

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 August 21, 2015, the Commission received from Baillio Sand Co., Inc., ("Baillio") 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 June 17, 2015, the Secretary mailed the proposed assessment to Baillio by U.S. Postal Service Certified Mail. On August 17, 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.

Baillio asserts that it never received the proposed assessment. Tracking information submitted by Baillio shows that the proposed assessment reached the Virginia Beach, VA post office on June 20, 2015, but does not show that the proposed assessment was delivered. The Secretary states that the U.S. Postal Service was not able to locate a signed delivery receipt. The Secretary does not oppose the request to reopen, but notes that the proposed assessment was mailed to the address of record on Baillio's Mine ID report. The Secretary asserts that he has sent other proposed assessments, which Baillio has contested, to this address.

Having reviewed Baillio's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because Baillio did not receive the proposed assessment. *See* 29 C.F.R. § 2700.26 ("[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment.")

Accordingly, Baillio'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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June 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. GATEWAY EAGLE COAL COMPANY, LLC	Docket No. WEVA 2016-1 A.C. No. 46-08637-380428

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 October 1, 2015, the Commission received from Gateway Eagle Coal Company, LLC ("Gateway Eagle"), a motion to reopen Docket No. WEVA 2016-1.

Gateway Eagle thereafter requested to withdraw its motion to reopen in Docket No. WEVA 2016-1.

We hereby grant Gateway Eagle's motion to withdraw in Docket No. WEVA 2016-1. Accordingly, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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June 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GIBRALTAR ROCK, INC.	Docket No. YORK 2015-154-M A.C. No. 28-00021-365489

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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 28, 2016

SHANE HORTON	
v.	
COAL RIVER MINING, LLC	Docket No. WEVA 2013-1183-D MSHA Case No.: HOPE-CD-2012-14

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 October 29, 2015, the Commission received from Shane Horton a motion seeking to reopen a discrimination proceeding and relieve him from the Default Order entered against him.

On June 10, 2015, Judge Zane Gill issued an Order to Show Cause in response to Horton's perceived failure to communicate with the court or participate in settlement negotiations.[1] When Horton did not file a response within 30 days, the Judge entered an order of dismissal effective July 21, 2015.

Horton asserts that he did not receive the Order to Show Cause because the Judge used the wrong P.O. Box number on correspondence intended for him. Commission records show that Horton stated in his initial discrimination complaint to MSHA and his section 105(c)(3) complaint to the Commission that his address was P.O. Box 164, Danville, West Virginia. However, the Secretary's discrimination determination letter was mailed to P.O. Box 803. The Judge appears to have adopted the latter address in all of his attempted correspondence with Horton.

Coal River Mining opposes Horton's motion to reopen. The operator argues, *inter alia*, that Horton failed to demonstrate justifiable circumstances or good cause to excuse the significant delay between the accident he alleges as the basis of his harassment and the filing of his original complaint to MSHA.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's

[1] Judge Gill was assigned this case on March 27, 2014. In his Order to Show Cause, he stated that "[w]e have no record of any communications or filings from Shane Horton since I was assigned this case in March 2014." However, the record shows that Mr. Horton wrote a letter to Chief Judge Robert J. Lesnick on April 26, 2014. Mr. Horton had also written a lengthy letter to Judge Lesnick, with evidence attached, on March 10, 2014.

decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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

Having reviewed Horton's request and the operator's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 30, 2016

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

v.

APOGEE COAL COMPANY, LLC, et
al.[1]

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"). On March 23, 2016, the Commission received a joint motion seeking to reopen 56[2] penalty assessments issued to subsidiaries of Patriot Coal Corporation ("Patriot") that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2016-324, WEVA 2016-325, WEVA 2016-326, WEVA 2016-327, WEVA 2015-343, WEVA 2016-344, WEVA 2016-322, WEVA 2016-323, WEVA 2016-303, WEVA 2016-304, WEVA 2016-305, WEVA 2016-306, WEVA 2016-307, WEVA 2016-308, WEVA 2016-309, WEVA 2016-310, WEVA 2016-311, WEVA 2016-312, WEVA 2016-313, WEVA 2016-315, WEVA 2016-316, WEVA 2016-317, WEVA 2016-318, WEVA 2016-319, WEVA 2016-320, WEVA 2016-321, WEVA 2016-328, WEVA 2016-329, WEVA 2016-330, WEVA 2016-332, WEVA 2016-333, WEVA 2016-334, WEVA 2016-335, KENT 2016-288, WEVA 2016-340, WEVA 2016-341, WEVA 2016-342, WEVA 2016-336, WEVA 2016-337, WEVA 2016-338, WEVA 2016-339, WEVA 2016-348, WEVA 2016-351, WEVA 2016-282, WEVA 2016-295, WEVA 2016-296, WEVA 2016-297, WEVA 2016-298, WEVA 2016-299, WEVA 2016-300, WEVA 2016-301, WEVA 2016-302, WEVA 2016-345, WEVA 2016-346, WEVA 2016-476, and WEVA 2016-347 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant operator's names, A.C. numbers, and associated docket numbers have been listed in Exhibit 1, attached to this order.

[2] On June 16, 2016, the parties filed a joint motion to reopen an additional penalty assessment in addition to the 55 penalty assessments in their original motion.

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

On or about May 12, 2015, Patriot filed for Chapter 11 bankruptcy in the U.S. District Court for the Eastern District of Virginia. Pursuant to the court-confirmed reorganization plan, Patriot was required to sell substantively all of its assets. For the vast majority of cases, Patriot contends that, due to the issues surrounding the bankruptcy and change in ownership, it was unable to timely contest penalties issued between the time that it declared bankruptcy and when it was able to transfer ownership of its mines. For other cases, Patriot claims that ongoing settlement negotiations made it unclear which penalties needed to be contested. The Secretary agrees that these cases should be reopened. [3]

Since the parties filed the joint motion to reopen, events have transpired that affect our consideration of the joint motion. Eastern Associated Coal, LLC, a subsidiary of Patriot, had a motion to reopen Case No. 000389549 (Docket No. WEVA 2016-61) pending before the Commission prior the filing of the joint motion. However, the joint motion also requested that this case be reopened. On April 5, 2016, the Commission granted Eastern Associated Coal's motion and reopened the case, rendering the joint motion to reopen Docket No. WEVA 2016-308 moot.

Additionally, in an email dated April 12, 2016, the parties informed the Commission that Case No. 000402707 was not a final order at the time the joint motion was filed and that Midland Trail Energy subsequently filed a timely contest. The contest has since been docketed by the Commission as WEVA 2016-390. As the penalties in this case never became final orders of the Commission, the joint motion to reopen Docket No. WEVA 2016-339 is moot.

[3] While it does not affect our consideration of the joint motion, we note that the parties have reached a proposed global settlement as to the all of the proposed penalties. In exchange for the Secretary accepting lower penalty amounts, Patriot has agreed that the Secretary will not be treated as a general unsecured creditor under the reorganization plan. Pursuant to 29 C.F.R. § 2700.31, approval of the proposed settlement will be subject to Commission review on remand.

Having reviewed the joint motion, we conclude that the motion to reopen Docket Nos. WEVA 2016-308 and WEVA 2016-339 are moot. As for the remaining cases, we hereby reopen these matters[4] and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, the Secretary shall file petitions for assessment of penalty in each case within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

[4] Subsequent to the filing of the joint motion, the parties informed the Commission that they only sought to reopen certain penalties associated with Case Nos. 000393531 (WEVA 2016-332), 000394461 (WEVA 2016-351), 000393293 (WEVA 2016-296), and 000394895 (WEVA 2016-305). Accordingly, we reopen those penalties specified in Exhibit 2, attached to this order.

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Exhibit 1

Operator	Docket Number	A.C. Number
Apogee Coal Company, LLC	WEVA 2016-324	46-01368-393525
Apogee Coal Company, LLC	WEVA 2016-325	46-01368-395956
Apogee Coal Company, LLC	WEVA 2016-326	46-08939-400382
Apogee Coal Company, LLC	WEVA 2016-327	46-08939-398390
Brody Mining, LLC	WEVA 2015-343	46-09086-398610
Brody Mining, LLC	WEVA 2016-344	46-09086-396167
Catenary Coal Company, LLC	WEVA 2016-322	46-07178-394670
Catenary Coal Company, LLC	WEVA 2016-323	46-07178-392504
Eastern Associated Coal, LLC	WEVA 2016-303	46-01456-392345
Eastern Associated Coal, LLC	WEVA 2016-304	46-01456-401466
Eastern Associated Coal, LLC	WEVA 2016-305	46-01456-394895
Eastern Associated Coal, LLC	WEVA 2016-306	46-03135-394896
Eastern Associated Coal, LLC	WEVA 2016-307	46-03135-397257
Eastern Associated Coal, LLC	WEVA 2016-308	46-06448-389549
Eastern Associated Coal, LLC	WEVA 2016-309	46-09152-389555
Eastern Associated Coal, LLC	WEVA 2016-310	46-09152-392353
Eastern Associated Coal, LLC	WEVA 2016-311	46-09152-394901
Eastern Associated Coal, LLC	WEVA 2016-312	46-09152-397265
Eastern Associated Coal, LLC	WEVA 2016-313	46-09152-397265
Eastern Associated Coal, LLC	WEVA 2016-315	46-08610-397263
Emerald Processing, LLC	WEVA 2016-316	46-08759-393297
Emerald Processing, LLC	WEVA 2016-317	46-08759-398125
Emerald Processing, LLC	WEVA 2016-318	46-08993-398129
Emerald Processing, LLC	WEVA 2016-319	46-09258-393310
Emerald Processing, LLC	WEVA 2016-320	46-09258-398137
Emerald Processing, LLC	WEVA 2016-321	46-03085-398118
Gateway Eagle Coal Company, LLC	WEVA 2016-328	46-06618-390824
Gateway Eagle Coal Company, LLC	WEVA 2016-329	46-06618-393529
Gateway Eagle Coal Company, LLC	WEVA 2016-330	46-06618-398383
Gateway Eagle Coal Company, LLC	WEVA 2016-332	46-08637-393531
Gateway Eagle Coal Company, LLC	WEVA 2016-333	46-08637-390827
Gateway Eagle Coal Company, LLC	WEVA 2016-334	46-08637-400380
Gateway Eagle Coal Company, LLC	WEVA 2016-335	46-08637-398386
Grand Eagle Mining, LLC	KENT 2016-288	15-16231-393377
Hobet Mining, LLC	WEVA 2016-340	46-04670-393291
Hobet Mining, LLC	WEVA 2016-341	46-05398-393292
Hobet Mining, LLC	WEVA 2016-342	46-05398-398120
Midland Trail Energy, LLC	WEVA 2016-336	46-09297-393779
Midland Trail Energy, LLC	WEVA 2016-337	46-09297-396169
Midland Trail Energy, LLC	WEVA 2016-338	46-09297-398612
Midland Trail Energy, LLC	WEVA 2016-339	46-09297-402707
Remington, LLC	WEVA 2016-348	46-09230-396828
Remington, LLC	WEVA 2016-351	46-09230-394461

Speed Mining, LLC	WEVA 2016-282	46-05437-398121
Speed Mining, LLC	WEVA 2016-295	46-05437-402270
Speed Mining, LLC	WEVA 2016-296	46-05437-393293
Speed Mining, LLC	WEVA 2016-476	46-05437-406785
Speed Mining, LLC	WEVA 2016-297	46-09099-390556
Speed Mining, LLC	WEVA 2016-298	46-09099-393305
Speed Mining, LLC	WEVA 2016-299	46-09099-398132
Speed Mining, LLC	WEVA 2016-300	46-08571-393296
Speed Mining, LLC	WEVA 2016-301	46-08571-398124
Thunderhill Coal Company	WEVA 2016-302	46-08818-393301
Wildcat Energy, LLC	WEVA 2016-345	46-09427-398396
Wildcat Energy, LLC	WEVA 2016-346	46-09427-390835
Wildcat Energy, LLC	WEVA 2016-347	46-09427-393540

Exhibit 2

Eastern Associated Coal, LLC	WEVA 2016-305	46-01456-394895
Citation/ Order Nos.:		
9084090	9084135	9084100
9084130	9084097	9084139
9084092	9084098	9084101
9084131	9084136	9084102
9084093	9084137	9084140
9084133	9084138	9084143
9084134		
Gateway Eagle Coal Company, LLC	WEVA 2016-332	46-08637-393531
Citation/ Order Nos.:		
9055817	9059323	9059325
9055819	9009770	9059327
9059321	9009771	
Remington, LLC	WEVA 2016-351	46-09230-394461
Citation/ Order Nos.:		
9008107	9008112	9008116
9008108	9008113	9008117
9008109	9008115	9052207
9008110	9054964	9052208
9008111	9053404	
Speed Mining, LLC	WEVA 2016-296	46-05437-393293
Citation/ Order Nos.:		
9052040	9055592	9056072
9052044	9007911	9055595
9052045	9055593	9056073
9052046	9059120	9052327
9055591	9059121	9055596

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 6, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MACH MINING, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0077 A.C. No. 11-03141-334561 Docket No. LAKE 2014-132 A.C. No. 11-03141-337701 Mine: No. 1 Underground Mine

AMENDED DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee for Petitioner

Christopher D. Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia for Respondent

Before: Judge McCarthy

The Decision and Order that issued on May 25, 2016 is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c), to read as set forth below.

I. Statement of the Case

These cases are before me are upon two Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). The two dockets at issue contain 20 citations alleging violations of mandatory health and safety standards.

A hearing was held on July 22-24, 2014 in Carbondale, Illinois. During the hearing, the parties introduced testimony and documentary evidence.[1] Witnesses were sequestered. Thereafter, the parties submitted post-hearing briefs. During hearing, the parties made a joint motion to settle nine of the 20 citations. The joint motion to approve settlement was read into the record. Tr. 377-84.

[1] ALJ Exhibits (ALJ Exs.) 1-8, Petitioner Exhibits (P. Exs.) 100-115, Respondent Exhibits (R. Exs.)1-8 and 11, and Joint Exhibit (J. Ex.) 1 were received into evidence. Tr. 10, 19-20, 304. R. Exs. 9 and 10 were not offered into evidence. Tr. 757.

In Docket No. LAKE 2014-0077, the parties moved for the approval of the settlement of nine of the thirteen citations, and proposed a reduction in penalties from $10,933 to $7,392. Tr. 386. The Secretary vacated Citation No. 8439443. Tr. 383. The Secretary's discretion to vacate a citation or order is not subject to review. *E.g.*, *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The parties agreed to settle Citations No. 8439449, 8439450, 8439452, 8445747, 8448973, and 8449000 with no modifications or reductions in penalties. Tr. 383. The parties also request that Citation No. 8445731 be modified to reduce the level of negligence from "moderate" to "low." Tr. 383-84.

I have considered the representations and documentation submitted at hearing, and I conclude that the proffered settlement in Docket No. LAKE 2014-0077 is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	**Assessment**	**Settlement**
8439449	$224	$224
8439450	$224	$224
8439452	$334	$334
8439460	$3,143	$2,438
8445731	$4,689	$2,000
8445747	$308	$308
8448973	$207	$207
844900	$1657	$1657
TOTAL	$10,933	$7,392

In Docket No. LAKE 2014-0132, the parties moved for the approval of the settlement of four of the seven citations, proposing a reduction in penalties from $4,826 to $3,252. Tr. 381. Citation No. 8445755 remains unchanged. Tr. 378. Citation No. 8445758 also remains unchanged, but the Solicitor justifies the reduction in proposed penalty by stating that there were legitimate factual and legal disputes regarding gravity and negligence. Tr. 380-81. The parties also request that:

> Citation No. 8445758 be modified to reduce the level of from "moderate" to low," and
>
> Citation No. 8451650 be modified to reduce the number of persons affected from "twelve" to "six."

Tr. 378-80.

I have considered the representations and documentation submitted at hearing, and I conclude that the proffered settlement in Docket No. LAKE 2014-0132 is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement
8445758	$2,282	$1,845
8451649	$1,530	$700
8451650	$807	$500
8445755	$207	$207
TOTAL	$4,826	$3,252

At hearing, Respondent moved for a directed verdict on Citation Nos. 8443200 and 8443901 in Docket No. LAKE 2014-132. The undersigned granted the motion because the Secretary's evidence did not support a violation of section 75.821(a). Tr. 242-62.[2]

[2] Both citations alleged that Respondent violated Section 75.821(a) because chip alerts were not working on longwall equipment. A mule train is comprised of several pieces of equipment that distribute power to the longwall. Tr. 53. Power enters the unit through a disconnect box, which can be switched on or off, and then travels to the power centers within the mule train. Tr. 55. Chirp alerts indicate that the equipment is energized by making a chirping noise and emitting a flashing light. Tr. 32-33. On the cited disconnect box in Citation No. 8443200, the chirp alert failed to make the chirping sound. Tr. 37. On the cited power center in Citation 8443901, the chirp alert failed to make the chirping sound and the flashing light failed. *Id*. MSHA inspector John Butcher testified that without notification from the chirp alerts that a piece of equipment is energized, the miners are at risk of fatal injuries from electrocution. Tr. 65-66, 74-75. Essentially, the Secretary argues that since the equipment was not being maintained, there was a violation of Section 75.821(a). Section 75.821(a) requires that every seven days, a person qualified to perform electrical work must test and examine longwall equipment to determine that such equipment is being properly maintained. 30 U.S.C. § 75.821(a).

The Secretary failed to establish that Respondent did not assign a qualified person to test and examine the chirp alerts within the last seven days to ensure that the equipment was being properly maintained. Inspector Butcher conceded on cross examination that as far as he knew, the required testing was actually performed and that he was not alleging that the mine was not conducting the appropriate testing and examination, but merely alleging that the chip alerts on the inspected equipment were not working properly. Tr. 109.

Q: …As far as you know, the test that was required every seven days was actually performed, correct?
A: As far as I know, yes.
Q: Okay. And that's not your allegation, is it, that the test—
A: No.
Q: —wasn't performed?

(continued…)

Citations No. 8451651 in Docket No. LAKE 2014-0132, and Citation Nos. 8439446, 8432319, 8439454, and 8452203 in Docket No. LAKE 2014-0077 were litigated at hearing.

For the reasons set forth below, I modify Citation No. 8451651 to reduce the level of negligence from "high" to "moderate." I modify Citation No. 8452203 to raise the level of negligence from "moderate" to "high." I find that Citation Nos. 8439446, 8432319, 8439454 were properly issued, as written. I assess a total civil penalty of $32,636 for the five citations adjudicated herein.

Based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following findings of fact and conclusions of law:

II. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the

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[2] (…continued)

A: No.
Q: Okay. So your—your allegation is — is not that the mine wasn't conducting examinations? Your allegation is — is, When I inspected this equipment, the chirp alert wasn't working, right?
A: Yes.
Q: So there's no dispute in your mind that the tests that are required by [Section] 75.821(a) were actually performed at the times required, correct?
A: Correct.

Tr. 109. In these circumstances, I found that Respondent complied with the requirements of § 75.821(a), and granted Respondent's motion for directed verdict. Tr. 242-62.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity

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 violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

C. Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).[4]

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary's argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. The Commission found that the Secretary's interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act's graduated enforcement scheme. 3 FMSHRC at 825, 828. The Commission also found that the Secretary's interpretation

[4] See also *id.* § 814(e), the Mine Act's pattern-of-violations provision, which is the only other provision that mentions S&S, and which defines the term the same way as § 814(d)(1).

would leave little room for inspectors to exercise their independent judgment. *Id*. at 825-26.[5] In addition, the Commission found that the Secretary's interpretation would render the Act's S&S language almost superfluous, and would render the Act's pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id*. at 826-27. Although the Commission did not develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term "hazard" denotes "a measure of danger to safety or health" and that a violation is S&S if it "could be a major cause" of such a danger. *Id.* at 827.

In its subsequent *Mathies* decision, the Commission set forth a four-prong test for determining whether a violation is S&S under *National Gypsum*. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id.* at 3-4. The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985)). The assumption of continued normal mining operations considers "the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued," without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn*'s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on

[5] The Commission has consistently reiterated that the inspector's judgment is an important element of the S&S determination. However, the concept has generally been raised in the context of deferring to the inspector's opinion that a violation was S&S, rather than in the context of examining whether the inspector exercised independent judgment in forming this opinion as opposed to merely following the "mechanical approach" advanced by the Secretary and rejected by the Commission in *National Gypsum*, 3 FMSHRC at 825. *See, e.g.*, *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

the particular facts surrounding the violation. *See, e.g.*, *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit's decision in *Buck Creek*, *supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g.*, *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).[6] Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard if it occurs").

The evolving case law, however, has presented conflicting guidance as to how some of these principles should be applied. In particular, there is some confusion about how to evaluate the facts surrounding the violation and the likelihood of injury under the second and third prongs of the *Mathies* analysis. The Fourth Circuit's recent decision in *Knox Creek*, *supra*, and the Seventh Circuit's decision in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014), have cast doubt on whether the traditional application of the literal language of the second and third prongs of the *Mathies* test is still valid.

Traditional Application of *Mathies* Test

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that "the reference to 'hazard' in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836. "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which "requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk*

[6] It is not completely clear whether redundant safety measures are precluded from consideration such that it is error to take them into account, which could make it difficult for judges at the trial level to discharge their duty of considering all the particular facts surrounding the violation, or whether arguments that rely on redundant safety measures are simply disfavored as a defense to S&S. Compare *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence regarding redundant safety measures has been "consistently rejected as irrelevant") with *Black Beauty*, 36 FMSHRC 1121, 1125 n.5 (May 2014) (stating only that such measures "do not prevent a finding of S&S") and *Buck Creek*, 52 F.3d at 136 ("The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners.").

Run Coal Co., 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.,* 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, "The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not." *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a reasonable likelihood that the hazard will result in injury under the particular facts of the case at hand, with the caveat that normal mining operations are assumed to continue without abatement of the violation. The crux of this traditional *Mathies* analysis is the third and fourth prongs of the test, which effectuate *National Gypsum*'s definition of S&S (reasonable likelihood of a reasonably serious injury) and are often combined into a single showing (reasonable likelihood that a particular serious injury will occur under the facts of the case). Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.[7]

Over the years, it appears that the Commission, with court approval, has developed special rules for applying the *Mathies* test in two situations. First, for violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied only when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 953; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). Second, for violations of emergency safety standards, the Commission assumes the emergency when making the S&S evaluation. *See, e.g.*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027-28 (D.C. Cir. 2013); *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015).

Effect of Recent Fourth & Seventh Circuit Decisions

The Fourth Circuit's recent *Knox Creek* decision issued in January 2016 appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

> In our view, the second prong of the test … primarily accounts for the Commission's concern with the *likelihood* that a given

[7] The Secretary's citation/order form contains boxes for inspectors to check the likelihood of injury and the expected severity of injury immediately above the line where they designate the violation S&S or non-S&S. Inspectors are trained not to designate a violation as S&S, unless item 10.A on the form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

> violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Knox Creek, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162.

The particular hazard confronted by the Fourth Circuit in *Knox Creek* was the escape of ignited gas into the mine atmosphere through impermissible enclosures. *Id.* at 164. The parties had stipulated that the mine was a "gassy" mine that liberated more than 500,000 cubic feet of methane or other explosive gases per day. *Id.* at 164. Consequently, the ALJ had found that methane was reasonably likely to accumulate to explosive concentrations. *Id.* The ALJ had also found that a resulting explosion was reasonably likely to cause serious injuries, but he had ultimately declined to find that the violation was S&S because the Secretary had failed to prove the likelihood of an ignition. *Id.* at 154, 164-65. Without discussing the likelihood of ignition, the Fourth Circuit deemed the ALJ's other findings sufficient to satisfy the third *Mathies* prong. *Id.*

Previously, in *Peabody Midwest Mining*, the Seventh Circuit had similarly suggested that the S&S analysis assumes the occurrence of the hazard. The violation at issue in that case was the mine operator's failure to erect berms on an elevated roadway. The Seventh Circuit defined the hazard as the risk that a vehicle would veer off the roadway and go over the edge. *Peabody Midwest*, 762 F.3d at 616. The operator had argued that a vehicle was not reasonably likely to veer off the road. *Id.* However, the Seventh Circuit stated that the question "is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Id.*

Peabody Midwest does not discuss the proper role of deference in the S&S context, but the Fourth Circuit reached its holding in *Knox Creek* by deferring to the Secretary's interpretation that the third *Mathies* element requires proof that the hazard, not the violation itself, is likely to cause injury. 811 F.3d at 161 (declining to afford deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but finding the Secretary's interpretation persuasive and therefore entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Fourth Circuit further asserted that this interpretation is consistent with a number of prior cases, including the Seventh Circuit's decisions in *Peabody Midwest* and in *Buck Creek*, *supra*, 52 F.3d at 135 (assuming occurrence of fire at third *Mathies* prong when ALJ had engaged in "confluence of factors" analysis at second prong); the Fifth Circuit's decision in *Austin Power*, *supra*, 861 F.2d at 103-04 (declining to require evidence that the hazard was likely to occur); and the Commission's decision in *Musser Engineering*, *supra*, 32 FMSHRC at 1280-81 (stating that the third *Mathies* prong requires a showing that the hazard, not the violation

itself, will cause injury). 811 F.3d at 161-62.[8] The Fourth Circuit rejected the operator's argument that under *Zeigler Coal Company*, *supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be "flatly contradicted" by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

The Fourth Circuit emphasized, however, that the *Mathies* approach that it has adopted "still allows plenty of room for a fact-intensive S & S analysis, both under prong two, where the Secretary must establish that the violation contributes to a discrete safety hazard, and within prongs three and four, where evidence is still necessary to establish that the hazard is reasonably likely to result in a serious injury." *Id.* Realistically, however, it will likely require very little fact-specific analysis to conclude that any given non-technical violation contributes to a discrete safety hazard, because the Secretary generally does not promulgate a mandatory health and safety regulation (except technical regulations), unless the Secretary has already found that violating the standard would contribute to a hazard. Under the third *Mathies* prong, judges must consider all of the facts surrounding the violation, but must assume continued normal mining operations without abatement of the violation, and may not rely on redundant safety measures to mitigate the likelihood of injury. Now, under *Knox Creek* and *Peabody Midwest Mining*, judges must also assume that the hazard will actually occur. At some point, so many circumstances are either assumed or precluded from consideration that judges will find themselves evaluating the likelihood of injury in the abstract. If this is the case, the Commission will have turned its back on the principles set forth in *National Gypsum* because the *Mathies* test will have become a longhand expression for "non-technical violations." S&S will apply to almost all violations and therefore will no longer serve as a statutory tool by which the Secretary can single out the violations that he believes the Commission should consider significant and substantial when assessing a penalty.

As noted above, the Fourth Circuit reached its result in *Knox Creek* by deferring to the Secretary's interpretation of the Mine Act, and the Seventh Circuit reached a similar result. At

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[8] It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant, except to the extent necessary to establish a "discrete" hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that "[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard." 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the Court's failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator's argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, that could trigger a fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a "confluence of factors" analysis or a showing that an ignition source existed at any prong of the *Mathies* test.

the outset of its analysis, the Fourth Circuit indicated that it would review the Commission's legal conclusions *de novo* but would afford deference to the Secretary's, not the Commission's, legal interpretations. *Id.* at 157 (citing *Sec'y of Labor ex rel. Wamsley v. Mut. Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996), in which the Fourth Circuit discussed the Mine Act's split-enforcement scheme and concluded that an informal rule created and implemented by the Secretary was entitled to deference over a contrary Commission decision).

It is not surprising that the Circuit Courts have departed somewhat from the traditional *Mathies* analysis in favor of the Secretary's legal interpretation, given the rule of deference mentioned above, and given the fact that the Secretary's attorneys, and not the Commission's, are the ones who argue for enforcement of the Commission's decisions in the Circuit Courts of Appeals. That latter protocol is strange. Notwithstanding the propriety of the rule of deference applied by the Fourth Circuit, which raises concerns that I previously discussed in *Knife River Corporation Northwest*, 34 FMSHRC 1109, 1125-27 (May 2012) (ALJ), it does not make sense that although Congress conferred independent adjudicatory authority upon the Commission to serve as an impartial forum for Mine Act litigation, and although the Commission itself laid out the test that parties have followed for more than thirty years to litigate S&S in this forum, the Secretary is permitted to challenge the Commission's interpretation of this long-standing test in the Circuit Courts of Appeals and litigate his own interpretation on behalf of the Commission. It should be obvious that since the Secretary is one of the litigating parties before the Commission at the trial level, the Commission's and the Secretary's views on interpretation of the Act may differ. *See e.g., The American Coal Co.,* 36 FMSHRC 1311 (May 2014) (ALJ), *petition for interlocutory review granted,* Unpublished Order dated July 11, 2014. In my view, the Commission's interpretations of Mine Act provisions that turn on adjudication and not enforcement should be accorded at least some form of deference based on the power to persuade, as evidenced by the fact that courts and litigants have uniformly followed the Commission-derived *Mathies* test.[9] *Compare Chevron*, *supra* (according full deference to agency's reasonable interpretation of ambiguous statutory provision) *with United States v. Mead Corp.*, 533 U.S. 218 (2001) (according deference based on "power to persuade" under *Skidmore*, *supra*, and finding that *Chevron* applies only where the agency was authorized by Congress to make rules carrying the force of law and did in fact promulgate the proffered interpretation in the exercise of that authority). It is within the Commission's authority to specify how the second and third factors of the *Mathies* test should be applied – particularly, whether the hazard must now be assumed at the third factor, and if so, what steps of the test account for the facts surrounding the violation – and whether the *Mathies* test is still intended to effectuate *National Gypsum*'s interpretation of the S&S provisions of the Mine Act or whether the Commission now interprets S&S differently.

Because I am bound by the Mathies test, I will evaluate S&S under this test after taking into consideration the more recent approach set forth in *Knox Creek* and *Peabody Midwest Mining.*

[9] *But see Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (expressly declining to address validity of *Mathies* test).

D. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

The Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman … is held to a high standard of care"); s*ee also Capitol Cement Corp.,* 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction," (quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc*., 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce

the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id*.

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701 (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)0. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

E. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, *supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account

and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the citations at issue in this case.

III. Stipulated Facts

A. Stipulations of Fact

At hearing, the parties agreed to the following stipulations:

1. 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.

2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

3. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 803.

4. At all relevant times, Respondent operated Mach No. 1 Mine, Mine ID 11-03141.

5. The violations in this docket are complete, authentic and admissible, but the Respondent does not stipulate to the allegations asserted therein.

6. Respondent mined 7,528,061 tons of bituminous coal in 2012 at Mach No. 1 Mine.

7. The violations in this docket were properly served on Respondent by a duly authorized representative of the Secretary on the dates stated therein.

8. The penalties proposed in this docket would not affect Respondent's ability to remain in business.

9. Respondent abated the citations involved herein in a timely manner and in good faith.

8. Tom Crum, Jr. is an agent of the operator Mach Mining. Tr. 272.

J. Ex. 1.

IV. Background Information

Mach Mining's No. 1 Mine is an underground coal mine located in Marion, Illinois. The height of the mine is generally nine to ten feet. Tr. 619. The mine is subject to five-day spot inspections by the Department of Labor's Mine Safety and Health Administration (MSHA), pursuant to § 103(i) of the Mine Act because the mine liberates more than one million cubic feet of methane or other explosive gases during a 24-hour period. 30 U.S.C. § 813(i); *see* Tr. 35, 211-10. At the time of the October 14, 2014 inspection, the mine liberated approximately two million cubic foot of methane in a 24-hour period. Tr. 158, 211-10.

V. Citation No. 8451651

A. Findings of Fact

1. The Inspection

On October 15, 2014, MSHA inspector Chad Lampley[10] issued Citation No. 8451651 during an E16 inspection of Mach Mine's No. 1 mine.[11] Tr. 140-42. Mark Schilke, the mine safety manager, accompanied Lampley during the inspection.[12] Tr. 143, 152, 159-160. The inspection was conducted during a production shift. Tr. 155. At the time of Lampley's inspection, however, mining had halted due to a problem with a conveyer belt. Tr. 153-54, 214-15.

2. The Location of the Truck

During the inspection, Lampley noticed a Dodge Ram pickup truck parked facing inby in the #3 tailgate entry at the no. 109 crosscut, two crosscuts from the longwall face. Tr. 144-45, 152; *see* P. Ex. 113.[13] Lampley used a 25-foot tape measure and determined that the diesel-powered truck was approximately 144 feet from the face, rather than the required 150 feet. Tr. 146-47.[14] Shilke observed Lampley measure the distance between the face and the truck. Tr. 302, 316. Neither Shilke nor Lampley reported any other measurements of the truck's location. Tr. 147, 301-02. Respondent does not dispute that the truck was closer than 150 feet from the longwall face. R. Post Hr'g Br. 4.

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[10] At hearing, Lampley had been a certified mine inspector with MSHA for seven years. He received a degree in Applied Science from Southern Illinois University (SIU). Upon graduation, Lampley worked in the automotive field and taught classes at SIU in automotive base, and electrical theory and operation. Prior to his employment at MSHA, Lampley worked at American Coal performing general mining tasks and maintenance. Tr. 140-41.

[11] MSHA ceased its regular EO1 quarterly inspections and normal 103(i) spot inspections during the 2014 government shutdown. Tr. 142. Nonetheless, Lampley still conducted E16 spot inspections of the working areas of the mine. *Id*.

[12] Schilke was a certified mine manager, examiner, instructor, and mine rescuer. 299-300. He worked for Respondent since 2010 in a variety of roles. Tr. 299. He had a bachelor's degree in mining engineering from SIU. Tr. 299-300.

[13] There is some confusion about the correct crosscut numbers. The crosscut referenced in the text above as no. 109 is referred to in Lampley's testimony as no. 108 and in Schilke's testimony as no. 109. Similarly the crosscut referred to herein as no. 110 is referred to in Lampley's testimony as no. 109 and in Schilke's testimony as no. 110. In the interest of clarity, I use Schilke's numbers as he was more certain about this issue at hearing.

[14] Electric face equipment must be permissible within 150 feet from pillar workings or longwall faces or in return air outby the last open crosscut. 30 C.F.R. §§75.1002 and 75.507-1.

Lampley learned that Tom Allen Crum, Jr. (Crum), the longwall maintenance supervisor, drove the truck. Tr. 152-53, 162, 213. Lampley did not speak to Crum. Tr. 215.

Crum testified that he drove his truck into the #3 tailgate entry to repair a conveyor belt. Tr. 265-67, 287.[15] Schilke testified that the truck was parked "slightly" inby the outby corner of crosscut 109. Tr. 305-06. Crum, however, testified that the truck was even with the outby corner. Tr. 268-69. I credit Schilke, particularly since his testimony is consistent with Respondent's map of the area where Crum parked. See R. Ex. 8.

There were no footage markers to indicate the distance from the face. Tr. 316. Crum estimated that he parked over 150 feet from the face because the crosscut centers were 120 feet and the face appeared 50 feet further than the last crosscut center. Tr. 268-71, 284. Because that crosscut was open, Crum knew that he was not permitted to drive further into the return air. Tr. 282-83. There were no obstructions blocking Crum from driving the truck all the way to the face. Tr. 216. Crum testified that had he intended to breach the 150-feet limit, he could have easily parked by the face. Tr. 271-72, 280. Crum opined that his actions demonstrated his intent to comply with the permissibility requirements, and that they negate any classification of high negligence. Tr. 279-80.

Crum further testified that he would have moved his truck before production resumed. Tr. 286-87. He further admitted that he would have started the truck's ignition to do so, because he had assumed that it was not parked in return air. Tr. 287.

3. The Presence of Methane

a. The Temperature of the Air

Inspector Lampley was concerned that the non-permissible diesel truck was parked in return air, which presented a methane ignition hazard. Tr. 148-49. Lampley testified that return air is warm and moist due to heat emitted from the longwall mining unit. Tr. 144, 146, 150. Near the truck, Lampley observed that the air approaching him from the face was warmer than the intake air at his back, indicating the presence of return air. Tr. 144, 146, 199.

Respondent's witnesses disagree. Schilke testified that the vehicle was in intake air because he felt cool air at his back and warm return air was not present until the middle of the intersection. Tr. 305-08. Crum testified that when he exited his truck, he felt cool intake air at his back. Tr. 273-76. Crum testified that there was little to no air movement where he parked the vehicle. Tr. 273. Crum further testified that he did not feel return air until midway through the crosscut. Tr. 283.

[15] Crum had 13-14 years of mining experience and had worked at several companies in a variety of roles. Tr. 263-64. Crum was a certified mine electrician, with face and examiner papers. Tr. 264. He was a member of mine management and a stipulated agent of Respondent. Tr. 272.

Longwall coordinator Parker Phipps drove an Electric Mine Utility vehicle (EMU) to the longwall tailgate that day. Tr. 324.[16] Phipps was aware of the requirement to park in intake air at least 150 feet from the face. Tr. 339. He parked approximately 150 feet from the face near open crosscut no. 109. Tr. 324, 340; *see* P. Ex. 110 and R. Ex. 8. After learning about the citation, Phipps observed Crum's truck underground. Tr. 330. Phipps testified that Crum's truck was parked even with the outby rib, approximately two feet from the solid coal wall. Tr. 330-331, 333. Phipps testified that the front of Crum's truck was within ten feet of the front of his own vehicle. Tr. 343. Facing inby, Phipps walked into the area between Crum's truck and the solid right-hand rib. Tr. 333. Phipps testified that the air was cool and moved inby. *Id*. Because return air from the longwall was warmer and more humid, Phipps opined that the truck was in intake air. Tr. 325, 328.

By the feel of the air, Phipps opined that the return air began in the center of the crosscut. Tr. 329, 358-359. Phipps referred to the crosscut center as a mixing zone for return and intake air. Tr. 329. Mixing zones are classified as return air. Tr. 363. Phipps believed that the mixing zone was inby Crum's truck, which left the truck entirely within intake air. Tr. 329-331, 335, 363. Phipps later testified, however, that the truck was near a "dead spot" with little air movement, where both the outby and inby air courses met. Tr. 353-54.

b. Inspector Lampley's Smoke Test

After noting the temperature differentials, Lampley performed a smoke test to determine the direction of return air. Tr. 150-51. A smoke test reveals the path of air along the mine's ventilation pattern. *Id*. With respect to ventilation in this area, Respondent sent 90,000-100,000 cubic feet of air per minute (cfm) from the headgate, which was well over the required 60,000 cfm. Tr. 181-82. Phipps testified that a great velocity of air would dilute gases. Tr. 355. In fact, Phipps opined that as little as 50 cfm of air would render flammable or noxious gases harmless, although Phipps did not know if the air around the truck reached that velocity. Tr. 361-62.

Lampley released smoke at the mining face and observed it travel down the entry. Tr. 145-46, 150-51, 207-08. The heavy airflow displaced the smoke, so Lampley released smoke into the atmosphere several times as he neared the truck. Tr. 208-10.

The smoke test revealed that the air traveled down the longwall face to the T-split, where it either seeped into the gob or branched off towards the #2 and #3 tailgate entries. Tr. 145, 176, 182-84.[17] Because the #2 entry had lower air pressure than the #3 entry, the majority of the air moved from the #3 entry into the #2 entry through the open no. 110 crosscut. The remaining air in the #3 entry reached the open no. 109 crosscut where the truck was located. Tr. 145, 184, 205-07. Stoppings were legally removed at the nos. 109 and 110 crosscuts (the first two crosscuts after the T-split) to allow this air movement. Tr. 187.

[16] Phipps was a licensed, professional engineer and was a certified mine examiner, manager, and fire boss. Tr. 323. His duties included running the longwall on a day-to-day basis, planning production, and dealing with MSHA inspectors. Tr. 323-324.

[17] A "gob" is an area of the mine where coal has been removed and the roof and strata have been allowed to cave in. Tr. 177.

Because the return air that reached the no. 109 crosscut was also drawn into the #2 entry, it moved faster at the corner near the crosscut than it did in the middle or other side of the entry near Crum's truck. Tr. 186, 194-95. Lampley noticed that while a large portion of the return air hugged the inby corner near the crosscut, some smoke traveled directly over the hood, windshield, and cab of the truck. Tr. 151, 185-87, 194, 200. Rather than continue over the back of the truck, the air turned and exited into the #2 entry through the crosscut upon meeting the intake air in a "mixing zone." Tr. 147, 161, 198. Lampley testified that the front of the truck up to the cab area was in return air, and that the cab to the tailgate bumper at the back of the truck was in the intake air. Tr. 146, 198-99.

During the inspection, Schilke watched Lampley conduct the smoke test. Tr. 303, 308. Schilke testified that Lampley had to stand "almost over the hood of the truck" before the smoke sample traveled over the hood. Tr. 308. No smoke test was conducted at the tailgate of the truck. Tr. 313-14.

Schilke testified that when Lampley tested further inby from the truck, the sample traveled towards the no. 109 crosscut, rather than over the hood of the truck. Tr. 309-311. Further, Schilke testified that when Lampley tested directly over the hood of the truck, the smoke rose and spread out, indicating to Schilke that the truck was in a dead spot. Tr. 307-309, 315. Schilke determined that this dead spot was caused by a "mixing zone" where return and intake air met. Tr. 307. On cross examination, however, Schilke conceded that if the truck was in the intake air, that air would push the smoke inby above the truck, which did not occur, rather than allow the smoke to rise and spread, which did occur. Tr. 315-16.

Lampley testified that the exact location of the truck within the return air was not important. Tr. 158-59. Rather, any place inby the intake air at crosscut no. 109 posed an equal hazard because it had the same, undiluted gas concentration where no additional air was added. Tr. 158-59, 194, 196-97, 221-22. Because of this, Lampley chose not to test the air volume. Tr. 166, 195-96, 198, 219. Lampley conceded, however, that the concentration of gas would diminish in a mixing zone. Tr. 198. Most of the mixing occurred near the corner where the air velocity was greatest, not above the truck. Tr. 200-201, 222. Lampley did not see any swirling smoke over the truck to indicate the mixing of intake and return air. Tr. 222-23. Lampley agreed, however, that there was no way to easily distinguish between return air and intake air. Tr. 201-02.

c. Other Considerations

Schilke testified that the cited area usually had 20.9 % oxygen and up to 0.1 % methane during production. Tr. 318. By contrast, Phipps testified that methane concentrations typically reached 0.6 % to 0.8 % during production. Tr. 332. While Phipps was in the cited area, his methane spotter reported 20.8 % oxygen, no methane, and no carbon monoxide. Tr. 331. He testified that historically no methane was produced in the area when the longwall was down. Tr. 331-332.

Crum also carried a methane detector, which produces audio and visual warnings when methane concentrations reach one percent. Tr. 276-77. Crum watched his detector closely and observed no methane in the cited area. Tr. 277.

During the repair work near the longwall face, the miners were required to take air readings every fifteen minutes with individual methane spotters. Tr. 289-90. The readings detected no methane. *Id*. Crum reported that all the checks were properly conducted. Tr. 290.

Schilke testified that no methane or carbon monoxide was present because the longwall had been down for several hours before Crum's truck arrived. Tr. 312-13. Lampley did not know how long the longwall had been down before Crum parked his truck, but Lampley noted that the hood of Crum's truck was still warm at the time of the inspection. Tr. 155, 213-14.

Schilke testified that the inspection began at approximately 6:00 a.m. Tr. 301. Phipps testified that the longwall had been down for several hours when Phipps arrived between 5:00 and 6:00 a.m. Phipps further testified that Crum's truck had not yet arrived. Tr. 332, 338, 341-42. Crum, however, testified that after working the day shift, he returned to the mine between 2:00 and 3:00 a.m. because the longwall was down. Tr. 265.

4. Issuance of Citation No. 8451651

After observing that Crum's non-permissible, diesel-powered pick-up truck was being used where permissible electrical equipment was required, Lampley issued Citation No. 8451651 for a violation of 30 C.F.R. § 75.1907(a), which requires that all diesel-powered equipment used where permissible electrical equipment is required must be approved under part 36. Tr. 147-48. Lampley determined that the violation was S&S and contributed to a methane ignition hazard that was reasonably likely to result in fatal injuries affecting four miners, as a result of Respondent's high negligence. Tr. 156, 162-63. The Secretary proposed a penalty of $16,867.

Lampley determined that the cited diesel truck was not permissible because it lacked properly enclosed electrical components necessary to prevent a methane ignition in the mine atmosphere. Tr. 147-49. Engine enclosures prevent flame paths from reaching the atmosphere. Tr. 149.

Lampley determined that the truck would likely ignite methane for several reasons. The truck had numerous ignition sources including a starter motor and a combustion engine, which produced thousands of combustions per minute. The electrical components of the truck were not sufficiently enclosed to contain any sparks from the engine. The diesel-powered truck did not have countermeasures, such as flame arresters, that were required in permissible equipment. Tr. 156-7. Most of the ignition sources were in the front of the truck and exposed to return air. Tr. 224. The cited truck was in the tailgate (rather than a headgate), which increased the likelihood of a methane ignition because the air in that area had ventilated the face. Tr. 175-176. Further, Lampley opined that since Crum was apparently unaware that he parked the truck in return air, it was likely to remain there until the longwall resumed production. Tr. 156. Further, during production, the face would move 2 and ½ feet closer to the truck with each pass of the longwall drum. Tr. 177.

Lampley was not aware of any reserves of methane at the mine, nor was he aware of the average concentration of methane in the mine atmosphere. Tr. 211-12. Lampley testified, however, that methane would be present in return air coming off an active longwall face in a gassy mine, which has gob, and would most likely be found at the tailgate or at a bleeder system at the wall. Tr. 158. Lampley found no methane present when he took readings at the T-split of air, when production was down. Tr. 189-91, 197. Lampley testified that regardless of air quality, or the fact that when the citation was written, the air from the T-split of the longwall outby Crum's truck was sufficient to dilute or render harmless any methane, MSHA regulations do not allow shorter permissibility distances when the longwall is not in production. Tr. 173-74, 227-29.

Apart from the likelihood of ignition during production, Lampley explained that an ignition hazard could be realized spontaneously from a rock fall. Tr. 155, 189-92. He noted that rock falls were not unusual and major gob falls were fairly common in longwall mining and that the methane concentration "at the gob line where the T-split occurs, that could change at any given moment whenever a roof fall occurs back there, and it's going to fall, it's just when it's going to fall." Tr. 190-92, 230. If a major rock or gob fall prevented the absorption of methane by sealing the gob, the resulting change in air pressure would pull methane from the gob area and allow methane to accumulate in the active working area. Tr. 227-30. Such a rock fall in the gob is fairly common given mining conditions in that area, although pressure changes in this mine were somewhat less likely because of the blowing and exhausting fans. Tr. 230-33.

Lampley testified that a methane ignition in a gassy mine could result in a "massive" explosion. Tr. 162. A massive methane explosion would be fatal to some or all of the miners on the face. Tr. 162-63. Lampley ascertained that at least two shearer operators, a shieldman, and a stage loader operator would be affected by an explosion. Tr. 162-64. Lampley referenced the Upper Big Branch explosion as one caused by the ignition of methane on a tailgate. Tr. 158.[18]

With respect to the negligence designation, Lampley found no mitigating circumstances and determined that Respondent's agent Crum should have been aware of the presence of return air when parking his truck. Tr. 163-64, 167. Given the change in air temperature and humidity and the lack of a visible stopping, Lampley opined that Crum knew or should have known that the truck's location created a permissibility violation. Tr. 163-64. Crum was a member of management who should have been aware of the methane ignition hazard created once Crum drove into the return air and broke the plane of the intersection. Tr. 171-73. According to Lampley, once Crum broke the plane and entered return air, it was too late to correct the condition. Tr. 173. Rather, Lampley testified that Crum should have stopped 300 feet from the face to ensure compliance. Tr. 174-175. Further, Lampley opined that Respondent also could have placed signs 150 feet from the face or blocked off the area to prevent the entrance of diesel equipment. Tr. 178. Lampley emphasized that the hazard remained whether the truck was parked six feet within the 150-foot limit or directly next to the face. Tr. 166-167. Rather, the dispositive issue was that the truck was in return air. Tr. 166-67.

[18] Lampley did not personally investigate the explosion and could not testify whether the majority of the air samples taken at Upper Big Branch contained methane rather than natural gas, or whether the gas originated from the face, or from another location, such as a crack in the floor. Tr. 210-11.

To abate the alleged violation, the truck was pulled by chain by another piece of equipment from intake air, and moved to an outby location outside the 150-foot limit where no return air was coursing over the pickup. Thereafter, the truck was disconnected and driven an additional 150 feet away from the face. Tr. 179; S. Ex. 114.

B. Analysis and Disposition

1. The Violation of §75.1907(a)

30 C.F.R. §75.1907(a) provides that diesel-powered equipment must meet permissibility standards where permissible electrical equipment is required. 30 C.F.R. §75.1907(a). Electric face equipment must be permissible within 150 feet from pillar workings or longwall faces or in return air outby the last open crosscut. 30 C.F.R. §§75.1002 and 75.507-1. The truck cited by inspector Lampley was diesel-powered equipment that did not meet permissibility requirements. Tr. 148. It is undisputed that the equipment was closer than 150 feet from the longwall face. R. Post Hr'g Br. 4. Accordingly, I find that the Respondent violated the cited standard.

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

For the reasons explained above, I have found the underlying violation of mandatory safety standard § 75.1907(a).

b. The Violation Contributed to a Discrete Measure of Danger to Safety

With regard to the second *Mathies* factor, the Secretary must show that the violation contributed to a discrete safety hazard, "which implicitly requires a showing that the violation is at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 163 (citing *Black Beauty*, 34 FMSHRC at 1741, n.12 ("[I]f the roadway here had lacked berms for only a short distance [thereby making the hazard of a vehicle falling off the edge less likely], or if the violation had been otherwise insignificant, the trier-of-fact could have found that the violation did not contribute to a discrete safety hazard, and hence that the Secretary had failed in her proof under the second element of *Mathies*.")), *aff'd sub nom*. *Peabody Midwest*, 762 F.3d 611; *Cumberland Coal Res*., *LP*, 33 FMSHRC 2357, 2368 (2011) (the violation, under the particular circumstances, was likely to contribute to the relevant hazard under *Mathies'* second prong), *aff'd sub nom*. *Cumberland Coal Res*., *LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *E. Associated Coal Corp*., 13 FMSHRC 178, 183 (1991) (same); *Utah Power & Light Co*., 12 FMSHRC 965, 970 (1990) (same). For the reasons set forth below, I find that the violation of parking an impermissible diesel-powered truck in return air where permissible equipment was required contributed to a discrete safety hazard or measure of danger to safety, that is, a methane ignition or explosion.

Permissibility requirements like the one at issue here ensure that ignitions occurring within enclosures on mining equipment with electrical circuits will not escape into the mine atmosphere. *Knox Creek*, 811 F.3d at 153-54; *Consolidation Coal Co*., 35 FMSHRC 2326, 2336

(Aug. 2013) (permissibility requirement is designed to prevent hot gases from escaping from an enclosure containing electrical connections, thus causing an ignition outside the enclosure."). Thus, the permissibility requirements are intended to prevent the ignition of explosive air-methane mixtures surrounding mine equipment. Consequently, I must determine whether it was somewhat likely that the violation contributed to the hazard or danger of allowing an ignition source to be available in this gassy mine. *Cf., Consolidation Coal,* 35 FMSHRC at 2335-36 (Commission affirmed judge's description of relevant hazard contributed to by the violation and her determination that second prong of *Mathies* was satisfied because the violation contributed to the hazard of "the danger of allowing an ignition source to be available in this gassy mine.").

When examining the likelihood of a permissibility violation to contribute to the hazard of a methane ignition or explosion, the Commission has traditionally examined whether a "confluence of factors" is present based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). The Commission has held that the confluence-of-factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area. *Excel Mining, LLC,* 37 FMSHRC 459, 465 (Mar. 2015); *Utah Power & Light Co.*, 12 FMSHRC at 970-71; *Texasgulf,* 10 FMSHRC at 501-03. For example, the mine in *Texasgulf* contained only miniscule amounts of methane and had never had a methane ignition or explosion. See 10 FMSHRC at 501. Given detailed testimony establishing the mine's history of low methane emissions, the absence of previous ignitions or explosions, and testimony establishing a reasonable expectation of low methane emissions in the future, the Commission concluded that that substantial evidence supported the judge's findings that there was not a reasonable likelihood that the hazard contributed to would result in a mine ignition or explosion.

On the other hand, numerous other Commission cases have upheld an S&S determination where the particular facts surrounding a violation established that a methane ignition was reasonably likely in a gassy mine. See e.g., *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1867–69 (Aug. 1984) (upholding significant and substantial finding where coal mine liberated over one million cubic feet of methane in 24-hour period, had a history of methane ignitions, and there was an excessive accumulation of coal nearby); *United States Steel Mining Co., Inc*., 7 FMSHRC 1125, 1128–30 (Aug. 1985) (upholding significant and substantial finding where coal mine liberated over one million cubic feet of methane in a 24-hour period, had a history of past methane ignitions, could liberate dangerous levels of methane in a relatively short period, and ventilation was substandard); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 673, 677–678 (upholding significant and substantial finding where coal mine was subject to inspection pursuant to section 103(i) and sudden outburst of methane had occurred recently); *Consolidation Coal Co*., 35 FMSHRC at 2337 (upholding a significant and substantial finding for a roof bolter that violated permissibility standards where methane was emitted during roof bolting, the bolter was located near the gob and far from the bleeder fans, and the mine was gassy).

Applying the confluence-of-factors analysis to the instant facts, I find that supervisor Crum's truck was a non-permissible ignition source that was parked in return air and would therefore likely be exposed to an explosive concentration of methane released from the longwall face during continued normal mining operations. Parking impermissible, diesel-powered equipment within 150 feet of the face in return air contributed to the discrete safety hazard that

restarting the truck could ignite any explosive concentration of methane present in return air during continuous mining operations. Accordingly, I find that the violation contributed to the hazard of a methane explosion caused by the location of impermissible equipment in return air.

Although the testimony of Crum, Schilke and Phipps suggested that the return air was inby the location where Crum parked his non-permissible, diesel-powered Dodge truck (Tr. 275, 283-84, 308, 330-31), I find that the hood of the truck extended into the mixing zone intersection and into return air and was not in intake air as Phipps, Crum and Schilke suggested. I credit Lampley's testimony and measurements that the truck was parked within 150 feet of the face, and the hood of the vehicle, including the combustion engine, was actually parked within the plane of the intersection or crosscut. Tr. 146-147, 158, 171, 198-99, 217. Crum's testimony and Respondent's own map indicate this. Tr. 269; R. Ex. 8. Lampley and Phipps both described the intersection at crosscut 109 as a mixing zone, where return air met intake air. Tr. 107, 329. Lampley and Phipps both noticed that warmer and more humid air that was characteristic of return air was present in the intersection or crosscut itself, where such air mixed with fresh intake air. Tr. 150, 328. Phipps conceded that areas containing return air, including mixing zones, are properly classified as return air. Tr. 363. Further, I have credited Schilke's testimony that the truck was parked slightly inby the outby corner of crosscut 109 (Tr. 305-06), over Crum's testimony that the truck was parked even with the outby corner. Tr. 268-69.

Although Schilke testified that Lampley had to stand directly at the Dodge truck and almost over the hood of the truck to get the smoke to travel over the hood of the truck, Schilke thereafter acknowledged that the smoke was in a dead spot and automatically spread out over the hood of the Dodge truck. Tr. 309. I credit Lampley's testimony that the results of his smoke test, which recreated the movement of air from the longwall face to the truck, established that return air wafted over the hood of the truck where the engine was located, and then out across crosscut 109. Tr. 151. Based on Lampley's credited testimony, as supported by the results of the smoke test, I find that return air, which would be carrying methane during continuous mining operations in a gassy mine, reached the hood and windshield of the truck, which extended into the intersection and mixing zone. Tr. 151, 194, 202.

I further credit the testimony of Lampley that the truck was an ignition source. Tr. 156-57. Lampley identified several sources of ignition within the truck that Respondent did not contest. *Id.* Most notably, the engine produced thousands of combustions per minute. *Id.* It is undisputed that the truck was not permissible equipment. Tr. 156-57, 275, 319. Consequently, the truck did not prevent sparks released by the combustions from encountering potentially explosive methane concentrations in the air. Tr. 147-49. Due to the numerous ignition sources within the truck, the number of ignitions per minute, and the lack of countermeasures to arrest a methane ignition, I find that the truck was a likely source of methane ignition because it was parked in return air in a gassy mine on five-day spot protocol where methane would be coming off an active face and heading outby past gob and over the truck, during continuous mining operations. Tr. 157-59.

It is important to emphasize that the Mach #1 Mine was subject to section 103(i) spot inspections every five days because of its excessive liberation of methane. Although the Secretary put on no evidence of any prior ignition at the Mach #1 Mine, and there is no mention

of a prior methane ignition on MSHA's data retrieval, there is some evidence of the presence of high dust concentration, including float coal dust, which might propagate a methane ignition. For example, inspector Robert Bretzman specifically testified that the mine normally had high dust concentration. In this regard, with respect to Citation 8432319, alleging that on September 12, 2013, almost a year before Citation No. 8451651 was written, the longwall shearer on the headgate six unit did not have a visible warning device to adequately alert the shearer operator when the methane concentration reached 1.0 percent, inspector Bretzman testified as follows:

> I determined that if—in the event that we did have a high degree of methane, excessive methane, and the operators were not aware of the methane and we was in a high dust concentration, *like we normally are*, we could have an ignition . . . .

Tr. 411 (italics added). As further explained below, these facts coupled with Lampley's testimony that methane would travel off the active face in return air and past gob to the truck (Tr. 157-59) are sufficient to make an accumulation of methane at explosive concentrations reasonably likely during continued normal mining operations. *Cf., Knox Creek*, 811 F.3d at 164; *Consolidation Coal Co*., 35 FMSHRC at 2336.

Respondent argues that the truck was not exposed to methane, much less any explosive concentration of methane. This argument is unconvincing in the context of continued normal mining operations. Although no methane was found in the readings taken at the time of the citation, I credit Lampley's testimony that the truck was exposed to numerous sources of methane. The most likely source of methane was from the gas released from the face during coal production, under continued normal mining operations. Tr. 158. Additionally, Lampley convincingly testified that bursts of methane released from rock falls within the gob could spontaneously increase methane concentrations to explosive levels quickly. Tr. 189-92. Finally, as noted above, the Commission has consistently found permissibility violations to be S&S where mines are characterized as gassy. *See e.g., Consolidated Coal Co.*, 35 FMSHRC at 2336 (affirming judge's finding that of reasonable likelihood of injury from an explosion despite no methane detected at time of violation because methane was emitted as bolter drilled into the roof, the bolter was close to the gob and far from the bleeder fans, and the mine was a gassy mine).

As emphasized, this mine was on a five-day spot and liberated approximately two million cubic foot of methane in a 24-hour period. Tr. 158. The risks of dangerous concentrations of methane quickly rising to an explosive level from the above sources are increased where the mine liberates such high quantities of methane. Although Respondent offered its ventilation scheme as a sufficient countermeasure against methane accumulation, the Commission has consistently found that adequate ventilation within a mine is not sufficient to remove the danger of explosive levels of methane. *U.S. Steel,* 6 FMSHRC at 1869; *Excel Mining*, LLC, 37 FMSHRC at 466. Based on the entire record, I find it reasonably likely that under continued normal mining operations, Crum's non-permissible truck would be exposed to an explosive concentration of methane in the return air where it was parked.

Respondent argues that the truck would have been removed before production restarted, thus eliminating the presence of the ignition source. Tr. 286. I reject this argument. As the

Fourth Circuit recently recognized, the Commission has long "held that an S&S determination ought to be 'made at the time the citation is issued (*without any assumptions as to abatement*).' *Sec'y of Labor v. U.S. Steel Mining Co*., 6 FMSHRC 1573,1574 (1984) (emphasis added); *see also Sec'y of Labor v. McCoy Elkhorn Coal Corp.,* 36 FMSHRC 1987, 1991 (2014) (rejecting the argument that an S&S finding was erroneous 'because [the mine operator] was in the process of cleaning the accumulations when the inspector arrived'); *Sec'y of Labor v.Gatliff Coal Co.,* 14 FMSHRC 1982, 1986 (1992) (finding that the ALJ erred in 'inferring that the violative condition would cease' in the course of normal mining operations)." *Knox Creek,* 811 F.3d at 165. In addition, Crum's testimony that the truck would have been removed before production restarted is speculative and unsupported by any evidence. Apart from Crum's interest as a longwall maintenance supervisor in remaining by the longwall to ensure that the belt and longwall operated properly before he returned to his truck and the surface, Crum likely would have been delayed in any number of ways as longwall maintenance supervisor. Furthermore, because Crum was ignorant of the violative condition (see e.g., Tr. 284), I find it likely that he would have started the truck while it was in return air after production restarted, thus increasing the likelihood of a methane ignition.

In sum, I find that the presence of an ignition source, the location of that ignition source within return air reserved only for permissible equipment, the likelihood of a methane build up to an explosive level during continued normal mining operations in this gassy mine, and the testimony that the mine normally had high dust concentrations make it likely that the violation contributed to a discrete methane ignition or explosion hazard. As such, I find that the second prong of *Mathies* test was satisfied.

c. The Violation Contributed to a Hazard That was Reasonably Likely to Result in Injury

As the Fourth Circuit has recognized, the third and fourth prongs of *Mathies*, which are often combined in a single showing, are primarily concerned with gravity or the seriousness of the expected harm. To the extent that the third and fourth prongs are concerned with likelihood at all, they are concerned with the likelihood that the relevant hazard will result in serious injury because requiring a showing at prong three that the violation itself is likely to result in harm would make prong two superfluous. *Knox Creek*, 811 F.3d at 162, citing *Mathies*, 3 FMSHRC at 3-4.

Regarding the third *Mathies* factor, the Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., a methane explosion contributed to by parking an impermissible ignition source in return air, was reasonably likely to result in an injury to the four miners working near the face. As noted, for this element to be satisfied "[t]he Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc. & PBS Coals, Inc*., 32 FMSHRC 1257, 1280-81 (Oct. 2010). Nor is the Secretary required to prove that the hazard contributed to will actually result in an injury-causing event. *Youghioghemy & Ohio Coal Co*., 9 FMSHRC 673, 678 (April 1987).

Rather, the test under the third prong of *Mathies* is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. *Knox Creek,* 811 F.3d at 161, citing *Musser Engineering,* 32 FMSHRC at 1281, where the Commission assumed the existence of the relevant hazard and considered only "evidence regarding the likelihood of injury as a result of the hazard." Although the Commission's decision in *Ziegler Coal Co.,* 15 FMSHRC 949, 953 (1993), supports the argument that evidence of the likelihood of the hazard is relevant at prong three, as the Fourth Circuit noted, that position is flatly contradicted by more recent Commission precedent in *Musser*, 32 FMSHRC at 1281, and by the unanimous voice of the Fourth, Fifth and Seventh Circuits. See *Knox Creek*, 811 at 164; *see also Peabody Midwest* 762 F.3d at 616 (holding that the question is not whether it is likely that the hazard would have occurred, but only if the hazard occurred, regardless of likelihood, it was reasonably likely that a reasonably serious injury would result); *Knox Creek,* 811 F.3d at 161 (*Skidmore* deference applied to Secretary's litigating positions 1) that third prong of *Mathies* focuses on the likelihood that the hazard to which the violation contributes will cause injury, not on the likelihood of the hazard occurring, and 2) the existence of the relevant hazard should be assumed); *Buck Creek*, 52 F.3d at 135 (the third prong of *Mathies* is satisfied where the ALJ determined that in the event of the hazard, a reasonably serious injury would result); *Austin Power*, 861 F.2d at 103-04 (finding third prong of *Mathies* satisfied where the hazard "would almost certainly result in serious injury," without requiring evidence that the hazard itself was likely); *cf. Cumberland Coal,* 71 F.3d at 1027-28 (Secretary's interpretation that decision maker should assume the existence of an emergency when evaluating whether the violation of an emergency safety standard is S&S is not inconsistent with *Mathies* or Commission precedent).

I credit inspector Lampley's testimony that the violation, parking the impermissible truck with unapproved electrical components in return air, contributed to a methane ignition or explosion hazard that was reasonably likely to result in an injury to the four miners working at the face. Tr. 156-63. The Commission has long recognized that a methane ignition or explosion is likely to result in a fatal injury to exposed miners. *See Consolidation Coal,* 35 FMSHRC at 2337 (affirming judge's determination that the lack of a permissible light on a roof bolter would contribute to the hazard of a methane gas ignition or explosion, which is reasonably likely to cause a permanently disabling or fatal injury); *Black Diamond Coal Mining*, 7 FMSHRC 117, 1120 (1985)("We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners"); *Jim Walter Res., Inc*., 37 FMSHRC 1968, 1976 (Sept. 2015)("horrific mine explosion[s took] the lives of 12 miners at Sago Mine"); *Sec'y of Labor v. Performance Coal Co.*, 34 FMSHRC 587, 588 (2012) (ALJ) (explosion at longwall section due to an ignition of methane propagated by coal dust resulted in deadliest U.S. mine disaster in 40 years, killing 29 miners); *cf. Knox Creek*, 811 F.3d at 163 (permissibility violations where a mine's atmosphere contains explosive concentrations of methane contribute to a methane ignition or explosion hazard that is reasonably likely to result in an injury-producing event). Accordingly, I find that the third prong of Mathies was satisfied.

d. There was a Reasonable Likelihood That the Injury in Question Will Be of a Reasonably Serious Nature

With regard to the fourth *Mathies* factor, I find a reasonable likelihood that any injury from a methane explosion would be of a reasonably serious nature. A methane-related explosion

contributed to by the violation was reasonably likely to result in fatal injuries to the four miners working at the face. *Consolidation Coal Co.*, 35 FMSHRC at 2337; *Black Diamond Coal Mining*, 7 FMSHRC at 1120; *Jim Walter Res., Inc*., 37 FMSHRC at 1976; *Sec'y of Labor v. Performance Coal Co.*, 34 FMSHRC at 588. Fatal injuries are necessarily serious in nature. Thus, I find the fourth *Mathies* factor satisfied.

In sum, considering all relevant factors, I find the violation was S&S.

3. Respondent's Negligence is Reduced from High to Moderate

I find that Respondent's negligence should be reduced from "high" to "moderate." It was not unreasonable for Crum, an agent of the operator, who was visually estimating distances, to mistake 144 feet for 150 feet and to park the hood of his truck slightly in return air. I find this honest mistake to be a mitigating circumstance that supports a reduction in Respondent's negligence from high to moderate.

4. Civil Penalty for Citation No. 8451651

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent, Mach Mining, Inc., operates the Mach Mining No. 1 Underground Mine, which mined 7,528,061 tons of bituminous coal in 2012. The parties stipulated that the originally proposed penalty of $16,867 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and S&S determinations. I have modified MSHA's negligence determination from high to moderate. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $5,081 civil penalty against the Respondent for Citation No. 8451651.

VI. Citation No. 8439446

A. Findings of Fact

1. Inspector Stanley's Testimony

After determining that Respondent's methane monitor attached to a roof bolting machine failed to register explosive concentrations of methane, Inspector Phillip Wayne Stanley[19] issued Citation No. 84539446 for a violation of 30 C.F.R. § 75.342(a)(4). Tr. 465-66. The cited standard requires that methane monitors be maintained in proper operating condition. Tr. 465. Properly operating monitors de-energize electrical equipment when methane concentrations reach 2.0 percent or when the monitor is not operating properly. 30 C.F.R. § 75.342(c); Tr. 465. Stanley determined that the violation was S&S and contributed to a methane ignition hazard that

[19] At the time of the hearing, Stanley had been a coal mine inspector for MSHA for four years and eight months. Tr. 461. Starting in December 1990, Stanley worked in potash mining for sixteen to seventeen years. *Id*. Thereafter, he worked in coal mining for approximately eight years. *Id*. Stanley graduated from high school in 1980, worked in the military for four years, and completed his training at the National Mine Safety and Health Academy. Tr. 461-62.

was reasonably likely to result in flash burns affecting two miners, as a result of Respondent's moderate negligence. Tr. 156, 162-63. The Secretary proposed a penalty of $1,412.

On August 6, 2013, Stanley conducted a regular inspection at Mach Mining. Tr. 461-62. As part of that inspection, Stanley tested the methane monitor attached to roof bolter #4 on the eighth headgate panel. Tr. 462, 464. Stanley conducted the inspection with a calibrator that displayed a digital readout, which listed the methane level. Tr. 464-65. When Stanley applied 2.5% methane to the monitor, it only read as high as 1.6 % methane. *Id*. The roof bolter is programmed to automatically de-energize at 2.0 %. Tr. 465. With an inaccurate methane monitor, the machine would likely fail to de-energize in explosive levels of methane. Tr. 468.

Under MSHA regulation, methane readings must be taken every twenty minutes during the process of roof bolting. Tr. 466, 496; 30 C.F.R. §75.362(d)(2). If a roof bolter lacks a methane monitor, readings must be taken with a probe at the deepest point of the cut approximately a foot from the roof or face. Tr. 467, 493-94. If the roof bolter has a methane monitor, readings can be taken within sixteen feet of the front of the machine. Tr. 466-67, 494-95. Stanley opined, but was not positive, that the methane monitor on the bolter did not run all day and was only used when a reading was taken. Tr. 495.

Stanley issued Citation No. 8439446 for a violation of 30 C.F.R. § 75.342(a)(4). Tr. 465-66. The cited standard requires that methane monitors be maintained in proper operating condition. Tr. 465. Properly operating monitors de-energize electrical equipment when methane concentrations reach 2.0 percent or when the monitor is not operating properly. 30 C.F.R. § 75.342(c); Tr. 465.

Stanley marked the citation as "reasonably likely" to result in an injury because the machine would not de-energize when encountering an explosive concentration of methane. Tr. 468. The mine liberated two million cfm of methane in a 24-hour period, and the eighth headgate panel itself released 25,000 cfm of methane in a 24-hour period. *Id*. Although more methane is released during extraction, some methane is released during roof bolting. Tr. 496. Because methane is lighter than oxygen, it accumulates in the top third of the entry where bolting occurs. Tr. 472-73. The methane monitor was placed on the automated temporary roof support system (ATRS) to gather readings in this accumulation zone. Tr. 468-69, 492. Additionally, the area near the roof of the mine was susceptible to sparking because the carbide tips of the bolter's drill bits encountered materials such as sandstone, limestone, and shale. Tr. 469. The roof bolter also created sparks when its wrench and bolt rotated against a steel-bearing plate. *Id*. Stanley referred to a 2012 ignition at Prosperity Mine to demonstrate the hazard resulting from a malfunctioning methane monitor on a roof bolter. Tr. 470.

Given the malfunctioning methane monitor, the likelihood and location of methane accumulation, and the potential for sparking, Stanley expected resulting injuries from an ignition to manifest as flash burns. *Id*. Stanley determined that these injuries would result in lost workdays or restricted duty and would affect the two machine operators. Tr. 470-71.

At the time of the citation, Respondent's ventilation system met regulatory standards. Tr. 490-92. Looking inby, the system ventilated the roof bolter with air traveling from right to left,

and included a line curtain to assist with ventilation. *Id*. This air acted to render harmless or remove noxious and hazardous gases and dust. *Id*., Tr. 505. However, ventilation systems may be inadequate where methane bleeders are encountered. Tr. 505-06. Bleeders are pockets of methane pressured under the strata. *Id*. They may continually replace explosive concentrations of methane faster than the ventilation can sweep the air. *Id*.

In deference to Respondent's implementation of seven-day checks on its methane monitors rather than the thirty-one day intervals required by the regulations, Stanley determined that Respondent's negligence was moderate. Tr. 471.

2. The Testimony from Respondent's Witnesses

a. Mark Schilke's Testimony

Schilke accompanied Stanley during his inspection of the roof bolter. Tr. 552. At the time of inspection, the bolter was pulled back approximately eighty feet from the face and outby the feeder break or last open crosscut. Tr. 555-56. The roof bolter is typically pulled in to secure unsupported roof after the continuous miner takes a fresh cut at the face. Tr. 557-58.

Schilke testified that prior to positioning the roof bolter, the roof bolt operators would take a methane reading. Tr. 553. A separate handheld methane monitor was attached to the probe and extended at least fifteen feet beyond the bolter. Tr. 553, 629-630, 635. The bolter operators repeated these readings every twenty minutes with a probe. Tr. 553, 624, 644. Schilke testified that having a methane monitor attached to the bolter did not affect the nature of the twenty-minute gas checks in any way. Tr. 629-632. There was no evidence to suggest errors in the equipment or data derived from these regular methane checks. Tr. 554.

Both Stanley and Schilke wore methane spotters and neither reported methane near the face. Tr. 559. Schilke testified that although the cited methane monitor failed to deenergize the machine, it did emit a warning during the methane test. Tr. 552, 628-29. Schilke also emphasized that methane monitors were an optional safety precaution. Tr. 552-53.

During roof bolting, Respondent ran a curtain to the tail of the bolter, to facilitate the flow of approximately 3000 cfm of intake air. Tr. 556-57. This ventilation system directed the air towards the face and across the bolter to remove gas and dust from the bolter. Tr. 556-58. Schilke admitted that the amount of ventilation would not diminish the necessity of twenty-minute gas checks. Tr. 633.

b. Johnny Robertson's Testimony

General Manager Johnny Robertson[20] testified that methane was only liberated when the continuous miners or the longwall shearers cut coal. Tr. 710-11, 742. Robertson testified that methane is less likely encountered during roof bolting than mining, and is usually only present when roof bolting into a coal seam. Tr. 716. Robinson testified that during his four years of tenure with Respondent, there were no reports of methane released from the roof or during bolting. Tr. 718-19.

According to Robertson, the regularity of spot inspections is determined by the amounts of methane and intake air in the mine. Tr. 743. Higher volumes of intake air reduce the methane content within the mine. Tr. 743-44. Robertson explained that Respondent's ventilation plan required a minimum of 3000 cfm of intake air blowing against a line curtain and across the back of the roof bolters. Tr. 711. Although Respondent met the ventilation requirements, its methane levels nonetheless required five-day spot inspections. Tr. 709-10, 743-44. Robertson conducted weekly methane readings where methane accumulated at the bleeder system behind the longwall. Tr. 710. He testified that during his time as general manager, neither his readings, nor any readings reported to him, were above 0.7 % methane. Tr. 711.

Robinson confirmed that Respondent used a continuous miner to carve out entryways. Tr. 717. After it cut forty feet of coal and withdrew, the roof bolter moved in to support the roof. *Id*., Tr. 742-43. Robertson testified that the light on the monitor was generally visible to the operator when the continuous miner cut and loaded coal. Tr. 723-24. He testified that the operator stood in front of the methane monitor. Tr. 745. He acknowledged, however, that the operator might turn away from the monitor while the cutter drum cut coal, whenever the shuttle car approached and loaded coal. Tr. 723-25, 745. Under such circumstances, the methane monitor was not visible for a few seconds. Tr. 723-25, 746. The continuous miner was not programed to automatically de-energize in concentrations of one-percent methane. Tr. 746-47. Instead, it was de-energized manually. *Id*.

Robertson also confirmed that when the roof bolter had a methane monitor attached to the ATRS, the operators probe sixteen feet in front of the bolter. Tr. 719. These methane checks were repeated every twenty minutes during roof bolting. *Id*. If the bolter did not have an attached methane monitor on the ATRS, these checks would occur with a different handheld monitor at the deepest point of penetration about twelve inches from the face and roof. Tr. 720.

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[20] Robertson had thirty-two years of experience in mining. For six years before commencement of employment with Mach Mining, Robertson was employed at Foresight Energy, which owns Mach Mining. Tr. 706. Before that, he worked for Massey Energy for twenty-six years, and held positions in engineering, safety, and operations. *Id*. He supervised multiple mine sites and was president of one of Massey Energy's large resource groups. Tr. 706-07. He was certified in Ohio, New Mexico, and Illinois as a foreman or mine manager. Tr. 707. Robertson was a MSHA instructor with certifications in dust and noise. Tr. 707. He has a Bachelor's Degree from Marshall University in West Virginia. *Id*. Robertson served in the Army Special Forces. *Id*.

B. Analysis and Disposition

1. The Violation of § 75.342(a)(4)

Section 75.342(a)(4) requires that operators maintain methane monitors in permissible and proper operating condition and calibrate them with a known air-methane mixture at least once every 31 days. A methane monitor in permissible and proper operating condition shall automatically de-energize electric equipment or shut down diesel equipment on which it is mounted when the methane concentration reaches 2.0 percent or when the monitor is not operating properly. 30 C.F.R. § 75.342(c).

Respondent admitted the violation. Tr. 552. *See* R. Br. 12. The methane monitor failed to de-energize the machine when methane concentrations reached 2% and failed to provide readings higher than 1.6 %. Tr. 464-65. Respondent argues that the violation was not S&S, that its negligence was less than moderate, and that the proposed penalty calculation is inappropriate.

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

For the reasons explained above, I have found and Respondent admits the underlying violation of a mandatory safety standard, i.e., § 75.342(a)(4).

b. The Violation Contributed to a Discrete Measure of Danger to Safety

As stated previously, the second Mathies factor requires a showing that the violation created a discrete safety hazard, "which implicitly requires a showing that the violation is at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 16, citing *Black Beauty Coal Co*., 34 FMSHRC at 1741, n. 12, *aff'd sub nom*. *Peabody Midwest*, 762 F.3d 611 (7th Cir. 2014); *Cumberland*, 33 FMSHRC at 2368, *aff'd sub nom*. *Cumberland*, 717 F.3d 1020; *E. Associated Coal Corp*., 13 FMSHRC at 183; *Utah Power & Light Co*., 12 FMSHRC at 970. Where a violation poses a risk of fire or explosion, this likelihood is demonstrated by the presence of a "confluence of factors," such as possible ignition sources, the presence of methane, and the type of equipment in the area. *Excel Mining, LLC,* 37 FMSHRC at 465, slip op. at 7, (Mar. 2015); *Utah Power & Light Co.*, 12 FMSHRC at 970-71; *Texasgulf,* 10 FMSHRC at 501-03. For example, in *Consolidation Coal*, the Commission found that a methane ignition was reasonably likely because methane was emitted during roof bolting, the bolter was located near the gob and far from the bleeder fans, and the mine was gassy. *Consolidation Coal Co*., 35 FMSHRC at 2337.

A properly functioning methane monitor is expected to automatically de-energize electrical equipment in two percent methane to avoid the potential ignition of explosive levels of methane at the 5-15% range. The monitor at issue in the present citation did not detect two percent methane when tested, and would not automatically de-energize the roof bolter in rising concentrations of methane, thus contributing to the likelihood of a methane ignition should methane accumulate to an explosive level during continued normal mining operations.

Consequentially, I find that the hazard contributed to by the violation was a methane-related ignition caused by undetected explosive levels of methane where ignition sources were present.

The risk of excessive methane in Respondent's mine nearly parallels the risk cited in *Consolidation Coal*. Methane was liberated during roof bolting. Tr. 469. Due to its weight, the methane accumulated near the top third of the entry where bolting occurred. Tr. 468-69. The potential for bleeders increased the possibility of dangerous methane concentrations. Tr. 505-06.

Furthermore, the Commission has held that if a mine liberates high levels of methane there may be an even greater potential for a methane ignition to occur and that this may be considered in a confluence-of-factors analysis. *Excel Mining, LLC,* 37 FMSHRC 465, slip op. at 7, (Mar. 2015); *Knox Creek Coal Corp.*, 36 FMSHRC at 1134. As stated previously, the Mach Mining No. 1 Underground Mine is a gassy mine that is on a five-day spot inspection schedule. Tr. 35. The mine liberates over two million cfm methane in a 24-hour period and approximately 35,000 cfm methane at the eighth head-gate panel. Tr. 468. I find that the confluence-of-factors test is satisfied here and that the violation created a discrete safety hazard, which was at least somewhat likely to result in harm.

Citing facts discussed in the *Consolidation Coal* ALJ decision, Respondent argues in its response to the Secretary's Post-Hearing brief that the risk of excessive methane in the present case is substantially different from the risk of excess methane in *Consolidation Coal*. R. Resp. Br. 6-7. According to Respondent, respondent Consolidation Coal had higher levels of methane because the roof bolters and continuous miners shut down four to five times in a cycle, and a curtain was removed by a foreman, thus raising methane levels to 7.7%. *Id*. However, the facts that Respondent relies on were not determinative in *Consolidation Coal*. Instead, the Commission cited *only* three factors when establishing a sufficiently dangerous risk for a methane ignition. *Consolidation Coal Co*., 35 FMSHRC at 2337 (emphasis added). The Commission cited the emission of methane while roof bolting, the location of the roof bolter near the gob and further from the bleeder fans, and the fact that the mine was gassy. *Id.* ("[T]he Robinsons Run mine liberates more than a million cfm of methane during a 24-hour period and is subject to five-day methane spot inspections"). Given the cited conditions, the Commission quoted the inspector's testimony that "it would only take a roof-fall for the gob air to … create an explosive amount of methane." *Id*. at 2336. With the additional danger of encountering pockets of methane bleeders, the present risk factors are nearly identical to those enumerated by the Commission in *Consolidation Coal*. Accordingly, I do not find Respondent's argument persuasive.

Respondent also cites Judge Zielinski's decision in *Ohio County Coal* for the proposition that a malfunctioning methane monitor is not S&S where the mine has low levels of methane concentrations. *Ohio County Coal Co*., 32 FMSHRC 220 (Feb. 2010)(ALJ). *Ohio County Coal* is distinguishable from the present case in at least one major way. The mine in *Ohio County Coal* did not liberate excessive quantities of methane, as noted by Judge Zielinski in his analysis. 32 FMSHRC at 224 (comparing Freedom mine to mines that liberate greater quantities of methane and are subject to spot inspections). Instead, the mine in that case emitted a mere 12,000 to 13,000 cfm methane in a 24-hour period, in comparison to Respondent's liberation of one million cfm methane in a 24-hour period. *Id.*

In short, Respondent roof bolted with a malfunctioning methane monitor in an area of methane emission and accumulation within a gassy mine. The inspector credibly testified that sparks released from roof bolting in excess methane concentrations will cause an ignition. I find that this combination of risk factors satisfies the confluence-of-factors test for a methane ignition hazard and supports a finding that the hazard is at least somewhat likely to occur. Accordingly, I find that the second *Mathies* factor is satisfied.

c. The Violation Contributed to a Hazard That was Reasonably Likely to Result in Injury

As stated previously, federal appellate law and Commission precedent have sufficiently established that a methane explosion is reasonably likely to result in injures. *See Buck Creek*, 52 F.3d at 135; *Consolidation Coal Co.*, 35 FMSHRC at 2337; *Black Diamond Coal Mining*, 7 FMSHRC at 1120; *Jim Walter Res., Inc*., 37 FMSHRC at 1976; *cf. Knox Creek*, 811 F.3d at 164-65. Accordingly, I find that the third *Mathies* factor is met.

d. There was a Reasonable Likelihood That the Injury in Question Will Be of a Reasonably Serious Nature

With regard to the fourth *Mathies* factor, I find a reasonable likelihood that any injury from a methane explosion would be of a reasonably serious nature. The record establishes that a methane-related ignition contributed to by the violation was reasonably likely to result in a serious injury or illness to at least two miners working with the bolter, who would suffer flash burns from a methane ignition. I find that the designation of "lost workdays or restricted duty" was appropriate for this violation.

In sum, considering all the relevant factors, I find that the violation was properly designated as S&S.

3. Respondent's Negligence was Appropriately Designated as Moderate

Based on the testimony and briefs, I do not find considerable mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent knew or should have known of the violation. Respondent's ventilation and weekly methane monitor calibrations are mitigating circumstances that support a moderate negligence designation. However, Respondent highlighted no action that *considerably* mitigated the likelihood or severity of a methane ignition during roof bolting without a properly functioning methane monitor. In these circumstances, I conclude that the Secretary properly designated Respondent's negligence as moderate.

4. Civil Penalty for Citation No. 8439446

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The parties stipulated that the originally proposed penalty of $1,412 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed

MSHA's gravity, negligence, and S&S determinations. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $1,412 civil penalty against the Respondent for Citation No. 8439446.

V. Citation No. 8432319

A. Findings of Fact

1. Inspector Bretzman's Testimony

After observing the absence of an auxiliary methane alarm light on a longwall shearer, MSHA inspector Robert L. Bretzman[21] issued Citation No. 8432319 for a violation of 30 C.F.R. § 75.342(b)(2), which requires that "[t]he warning signal device of the methane monitor shall be visible to a person who can de-energize electric equipment or shut down diesel-powered equipment on which the monitor is mounted." Tr. 409. Bretzman determined that the violation was unlikely to contribute to a methane ignition hazard, but that any injuries that did result from the hazard would result in lost work days or restricted duty affecting three miners, as a result of Respondent's low negligence. Tr. 409-411. The Secretary proposed a penalty of $117.

On September 11, 2013, Bretzman was among several inspectors who conducted a quarterly inspection of Respondent's longwall. Tr. 396-97. Bretzman testified that the longwall was probably producing coal when he arrived, but he could not say for sure. Tr. 418. During the inspection, Bretzman noticed that there was no auxiliary alarm light on the longwall shearer. Tr. 398. In Bretzman's experience, longwall shearers always have auxiliary alarm lights. Tr. 407, 410. The shearer at issue has an electric panel with a four to six-inch LED screen, which constantly displays the current concentration of methane. Tr. 439-440. This methane reading flashes when methane levels reach a certain percentage. Tr. 440-441. When methane concentrations reach one percent, an alarm light turns on to alert the shearer operator of excessive methane. Tr. 441. This alarm light is located in the bottom right-hand corner of the panel and is approximately the size of a quarter. Tr. 411-412, 441; S. Ex. 102.

Respondent usually has two longwall shearer operators, a headgate operator and a tailgate operator, and each has a remote control box that can de-energize the shearer. Tr. 404-05, 433. The shearer also has an emergency stop button that can be operated by anyone in the area, including the stage loader operator. Tr. 434-36. Bretzman testified that the stage loader operator works in a stationary position at the headgate of the longwall. Tr. 435-36. Bretzman testified that the only way to see the alarm on the shearer is to stand directly in front of the monitor. Tr.

[21] Inspector Bretzman was employed by MSHA as a special investigator for two and a half years, and as an electrical specialist for five years. Tr. 394. Bretzman worked in mining since 1977. Tr. 395. He held positions as a belt maintenance worker, a shieldman, a mechanic, and a maintenance foreman. *Id*. Additionally, Bretzman worked for a short time in the electrical department for Joy Technologies, a mine manufacturing company. *Id*. Bretzman holds an Associate's degree and received his Bachelor's degree from Southern Illinois University in work force education and training. Tr. 396. He was a certified mine examiner, who possessed a federal electrical card. Tr. 398.

402, 413. Respondent failed to present any testimony that the stage loader operator could see the auxiliary light on the longwall shearer.

Bretzman did not observe the longwall in operation and did not know for certain where the operators stood that particular day. Tr. 437-438, 442. However, Bretzman testified that it was highly unlikely that a miner would stand where he could see the monitor because from that location he would be unable to see the cutting drums. Tr. 402-403. At any given time, an operator may stand anywhere along the shearer, up to twenty-five feet from the monitor. Tr. 412-15, 438-439, 447. Upon questioning headgate operator Mike Skelton, Bretzman learned that he was positioned outby the headgate drum when it traveled towards the headgate. Tr. 446; *see* S. Ex. 100, p. 3. This location confirmed Bretzman's suspicion that the shearer operator would not see the warning light. Tr. 446. Bretzman's notes from the day of the inspection do not indicate the tailgate operator's usual location, although Bretzman opined that Skelton would have volunteered that information if it was exculpatory. Tr. 456-57.

Bretzman returned to MSHA and verified that alarm lights were required on the shearer. Tr. 405, 408, 443. Bretzman decided, and the MSHA field office supervisor agreed, that a citation was appropriate. Tr. 444. Bretzman returned to the mine the next day and issued the citation. Tr. 408. The cited standard requires that "[t]he warning signal device of the methane monitor shall be visible to a person who can de-energize electric equipment or shut down diesel-powered equipment on which it is mounted." 30 C.F.R. § 75.342(b)(2); *see also* Tr. 409. Bretzman determined that the operator could not see the monitor during normal mining operations unless he was in the direct line of sight of the readout. Tr. 409, 412, 441. As a result, the operator would not have accurate methane readings during mining. Tr. 409. However, Bretzman conceded that the standard does not specifically say that the monitor must be visible to the headgate or tailgate operator. Tr. 436-37. Any person assigned to watch the monitor would be sufficient. Tr. 437, 439. To Bretzman's knowledge, no one stood at the center of the shearer. Tr. 447. Furthermore, Bretzman could not recall anyone from Respondent telling him that the indicator light could be seen by a person who could de-energize the machine. Tr. 446.

Respondent argues that the lack of previous citations from past inspections suggests that the condition was not a violation. Tr. 725-27. Since 2006, Respondent developed longwall panels for three miles and was subject to many inspections, including E01 inspections, spot inspections, and permissibility certifications for 2G longwall equipment. Tr. 422-442. Bretzman testified that the 2G approvals were irrelevant because they only certified diagrams and plans of the mine, and not the ways in which equipment was actually used. Tr. 451-452. For instance, Bretzman recalled a similar citation at the same mine requiring an auxiliary alarm light on a stage loader. Tr. 406. In that case, the stage loader satisfied 2G permissibility requirements if one assumed that the operator was in view of the methane alarm. Tr. 451-52. In practice, however, MSHA inspectors observed that the operators were not always in position to view the alarm and therefore issued a citation. *Id*. Bretzman could not recall if he had spoken with Respondent previously about the failure to place a light on the shearer, although he believed he had. Tr. 422, 431. Bretzman testified that every longwall shearer that Bretzman worked with at Consol, and most of the ones at Joy Technologies had auxiliary alarm lights. Tr. 407.

Bretzman determined that the unlikely injury that would result from the alleged violation was lost work days or restricted duty for three miners. Tr. 410-11. He testified that there was normally a high concentration of coal dust at the site. Tr. 411. Excessive methane in an environment with coal dust creates an ignition hazard. *Id*. As a result, Bretzman determined that the shearer operators and shieldman were at risk for burns. *Id*. Bretzman wrote the citation as unlikely because mining had stopped and he had no evidence to suggest that methane was present. Tr. 410, 420. Furthermore, Respondent's ventilation pushed over 100,000 cfm of intake air over the headgate, and the shearers were designed to automatically de-energize at 2.5 % methane. Tr. at 417-21. The monitors designed to shut off the shearers worked properly at the time of the citation. Tr. 421.

To abate the alleged violation, Respondent ordered the equipment necessary to install an auxiliary alarm light on the shearer. Tr. 412. Respondent installed a new, two-inch flashing light that was visible to the shearer operators. Tr. 448. The citation was terminated by another inspector. Tr. 457-58.

2. The Testimony from Respondent's Witnesses

a. James Key's Testimony

James Key was a shearer operator for the Respondent.[22] Key explained that a longwall shearer is a piece of equipment with two drums, one at the head and one at the tail end. Tr. 649-650. As the shearer passes from the headgate to the tailgate, the tail drum cuts the top, and the head drum cuts the bottom. *Id*. The headgate operator runs the head drum with a remote control as cuts are made, while the tailgate operator does the same with the tail drum. Tr. 650-52. The remotes have stop buttons that can turn off, but not de-energize, the machine. Tr. 651. Instead, the shearer has an emergency stop that de-energizes the machine. Tr. 652.

When the shearer moves from the headgate to the tailgate, the tailgate operator typically stands approximately six to seven feet to the right of the alarm light in the direction of the tailgate. Tr. 653, 664. Key further testified that the alarm light was visible to the tailgate operator, if he turned his head. Tr. 664. According to Key, the headgate operator was usually in a variety of locations, including anywhere from right behind the tailgate operator to the back of the head drum. Tr. 653-54, 664-65, 668. Key testified that the headgate operator could also see the light, if he turned his head. Tr. 664.

Key testified that when the shearer moved in the opposite direction, the tailgate operator typically stood on the head side of the drum. Tr. 655, 666-68. The headgate operator was usually located closer to the alarm light, although neither operator remained in a certain location. Tr. 666-68. Although the light was usually visible, the operators might not have been in position to

[22] Key had been employed by Mach Mining since January 2007. Tr. 647. At the time of the citation, Key was certified as a mine examiner and mine manager. Tr. 648. Prior to that, Key worked as a shearer operator on the longwall at American Coal's Galatia Mine for 20 months. Tr. 646-48. Key had twenty years of mining experience. Tr. 647.

see the light at any given moment. Tr. 666. Key admitted that there was not always someone standing in front of the light during mining. Tr. 674.

Key was familiar with the methane monitor and the lights on the display. Tr. 661. Key had worked for a different coal company with a similar longwall system, which had the monitor in the same location. Tr. 669. According to Key, the light, which turned on when methane levels reached one percent, was "pretty bright." Tr. 662-63, 665. The light was approximately an inch in circumference. Tr. 663. It was located within an enclosure that jutted out around the edges. Tr. 673. The raised edges limited the light's visibility at certain angles from the monitor. Tr. 673-74.

b. Johnny Robertson's Testimony

General Manager Robertson was familiar with the methane monitor on the longwall shearer. Tr. 720-21. Robertson testified that in one percent methane, a yellow light turned on. Tr. 722, 746. Further, given adequate ventilation, the operator merely had to stop mining to halt methane liberation. Tr. 722. Once methane levels dropped below one percent, the operators could resume mining. *Id*.

Robertson testified that Respondent had never received a citation for the location of the auxiliary alarm light on the shearer during the prior six years when Respondent used the longwall. Tr. 725-27. Additionally, Robertson testified that Massey Energy used the same methane display and never received a citation during his four years as a general manager there. Tr. 725-28. Until the instant inspection, Robertson had never heard of a citation for this issue. Tr. 729. Robertson testified that, apart from the issuance of the citation, Respondent suffered no reported negative consequences from the location of the alarm light. Tr. 751-53. Respondent abated the citation by ordering an alarm light and installing it on a Saturday, when the longwall was down. Tr. 756.

Robertson testified that approximately five years before the date of the hearing, MSHA inspector, Dean Cripps, issued a similar citation for lack of visibility on a monorail methane monitor.[23] Tr. 728-30, 749-50. Robertson testified that Cripps' concern about the location of the alarm light was limited to the monorail because Cripps did not issue a citation for the alarm light on the longwall shearer. Tr. 730. According to Robertson, Cripps informed Robertson's supervisor, Anthony Webb, that any change in policy for the shearer methane monitors would be accompanied by written verification from MSHA. Tr. 730, 738. Robertson testified that Respondent never received verification in writing on this issue until the issuance of the citation. Tr. 738-41.

Robertson further testified that two years ago, Webb and Robertson determined that installing the light required partially dismantling the shearer, and therefore, any necessary alterations to the alarm light would occur when the shearer was rebuilt for another mining panel.

[23] Both Robertson and Bretzman referred to a prior similar citation. Tr. 728-30, 749-50. Bretzman testified that the alarm light in the prior instance was on a stage loader, and Robertson testified that the citation was for a monorail alarm light. *Id*. The particular equipment is not determinative in the present case.

Tr. 730-32, 749-50. Robertson, however, admitted that Respondent did not have to rebuild the shearer to install the light for abatement purposes. Tr. 752.

Robertson relayed his conversations with Cripps and Webb to Bretzman. Tr. 733, 739-40.

B. Analysis and Disposition

1. Respondent had Adequate Notice of the Requirements for § 75.342(b)(2)

Respondent argues that it did not have fair notice of the standard before receiving the citation. R. Br. 25-27. Respondent asserts that a previous MSHA inspector (Cripps) assured Respondent that a change in policy on the methane monitors would be accompanied by written notification. Tr. 730, 738. Respondent contends that Cripps' assurance, coupled with a lack of previous citations on the longwall shearer's methane monitor, establish that Respondent did not receive fair notice of the standard.

Due process considerations prevent the adoption of an agency's interpretation of a regulation that "fails to give fair warning of the conduct it prohibits or requires." *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013)(citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). The Commission has held that adequate notice is provided where a regulation has clear meaning and is not inconsistent with MSHA's Program Policy Manual (PPM). *Jim Walter Res*., *Inc*., 28 FMSHRC 579, 594-95 (Aug. 2006). Where a regulation is not expressly defined, the Commission has found adequate notice where clarification is found in MSHA policy publications. *See e.g., Dolese Brothers Co*., 16 FMSRHC 689, 693-94 (Apr. 1994)(where MSHA's PPM and a policy letter clarified the applicable standard).

Here, the language of the regulation is clear when it states that the "[t]he warning signal device of the methane monitor shall be visible to a person who can deenergize electric equipment or shut down diesel-powered equipment on which the monitor is mounted." § 75.342(b)(2). This standard is further explained in MSHA's Program Policy Manual (PPM) for machines operated by remote controls. Thus, even assuming some ambiguity in the regulatory language, the PPM was sufficiently clear regarding the requirements of the standard. *See Coal Employment Project v. Dole*, 889 F. 2d 1127, 1130 n. 5 (D.C. Cir. 1989)(PPM, although not binding, is an accurate guide to current MSHA policies and practices); *accord Mettiki Coal Corp*., 13 FMSHRC 760, 766-67 & nn. 6 & & (May 1991). For such machines, the PPM requires that methane warning devices be installed "in such a location that [it] can be readily seen or heard by…the machine operator…at *all* locations from which the machine is operated." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75.342 at 41(2015) (emphasis added). I find that the plain language of the regulation, coupled with the accompanying explanation in the PPM, provided clear and fair notice to Respondent regarding the interpretation of the cited standard. That is, MSHA requires that methane warning devices for remote-controlled machinery be visible from all locations from which the operator is located. 30 C.F.R. 75.342(b)(2).

Respondent's argument that it detrimentally relied on inspector Cripps' assurances that a change in policy on the methane monitors would be accompanied by written notification is not persuasive. Essentially, Respondent argues that MSHA should be estopped from issuing a

citation on the methane warning light on the longwall shearer because of Cripps' assurances and lack of previous enforcement. The Commission has declined to apply equitable estoppel against the government, or in this case, its agents. *King Knob Coal Co*., 3 FMSHRC 1417, 1421 (June 1981). Generally, "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law." *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1981). The Commission has held that "an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Mach Mining*, 34 FMSHRC 1769, 1774 (Aug. 2012) (citing *Austin Powder Co*., 29 FMSHRC 909, 920 (Nov. 2007)).

I have credited Bretzman's testimony that MSHA requires visible alarm warnings on methane monitors on longwall shearers. Bretzman recognized an alleged violation and verified the applicability of the regulation with his supervisor at MSHA. Tr. 444. I have found that the plain language of the regulation, coupled with the accompanying explanation in the PPM, provided clear and fair notice to Respondent regarding the interpretation of the cited standard. Accordingly, I conclude that Respondent had adequate notice of the requirements of 30 C.F.R. § 75.342(b)(2).

2. The Violation of § 75.342(b)(2)

Section 75.342(b) provides that the warning signal device of the methane monitor must be visible to a person who can de-energize the equipment on which the monitor is mounted. 30 C.F.R. § 75.342(b)(2). The regulations require the monitor to give this alarm signal when methane concentrations reach one percent. 30 C.F.R. § 75.342(b)(1). At that point, the miner must de-energize or shut down the equipment. 30 C.F.R. § 75.342(b)(2).

The Commission and the D.C. Circuit have previously examined the application of this regulation to longwall methane monitors. *Consolidation Coal Co*., 136 F.3d 819 (D.C. Cir. 1998) affirming *Consolidation Coal Co*., 18 FMSHRC 1903 (Nov. 1996). The D.C. Circuit determined that a visible alarm is essential because it alerts miners of dangerous concentrations of methane should other safety measures fail. *Id.* at 822. The warning functions as a fail-safe to ensure that miners respond to potentially hazardous situations. *Id.* at 823. The D.C. Circuit Court concluded that the Secretary's interpretation of § 75.342(b) which requires that a warning signal be visible at all times to a miner who can "react to increasing methane levels and, if necessary, de-energize mining equipment," was appropriate. *Id.* at 822.

Respondent attempts to distinguish the present case from *Consolidation Coal* on the basis of notice. R. Resp. Br. 25-26. In that case, the Commission found actual notice where MSHA reiterated the requirement in seven meetings over the course of one year. *Consolidation Coal, Co*., 18 FMSHRC at 1907. Those facts do not prevent a finding of fair notice in the present case, for the reasons explained above.

I credit Bretzman's testimony that the longwall shearer operators would not be able to see the alarm light from various positions. Tr. 446. Although Key described the warning light as bright, both he and Bretzman testified that it was quite small, only up to an inch in circumference. Tr. 412, 661. Furthermore, the control panel in which the alarm light was

contained had raised edges, which further limited its visibility at certain angels. Tr. 673-74. Finally, Bretzman credibly testified that the operators worked up to twenty-five feet from the warning light. Tr. 415.

Respondent argues that because Bretzman did not observe an operator working thirty feet from the monitor, the citation was inappropriate. R. Resp. Br. 26. However, Key corroborated Bretzman's testimony that the operators were not stationary during mining. Tr. 664-668. Further, Key acknowledged that the alarm was not in the line of sight of the operators at certain locations or angles. Tr. 666. Bretzman determined that the operator could not see the monitor during normal mining operations unless he was in the direct line of sight of the readout. Tr. 409, 412, 441. Therefore, I find that the Secretary proved by a preponderance of the evidence that the small methane alarm light on the longwall shearer was not visible from all locations where the machine was operated, to a person, especially a machine operator working up to twenty-five feet from the control panel, who could de-energize the equipment. Indeed, a light the size of a quarter and located within the enclosure described, would not be visible at much shorter distances. Respondent failed to rebut the Secretary's case by establishing that a person could see the alarm light from all locations from which the machine was operated remotely. Further, Bretzman could not recall anyone from Respondent telling him that the indicator light could be seen by a person who could de-energize the machine. Tr. 446. Accordingly, I find a violation of § 75.342(b)(2).

Bretzman determined that because production had halted and because he had no evidence of methane present at the time of the citation, the violation was unlikely to result in an injury. Tr. 410, 420. Under extant Commission precedent, I lack authority to modify the non-S&S designation and make it S&S.[24]

3. Respondent's Negligence was Appropriately Designated as Low

The Secretary argues that Respondent's negligence was low, citing the lack of previous enforcement as a mitigating factor in the inspector's analysis. P. Post Hr'g Br. 3-4 (quoting *Mach Mining, LLC*, 34 FMSHRC 1769, 1744 (Aug. 2012), citing *Austin Powder Co*., 29 FMSHRC 909, 920 (Nov. 2007)). In determining the weight to be given the lack of enforcement, I note that Commission judges are not bound to apply the levels of negligence definitions that are designated by potential mitigating circumstances in the Secrtary's regulations. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. While the Commission has held that inconsistent enforcement is not a defense to liability, it is relevant to the determination of negligence, and may be cited as a mitigating factor in reducing said negligence. *Mach Mining*, 34 FMSHRC at 1744 (citing *King Knob Coal Co*., 3 FMSRHC 1317, 1422 (June 1981), *aff'd sub nom Mach Mining, LLC v. FMSRHC*, 809 F.3d 1259 1259 (D.C. Cir. 2016) (inconsistent enforcement of a regulation may reduce the level of negligence and detrimental reliance on MSHA's incorrect interpretation of a regulation is properly considered in mitigation of penalty).

Both this citation and the previous citation involve violations of the same standard. While the similarity between the citations might result in comparable negligence determinations, the

[24] *Mechanicsville Concrete, Inc. t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996).

precedent cited above permits consideration of inconsistent prior enforcement at this juncture to determine the appropriate level of negligence. I credit Robinson's testimony that MSHA overlooked the violation of §75.342(b)(2) on the instant shearer for years before issuing a citation on the date of the inspection. Tr. 725-27. Given the lack of previous enforcement, I find that the Secretary properly designated Respondent's level of negligence as low.

4. Civil Penalty for Citation No. 8432319

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The parties stipulated that the originally proposed penalty of $117 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and negligence determinations. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $117 civil penalty against the Respondent for Citation No. 8432319.

VII. Citation No. 8439454

A. Findings of Fact

1. Inspector Stanley's Testimony

On August 15, 2013, Stanley returned to the mine to conduct a regular inspection of the surface of the property, including any underground equipment found on the surface. Tr. 472. Stanley inspected a Kubota 10, a two-seater diesel Road Taxed Vehicle (RTV), used to transport men or material underground. Tr. 473. Stanley did not know who operated the Kubota, but thought that it was Schilke. Tr. 499. Stanley examined the steering components of the vehicle as the operator turned the steering wheel. Tr. 474, 482. Stanley inspected the Kubota again in the repair shop. Tr. 486. Stanley testified that both times, he observed impermissible play in the lower left ball joint. *Id*.

Stanley observed and concluded that there was excessive wear and play in the lower left ball joint for three reasons. Tr. 474-75, 482. First, the tires did not simultaneously turn with the steering wheel. Tr. 474-75, 508. Stanley described this as hesitation or delay in the steering. Tr. 474-75. Second, there were areas of shine on the ball joint. Tr. 474, 508. Stanley observed that the shiny area was more than an eighth of an inch. Tr. 483. He testified that this shine occurs when the tie-rod end wears on the ball. Tr. 474. Finally, Stanley observed that there was in excess of an eighth of an inch of play on the joint. Tr. 474, 480.

Stanley did not use a dial indicator or any other tool to assist his measurements during either inspection. Tr. 483, 487, 507. Instead, he examined for separate movement in steering components. Tr. 474-75, 487, 498. Stanley testified that an excess of an eighth of an inch of play contravenes MSHA out-of-service criteria. Tr. 507-08. Stanley was unable to verify where the standard for an eighth of an inch of play could be found in writing. Tr. 511-12. Stanley further testified that the day before the hearing, he learned from Kubota's service personnel that a steering linkage component with any play must be replaced immediately. Tr. 475, 507, 510.

After observing excessive wear on the ball joint of a Kubota vehicle, inspector Stanley issued Citation No. 8439454 for a violation of 30 C.F.R. § 75.1914(a), which requires that all diesel equipment be maintained in proper operating condition. Tr. 465, 476. Stanley determined that the violation was S&S and contributed to a loss of steering hazard that was reasonably likely to result in a lost workdays or restricted duty injury for one miner as a result of Respondent's moderate negligence. P. Ex. 107; Tr. 476-77. The Secretary proposed a penalty of $1,026.

The Kubota was driven at speeds up to approximately 21 miles per hour (mph) in the mine. Tr. 500, 503. When underground, the Kubota was driven on a rough, concrete travel road, with potholes and a steep decline of approximately 3000 feet. Tr. 477, 501-02. Stanley described the slope as having at least an eight-percent grade. Tr. 478. He testified that an excessively worn and unrepaired ball joint will cause "the steer tire [to] most likely fold over and lay down… [resulting in a] complete loss of steering on the vehicle." Tr. 477. Stanley determined that such a hazard was likely to cause injury to the Kubota operator or one of the pedestrian miners clearing coal near the conveyor belt along the travelway. Tr. 477-79. The latter type of injury would result from the Kubota either striking a miner or pinching a miner against other structures. Tr. 478. Stanley testified that the brakes on the Kubota were in good working condition, and that operators generally drove at speeds consistent with road conditions. Tr. 499-500.

Stanley opined that the condition needed more than one day to develop. Tr. 479. He further testified that the wear would not likely be discovered during weekly inspections. *Id*. Stanley did not recall whether Respondent's miners made any statements about mitigating factors when he issued the citation. Tr. 488. Without evidence indicating how long the condition actually existed, Stanley classified the Respondent's negligence as moderate. Tr. 479.

The citation was abated later that day when the tie-rod end and the ball joint were replaced. Tr. 480, 488. Stanley did not take measurements after abatement, although he did go under the Kubota to examine the repair. Tr. 498.

2. The Testimony from Respondent's Witness

a. Schilke's Testimony

As noted, Schilke accompanied Stanley during the inspection. Tr. 560. Schilke testified that he did not recall if Stanley initially examined the vehicle. Tr. 563. Schilke then testified that Stanley observed the steering while Jeff Wilkins, the Kubota operator, was directed to turn the steering wheel. Tr. 560, 563-64.

According to Schilke, after Stanley's inquiry, Wilkins told Stanley that Wilkins had checked the Kubota prior to use and found no issues with the steering. Tr. 560-61, 624, 627. Stanley then directed Wilkins to drive the Kubota to the repair shop. Tr. 561-62. Schilke observed no problems with the steering as Wilkins drove the vehicle to the shop. *Id*., Tr. 624. At the shop, the vehicle was lifted and the ball joints were examined. Tr. 561, 567. There Schilke observed movement in the ball joint, although neither he nor Stanley used an instrument to quantify how much movement was present. Tr. 561-62, 567-68, 621, 625. Schilke opined that the

movement was less than an eighth of an inch, or less than the thickness of a quarter. Tr. 568, 622, 625. Schilke conceded that the movement would get worse over time if not repaired. Tr. 625.

Schilke testified that the Kubota that Wilkins drove was very similar to the Kubota that Schilke drove. Tr. 565-66; *see* R. Ex. 5 (photograph of Schilke's Kubota). Schilke described the brakes on the Kubotas as "pretty good." Tr. 566. The Kubotas have hydrostatic transmissions, which slow down the vehicles when pressure is removed from the gas pedal. *Id*. Finally, Schilke described the concrete slope in the mine as rougher than an interstate, with a rutted and grooved surface. Tr. 636.

When asked on direct examination to offer any mitigating circumstances, Schilke testified that the movement of the ball joint had little impact on the steering. Tr. 569. He also mentioned that any impact on steering was further reduced by the soft tread of the tires on the soft clay floor of the mine. *Id*. Finally, Schilke reiterated that Wilkins had driven the Kubota down to the seals of the mine and back, and that Wilkins had found no difficulty with steering. *Id*.

Schilke also testified that he spoke with a mechanic for Respondent after Stanley issued the citation. The mechanic did not testify at hearing. Schilke testified that the mechanic told him that he would not have allowed an unsafe Kubota to go underground. Tr. 627, 637. According to Schilke's testimony, the mechanic was of the opinion that the Kubota was safe because Wilkins had told him that the steering worked fine. *Id*. Schilke further testified that the mechanic told him that although the Kubota manufacturer wants no movement in the ball joint, in practice, vehicles that are used in a mine experience similar movement. Tr. 561-62, 566. Schilke later conceded on cross-examination that the steering in a private vehicle is very different from the steering in a Kubota. Tr. 620.

b. Jeff Wilkins' Testimony

Jeff Wilkins was a mine examiner for Respondent.[25] Tr. 683. Wilkins operated the Kubota in question every day. Tr. 685-686, 697. On the date of the inspection, Wilkins conducted a pre-operational check of the Kubota. Tr. 687. This check included an examination of the steering, which he performed by turning the wheel back and forth to ascertain any slack.[26] Tr. 687-88. Wilkins stated that a visual inspection of the ball joint while the wheel was turned was not necessary to detect movement in the ball joint. Tr. 688-89. Instead, the movement would manifest as play in the steering wheel. *Id*. Wilkins testified that without turning the wheel, he would not notice wear in the ball joint, unless it was substantial. Tr. 699. Wilkins claimed that he

[25] Wilkins was employed with Respondent for seven and a half years. Tr. 683. Apart from his position as an examiner, Wilkins worked as an outby laborer and foreman. *Id*. Prior to his employment with Respondent, Wilkins worked at three separate mines: Willow Lake Mine, Eagle Valley Mine, and Sahara Mine. Tr. 683-84. Wilkins was a certified examiner with an electrical card. Tr. 685.

[26] When the wheel turned, suspension rose and descended, pivoting the ball joint that was threaded in the tie rod. Tr. 701-03. The ball joint had a nut and cotter pin that were intact. *Id*.

would notice gradual slack in the Kubota's steering over time. Tr. 698. Wilkins further testified, consistent with Schilke's account, that Wilkins did not notice any problems with the steering during his pre-operational check of the vehicle. *Id*.

After concluding his pre-operational check, Wilkins drove his Kubota underground for approximately one hour. Tr. 689-90. He described the underground path driven as a fairly steep slope, with smooth and rough patches, with rough conditions encountered where rocks fell off beltlines and along intake ways. Tr. 695-96. He testified that the Kubota was a slow-moving vehicle and he experienced no problems with the steering or the brakes. Tr. 690-91, 701.

Wilkins contrasted his trip on the day of the citation with an earlier experience that he had driving a Kubota with faulty steering. Tr. 692. In the later instance, Wilkins noticed the steering arm loosen and jerk when he drove over a rough area. *Id*. He testified that without repair, such a steering arm may disconnect from the steering jack, forcing the vehicle to halt instantly. *Id*. Wilkins testified that the Kubota automatically stops when the wheel is turned and the operator removes his foot from the gas. Tr. 693.

Contrary to Schilke's testimony, Wilkins testified that he did not operate the Kubota around Stanley. Tr. 696. Rather, Wilkins testified that he left the Kubota after returning to the surface. Tr. 693-94. Wilkins was not present for Stanley's initial inspection of the vehicle or for the inspection that occurred in the repair shop. *Id*. When Wilkins returned to the vehicle, Stanley and Schilke had already decided to relocate the vehicle to the repair shop. *Id*.

B. Analysis and Disposition

1. The Violation of § 75.1914(a)

Section 75.1914 imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the standard. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979). The Kubota cited by inspector Stanley was mobile equipment. It is undisputed that such mobile equipment was in service when cited. The dispute is whether the Kubota was maintained in safe operating condition. I find that the Kubota was not maintained in safe operating condition and was not removed from service. Accordingly, I find the violation.

Equipment is in unsafe operating condition when a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Ambrosia Coal & Construction*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp*., 4 FMSHRC 2128, 2129 (Dec. 1982) (applying identical standard in underground coal mines)).

The Commission has recognized that movement in steering linkage ball joints alone can rise to the level of a hazardous defect. *See LaFarge North America*, 35 FMSHRC at 3500 (applying § 56.14100(c), which concerns defects that make continued operation hazardous, and remanding to determine amount of movement in ball joints and whether such amount constitutes

a hazardous defect). Stanley credibly testified that MSHA finds violations where there is excess play in the ball joint. Tr. 507. Both Stanley, and through Schilke's hearsay admission, Respondent's mechanic, reported that the Kubota manufacturer requires no movement in the ball joint. Tr. 475, 561. In addition, I take administrative notice of the North American Standard Out-of-Service Criteria, issued by the *Commercial Vehicle Safety Alliance*.[27] This manual provides that a vehicle is to be taken out of service if any of its ball and socket joints exhibit "any motion, other than rotational, between any linkage member and its attachment point of more than 1/8 inch (3.2 mm) measured with hand pressure only" or if any tie rod exhibits "any looseness in any threaded joint." *Commercial Vehicle Safety Alliance*, North American Standard Out-of-Service Criteria, at 44 (revised April 2010).

I credit inspector Stanley's testimony that there was impermissible movement in the lower left ball joint. A simple visual inspection by Stanley as the operator turned the wheel revealed a hesitation in steering, while the shine on the ball joint itself supplied physical evidence of wear. Tr. 474. Schilke corroborated the play in the ball joint when recalling the examination conducted in the repair shop. Tr. 561-62. The operator, Wilkins, used the Kubota after conducting a pre-operational examination, which he admits did not include a visual examination of the ball joint, and failed to reveal the play in the ball joint. Tr. 687-89.[28] Neither side disputes that, if left unchecked, the movement would grow worse over time. Tr. 477, 625. Accordingly, I find that excess play in the ball joint as visually observed by inspector Stanley constitutes a hazard making continued operation of the Kubota unsafe and requiring its removal from service.

I discredit the recollection of Respondent's witnesses concerning the ball joint examination. Respondent's witnesses contradict themselves and each other with regard to the Kubota's inspection. Schilke alleged that he could not recall Stanley's examination of the Kubota's steering, and then immediately proceeded to describe the inspection. Tr. 563-64. Although Wilkins did not remember participating in the inspection, both Stanley and Schilke confirmed the participation of Wilkins during Stanley's inspection. Tr. 482, 560-64, 693.

Based on my review of the testimony, I find that the Secretary proved by a preponderance of the evidence that Respondent violated § 75.1914(a) by failing to maintain the Kubota in safe operating condition, and by failing to remove it from service.

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[27] This manual is relied on and cited by the United States Department of Transportation. 49 C.F.R. Pt. 385.4(b)(1)(2013); 79 F.R. 27766, (May 15, 2014). Under Commission precedent, judicial notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony, but is commonly known, or can safely be assumed, to be true. *Union Oil*, 11 FMSHRC 289, 300 n.8 (Mar. 1989).

[28] Although Respondent was not cited for an inadequate pre-operational inspection, I have determined in previous cases that a proper pre-operational inspection of a ball joint requires one person monitoring the steering linkage while another person moves the steering wheel. *Extra Energy*, 36 FMSHRC 2733, 2743 (Oct. 2014)(ALJ). Wilkins failed to conduct a visual inspection of the ball joint while another person turned the wheel, or vice versa.

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

For the reasons explained above, I find the underlying violation of mandatory safety standard § 75.1914(a).

b. The Violation Contributed to a Discrete Measure of Danger to Safety

My finding of a violation supports a finding of a discrete measure of danger to safety as the standard violated requires a failure to maintain mobile equipment in safe operating condition. Accordingly, if the Kubota is not maintained in safe operating condition, there is necessarily a discrete measure of danger to safety. This conclusion is supported by the fact that MSHA, the Kubota manufacturer, and the North American Standard Out-of-Service Criteria manual require that vehicles with ball joints exhibiting excessive wear must be immediately repaired or removed from service. Tr. 507, 475. Furthermore, Stanley credibly testified that such a ball joint, if left unrepaired, would fail and result in compromised steering and control over the vehicle. Tr. 477. Accordingly, I find that the second *Mathies* factor is satisfied.

c. The Violation Contributed to a Hazard That was Reasonably Likely to Result in Injury

Regarding the third *Mathies* factor, the Secretary demonstrated that the hazard contributed to by the violation, i.e., loss of steering of a Kubota within the mine, was reasonably likely to result in an injury. Schilke and Wilkins testified that Kubotas are slow to a stop when pressure is removed from the gas pedal. Tr. 499, 692-93. However, a Kubota driven at speeds up to approximately twenty-one miles an hour on rough mine roads at an eight degree slope with undiscovered excess wear on the ball joint, is reasonably likely to contribute to compromised steering and loss of control of the Kubota, which hazard is reasonably likely to result in injury to the driver or injury to a miner working nearby. The driver is exposed to injury due to the excessive wear in the ball joint, which contributes to a compromised or loss-of-steering-control hazard that would likely result in collision with an object or rib and injury to the driver. Further, Stanley's testimony credibly establishes that miners working along the conveyer belt adjacent to the travelway were exposed to injury from a collision due to the loss of control of the Kubota. In these circumstances, the loss-of-control hazard contributed to by the violation, was reasonably likely to result in injury during continued operation of the Kubota with excessive wear in the ball joint.

d. There was a Reasonable Likelihood That the Injury in Question Will Be of a Reasonably Serious Nature

With regard to the fourth *Mathies* factor, I find a reasonable likelihood that any such injury would be of a reasonably serious nature. The loss-of-control hazard contributed to by the failure to maintain the Kubota in safe operation condition was reasonably likely to result in a collision with associated serious or fatal injury to the Kubota operator or pedestrian miners working nearby. The Kubota is large enough to seat two people and has a dump bed in the back.

See R. Ex. 5. A collision with a miner, the rib, or other equipment would likely be serious or fatal. A miner struck by the Kubota and pinned against the vertical supports within the mine would likely suffer serious injuries. Accordingly, the Secretary has shown a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious or fatal.

3. Respondent's Negligence was Appropriately Designated as Moderate

As discussed above, a reasonably prudent operator engaging in appropriate buddy-checks of steering linkage components should have been aware of the cited condition. Based on the testimony and briefs, I do not find considerable mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent's assertion that the soft floor of the mine would reduce the impact of malfunctioning steering is not persuasive. There was no evidence that the floor disturbed the speed or performance of a Kubota in safe operating condition. Therefore, I discredit Schilke's inference that the same floor would hinder a Kubota with compromised steering. Tr. 569. Further, the assertion that the Kubota's operator (Wilkins) noticed no defect in the steering that day does not eliminate the likelihood of the danger. Rather, the insufficient examination procedure supports at least a moderate negligence designation. Respondent's Kubota operator failed to perform any visual examination the vehicle, much less while another person turned the wheel. Tr. 699. In these circumstances, I find that the Secretary properly designated the Respondent's level of negligence as moderate.

4. Civil Penalty for Citation No. 8439454

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The parties stipulated that the originally proposed penalty of $1,026 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity, negligence, and S&S determinations. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $1,026 civil penalty against the Respondent for Citation No. 8439454.

VII. Citation No. 8452203

A. Findings of Fact

1. Inspector Horseman's Testimony

After observing a missing portion of an emergency lifeline, MSHA inspector Steven Paul Horseman[29] issued Citation No. 8452203 for a violation of 30 C.F.R. § 75.380(d)(7)(i), which

[29] At the time of hearing, inspector Horseman had been employed with MSHA for one year and eleven months. Tr. 515. Apart from a four-year stint with a phone company, Horseman had worked in mining since 1991. Tr. 516. He has experience in longwall and continuous mining and has held various positions, including equipment operator, examiner, IT specialist, electrician, and mine supervisor. *Id*.

requires that lifelines be installed and maintained throughout the entire length of the escapeway. Tr. 465, 476. Stanley determined that the violation was S&S and contributed to an inability-to-timely-escape hazard that was reasonably likely to result in injuries affecting thirty miners as a result of Respondent's moderate negligence. Tr. 156, 162-63. The Secretary proposed a penalty of $13,268.

On September 8, 2013, Horseman conducted an EO2 section 103(i) spot inspection, while being accompanied by safety manager Schilke. 30 U.S.C. §813(i); Tr. 517; P. Ex. 109. On the way toward headgate seven, Horseman lost sight of the lifeline along the East Mains travel road. Tr. 517. He asked Schilke to pull over and the two of them located the lifeline one entry over in the secondary escapeway. Tr. 517, 529. They returned to their vehicle and followed the lifeline until they found a break in the line. *Id*. The lifeline dangled from the ceiling, approximately five feet above the ground. Tr. 517-18. The other end of the line was located approximately 160 feet away. Tr. 518. Horseman measured the gap between the ends of the lifeline, while Schilke found replacement line. *Id*. With the extra line, Horseman and Schilke connected the two ends of the lifeline. *Id*., 525-26.

Horseman issued Citation No. 8452203 for a § 75.380(d)(7)(i) violation. Tr. 519. §75.380(d)(7)(i) requires lifelines to be installed and maintained throughout the entire length of the escapeway. *Id*. A lifeline is typically a durable, nylon rope. In the event of an emergency, a lifeline provides disoriented miners with a tactile method of escape if the entry fills with smoke. Tr. 520. The lifeline has cones and reflective lights that direct the miner towards the exit near the slope. Tr. 543-45; 30 C.F.R. § 75.380(d)(7)(iii-v).

Horseman opined that all lifeline citations are not automatically S&S. Tr. 526. He designated the instant violation as S&S because he determined that the violation contributed to a hazard that was reasonably likely to result in fatal injuries affecting 30 miners. Tr. 523-24. With respect to likelihood, Horseman testified that the lifeline would only be used in the event of an emergency. Tr. 523. If a fire or explosion occurred, Horseman testified that it would not be unusual for ventilation control devices to fail. *Id*. With failed ventilation, Horseman testified that miners would inhale toxic fumes from smoke, or find themselves in a buildup of carbon monoxide. *Id*. Even assuming sufficient time to don self-contained self-rescuers (SCSRs), Horseman noted the reduced efficacy of these devices should the miners panic or fumble during the emergency. Tr. 523. He recalled an incident from his own experience as a miner when a smoke-filled entry limited visibility to the point where "you could not see your hand in front of your face." Tr. 521. He testified that in such conditions, 160 feet of missing lifeline would prevent a miner from locating the other end of the lifeline and escaping the mine. *Id*. Additionally, he testified that the miners may not have been aware that the lifeline changed entries, which left them susceptible to further disorientation. Tr. 522. Given these conditions, Horseman believed that fatal injuries were reasonably likely. Tr. 523. With respect to the number of persons affected, Schilke informed Horseman that three loading crews comprised of ten miners apiece were working inby the missing lifeline. Tr. 524.

Horseman designated the Respondent's negligence as moderate. *Id*. He made this designation because he could not determine how long the condition existed. Tr. 524-25. He conceded that of the 35,000 feet of secondary escapeway, he found only 160 feet of the lifeline

that was missing. Tr. 542-43. He confirmed that Respondent held escape drills for miners to familiarize themselves with using the escapeways. Tr. 547. Additionally, Respondent's vehicles had tethers. *Id*. A tether allows miners to stay attached to one another in case a single miner grows disoriented. Tr. 547-49.

2. The Testimony from Respondent's Witnesses

a. Schilke's Testimony

Schilke confirmed that a portion of the lifeline was missing in the East Mains #1 travelway. Tr. 570-72. Schilke did not know how the condition occurred, or for how long it had existed prior to discovery by Horseman. Tr. 601-02. Schilke admitted that he traveled that route daily and had not discovered the condition. Tr. 615. The mine records did not contain any notations regarding the missing lifeline. Tr. 602. The cited condition was in an area where tractors were driven all day long, including the third-shift tractors, which had passed through the area before the inspection. Tr. 602-03. Schilke did not find the disconnected section of the lifeline and speculated that it could have been dragged away by a passing vehicle. Tr. 612-15. The remaining ends of the lifeline, normally at shoulder height, were on the ground. Tr. 613-14.

Schilke testified about the location of the missing lifeline. If one walked towards the exit of the mine, the lifeline primarily followed the direction of the travel road. Tr. 600. The travel road headed north before turning west into the #3 entry of the East Mains #1 route. *Id*. The lifeline did not turn with the travel road, but continued into the #2 entry before turning west. Tr. 601. This detour ran parallel to the travel road and past three crosscuts. Id. The gap in the lifeline occurred within this detour in the #2 entry. Tr. 578, 599-601. The detour turned south down the #29 crosscut to rejoin the travel road in the #3 entry. Tr. 597-601; *see* R. Ex. 11. A miner, who followed the lifeline into the #2 entry, needed to walk through two crosscuts to find the other end of the line. Tr. 574-75.

Schilke testified that the miners were aware of the detour because the lifeline had followed that path since the area was developed. Tr. 610. He conceded, however, that miners would not be expecting the section of the lifeline to be missing. Tr. 611. Schilke opined that miners, who encountered a gap in the lifeline, would continue forward following the flow of air rather than choose to retrace their path to rejoin the travel road. Tr. 608. However, he admitted that in an emergency, the direction of air can change, thus preventing miners from using air courses as directional indicators. Tr. 616. Nonetheless, he opined miners would know which direction they were walking because the mine graded up as it headed outby. Tr. 616-17.

According to Schilke, if the miner could not find the other end of the line, he or she would eventually hit stoppings placed west and north of the detour through the #2 entry.[30] Tr.

[30] There was a stopping in the #2 entry inby the # 29 crosscut, which prevented miners from walking further westward. Tr. 595-96. There were additional stoppings that blocked access to the crosscuts and entries to the north of the #2 entry. One of the stoppings in the crosscuts north of the #2 entry had a man door. Tr. 596. A man door allow miners to cross through a stopping. *Id*. During normal production, man doors are closed. Tr. 595-96.

596, 608. Thus, disoriented miners would eventually be forced to turn south or return east in the direction from which they came. Tr. 596-98, 608. When choosing between these options, Schilke opined that the miners would not return east in the direction from where smoke traveled. Tr. 608. The remaining direction, south, would lead the miners to the travel road. Tr. 596-97, 608.

The self-contained self-rescuers (SCSRs) are equipped to last from forty-five minutes to an hour. Tr. 617. Schilke recalled that the nearest self-rescuer caches were approximately 2,500 feet inby the missing lifeline, and 3,000 feet outby the missing lifeline. Tr. 640-42. As noted, the height of the mine is generally nine to ten feet. Tr. 619. Schilke estimated that it would take approximately an hour to travel about 5,700 feet, although some miners may move more slowly than others. Tr. 619, 637, 644. Additionally, disoriented or lost miners may take longer to reach a cache. Tr. 644-45. According to Schilke, the distance from the three working sections to the missing lifeline was 15,000 feet. Tr. 618. The distance between the missing lifeline and the slope exit of the mine was about another 15,000 feet. Tr. 617-18. On foot, it would take a miner nearly three hours to reach the slope from the missing lifeline. Tr. 619, 637.

Schilke opined that directional signals on the lifeline and Respondent's safety protocols reduced the danger of the violation. On either end of the missing lifeline section, Respondent's lifeline had cones and reflectors that indicated the direction towards the exit. Tr. 572-73, 614. The reflectors were visible in the cited area. Tr. 573-74. Reflectors were spaced every twenty-five feet and were attached to either a cone or the lifeline itself. Tr. 573. Schilke recalled that the cones were spaced every 100 feet. Tr. 573. The cones were situated on the lifelines so that a miner's hand would slide smoothly over the tip of the cone towards the base as the miner traveled towards the exit. Tr. 573. If a miner traveled in the wrong direction, the miner's hand would stop against the base of the cone. Tr. 573.

Additionally, Schilke testified that escaping miners would not rely solely on lifelines during an emergency situation. Tr. 609. He testified that in the event of an emergency, the ideal method for escape was by vehicle. Tr. 574, 604-05, 609. He further testified that an escaping vehicle would continue along the main travelway, rather than detour into the adjacent entry to follow the lifeline. Tr. 574. Depending on the level of smoke, however, Schilke was uncertain whether the vehicle could drive down the secondary escapeway. Tr. 611-12. Schilke opined that a pedestrian miner would exit the mine along the main travelway, rather than follow the lifeline. Tr. 574-576. He conceded, however, that a miner might become disoriented, panic, and become lost in an emergency. Tr. 611, 644-45.

Schilke confirmed that Respondent held escapeway drills every ninety days and instructed miners to use tethers to keep together during a mine evacuation. Tr. 603-605, 609, 611. Additionally, he testified that signs labelling the crosscut numbers would indicate a miner's location. Tr. 573-74. Schilke maintained that these precautions, combined with the miner's knowledge of the mine's topography and air flow, were sufficient for miners to find their way out of the mine in an emergency situation. Tr. 608-10.

B. Analysis and Disposition

1. The Violation of § 75.380(d)(7)(i)

Section 75.380(d)(7)(i) provides that a continuous directional lifeline must be installed and maintained throughout the entire length of each escapeway. 30 C.F.R. § 75.380(d)(7)(i). Neither side contests that a portion of the lifeline was missing. Tr. 572; *see* R. Ex. 14 (missing lifeline denoted in red). The missing portion of the line was approximately 160 feet. Tr. 518. A A missing portion or gap in the lifeline makes it non-continuous under the plain meaning of the standard and creates a violation of § 75.380(d)(7)(i).

Respondent argues that the violation was not S&S because the missing portion of the lifeline was relatively small compared to the full length of the line, and because additional safety measures were adequate to ensure the safe evacuation of the miners.

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

For the reason explained above, I find the underlying violation of mandatory safety standard § 75.380(d)(7)(i).

b. The Violation Contributed to a Discrete Measure of Danger to Safety

With regard to the second *Mathies* factor, the violation created a discrete safety hazard or measure of danger to safety. The Commission has found that an accurate description of the hazard contributed to by an inaccessible lifeline is "the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine." *Black Beauty Coal Co*., 36 FMSHRC 1121, 1124 (May 2014). This description supports the Commission's earlier understanding of the hazard as "miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape." *Cumberland,* 33 FMSHRC at 2346, *aff'd sub nom*., *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). I find that a 160-foot gap in the lifeline is a significant and substantial hindrance that contributes to the hazard of not being able to use the lifeline to escape the mine in an emergency situation.

Respondent argues that an S&S designation is inappropriate because 160 feet of missing lifeline is a small percentage of the length of the entire lifeline. R. Br. 20-21. The percentage of uninterrupted line is essentially immaterial to the impact that a 160-foot break in the line would have on escaping miners. In *Black Beauty*, the Commission found that 110 feet of inaccessible lifeline was reasonably likely to contribute to an inability-to-timely-escape hazard that would result in injury. *Black Beauty*, 36 FMSHRC at 1124-25. Given the greater length of missing lifeline in the present case, I find that 160 feet of missing lifeline supports my S&S finding for this violation.

Respondent also argues that its miners would use quicker alternatives to escape, and that their knowledge of the primary escapeway would keep them on the quickest path towards the exit, allowing them to disregard the lifeline entirely. I reject this argument. Although the Commission has not yet defined the weight that must be given to the presence of additional safety precautions, the Commission discounts the argument that additional safety measures prevent an S&S finding. See *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence of redundant safety measures has been consistently rejected as irrelevant); *Black Beauty*, 36 FMSHRC at 1125 n.5 (stating that additional safety measures do not prevent a finding of S&S); *Cumberland*, 33 FMSHRC at 2369 (stating that allowing redundant safety measures to provide a defense to a finding of S&S would defeat the purpose of any safety protection, and citing *Buck Creek*, 52 F.32 at 136). Thus, alternative safety protocols do not undercut the significant and substantial contribution that violations of mandatory standards have toward discrete safety hazards.

In the present case, I examine the impact of a missing lifeline on a miner that must rely upon said lifeline to quickly and safely exit the mine in an emergency situation. In short, I find that the hazard contributed to by the violation was the prevention of a quick escape from the mine by miners who were entitled to rely on a continuous lifeline when escaping the mine during an emergency. Accordingly, the second *Mathies* factor is satisfied.

c. The Violation Contributed to a Hazard That was Reasonably Likely to Result in Injury

I find that the violation contributed to the hazard that miners would become lost, disoriented, or otherwise unable to quickly escape from the mine because of a compromised lifeline, and that such hazard was reasonably likely to result in injury. The Commission requires its judges to examine the S&S factors for lifeline violations within the context of emergency conditions. *Cumberland,* 33 FMSHRC at 2357, *aff'd Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). The Commission has discussed different hazards that are reasonably likely to result in an injury because of a lifeline violation in an emergency situation. *Black Beauty*, 36 FMSHRC at 1125 (inaccessible lifelines contribute to injuries that are reasonably likely to result from hazards such as tripping or stumbling, an interruption of ventilation, miner panic and disorientation during an emergency, and excessive smoke filling a corridor as a result of an a fire inby). In the present case, should miners follow the lifeline into the secondary escapeway, and should the secondary escapeway fill with smoke, visibility may be completely compromised. Because the gap in the lifeline occurs within the secondary escapeway, miners will be unable to use the lifeline to navigate out of the secondary escapeway in conditions of reduced visibility, re-enter the primary escapeway and continue exiting the mine via the primary escapeway. Tr. 522; R. Ex. 11. Inspector Horseman testified that he personally experienced a situation where smoke within the mine was so thick that he could not see his hand in front of his face. Tr. 521. With such reduced visibility, locating a lifeline 160 feet away is a staggering and time-intensive obstacle to overcome. A miner with little to no visibility and no lifeline is likely to be disoriented or lost.

The Commission has discussed different ways a lifeline violation in an emergency situation was reasonably likely to result in injury. *Black Beauty*, 36 FMSHRC at 1125

(inaccessible lifelines contribute to injuries that may result from hazards such as tripping or stumbling, an interruption of ventilation, miner panic and disorientation during an emergency, and excessive smoke filling a corridor as a result of an a fire inby). Should ventilation fail in an emergency, miners may breathe toxic air or a buildup of carbon monoxide. Tr. 523. The miners carry portable ventilation self-rescuers that only last for forty-five minutes to an hour. Tr. 617. This time is reduced if the miners fumble or panic in an emergency. Tr. 523. In an emergency, time spent lost or disoriented due to a missing lifeline reduces precious air supply, may prevent miners from reaching the next self-rescuer supply cache, or may thwart them from escaping the mine entirely.

Respondent put on evidence that it has adequate safety protocols and training to ensure that miners will not panic in an emergency. Tr. 608-10. However, the Commission has reasoned that even experienced miners "panic and become disoriented in an emergency." *Black Beauty*, 36 FMSHRC at 1124. I find it likely that panic will exacerbate the consequences of reduced visibility or limited ventilation.

I conclude that a miner who becomes lost, disoriented, or delayed in locating a missing portion of the lifeline in order to escape during a mine emergency is reasonably likely to suffer injury from smoke inhalation, carbon monoxide inhalation, or entrapment during the emergency. Accordingly, the third *Mathies* factor is satisfied.

d. There was a Reasonable Likelihood That the Injury in Question Will Be of a Reasonably Serious Nature

With regard to the fourth *Mathies* factor, any such injury from a delayed escape from the mine is reasonably likely to be of a serious nature. *Black Beauty*, 36 FMSHRC at 1125 ("The hazard of delayed or no escape at all due to an inaccessible lifeline in an emergency is reasonably likely to result in serious or fatal injuries"); *Cumberland*, 717 F.3d at 1029 ("[T]he lifeline violations at issue here would delay miners from escaping from an emergency and that such a delay would be reasonably likely to cause serious injuries or death"). The hazard of a delayed escape is supported by inspector Horseman's testimony. He reasonably determined that limited air supply from the self-rescuers in a corridor filled with smoke and carbon monoxide, miner panic and disorientation during an emergency, and reduced visibility are reasonably likely to inhibit a timely escape from the mine. Tr. 523-24. I credit his testimony that the prolonged inhalation of smoke and carbon monoxide during such an escape from the mine is reasonably likely to be of a reasonably serious nature or fatal. *Id*. Accordingly, the Secretary has demonstrated a reasonable likelihood that any injury resulting from the hazard contributed by the violation would be serious or fatal.

3. Respondent's Negligence is Raised from Moderate to High

I find that Respondent's negligence should be raised from moderate to high. Respondent knew or should have known of the missing lifeline and there are no mitigating circumstances. Initially, I note that escapeways must follow "the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). The lifeline followed a circuitous route used by drivers to avoid a belt drive that was once installed in

the main travelway. Tr. 610. However, at the time of the citation, the belt was no longer within the travelway. Tr. 610. Respondent's failure to move the line to the primary travelway indicates that Respondent paid little to no attention to the path of the line after the belt drive was removed. Furthermore, Respondent failed to discover the condition of the lifeline for an undetermined length of time.

The violation before me presents more than a lifeline that was merely in poor condition. A portion of the primary escapeway did not have a lifeline because the lifeline took a detour into the secondary escapeway that was costly in both time and distance for a miner escaping on foot. Within that detour, 160 feet of lifeline was entirely absent. Schilke testified that he traveled the route daily and did not notice the condition. Tr. 615. Respondent's inability to definitively explain why the line was missing or for how long the violation existed is not a mitigating circumstance, but instead, is further evidence of a cavalier lack of care towards a condition that is essential to the survival of miners in an emergency situation. Further, Respondent's ignorance raises the concern that a similar section of the lifeline could go missing again without discovery. Finally, Respondent has not justified its failure to maintain an intact lifeline -- a failure that jeopardized the lives of thirty miners. I find that the Respondent should have known of the violative condition and corrected it immediately as a top priority. Accordingly, Respondent's negligence is raised from moderate to high.

4. Civil Penalty

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The Secretary originally proposed a penalty of $13,268 and the parties have stipulated that the total proposed penalty from all seven citations equaling $39,500 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's S&S determination. I have modified MSHA's negligence determination from moderate to high for the reasons stated above. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a $25,000 civil penalty against the Respondent for Citation No. 8452203. Respondent's new total penalty from the combined citations is now $32,636. Given that this is lower than the total amount which Respondent stipulated will not affect its ability to remain in business, I find that this increase in penalty is appropriate and justified for the gravity and severity of the violation and would not affect Respondent's ability to remain in business.

VIII. ORDER

WHEREFORE, the joint motion for settlement presented at hearing is **GRANTED**.

It is **ORDERED** Citation No. 8445731 be **MODIFIED** to reduce the level of negligence from "moderate" to "low."

It is **ORDERED** Citation No. 8445758 be **MODIFIED** to reduce the level of from "moderate" to low," and

It is **ORDERED** Citation No. 8451650 be **MODIFIED** to reduce the number of persons affected from "twelve" to "six."

It is further **ORDERED** that Citation No. 8451651 be **MODIFIED** to reduce the level of negligence from high to moderate.

It is **ORDERED** that Citation No. 8439446 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8432319 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8439454 is **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8452203 be **MODIFIED** to raise the level of negligence from moderate to high.

It is further **ORDERED** that the operator pay a total penalty of $43,280[31] within thirty days of this decision.[32]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

[31] As noted herein, I assess a penalty of $5,081 for Citation No. 5481651, $1,412 for Citation No. 8439446, $117 for Citation No. 8432319, $1,026 for Citation No. 8439454, and $25,000 for Citation No. 8452203.

[32] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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June 6, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MINDY S. PEPIN, Complainant, v. EMPIRE IRON MINING PARTNERSHIP, Respondent.	DISCRIMINATION PROCEEDING: Docket No. LAKE 2015-386-DM MSHA Case No. NC-MD 15-02 Mine: Empire Mine Mine ID: 20-01012

DECISION

Appearances: Suzanne F. Dunne, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, on behalf of Complainant

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Respondent

Before: Judge Barbour

This case is before me upon a complaint filed by the Secretary of Labor ("the Secretary") on behalf of Mindy Pepin pursuant to the interference provision of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "the Act"), 30 U.S.C. § 815(c), and on an amended complaint seeking the assessment of a civil penalty filed by the Secretary against Empire Iron Mining Partnership ("Empire Iron") pursuant to Sections 105 and 110 of the Act, 30

U.S.C. §§ 815 and 820.[1] On December 2, 2014, Pepin filed a complaint with the Mine Safety and Health Administration ("MSHA") alleging that her shift supervisor, Tim Hooper, confronted her about a safety concern she raised and accused her of using safety to bottleneck production. On April 6, 2015, the Secretary filed this action on behalf of Pepin alleging that "Pepin was illegally interfered with by [Empire Iron] when she was confronted and intimidated by a management official for engaging in activities protected by [the Act]." Sec'y Complaint at 2.

The Secretary proposes a civil penalty of $20,000 for Empire Iron's alleged violation of section 105(c)(1) and an order granting Pepin unspecified monetary compensation for pain, suffering, and emotional distress. Additionally, the Secretary requests a finding that Empire Iron unlawfully interfered with protected activity, an order that the company cease and desist from the unlawful interference, an order that the company's mine superintendent read a notice to all miners informing them of their 105(c) rights and of the company's 105(c) violation, and an order that the company post a written copy of that notice to the mine bulletin board for a period of one year.

The case was assigned by the Chief Judge to the court, and the parties presented testimony and documentary evidence at a hearing on January 20, 2016, in Marquette, Michigan. For the reasons that follow, the court concludes that Empire Iron interfered with the rights of Pepin under the Mine Act in violation of section 105(c).

I. STIPULATIONS

1. At all times relevant to this proceeding, [Empire Iron] did business and operated the Empire Mine . . . and associated processing plants and is . . . an "operator" as defined in Section 3(d) of the Act. . . .
2. The subject Empire Mine wherein [Empire Iron] operates the surface mine . . . is a "mine" as defined in Sections 3(b) and 4 of the Act. . . .

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[1] Section 105(c)(1) states, in part:

> No person shall discharge or in any manner discriminate against or . . . cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner* . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(a) requires the Secretary to advise the operator of the amount of the civil penalty proposed for an alleged violation of section 105(c)(1), and section 110(a)(1) requires the Commission to assess a penalty if a violation of section 105(c)(1) is found to have occurred. 30 U.S.C. § 820(a)(1). Section 105 mandates the assessment of a penalty for a violation of the Act, and Section 110(i) sets forth criteria the Commission must consider in assessing any such penalty. 30 U.S.C. § 820(i).

3. At all times relevant herein, Mindy S. Pepin . . . worked at . . . Empire Mine and was a "miner" as defined in Section 3(g) of the Act. . . .

4. Empire Mine is subject to the jurisdiction of the [Act]. . . .

5. Empire [Mine] is a large open pit mine near Ishpeming, Michigan. Empire [Iron] produces iron ore pellets for use in the steelmaking industry.

6. Pursuant to Section 113 of the Act . . ., the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

7. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

8. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

9. [Empire Iron's] operations affect interstate commerce.

10. On the morning of October 31, 2014, an alert generated by the ThorGuard lightning detection system was "cleared" and the mine returned to full operating mode.

11. On November 2 and 3, Ms. Pepin had recorded the clearing of a lightning red alert on what [are] known as "Take 5" cards.[2] These cards were signed by Mike Gauthier who made Tim Hooper aware of the notations. Copies of such cards are identified as Exhibit G-1 and may be admitted into evidence.

12. A section 103(g) complaint was filed concerning the issue.[3] On November 3-4, MSHA Inspector Ernie Letson investigated the Section 103(g) complaint concerning the clearing of the lightning red alert. A copy of such complaint as presented to the mine is identified as Exhibit G-2 and may be admitted into evidence.

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[2] A red alert indicates the potential for lightning in the area.

[3] Section 103(g)(1) of the Act states, in pertinent part:

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

30 U.S.C. 813(g)(1).

13. On November 4, 2014, after extensive interviews of hourly and management personnel, Mr. Letson issued a notice of negative findings[4] to Steve Baril, who forwarded it to Tyson Murphy, who forwarded it to the Mine Operations Supervisory team, including Tim Hooper, Ms. Pepin's direct supervisor. A copy of the negative findings [is] marked as Exhibit G-3 and may be admitted into evidence.

14. The Secretary has no independent knowledge of whether or when Ms. Pepin was informed of the outcome of the Section 103(g) complaint she filed related to the ThorGuard lightning detection system. Pursuant to MSHA requirements, MSHA investigators routinely inform company management and union officials of results of hazard complaints. MSHA does not routinely inform complainants of results of hazard complaints.

15. Mr. Hooper gave a copy of the findings to Ms. Pepin on the evening of November 4, 2014 before the start of her shift.

16. Ms. Pepin and Chad Filizetti then went to Mr. Hooper's office for a discussion. The nature and content of such discussion is at issue in this case.

17. On December 2, 2014, Ms. Pepin filed a complaint with the Secretary of Labor charging discrimination pursuant to Section 105(c)(l) of the Act.

18. The total proposed penalty for the citations at issue ($20,000) will not affect Respondent's ability to continue in business.[5]

J-Ex. 1.

II. THE TESTIMONY

1. Background and the 103(g) Complaint

Empire Iron owns and operates two adjacent open pit iron ore surface mines, the Empire Mine and the Tilden Mine, both of which are located in Marquette County, Michigan. Tr. 17, 93. At the Empire Mine, iron ore is extracted, crushed, and concentrated. Tr. 93. Mindy Pepin is a crusher operator at the Tilden Mine. Tr. 24. She has approximately six years of experience in her current position, and nearly eleven years of experience at the mines. Tr. 24.

In the early morning of October 31, 2014, at the end of a midnight shift, Pepin walked into the dispatch office at the mine and noticed a "red alert" on a computer screen for two different ThorGuard systems, which she believed indicated a "great potential for lightning." Tr.

[4] A notice of negative findings informs an operator at the end of a 103(g) complaint investigation that no violation of the Act or a mandatory health or safety standard has been found.

[5] No citation or citations were actually issued. Rather, the Secretary seeks the assessment of a $20,000.00 penalty for the company's violation of the Act in an amended complaint. Sec'y Amended Complaint at 3.

24-25. The ThorGuard system monitors electrical activity in the atmosphere in order to assess the potential for a lightning strike at the mine. Tr. 94. Witnesses for both the Secretary and the company testified that it was snowing that day. Tr. 25, 96. However, Pepin also testified to seeing thunder and lightning around the start of her shift. Tr. 25, 96.

Pepin maintains that up until that night "the ThorGuard system was used as … the holy grail," meaning if there was a red alert, the company evacuated the areas that could be affected by lightning. Tr. 27. However, in this instance, the company "disregarded the red alert" and informed employees at the mine that they could continue working in the affected area. Tr. 26-27. Pepin was concerned about employees working on the ground, especially near a blast pattern, or in areas where they might be handling energized cables, because the ThorGuard system was still indicting the potential for a lightning strike, and lightning could cause explosives to detonate. Tr. 79.

When she entered the dispatch room, Pepin asked her supervisor Tyson Murphy, the section manager for mine production, why Empire Iron chose to disregard the red alert. Tr. 26, 92. Murphy testified that he provided Pepin with a 30 second explanation for why he did not believe there was a hazard. Tr. 98. Part of this explanation was that the ThorGuard system is prone to show false positives, especially when it is snowing, and all of the other evidence that the company looks to in these circumstances suggested that there was no lightning hazard.[6] Tr. 98.

Murphy described Pepin's demeanor during this conversation as "agitated" and "upset," and he believed that at the end of the discussion Pepin "still wanted to argue the point." Tr. 100. Murphy testified that Pepin turned around with a "humpf" and "stormed down the hallway" saying something he could not make out. Tr. 100. According to Jeffrey Delmont, a blasting supervisor at the mine who walked by her while she was leaving the office, Pepin said, "Fucking red is red." Tr. 116. Witnesses for the company admitted that as of October 31, there was nothing explicit in the electrical storm notification procedures available to employees at the mine dealing with ThorGuard system false positives. Tr. 109-10, 118-19, 130-31.

On the 2nd and 3rd of November, Pepin filled out a Take 5 card, a workplace inspection form on which employees may raise safety concerns with the company. Tr. 27-28, 100-01. On both dates, Pepin documented on the cards that management permitted employees to reenter the area affected by a potential lightning strike on October 31, even though the ThorGuard system was still displaying a red alert. Tr. 28; Sec'y Ex. 1. At the end of each shift, Pepin placed the cards in a box, where they would be picked up and reviewed by the shift supervisor. Tr. 29. Pepin testified that prior to this incident she had only written a safety concern on a Take 5 card three or four times over the course of approximately five years. Tr. 29.

[6] According to Murphy, none of the supervisors or dispatchers to whom he spoke observed lightning, nobody called in and reported seeing lightning, and an online lightning strike map indicated that the nearest lightning was in Texas. Additionally, Murphy and Jeffrey Delmont, a blasting supervisor at the mine, testified that ThorGuard and Weather Channel radar maps did not indicate any nearby thunderstorm activity. Tr. 97, 114-15.

Daniel Keranen, the area manager of mining operations, testified that it is the company's expectation that when employees raise safety issues on Take 5 cards, they will receive a response from management. Tr. 171. When asked whether management responds to these complaints, Keranen responded affirmatively, and clarified that the employee's supervisor may be the one to respond. Tr. 171-72. However, Keranen conceded that the company does not have any way of ensuring that supervisors respond, and therefore he could not say for sure how Take 5 complaints are addressed in practice. Tr. 172-73. Pepin testified that in the three or four prior instances in which she raised a safety concern on her Take 5 cards, she never received a response from management, nor had she received a response to the one additional concern she raised following her ThorGuard complaints. Tr. 58-59. She stated it was typical not to get an answer from the company. Tr. 58-59.

On the morning of November 3, shortly after turning in her Take 5 card at the end of her shift, Pepin contacted MSHA and made a complaint pursuant to section 103(g) of the Act raising the same concerns about the company sending miners back to work even though the ThorGuard system displayed a red alert. Tr. 29; Sec'y Ex. 2. Pepin testified that this was the first time she had ever made a safety complaint to MSHA. Tr. 36. On November 3 and 4, MSHA investigated the complaint, interviewing hourly and management personnel in the process. Tr. 112; Stip. 12. On November 4, MSHA issued a notice of negative findings for the allegations in Pepin's 103(g) complaint. Stip. 13; Sec'y Ex. 3. MSHA did not interview Pepin as a part of the investigation or inform her of its findings. Tr. 30. The inspector who investigated the incident personally delivered the findings to Steve Baril, a safety representative for the company. Tr. 122-23. Baril scanned the document and emailed the findings to supervisors Dan Keranen, Tyson Murphy, Dan Wegleitner, and Richard Carlson. Tr. 123. Baril claims he expected them to communicate the findings to the employees at the company through intermediate supervisors in toolbox meetings. Tr. 123-24. He also testified that supervisors often communicate the findings from an MSHA complaint inspection this way. Tr. 124.

2. The Ready Room Incident

On the evening of November 4, Mindy Pepin was seated in the employee's ready room in a building at the mine waiting to start her shift. Tr. 64. With her, at the time, was Chad Filizetti, a fellow miner and her then-fiancé. Tr. 64. At least two or three other miners were also in the room. Tr. 32, 64. Tim Hooper, her shift supervisor for the night, entered the ready room at approximately 10:10 p.m., walked up to Pepin, and gave her a piece of paper containing MSHA's negative findings on her 103(g) complaint. Tr. 31, 65, 137-38. According to Pepin, Hooper "shoved" the paper in her face and said, "Here, I thought you'd like to see this." Tr. 31. He then left the room and went back to his desk. Tr. 139; see also Tr. 65.

Hooper testified that he merely "handed" the paper to Pepin by "set[ting] it on the counter right in front of" her and Filizetti. Tr. 137, 139. Then, in Hooper's account, he stated "Here[,] . . . I thought you'd be interested in seeing this. This is the findings from MSHA on the ThorGuard." Tr. 139. According to him, he did not stick around to have a discussion "because [he] knew it would probably escalate into an argument" which he wished to avoid. Tr. 139-40.

Pepin testified that she was taken aback by Hooper's decision to give her the complaint because it was not a normal practice. Tr. 33. She interpreted Hooper's actions as "giving [her] a message that he knew it was [Pepin] that called MSHA." Tr. 33. Filizetti testified that he interpreted Hooper's actions similarly. Tr. 74, 84.

Hooper insisted that he merely intended to address the concerns Pepin raised in her Take 5 cards, and that he did not even know she filed the section 103(g) complaint.[7] Tr. 136-37, 140. Hooper testified that he arrived at the decision to present Pepin with the negative findings in consultation with his supervisor Joe Garnsey, because "obviously by filling her Take 5 card out two days in a row, [Pepin] was very concerned" about the October 31 incident. Tr. 135-36. Garnsey stated in a deposition that he thought Hooper should show Pepin the findings because they would relieve her anxiety, and that the decision had nothing to do with proving Pepin wrong. Resp't Ex. 19 at 10. Garnsey did not know whether Pepin filed the MSHA complaint, but he assumed she had. Resp't Ex. 19 at 11, 16.

Additionally, Hooper testified that he planned to discuss the MSHA negative findings with the rest of the shift crew during their standard toolbox meeting at 10:45 p.m. on November 4, which he subsequently did. Tr. 137-38, 145. However, Pepin started her shift early, normally at 10:20 p.m., before the rest of the crew. Tr. 137. Therefore, Hooper informed Pepin of the findings individually apart from the rest of the crew. Tr. 137.

3. The Confrontation in Tim Hooper's Office

After Hooper left the ready room, Pepin followed him into his office because, according to her, she "was curious to see why he felt the need to give [her] the MSHA findings." Tr. 33. She denied that she had any intent to provoke Hooper, although she was "aware that Mr. Hooper has a temper." Tr. 47, 53. At Pepin's request, Filizetti accompanied Pepin. Tr. 33.

Pepin testified that she calmly asked Hooper why he gave her the findings. Tr. 33-34. According to Pepin, Hooper responded, "Because we all knew it was you that called MSHA." Tr. 34. Pepin said she was shocked by that statement and told Hooper, "Just because you know it's me doesn't mean you're supposed to be telling me it's me." Tr. 34. According to Pepin's testimony, when asked how he knew it was Pepin who had called MSHA, Hooper answered that it was because she wrote the same complaint on her Take 5 cards. Tr. 34.

At some point during this interaction, Pepin claims that Hooper "came flying out of his chair at his desk" and that the conversation "got pretty heated really fast." Tr. 34-35. Pepin recalled that Hooper asked, "Do you know how many people I had to pull off of equipment to go

[7] Hooper stated that he found out about the complaint almost immediately after seeing Pepin's Take 5 card complaints, so the thought crossed his mind that it was Pepin who called MSHA. Tr. 147, 150. However, Hooper agreed that Pepin could have raised the issue with the safety committee of the United Steelworkers of America (Pepin's union), and a member of the union's safety committee, rather than Pepin, could have called MSHA. Tr. 154. Hooper maintained that he would have no way of knowing who filed the 103(g) complaint in that scenario. Tr. 154-55.

in for your interview?" Tr. 35. She interpreted this question to mean that the MSHA investigation was a major inconvenience for the company. Tr. 35. Pepin also alleged that Hooper told her she used "safety [complaints] to bottleneck production" and that Pepin and Filizetti were the "ringleaders of the bottlenecking" operation.[8] Tr. 35, 37. When asked by Pepin for further elaboration, Hooper allegedly replied, "[E]verybody in the back office knows what [you are] up to and they're watching [you]." Tr. 37. As far as Pepin was aware, the back office would have included Dan Keranen, Tyson Murphy, and all upper salary management personnel. Tr. 38.

Pepin testified that Hooper next threatened to send her home for insubordination. Tr. 38. When Filizetti asked how Pepin was being insubordinate, Hooper allegedly answered, "Because she's scolding me for the way I'm talking to her," and "I'm just telling her everything that everyone else wants to say but is afraid to." Tr. 38. Pepin testified that she was angry and shocked at the turn the conversation had taken, and that she told Hooper the conversation was over and left. Pepin recalled that at the end of the conversation she realized she had backed out into the hallway after Hooper got up from his chair, even though she had started the conversation at his desk. Tr. 47.

Although Filizetti's recollection of the meeting was much hazier than Pepin's and omitted a few statements that Pepin alleged Hooper made, Filizetti corroborated Pepin's testimony that Hooper accused her of filing the MSHA safety complaint and of using safety complaints to bottleneck production. Tr. 66-68. Filizetti also recalled Hooper getting out of his chair at some point during the conversation, although in his telling Hooper "slowly came [their] way" instead of "flying at" them. Tr. 70.

After Pepin left, Filizetti remained with Hooper in his office. Tr. 39. Although Filizetti had trouble recalling most of the ensuing conversation, he testified that Hooper explained, regarding his interaction with Pepin, that he does not have "people skills." Tr. 75. According to Filizetti, Hooper also stated that "everybody in the back hallway knew what [Pepin] was up to," which Filizetti interpreted to mean that his superiors were watching Pepin. Tr. 75-76. Filizetti agreed that the tension eased in the room after Pepin left. Tr. 86.

Hooper's account of the meeting differed slightly from Pepin's. According to Hooper, Pepin started asking questions right away and the interaction became increasingly hostile. Tr. 140. Pepin was allegedly loud, agitated, and full of attitude. Tr. 142. Hooper also testified that he made sure he was seated the entire time, because he did not want to look intimidating, whereas Pepin was "moving around." Tr. 142, 145. Hooper admitted that he did become slightly angry during the conversation. Tr. 145-46. He stated that "it's hard not to be [angry] when stressful situations are thrown at you like that." Tr. 146.

[8] Pepin believed that she did not make safety complaints very often and only regarding issues that were "really concerning." Tr. 35-36. She had never made a complaint to MSHA prior to this incident, although she did recall bringing what she termed "minor things" to the attention of a shift supervisor or salaried employee verbally. Tr. 36-37. These included issues regarding a disintegrating walkway grating and berms of insufficient height. Tr. 37.

Hooper claimed that he did not know Pepin had called MSHA until she brought up the subject. Tr. 140-41. Hooper stated that once the conversation started to get hostile, he announced that the conversation was over and told Pepin and Filizetti to leave. Tr. 141. However, they did not leave, and Pepin continued to ask questions. Tr. 141. It was at this point that Hooper claims he threatened Pepin with insubordination because she would not leave the room when told to do so. Tr. 141. Hooper then told Filizetti, "She cannot . . . come in here and quiz me on anything she feels is relevant at the time." Tr. 142.

Hooper next described his conversation with Filizetti after Pepin left the room. After complaining about Pepin's attitude, Hooper told Filizetti, "I don't know what's happened to this crew. That crew . . . used to be one of the top crews, and now it seems like there are a few people on the crew that are using safety as a crutch to not do their work." Tr. 143. Hooper clarified that he was referring to "minor equipment issues" where employees would shut down equipment that was actually safe to run. Tr. 143-44. Hooper also believed that there had been frivolous complaints filed with MSHA, including one where an employee had contacted MSHA because a toilet was plugged without notifying management. Tr. 144. Hooper generally did not view MSHA as an ideal first option for raising safety issues.[9] Tr. 151.

Hooper testified that he then continued, "You know, have you seen the price our stock is trading at? . . . [W]e need to work through some of these safety issues together to take care of them, not in this manner." Tr. 144. As noted, Hooper believed that the majority of safety issues could be taken care of if they were brought to management's attention. Tr. 144-45. That said, he maintained he did not intend to prohibit or discourage Pepin or Filizetti from filing complaints with MSHA. Tr. 145.

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[9] Hooper believed miners should raise safety complaints with management before complaining to MSHA. He expressed this belief during the following exchange with the solicitor at the hearing:

> Q: [Y]ou felt that some people were making frivolous safety complaints?
> A: Not frivolous safety complaints. Frivolous complaints to MSHA.
> Q: So you think a complaint to MSHA is not a safety complaint?
> A: Not if it's—if it's not a real one.
> Q: So who is to judge what a real safety complaint is then?
> A: Well, I guess the safety committee and the supervisors.
> Q: So then the miners should take their complaints only to the supervisors and not call MSHA if they feel that they have a complaint, to check to see if it's a real safety complaint?
>
> * * *
>
> A: Firstly, yes.
> Q: So firstly they should take a complaint to the supervisors instead of taking the complaint to MSHA?
> A: Yes.

Tr. 151.

4. The Toolbox Meeting

At around 10:45 p.m. on November 4, Hooper subsequently discussed the MSHA negative findings with his crew in a toolbox meeting in the ready room. Tr. 77. Pepin was not a part of this meeting. Tr. 77. According to Filizetti, Hooper made mention during that meeting that the company's stock had been dropping and that the company was not in good shape financially. Tr. 77. Filizetti took this comment, immediately following discussion of the MSHA negative finding, to mean that unsubstantiated safety complaints were costing the company money. Tr. 78. Hooper denied discussing the company's stock prices with the crew, and instead claims that he only mentioned that to Filizetti in private due to Filizetti's own personal interest in the matter. Tr. 153.

Hooper claimed that he had provided MSHA negative findings in a toolbox meeting prior to this, but later admitted that he could not remember if he had. Tr. 148-49. Daniel Keranen, the area manager of mining operations, testified that the company communicates MSHA negative findings with the crew during toolbox meetings and that he had told Tyson Murphy to disseminate information regarding the negative findings at issue in this case to all of the crews at the mine. Tr. 171

5. Relevant History Between Mindy Pepin and Tim Hooper

Pepin testified that while she and Hooper did have a "couple of small run-ins" prior to the events of this case, she considered her relationship with Hooper to be friendly and professional up until this point. Tr. 40. The "run-ins" to which Pepin referred included an incident where Hooper informed Pepin that she needed to start scanning in and out of the mine at the end of her shift and an incident where he allegedly berated her for using the wrong door to exit a changing room at the mine. Tr. 41, 53-54. Hooper clarified that there were several other employees who were reprimanded for not scanning in and out of the mine at the time, but that the changing room reprimand was specific to her. Tr. 146. These incidents were documented by the company in a record of verbal redirections, although Pepin claims that she was not aware that such a record existed until this proceeding. Tr. 40; Sec'y Ex. 4, 5. Pepin also recalled an incident in the fall of 2011 where Hooper reprimanded her for questioning a management decision on the company radio. Tr. 42. According to Pepin, Hooper angrily slammed open the door where Pepin was working and told her, "Don't ever say something like that again on the radio." Tr. 42.

Filizetti testified that Pepin and Hooper have similar personalities, in the sense that it is very difficult to change their minds when they think they are right. Tr. 81. Multiple witnesses also testified about the fiery attitudes of both individuals. Keranen stated that although he and Pepin had been childhood friends and neighbors, she had been aggressive and abrasive toward him at work in the past, Tr. 169-70, while Garnsey claimed that Pepin is easily agitated. Resp't Ex. 19 at 7-9. Both Pepin and Filizetti testified that everyone who knows Hooper is aware that he has a temper. Tr. 53, 86.

6. Damages and Aftermath

Pepin testified that following her encounter with Hooper, she cried during her shift and felt very frustrated. Tr. 39. Because of allegedly being told that everyone in the back office is watching her, she claims that she now feels there is a target on her back and worries that the company is looking for a reason to fire her. Tr. 45. Filizetti confirmed that Pepin has expressed feeling this way. Tr. 78-79. Keranen testified that Pepin later told him that she felt threatened by Hooper and did not want to work with him. Tr. 174. Pepin stated that the stress of having to interact with Hooper has affected her personal life. Tr. 45-46. According to her, the situation was a contributing cause to the dissolution of her relationship with her then-fiancée and co-worker Filizetti. Tr. 46, 55-56. However, at the time of the hearing, Pepin and Filizetti were once again engaged. Tr. 33, 87. Pepin has also not sought treatment or medication for her stress. Tr. 58.

Other employees at the mine have learned about Pepin and Hooper's confrontation from Pepin and Filizetti. Tr. 60. Pepin testified that those employees have said that they are "floored" by this situation, and have told her sympathetically, "That's what you get for filing safety complaints." Tr. 60. Pepin claims that she will have significant reservations about raising safety issues in the future. Tr. 46.

Pepin has become a member of the union safety committee since the alleged interference. Tr. 53. She has raised a safety issue within the company and made a safety complaint during a crew meeting since then as well. Tr. 158, 170. Since the alleged interference there has not been a decline in the number of section 103(g) complaints filed by mine employees at the company. Resp't Ex. 17.

III. SECTION 105(C) INTERFERENCE CLAIMS

1. The Law

The Secretary alleges that Empire Iron interfered with the exercise of Pepin's statutory rights in violation of Section 105(c)(1) of the Mine Act. Section 105(c)(1) states in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise *interfere with the exercise of the statutory rights of any miner* . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). This section establishes a cause of action for unlawful discrimination, which the Commission normally analyzes under the *Pasula-Robinette* framework laid out below. However, in plurality and concurring opinions in a recent case, a majority of Commissioners recognized that this section also "establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young

& Cohen, Comm'rs), vacated, 620 Fed. Appx. 127 (3d Circ. 2015); *id*. at 2105-07 (Jordan & Nakamura, Comm'rs).

Under the traditional *Pasula-Robinette* framework, a complainant alleging discrimination must prove, by a preponderance of the evidence, (1) that he or she engaged in protected activity; (2) that he or she suffered an adverse action; and (3) that the adverse action taken against him or her by the mine operator was motivated in any part by the protected activity. The operator may rebut a prima facie case by showing that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) (*rev'd on other grounds*); *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by proving (1) that it was also motivated by the miner's unprotected activity and (2) that it would have taken the adverse action in any event for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

Additionally, certain business policies that on their face plainly and explicitly discriminate against protected activity may be "so 'inherently destructive of employee interests' that [they] may be deemed proscribed without need for proof of an underlying improper motive." *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206 (Feb. 1994) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). This is because "some conduct carries with it unavoidable consequences which the employer not only foresaw but which he *must have intended* and thus bears 'its own indicia of intent.'" *Great Dane Trailers*, 388 U.S. at 33 (emphasis added).

In contrast to the detailed analysis that the Commission has provided for discrimination claims, there is relatively little Commission case law on the appropriate framework for analyzing interference claims. The most significant Commission cases dealing with interference are *Moses v Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985) and *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005). Additionally, the Secretary and two Commissioners have recently proposed a framework for interference claims, discussed more fully below, that the Commission as a whole has yet to adopt. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). The Secretary urges the court to adopt the *Franks* framework, in part because he argues it is consistent with Commission precedent, specifically *Moses* and *Gray*. Sec'y Br. 11. Therefore, the court will discuss these two cases in depth below.

In *Moses v Whitley Dev. Corp.*, the Commission held that persistent and accusatory interrogation directed toward a miner in response to that miner's filing of a 103(g)(1) complaint constituted prohibited interference under the Act. *Moses*, 4 FMSHRC at 1480. In reaching that result, the Commission first cited to Mine Act legislative history indicating that section 105(c)(1) was directed against "not only the common forms of discrimination, such as discharge, suspension, [and] demotion . . ., but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal" and then found that "coercive interrogation and harassment over the exercise of protected rights" were among the "more subtle forms of

interference" that the drafters of the Act had in mind. *Id.* at 1479 (citing S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ["Legis. Hist."]). The Commission was especially concerned about the tendency of an employer's actions or statements to instill a fear of reprisal in the minds of its employees and chill the exercise of protected rights. *Moses*, 4 FMSHRC at 1479. In a footnote, the Commission attempted to distinguish between comments or questions regarding a miner's exercise of a protected right that are "innocuous or even necessary to address a safety or health problem" and those that constitute unlawful interference: "Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Id.* at 1479 n.8.

In a separate part of the *Moses* decision, dealing primarily with discharge, and secondarily with interference, under the *Pasula-Robinette* framework, the Commission also held that an operator may be held liable for adverse actions motivated by the suspicion of protected activity, even if the complainant had not actually engaged in such protected activity. *Moses*, 4 FMSHRC at 1480. The Commission acknowledged that a literal interpretation of section 105(c)(1) might require the actual or attempted exercise of protected activity, but reasoned that such a narrow interpretation would frustrate Congressional intent. *Id.* Instead, the Commission adopted a broad interpretation of the statutory language, "No person shall discharge . . . any miner . . . because of the exercise by such miner . . . of any statutory right afforded by this Act." The Commission's interpretation turned on the motives and beliefs of the "person" discharging the miner, rather than the activities of the miner. *Id.*

The Commission subsequently distinguished interference from discrimination claims and raised new questions about the intent requirement in section 105(c) interference cases in the matter of *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc*. In *Gray*, a mine's superintendent repeatedly asked an employee about his grand jury testimony stemming from an MSHA investigation and sought assurances from the miner that he did not testify against the superintendent, joking that if he had, the superintendent would kill him. *Gray*, 27 FMSHRC at 2-3. A Commission ALJ evaluated the interference allegations under the *Pasula-Robinette* framework and found that the alleged interference did not qualify as adverse actions under the Act because, in part, the superintendent did not literally intend to harm the employee. *Id*. at 4-5; *Sec'y of Labor on behalf of Gray v. N, Star Mining, Inc.*, 25 FMSHRC 198, 202 (Apr. 2003) (ALJ). The ALJ found it unnecessary to reach the issue of discriminatory motivation, having already found no adverse action. *Gray*, 25 FMSHRC at 216. The Commission vacated the ALJ's interference finding and remanded the matter for "further consideration of the facts and circumstances surrounding the statements to determine if they were coercive under section 105(c)(1) of the Mine Act." *Gray,* 27 FMSHRC at 12.

After first announcing that coercive operator statements are not to be analyzed under the normal *Pasula-Robinette* framework, the Commission identified several other errors in the ALJ's decision that hinted at how the Commission would prefer interference claims to be analyzed. *Gray*, 27 FMSHRC at 7 n.6. In particular, the Commission noted "that the judge examined [the superintendent's] statements too narrowly by considering largely, if not exclusively, [his] intent or motive in making the statement." *Id.* at 10. The Commission found error in the ALJ's belief

that "the presence or absence of a violation of section 105(c) of the Mine Act turned on whether [the supervisor] literally intended by his words to cause physical harm to [the employee] or any other miner who testified against him during the grand jury investigation." *Id.*. Instead, citing *Moses* and case law on section 8(a)(1) of the NLRA, the Commission held that the ALJ should have analyzed the "totality of circumstances surrounding [the supervisor's] statements to determine whether they were coercive and violative of section 105(c)" because they carried implicit "threats of reprisals or of employment discrimination," which the Commission had already recognized in *Moses* as capable of giving rise to claims of prohibited interference. *Id.*

2. The Secretary's Proposed Test

The Secretary of Labor has proposed a test for evaluating interference claims. Sec'y Br. 9-12. The Secretary originally proposed this test before the Commission, and two Commissioners chose to adopt it. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). Under the *Franks* test, an interference violation occurs if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108.

Under the first prong of the test, in order to establish that conduct tends to interfere with the exercise of protected rights "it is not necessary [for the Secretary] to show that a miner has been actually prevented or deterred from exercising rights" or "that the operator acted with discriminatory motivation or unlawful intent." *Franks*, 36, FMSHRC at 2107; Sec'y Br. 12. The second prong of the test "ask[s] whether the operator's actions were narrowly tailored enough to promote its business justification without undue interference to the rights of the miners." *Franks*, 36 FMSHRC at 2118 n.14; Sec'y Br. 10-11.

Empire Iron asks the court to reject the Secretary's proposed test, particularly because the company believes that discriminatory motive must be a required element of a section 105(c) violation. Resp't Br. 12. The Secretary in turn claims that his proposed test is entitled to *Chevron* deference, and provides two rationales for why the court should adopt this test. Sec'y Br. 10; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). First, the Secretary argues that section 105(c)(1)'s prohibition on "interference" reflects parallel language in section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), and that section 8(a)(1) has been interpreted by courts and the National Labor Relations Board ("NLRB") not to require a showing of intent. Second, the Secretary claims that his proposed test is "firmly grounded in both Commission and NLRA precedent." Sec'y Br. 11.

Even assuming that the Secretary's entire test is deserving of *Chevron* deference if it is found to be a reasonable interpretation of an ambiguous provision,[10] the court finds the Secretary's interpretation of section 105(c)(1) to be unreasonable as to the question of whether the Secretary is required to prove unlawful intent in interference proceedings but reasonable as to the question of whether it is necessary to show that a miner has actually been deterred from exercising rights.

3. The Plain Language of the Act and NLRA Guidance

The court first acknowledges that certain elements of section 105(c)(1) of the Act are ambiguous. For instance, the types of actions that may qualify as "interference" under the section are open to interpretation. However, the court cannot envision any permissible interpretation of section 105(c)(1) that entirely reads out the word "because" and all subsequent language from the phrase: "No person shall . . . interfere with the exercise of the statutory rights of any miner . . . *because* such miner . . . has filed or made a complaint under or related to this Act . . . or *because* of the exercise by such miner . . . of any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1).

It is a general principle of legal interpretation that every word and phrase in a statutory provision must be given effect. And a statutory provision that prohibits a person from acting "because of" a protected status or activity is generally given the effect of requiring that the protected status or activity "was the 'reason' that the [person] decided to act," *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), or at least a motivating factor. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2032 (2013).[11] The court concludes that within section 105(c), the phrase beginning with the word "because" clearly denotes a requirement that a miner's protected activity motivated an operator's interference with his or her exercise of protected rights.

The Secretary instead relies primarily on the similarities in both language and purpose between section 105(c)(1) of the Mine Act and section 8(a)(1) of the NLRA and argues that the interference language in each statute does not carry with it an intent requirement. Sec'y Br. 11. Section 8(a)(1), in full, states, "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). While there are some similarities between the two sections that justify the inference that section 8(a)(1) informed the drafting of section 105(c), the court

[10] The court notes that the Court of Appeals for the Sixth Circuit, wherein the mine that is the subject of this proceeding is located, has previously refused to grant *Chevron* deference to the Secretary's interpretation of an ambiguous Mine Act provision. *See North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Circ. 2012).

[11] In exceptional circumstances involving disparate impact language in antidiscrimination statutes closely modeled after Title VII of the Civil Rights Act of 1964, courts have occasionally declined to give such effect to the words "because of," however this court does not find that section 105(c)(1) of the Mine Act fits into this exception. *See, e.g., Griggs v Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228 (2005), *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

nevertheless cannot ignore the obvious difference between the statutory provisions: section 8(a)(1) does not use the word "because" or include any intent requirement, while section 105(c)(1) unambiguously does. The additional language must serve some distinct purpose.

Of further relevance, section 8(a)(4) – a clearly separated sub-section within the same section of the NLRA – provides that, "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (emphasis added). If the drafters of the Mine Act had indeed sought guidance from section 8(a) of the NLRA, they would have found a straightforward template for separating discharge and discrimination from interference and for ensuring that the intent requirement for the first two causes of action did not apply to the third. Instead, the Mine Act clearly groups "discharge," "discriminate," and "interfere" together and applies the same intent requirement to all three.

The Secretary also notes that the Commission has previously identified an identical purpose between section 8(a)(1) of the NLRA and section 105(c) of the Mine Act, namely "to provide legal protection against adverse action to employees who exercise rights afforded by law." Sec'y Br. 11 (citing *Sec'y of Labor on behalf of Johnson v. Jim Walters Resources, Inc.*, 18 FMSHRC 552, 558 (Apr. 1996) (finding subjective and objective evidence of an adverse action's chilling effect on the exercise of rights is relevant to the gravity criterion for a civil penalty assessment in discrimination proceedings)). The court agrees that the two provisions share an identical purpose when framed in that broad level of generality. However, the different language in the two statutes indicates that section 105(c) is aimed in a more targeted fashion at providing legal protection against adverse actions *motivated* by the exercise of rights afforded by law.

One possible explanation for this difference is that section 8(a)(1) of the NLRA deals with labor organizing and negotiation over terms of employment and assumes a naturally adversarial relationship between employers and employees in that process. *Cf. Franks*, 36 FMSHRC at 2120 (Althen, Comm'r, dissenting). Therefore, intent may be inferred in employer actions that interfere with the right to organize or collectively bargain. In contrast, the Mine Act deals with miner health and safety and does not automatically assume that employers and employees always have adverse interests in the goal of promoting safety.

The Secretary, finding support in NLRA case law, also takes the position that he need not prove that a complainant "has been actually prevented or deterred from exercising rights" in order to "show that [the alleged] conduct tends to [unlawfully] interfere with the exercise of protected rights." Sec'y Br. 12 (citing *Flagstaff Med. Cir., Inc. v. NLRB*, 715 F.3d. 928, 930 (D.C. Cir. 2012); *NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 212 (4th Circ. 2005); *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102, 107 (6th Cir. 1987)). This issue is relevant in this matter because the company claims that Hooper's alleged interference has not in fact affected Pepin's exercise of her protected rights. Resp't Br. 30-31.

In this limited context, the court agrees with the Secretary's use of applicable NLRA principles. The Secretary's position is not contradicted by the plain language of the statute, and the court recognizes that a complainant's perseverance in the face of efforts to deter his or her exercise of protected rights should not defeat any potential interference claims. Therefore, the

court finds the Secretary's position regarding the lack of a need to prove that the exercise of protected rights was actually restricted to be reasonable and persuasive, under both a *Chevron* and *Skidmore* analysis. *See Skidmore* v *Swift & Co.*, 323 U.S. 134, 139 (1944) (deferring to an agency's interpretation of an ambiguous provision due to its power to persuade).

4. Commission Precedent

The Secretary argues that his proposed test is consistent with Commission precedent regarding interference, specifically in *Moses* and *Gray*. Regardless of whether or not this assertion is correct, the court does not find that Commission precedent compels the Secretary's interpretation.

Reading the statute broadly in *Moses*, the Commission articulated a totality of the circumstances test to assess whether certain statements or actions rise to the level of unlawful interference and affirmed an ALJ's finding of discrimination even when an operator was motivated by suspicion of a miner's protected activity rather than actual knowledge. *Moses*, 4 FMSHRC at 1479 n.8, 1480. It did not, however, suggest that such a test would be sufficient to establish a violation of section 105(c)(1) absent any showing of intent.[12]

Gray provides stronger support for the Secretary's claim that intent is not a necessary element of an interference claim. *See* discussion *supra* p. 13. However, it is important to keep in mind that the ALJ had analyzed the case under the *Pasula-Robinette* framework and had only addressed the issue of the operator's intent in the context of finding that the Secretary had failed to prove any adverse action. It was this finding alone that the Commission found to be in error, as the ALJ did not reach the issue of discriminatory motivation.

It is therefore unclear to this court whether the Commission in *Gray* found the ALJ to be in error for requiring the Secretary to prove any intent whatsoever (which is one possible interpretation of the opinion given the Commission's extended discussion of section 8(a)(1) of the NLRA), or whether it concluded the ALJ erred by finding that the alleged statements could not qualify as adverse actions unless the superintendent in the matter intended his statement as a literal threat on the complainant's life, rather than as a threat of reprisal more generally. The lack of a clearly articulated standard or holding from the decision regarding the role or relevance of intent in interference proceedings, and the extent to which a broad holding would have represented a significant development in the law, cautions against drawing too broad a conclusion from the language therein. Instead, the court reads the opinion to reaffirm the importance, first articulated in *Moses*, of looking at the totality of circumstances in interference allegations and focusing on the tendency of an employer's actions or statements to instill a fear of reprisal in the minds of its employees and chill the exercise of protected rights.

[12] The Commission in *Gray* speculated that the totality of the circumstances test in *Moses* may have been derived from section 8(a)(1) of the NLRA and subsequent case law. *Gray*, 27 FMSHRC at 10. This finding is consistent with this court's approach in drawing from NLRA precedent in its interpretation of section 105(c)(1) where appropriate. Exactly how much of that case law should be imported into the Mine Act, however, is open to question.

5. Additional Considerations

The court is troubled by the possible implications of the Secretary's proposed test in interference cases going forward. The test may even introduce uncertainty into the relatively settled area of discrimination law under the Mine Act.

Normally a discharge or suspension, or similar acts of serious discipline, would trigger the *Pasula-Robinette* analysis, whereby the Secretary would need to prove all of the elements mentioned previously: protected activity, adverse action, and discriminatory motivation. Then, not only may an operator rebut the Secretary's prima facie case and prevail by establishing non-discriminatory motives for its actions, but it may even avoid liability in spite of discriminatory motives through an affirmative defense. Additionally, other acts of discipline or reprisal can also trigger the *Pasula-Robinette* analysis, provided that they satisfy the *Burlington Northern* standard, which asks whether such actions are "harmful to the point that they could well dissuade a reasonable worker from [engaging in protected activity]," "depend[ing] upon the particular circumstances" surrounding the actions. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930-31 (Aug. 2012) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). This language closely resembles the Secretary's proposed test for interference claims.[13] However, the *Burlington Northern* test still fits within the *Pasula-Robinette* framework, and therefore still requires proof of discriminatory motivation (along with protected activity) once an adverse action is established.

In contrast, under the Secretary's theory of section 105(c), alleging subtler acts of interference would trigger a far less demanding test, where the Secretary would no longer be required to prove any protected activity, adverse consequences for the complainant in his or her employment relationship, or improper motivation on the company's part. Further, even if the

[13] The similarities between the Commission's adverse action test and interference test are not coincidental. The "interference" analysis in *Moses* spawned two divergent lines of cases and culminated in these two related tests. One line of cases (*Moses-Gray-Franks*) treats "interference" as a separate cause of action, with a distinct framework for analysis. *See Franks* , 36 FMSHRC 2088, 2103 n.22 (Young & Cohen, Comm'rs); *id*. at 2105-07 (Jordan & Nakamura, Comm'rs) (citing *Gray*, 27 FMSHRC at 8 n.6). Another line of cases (*Moses-Hecla Day-Pendley*) treats the "interference" analysis in *Moses* as a guide for deciding when actions other than "discharge" or "suspension" qualify as adverse actions for traditional discrimination claims. *See Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48, 1848 n.2 (Aug. 1984) (noting that when faced with actions outside of the "self-evident form[s] of adverse action, like discharge or suspension, . . . [the Commission] must examine closely the surrounding circumstances to determine the nature of this action.") (citing *Moses*, 4 FMSHRC at 1478); *see also Pendley*, 34 FMSHRC at 1930-31 (adopting the *Burlington Northern* adverse action test in large part due to its consistency with *Moses* and *Hecla-Day*). This has created, over time, no little confusion regarding exactly when the *Gray-Franks* interference test is appropriate and when the *Hecla Day-Pendley* discrimination test should be used instead. *See, e.g., McNary v. Alcoa World Alumina, Inc.,* 37 FMSHRC 2205 (Sept. 2015) (ALJ) (currently on appeal over whether the ALJ erred in analyzing the interference claims under the *Hecla Day-Pendley* adverse action test instead of the *Gray-Franks* interference test.)

operator established a motive unrelated to the exercise of protected rights, the company would then need to prove that its justification for its action was substantial, business-related, and that its importance outweighed the harm caused to the exercise of protected rights—additional hurdles not present in the *Pasula-Robinette* analysis. The lack of a substantial business justification whose importance outweighs the interests of the protected activity may provide circumstantial evidence that an operator's proffered justification is merely pretextual. However, this is not the only factor or evidence that the court considers in evaluating an operator's true motivation. The court cannot see how any allegation that satisfied the traditional discrimination requirements would not likewise satisfy all of the elements of the Secretary's proposed interference test, whereas the reverse would not hold true in many instances.

In effect, under the Secretary's suggested test, the less severe of a disciplinary action that a complainant alleges, the lower the burden will be for establishing a section 105(c) violation. This could create a perverse incentive for a petitioner to recast every act of overt discrimination as one of the subtler forms of interference in order to obtain that lower burden, especially since many subtle acts that subject an employee to a detriment in his employment relationship may qualify as either acts of interference or adverse actions under the *Burlington Northern* standard.

Additionally many overt acts of discipline alleged to be discriminatory are often preceded or accompanied by acts or statements that may otherwise tend to interfere with the exercise of protected rights. For example, in *Franks*, three out of five Commissioners disagreed with the ALJ's finding that a company's suspension of its miners constituted unlawful discrimination under section 105(c) of the Act, but the Commission nonetheless affirmed the ALJ's ruling based in part on two Commissioners finding that the suspension and the company's interviews with its miners leading up to the suspension interfered with their protected rights. *Franks*, 36 FMSHRC 2088. The court is unclear as to whether the complainants could have alleged interference, and therefore could have prevailed as they ultimately did, absent the allegation of "subtler acts" of coercive interrogation preceding the suspension. If the answer is no, this creates a problematic incentive to allege coercive operator statements or other subtler acts of interference alongside every allegation of traditional discrimination.[14] If the answer is yes, the court does not see why a complainant would ever again allege a suspension to be an act of discrimination, rather than an act of interference.

6. The Court's Interference Test

Based on the foregoing, the court holds that to prove an allegation of illegal interference under section 105(c)(1), the Secretary must show that (1) the Respondent's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality

[14] The court recognizes that the alleged acts of interference preceding the suspension in *Franks* were serious and substantial. However, the plurality opinion finding interference did not specify that acts of interference must be any more serious and substantial than the acts that qualify as adverse actions under *Burlington Northern*. Were the Commission to provide clarification along those lines, the court would be less concerned about the potential for opportunistic pleading to avoid the additional hurdles of the *Pasula-Robinette* test.

of the circumstances, as tending to interfere with the exercise of protected rights,[15] and that (2) such actions were motivated by the exercise of protected rights.[16]

The respondent may rebut the Secretary's *prima facie* case by showing that its actions did not tend to interfere with the exercise of protected rights or that the actions were in no part motivated by the miner's protected activity.

If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by demonstrating a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

IV. APPLICATION OF THE COURT'S INTERFERENCE TEST

1. Actions Tended to Interfere with the Exercise of Protected Rights

Section 103(g) protects the anonymity of miners in making safety complaints and encourages complaints when miners have "reasonable grounds to believe" that a violation exists. 30 U.S.C. 813(g)(1). The court finds that Mindy Pepin engaged in protected activity when she filed an anonymous section 103(g) safety complaint with MSHA under a reasonable belief that a violation existed. The fact that the company's procedures did not deal with the possibility of a false positive on the ThorGuard system, and that Pepin did not receive a response when she filed multiple Take 5 complaints within the company raising the issue, supports the reasonableness of Pepin's belief. Tr. 58, 109-10, 118-19, 130-31.

The court further finds that Hooper's response to Pepin's protected activity tended to interfere with the exercise of protected rights. The court finds Pepin's account of the substance of her conversation with Tim Hooper in his office to be credible, and the statements Hooper made in that account would tend to instill within the mind of a reasonable person a fear of reprisal for exercising protected activity.

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[15] By focusing on the *tendency* to interfere with protected activity, the court adopts the Secretary's position that "it is not necessary to show that a miner has been actually prevented or deterred from exercising rights." Sec'y Br. 12. Further, the court's interference test does not focus on the type of employer decisions that necessarily subject a miner to an actual detriment in his or her employment relationship, such as discharge, suspension, or demotion. Thus, statements that could reasonably chill the exercise of protected rights may qualify as acts of interference even if the exercise of those rights has not been chilled and the particular complainant in a proceeding has suffered no detriment in his or her employment relationship.

[16] The court notes that while the *Pasula-Robinette* test prohibits retaliation against the complainant's actual, attempted, or suspected exercise of protected rights, the Secretary has urged the Commission to adopt an interference test that encompasses attempts to chill the exercise of rights going forward without any showing of protected activity. *See, e.g., Sec'y of Labor, on behalf of McGary v. The Marshall County Coal Co.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ). The court takes no position on this issue, as the instant matter involves the actual exercise of protected activity.

Unlike acts that the Commission has previously found to constitute interference, this matter does not involve persistent questioning over the course of multiple interactions, explicit threats, or attempts to isolate the complainant in an inherently coercive one on one setting. However, this matter does involve implicit threats of reprisal and intimidating behavior by a supervisor, which the Commission has noted takes on special significance given the supervisor's "ability to impact the employment relationship of [the complainant]." *Gray*, 27 FMSHRC at 8. Hooper's accusations that Pepin was using safety complaints to bottleneck production and that Pepin and Chad Filizetti were the ringleaders of a bottlenecking operation are examples of intimidating language directed against the exercise of protected rights. Tr. 35, 37, 66-68. His statement that his superiors in the back office were watching Pepin can also be reasonably viewed as a threat of reprisal or of employment discrimination. Tr. 37, 75-76.

In regard to the ready room incident, the court first notes that Hooper's decision to hand Pepin the results of the MSHA investigation might not be reasonably viewed as tending to interfere with the exercise of protected rights when taken in isolation. Rather, the decision could be viewed as a reasonable response to the concerns on Pepin's Take 5 cards. However, under the totality of the circumstances, given Hooper's subsequent statements in his office ("We all knew it was you that called MSHA," and "Do you know how many people I had to pull off of equipment to go in for your interview?"), the court's finding that Hooper's actions tended to interfere with protected rights encompasses the events in the ready room as well.[17] Tr. 34-35.

The company argues that Hooper's alleged acts of interference within his office would have never occurred had Pepin not followed him in there and instigated a confrontation. Resp't Br. 28, 31. The court agrees with this assessment. The company also argues that Pepin's behavior during the meeting was likely much more "agitated" and "challenging" than how she portrayed it in her testimony, given other witnesses' descriptions of her normal behavior, while Hooper's demeanor was likely less "threatening." Resp't Br. 29-30. Be that as it may, Hooper's statements were sufficiently threatening in context that Hooper's and Pepin's respective demeanors and the alleged provocation for the statements are not decisive factors in the court's analysis of their tendency to interfere with protected rights.

The Secretary alleges that Hooper's statements to Filizetti, privately, and to Hooper's crew during a toolbox meeting with Pepin out of the room also affected other miners. Sec'y Br. 15. Whether actions directed wholly toward miners other than the complainant are relevant to that complainant's interference claim need not be decided at this juncture, as the court does not find that those statements or activities tended to interfere with protected rights regardless.

There is some discrepancy between Hooper and Filizetti about whether Hooper discussed the company's falling stock prices and financial condition in the toolbox meeting with the entire crew or only in the private conversation between the two of them after Pepin left Hooper's

[17] The court however does not agree with the Secretary that Hooper's actions interfered with the rights of others seated in the ready room at the time. Sec'y Br. at 15. Hooper did not publicize his message for Pepin to anyone else in the room, and there is insufficient evidence in the record to find that anyone else in the room knew or could have known what Hooper's actions meant. Tr. 57.

office. Tr. 77, 144, 153. Although both witnesses had difficulties with their recollection in their testimony, the court credits Hooper's testimony that he only discussed falling stock prices with Filizetti in his office, and only because Filizetti had expressed interest in the subject previously. Tr. 153. Given this context that Filizetti would have understood, the court does not find that this statement would tend to interfere with Filizetti's protected activity, or Pepin's protected activity indirectly.

Similarly, the court does not find that the presentation of MSHA's negative findings in Hooper's toolbox meeting constituted interference. The court credits Keranen's and Baril's testimony that the company often communicated MSHA negative findings with the crew during toolbox meetings. Tr. 124, 171. While Hooper himself may not have presented negative findings in a toolbox meeting prior to this incident, a reasonable person at the mine listening to the presentation would not necessarily draw an inference that Hooper was motivated by animus toward Pepin, since Hooper did not mention Pepin at the time nor use the findings to discourage safety complaints. Tr. 148-49.

In summary, the court finds that Hooper's statements to Pepin in his office and his decision to hand Pepin MSHA's negative findings from her 103(g) complaint tended to interfere with her exercise of protected rights, because they carried with them implicit threats of reprisal. However, the court does not find that Hooper's statements to Filizetti in private or to the crew during his toolbox meeting violated section 105(c) of the Act, because under the totality of circumstances a reasonable person in the miners' positions would not interpret them as threats or hostile gestures.

2. Actions Were Motivated by the Exercise of Protected Rights

With traditional discrimination claims, a complainant will often have to rely on circumstantial evidence in order to prove that an adverse action was motivated by protected activity, since "direct evidence of motivation is rarely encountered." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). The Commission has clarified that circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510. The court finds such evidence to be equally useful in analyzing whether the actions that give rise to an interference claim were intended to interfere with protected activity.

The court first finds that Hooper had at least a strong suspicion that Pepin had filed a 103(g) MSHA complaint based on his knowledge that she had filed nearly identical Take 5 safety complaints within the company. Tr. 147. While Hooper could not be sure that the MSHA complaint came from Pepin (rather than a United Steelworkers safety committee member), he admitted that the thought crossed his mind, and his supervisor Joe Garnsey admitted that he assumed she had. Tr. 150; Resp't Ex. 19 at 11-16.

Hooper also expressed hostility and animus toward the protected activity both in his statements to Pepin in his office and at the hearing during cross-examination. Several of

Hooper's statements that form the basis of Pepin's interference claim also provide evidence of Hooper's hostility toward protected activity. These include accusing Pepin of using safety complaints to bottleneck production and expressing significant frustration at having to pull miners away from production to participate in the MSHA investigation. Tr. 34-5, 37, 66-68. At hearing, Hooper also complained about frivolous complaints to MSHA, and suggested that all complaints should go through the company or safety committee first in order to determine whether or not they are frivolous. Tr. 151. The court finds these statements also indicate animus and hostility toward 103(g) complaints and those who make them, in this case Pepin.

The coincidence in time between Pepin's protected activity and the alleged interference is a less relevant factor in this analysis, since the company contends that the alleged interference was a response to Pepin's Take 5 complaints, which were filed contemporaneously with her 103(g) MSHA complaint. Tr. 136-37. Additionally, there may have been disparate treatment in the way the company responded to Pepin's Take 5 complaints by using MSHA negative findings, as there is sufficient evidence to suggest that the company did not normally respond to employees about their Take 5 complaints at all. Tr. 58-59. However, this disparate treatment can be explained by the persistence with which Pepin raised concerns about the ThorGuard issue. Tr. 135-36.

There are two additional considerations for the court in this matter. First, the heart of Pepin's interference claims is contained in her confrontation with Hooper in his office. That confrontation never would have happened if she had not followed him into his office. Second, Hooper's temper, Pepin's adamant questioning, and past disciplinary "run-ins" between the two likely contributed to Hooper's outbursts during the meeting.

Taken together, these findings lead to the conclusion that the proven acts of interference in the proceeding were not premeditated. However, the court concludes that they were motivated by Hooper's animus toward Pepin's exercise of protected rights, which boiled to the surface during a heated exchange, and they were intended in that moment to deter Pepin from filing safety complaints with MSHA in the future. The court finds this sufficient to establish intent to interfere with protected activity.

3. Actions Had No Legitimate and Substantial Business Justification

The court finds that Hooper could not have had any legitimate business justification for the statements he made to Pepin in his office and that his proffered rationale for presenting Pepin with the MSHA negative findings was not narrowly tailored to achieve the company's interests of adequately responding to Pepin's Take 5 complaints without doing undue harm to her right to make anonymous safety complaints with MSHA. Empire Iron could have achieved the same purpose by simply explaining the findings of its own investigation to Pepin after she filed her Take 5 cards. Alternatively, the company could have posted the MSHA negative findings in the ready room as it normally did. Tr. 57. This approach would have protected Pepin's anonymity and would not have created the perception that she was being singled out for reprisal because she exercised her 103(g) rights.

V. REMEDIES

1. Civil Penalty

The court has found a violation and it must assess a civil penalty taking into account the statutory civil penalty criteria, including the size of the operator, its history of previous violations, the effect of the penalty on the operator's ability to continue in business, the operator's negligence, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed a $20,000.00 civil penalty. The Secretary relies primarily on the "high negligence" and "substantial" gravity of Hooper's conduct in justifying the penalty. Sec'y Br. 18. Empire Iron argues that the Secretary's assessment lacks evidentiary foundation and that the company evidenced no animus toward protected activity. Resp't Br. 33, 35.

The court first notes that the parties stipulated to the fact that Empire Mine is large and that the assessed penalty would not impact the mine's ability to continue in business. Stip. 5, 18. Additionally, the mine's history of assessed violations admitted into evidence showed no history of 105(c) violations. Sec'y Ex. 7.

In regard to the company's negligence, the court has found that Hooper intentionally interfered with Pepin's protected rights. This intent establishes an elevated level of negligence, and that intent is imputed to the company. However, the court has also found that Hooper's interference was not premeditated. Additionally, there was scant evidence at hearing, outside of Hooper's own comments during his confrontation with Pepin, that other officials at the company displayed animus toward Pepin's protected activity or that backroom management officials were actually watching Pepin and plotting reprisal as Hooper claimed. Hooper's interference did not reflect a concerted effort by multiple agents of Empire Iron to interfere with Pepin's protected rights.[18] Indeed, one of those backroom officials Hooper referenced was Keranen, a childhood friend of Pepin's, who gave serious attention to her complaints regarding Hooper and offered to formally investigate her allegations against him – which the court also considers a good faith effort to remedy the violation. Tr. 169-70, 174; Resp't Ex. 5. These factors mitigate Empire Iron's level of negligence.

The court finds that the gravity of the violation was serious. The right to make anonymous safety complaints to MSHA is an important and necessary one. Therefore, the expression of animus toward those rights and efforts to chill their exercise must not be tolerated.

[18] The court observes that this factor may often distinguish interference from discrimination claims. The adverse actions in a typical discrimination proceeding, including discharge and suspension, often require multiple agents to sign off on the decision giving rise to a cause of action and therefore tend to reflect a level of deliberation and coordination (or at least a systemic failure of oversight and supervision) that may not be present in an interference case stemming from the words of a single supervisor in the heat of the moment. The court believes that the civil penalties in these matters should reflect this distinction.

However, different actions have varying degrees of chilling effect on the exercise of rights. An oral confrontation where a supervisor expresses animus regarding a miner's exercise of protected rights may not have the same effect as a discharge or suspension or even an overt threat of dismissal. As indicated earlier, the Secretary did not allege persistent questioning over multiple interactions, explicit threats, or attempts to isolate the complainant in an inherently coercive one on one setting. The record also does not indicate that Hooper's actions have had any effect on the filing of MSHA safety complaints, which the court finds slightly relevant for its gravity determination. Resp't Ex. 17. Furthermore, the court has found that Hooper did not widely publicize his hostility regarding Pepin's protected activity, which limited the number of persons affected by his act of interference. Consequently, the court finds the gravity of the violation to be lower than alleged.

Given these findings, the court assesses a civil penalty of $8,000.00 for the violation.

2. Other Relief Requested

As Pepin was not terminated, suspended, or officially disciplined, there is no back pay owed. Pepin instead seeks unspecified compensation for pain, suffering, and emotional distress caused by the company's interference. The Secretary acknowledges that the "Commission has never specifically decided whether emotional distress damages may be awarded under the Act." Sec'y Br. 16. And, the complainant acknowledged that she did not seek or incur expenses for treatment or medication related to her distress. Tr. 58. However, the Secretary argues that emotional distress damages are nonetheless necessary to fulfill the Act's remedial purpose of making the complaining party whole. Sec'y Br. 16.

The court expresses no opinion as to whether emotional distress damages may ever be awarded under the Act, absent any concrete injury or financial loss, but finds that this case does not present the sort of exceptional circumstances that might merit such an award. Pepin may have been justifiably upset by her encounter with Hooper, but being upset by workplace disputes is part and parcel of the workplace experience, and there is nothing in the record to indicate her encounter with Hooper caused her to seek medical and/or psychological assistance, or that it interfered with her normal daily activities. Pepin also alleged that the violation had strained her relationship with her fiancé, Chad Filizetti, and caused them to break their engagement. However, Pepin and Filizetti were again engaged at the time of the hearing. Tr. 33, 46, 55-56, 87. Given these facts, the court denies the request for emotional distress damages.

In regard to the Secretary's request for Empire Iron to have its Mine Superintendent (a position that the company alleges does not exist at its mine) read a notice to all miners at Empire Mine acknowledging the violation and reiterating miners' rights, the court deems it sufficient for deterrence purposes to order the company to post a notice to that effect to the mine bulletin board, for a period of one year.

ORDER

Based on the above, the court finds that Respondent violated section 105(c) of the Act by unlawfully interfering with the protected activity of Pepin. It is hereby **ORDERED** that Empire

Iron cease and desist from the unlawful interference that forms the basis of the interference violation. It is further **ORDERED** that within 30 days of the date of this decision Empire Iron post on the mine bulletin board, for a period of one year, a written notice stating that: (1) a section 105(c) complaint was filed against Empire Iron based on the above-described conduct; (2) Empire Iron has been found to violate section 105(c); (3) miners have a protected right to communicate safety and health concerns to Empire Iron management; (4) miners have the protected right to confidentially and independently communicate safety and health concerns to MSHA; and (5) mine management will not interfere with or engage in discrimination based on the exercise of those protected rights. Finally, within 30 days of the date of this decision, Respondent is hereby **ORDERED** to pay a civil penalty of $8,000.00.[19]

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

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/rd

[19] 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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June 9, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. SUTTER GOLD MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-856 A.C. No. 04-05038-384525 Mine: Lincoln Mine Project

DECISION AND ORDER

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

Katie Jeremiah, Jordan Ramis, PC, Lake Oswego, OR, 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 four citations issued pursuant to Section 104(a) of the Mine Act with proposed penalties totaling $6,406.00. The parties presented testimony and evidence regarding these citations at a hearing held in Sacramento, California, on May 4, 2016. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

I. MSHA'S INSPECTION

The Lincoln Mine Project is an underground gold mine in Sutter Creek, California, operated by Sutter Gold Mining Company. At the time of the inspection in March 2015, the Lincoln Mine Project was non-producing but was being maintained for future production. This involved operating an underground water treatment facility and maintaining escapeways. On the date of the inspection, only one employee of Sutter Gold was working at the mine. The previous two days, several contractors had been working at the mine doing safety inspections and maintenance. The parties have stipulated that Sutter Gold is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Jt. Stips. ¶¶ c, d.

On March 4, 2015, Inspector Kimberly Hakala traveled to the Lincoln Mine Project to conduct a general inspection. Hakala has been a mine inspector for approximately four years and has conducted hundreds of inspections of underground mines. Prior to becoming a mine inspector, she worked for seven years at a family-owned gypsum mine, including as a safety representative who accompanied mine inspectors.

Upon arriving at the mine, Inspector Hakala went into the mine's office and asked to see the person in charge. She was directed to Pat Carney, a consultant at the mine. Hakala recalled that on her last visit to the mine, Carney had been identified as a supervisor or foreman. Carney escorted Hakala underground to conduct the inspection. David Cochrane, Vice President for Environment, Health, and Safety at the mine, arrived at 10 a.m., after Carney and Hakala had begun the inspection. Cochrane attempted to reach Carney and Hakala when he arrived, but could not. Instead, he met with Hakala when she returned from underground to discuss the citations she had issued and advised her that Carney was a contractor and did not have the authority to act on behalf of the company. Cochrane did not ask to revisit any underground areas with Hakala.

Sutter Gold argues that its walk-around rights were violated when Hakala conducted the inspection accompanied by Carney, a contractor, instead of Cochrane. Section 103(f) of the Mine Act requires that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . ." 30 U.S.C. § 813(f). However, the Act specifies that "Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." *Id*. The Commission has explained that where an operator's Section 103(f) rights are violated, "the judge is permitted to consider the effect of the improper denial of the operator's walkaround rights on the operator's ability to present its case." *SCP Investments, LLC*, 31 FMSHRC 821, 822 (Aug. 2009).

At the outset, I find no problem with the actions of Inspector Hakala. She did not refuse to allow a representative to accompany her; rather, no one from management was present when she arrived at the mine. The inspector had met Carney on earlier inspections and was unaware that his position had changed from manager to consultant. She did everything she was required to do, including asking for the person in charge and going underground with someone who she thought, from previous experience, was management at the mine. Carney did nothing to indicate he was not in charge and accompanied her underground. Further, Carney was familiar with the mine and worked there regularly. I find no merit to Respondent's argument that there was an improper denial of its right to have a representative accompany the inspector.

II. PRINCIPLES OF LAW

A. Establishing a Violation

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). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the

evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. Significant and Substantial

A "significant and substantial" ("S&S") violation 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); *Mathies*, 6 FMSHRC at 4 (finding that a broken sander on a mantrip contributed to the hazard of a derailment or collision because of damp conditions at the mine and the steep route of the mantrip). 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.

C. Negligence

The Secretary's regulations categorize 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). 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).

While the Secretary's regulations focus on the presence or absence of mitigating circumstances in determining the level of negligence, 30 C.F.R. § 100.3, the Commission has indicated that Commission judges are not limited to this analysis and "may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03. High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1703.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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).

A. Citation No. 8873031

Citations 8873031, 8873032, and 8873033 relate to the water treatment area of the mine. The treatment area is accessed regularly for maintenance, and miners had been working there the day prior to the inspection.

Inspector Hakala testified that as she entered the water treatment area, she observed material on the ground and timbers being used to support the roof. Carney informed her that some material had recently fallen from the roof, and miners had scaled the area and added the timbers as additional support. He informed her that the timbers were a temporary fix until the condition could be properly addressed. Hakala conducted a visual inspection of the area and observed a fracture in the rock. She thus determined that a fall of material hazard existed. She did not sound the material, however, and testified that the timbers were stable and in good condition.

The mine's witnesses disputed Carney's assertion that a fall of materials had occurred in the area. Cole McGowan had gone to the water treatment area to check ground conditions in February 2015. He testified that he had been sent to check the area not because of a recent fall,

but rather in preparation for electricians to work there. McGowan had scaled the area, but noticed some hollow-sounding rock that would not come down with a scaling bar. He thus suggested to Cochrane that they install timbers as extra support. McGowan stated that he did not believe that the hollow-sounding rock was in danger of falling, but wanted to provide extra support in case of vibrations during the upcoming electrical work. The timbers were installed on March 2 and 3. McGowan's opinion was that the timbers had fixed the problem, and the area was safe. Cochrane testified that the rock in the area was of a strong type that was unlikely to fall. Inspector Hakala agreed that the rock was of a solid type. She admitted that she did not believe that there was an imminent danger of materials falling.

Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.18002(c) based on the conditions in the water treatment area. Section 57.18002(c) requires that

> conditions that may present an imminent danger which are noted by the person conducting the [shift] examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the [Act]) until the danger is abated.

30 C.F.R. § 57.18002(c). The persons referred to in Section 104(c) include

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order; … and (4) any consultant to any of the foregoing.

30 U.S.C. § 814(c).

The Secretary alleges that a fall of material hazard existed in the area, and thus that the mine should have withdrawn all persons from the area. While Carney told the inspector that an imminent danger existed in the area, the Secretary presented no further evidence to support that finding. The inspector admitted at hearing that she did not believe a rock was going to fall while she was in the water treatment plant. The mine's witnesses all agreed that there may have been a "drummy" portion of the roof in the area, but that the timbers had been set as an extra precaution and that they had resolved the issue.

I find that the Secretary has failed to prove that the ground conditions constituted an imminent danger, a necessary element of the standard. Accordingly, the citation is vacated.

B. Citation No. 8873032

Citation No. 8873032 also relates to ground conditions in the water treatment area. Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.3200, which provides:

> 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.

The Secretary alleges that no warning signs or barriers were posted to warn miners of the possibility of falling materials in the water treatment area.

The mine's witnesses testified that a chain with warning signs was ordinarily in place in front of the water treatment area. Inspector Hakala recalled seeing this chain on previous inspections. *See* Gov't Ex. 2 at 8. However, it was not in place on the date of the inspection. The mine's witnesses explained that this was because the mine had held an emergency drill at the end of the shift prior to the inspection, and because miners were required to leave their work stations immediately the chain had not been replaced it at the end of the shift. Inspector Hakala believed that even if the chain had been present, the mine should have had a sign specifically referring to hazardous ground. David Cochrane also testified that there is a barrier made of a rail and 55 gallon drums several feet before the chain that impedes entry to the area.

To prove a violation of § 57.3200, the Secretary must prove first that hazardous ground conditions were present, and second that the required warning signs or barriers were not provided. The Commission has stated that a number of factors should be considered in determining whether loose ground is present in a metal mine, including, but not limited to: "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *ASARCO, Inc.*, 14 FMSHRC 941, 952 (June 1992); *Amax Chem. Corp.*, 8 FMSHRC 1146, 1149 (Aug. 1986). In *ASARCO*, the Commission found that no violation had been proven where the area had been examined and tested, testimony indicated that ground conditions were not believed to be hazardous, scaling had been performed, there were no popping or snapping sounds, and the dolomite formation in the mine was stable. 14 FMSHRC at 952-53.

I find that the Secretary failed to present sufficient evidence of a ground condition creating a hazard in this area. The inspector based her conclusion that a hazard existed on a visual inspection and information provided by Carney that may not have been accurate. She did not conduct a sounding test and did not have reliable information about past roof falls. The area had been scaled and Cochrane testified that the rock in the area was stable. While miners had found that some rock in the area was hollow sounding, they had placed timbers to support it, and there was no evidence that those would not be effective at preventing rock from falling. Before the timbers were added, the chain with warning signs was in place to impede entry. For these reasons, I find that the Secretary did not meet his burden of proof. Therefore, I vacate the citation.

C. Citation No. 8873033

While in the water treatment area, Inspector Hakala observed a number of electrical panels used to power the water treatment equipment. The seven panels were hanging by chains and not secured to the ribs. Inspector Hakala testified that the panels were 480 volts, which is

considered high voltage. The panels were energized when Hakala observed them. The chains holding the panels were meant to keep them off the floor and out of the water but at a reasonably accessible height, but Hakala did not believe that the chains were sufficient to hold the panels. She observed that an S-hook connecting a chain to the wall was pulling apart and away from the wall. Several links appeared stressed and one was cracked. She believed that this was an indication that the chains were holding too much weight or had been struck. She also observed that the panels swayed when touched. Given the small size of the area, she was concerned that the panels would hit someone if they were to fall.

Cochrane pointed out that the chains were capable of holding 800 pounds and were connected to rock bolts, which were in turn connected to face plates. Cochrane believed that the chain mounting system was standard practice in many mines and was sufficient to support the weight of the panels. Randy Dutton, who had installed the panels, also testified that the chain mounting was a common practice in other mines. He believed that there was no chance that the panels would fall, and noted that blasting had occurred numerous times near the panels and they had not fallen. While there had been no blasting since the mine was put on non-producing status, the mine did not dispute or address the strength of the chains in the weakened condition observed by the inspector.

Carney informed Inspector Hakala that Cal-OSHA had advised the mine to update the chain system on a previous inspection. Carney characterized the Cal-OSHA statement as a "warning," but Cochrane described it as a "comment," saying that Cal-OSHA was merely recommending that the mine update the system to conform to the changing practice in other mines of using a solid mount. The mine had attempted to hire someone to address the condition, but the person had not yet been available to do the work. The inspector understood that several people were going in and out of the water treatment area each week. She noted that it was a tight area where workers would be very close to the hanging panels.

Inspector Hakala cited the mine for a violation of 30 C.F.R. § 57.12030, which requires that "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

I credit the testimony of Inspector Hakala that there were defects in the chains that weakened their effectiveness. It was unclear from her testimony whether the damage to the chains was enough to contribute to a fall or whether some work or vibration was necessary to contribute to the failure of the chains. However, the panels were heavy and there was activity in the mine that could have loosened or weakened the chains further. I find that the Secretary has demonstrated a violation of the mandatory standard. Because the mine was aware of the condition based on the Cal-OSHA inspection but had hired someone to fix the panels, I affirm the Secretary's moderate negligence assessment.

The Secretary alleges that the violation was reasonably likely to result in an injury causing lost workdays or restricted duty and that it was S&S. The Secretary has proven that a violation occurred, satisfying the first element of the *Mathies* test for S&S.

To satisfy the second element, the Secretary must prove the existence of "a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation." *Mathies*, 6 FMSHRC at 3-4. Here, the inspector observed that the chain links supporting the electrical panels appeared stressed and the panels swayed when touched. She observed that one of the S-hooks was pulling away from the wall and one of the chains had signs of cracks. The maintenance work in the area, such as scaling and setting timbers, could create a vibration that could cause the panels to fall. Given that the panels were heavy and the ability of the chains to hold their full weight was compromised, I find that the Secretary has demonstrated that the violation created a discrete safety hazard of the panels falling. The inspector observed that conditions in the area were tight and that miners would be in close proximity to the panels. The presence of timbers for roof support made it especially difficult to maneuver in the area. While there is some dispute as to how many people routinely worked in the area, it is clear that scaling had to be done and the water treatment area maintained, indicating that someone would be in the area two to three times each week. Such a person would likely be seriously injured if a panel were to fall. Therefore, I find the violation to be S&S.

D. Citation No. 8873030

In addition to inspecting the water treatment plant, the inspector and Carney traveled the secondary escapeway. Citation 8873030 concerns conditions in the secondary escapeway at the 1100-1200 level. Carney told Inspector Hakala that the escapeway had been examined and the roof scaled on the day prior to the inspection. But Hakala observed loose and cracked material in a number of areas as she walked the escapeway, an indication to her that the roof had not been properly scaled. She believed the loose materials were obvious and should have been pried off before anyone traveled the escapeway. Some of the loose areas were as large as one and a half feet wide by two feet long. If these fell, they would be likely to cause fatal injury. While there were roof bolts in places, some of the loose materials were not near the bolts. The Secretary produced photographs showing the condition, though they were not particularly illustrative due to the dark conditions in the mine. Gov't Ex. 4 at 4-10. Hakala did not conduct sounding tests and the roof was not making any sounds, but Carney tested an area with a bar and material fell. Hakala understood that miners did not regularly access the escapeway except for maintenance, but that they should be checking it every time they went underground, approximately two to three times per week.

David Cochrane confirmed that scaling was done in the secondary escapeway on a monthly basis, and it had been done by an independent contractor the previous day. The contractor, Cole McGowan, testified that he and another contractor had spent two days scaling the secondary escapeway. Cochrane had not inspected the area because of the safety drill the previous day, but McGowan had told him he had finished. McGowan testified that he had performed the scaling thoroughly, taking down any loose ground with a scaling bar. He stated that no material was falling or obvious, but that he did bring some material down. He also brought down any material that sounded drummy, even if it was not loose. He stated that typically he moved the material brought down during scaling to the side, but could not completely remove it because of the difficulty of getting the appropriate equipment into the area. Cochrane and Dutton testified that hard hats would be worn in the area, and any materials that would have fallen would not have been large enough to injure someone.

Cochrane testified that when McGowan scaled the area to abate the citation, he was able to bring down only a few pieces, none bigger than egg size. Randy Dutton, who also assisted with the scaling, stated that the only pieces large enough to hurt someone were low on the ribs. Inspector Hakala was not present for the termination, but believed that large pieces were brought down. The termination photos show a few large pieces, though it is unclear whether they were brought down from the roof or the ribs.[1] *See, e.g.*, Gov't Ex. 4 at 12, 17. It is also possible that the pieces were brought down in prior scaling, given that the area had not been cleaned in over a year.

Inspector Hakala issued Citation No. 8873030 based on the conditions in the secondary escapeway. The Secretary alleges a violation of 30 C.F.R. § 57.3200, which requires that:

> 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.

As stated with regard to Citation No. 8873032, the Commission has stated that a number of factors should be considered in determining whether loose ground is present, including, but not limited to: "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." *ASARCO, Inc.*, 14 FMSHRC at 952; *Amax*, 8 FMSHRC at 1149.

McGowan and the inspector walked the secondary escapeway a day apart, but had differing views of the roof conditions. McGowan believed he had thoroughly scaled the area just prior to the inspection, whereas Hakala saw roof problems including cracks and loose material in a number of areas. McGowan admitted that it was possible for the ground material to have shifted overnight. In any case, I credit the inspector's testimony with regard to the roof conditions. While she did not conduct sounding tests or observe popping or snapping sounds, she noticed cracks and loose material. There were roof bolts in the area, but some loose areas were not captured by the bolts. Accordingly, I find that there was a ground hazard as alleged by the Secretary. Because there was no barrier or warning sign in the area, the condition was in violation of § 57.3200.

The Secretary alleges that the violation was the result of moderate negligence. Because the area had been recently scaled, I agree that the negligence was moderate.

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[1] Respondent argues that evidence of termination should not be admitted because it constitutes evidence of subsequent remedial measures, which is inadmissible as proof of culpability under Federal Rule of Evidence 407. However, the policy behind the Federal Rule is to avoid discouraging safe conduct after an accident. That policy is inapplicable here, where abatement of the alleged violation is required by statute. *See* 30 U.S.C. § 814(b). Accordingly, I find that evidence of abatement measures is admissible, but I do not rely on it as evidence of the violation.

The Secretary alleges that the violation was reasonably likely to result in a fatal injury and was S&S. Respondent offered evidence that miners would be wearing hard hats and any material that fell would be small and therefore would not injure a miner. However, Hakala observed loose materials that were large enough to injure or kill a person if they fell. While the loose materials were only in some areas of the escapeway, given that miners travelled the area, it was reasonably likely that a fall would injure a miner.

Applying the *Mathies* test to this citation, the Secretary has proven that a violation occurred. The inspector observed fractures and loose materials, which indicate that the hazard of falling material was present, satisfying the second *Mathies* element. Some of the loose rocks were large and miners were frequently in the area. Even though some of the loose rocks were small, a small falling rock could still cause serious injury to a miner, even one wearing a hard hat. *See Springfield Underground, Inc.*, 17 FMSHRC 613, 620 (Apr. 1995) (ALJ) (upholding S&S for violation of § 57.3200 where only fist-sized rocks were brought down in abatement, because those could still seriously hurt someone). I find that a fall of materials would be likely to cause serious injury, satisfying the third and fourth elements. Accordingly, the citation was properly designated S&S.

IV. 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, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The Secretary has proposed a penalty of $243.00 for Citation No. 8873033, the violation related to the electrical boxes and a penalty of $807.00 for Citation No. 8873030, the violation related to hazardous ground conditions in the escapeway. Sutter Gold is a small operator for purposes of penalty calculations. The Secretary introduced the mine's history of violations, which shows that the mine had two violations in the year prior to the inspection at issue. Gov't Ex. 7. With regard to the two violations at issue, the Secretary has proven that the operator was moderately negligent and the violations were reasonably likely to cause serious injury. The parties have stipulated that the operator demonstrated good faith in abating the violations. Jt. Stips. ¶ f. No evidence was presented that the proposed penalties would affect the operator's

ability to continue in business. Accordingly, I find that a penalty of $500.00 is appropriate for Citation No. 8873033 and because the violation was extensive, I find that a penalty of $1,000.00 is appropriate for Citation No. 8873030.

V. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $1,500.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

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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

June 10, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2012-1022-M AC No. 04-01299-289667 Docket No. WEST 2013-321-M AC No. 04-01299-306795-01 Docket No. WEST 2013-322-M AC No. 04-01299-306795-02 Docket No. WEST 2013-323-M AC No. 04-01299-306795-03 Docket No. WEST 2013-365-M AC No. 04-01299-309234 Docket No. WEST 2013-486-M AC No. 04-01299-311898
v.	
ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED, Respondent	Mine: Sixteen to One Mine

AMENDED DECISION

Appearances: Jan M. Coplick, Esq., Seema N. Patel, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for Petitioner;

Michael M. Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, for Respondent.

Before: Judge Bulluck

This Amended Decision **CORRECTS** the proposed penalty figures as follows: page 2 – the introductory paragraph, line 5 and footnote 1, line 3; page 34 – Penalties section, paragraph 1, line 1.

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Original Sixteen to One Mine, Incorporated ("Original Sixteen"), pursuant to

section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $10,141.00 for 29 alleged violations of his mandatory safety standards.[1]

A hearing was held in Nevada City, California.[2] The following issues are before me: (1) whether Original Sixteen violated the cited standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of negligence alleged; and (4) whether the violations were attributable to unwarrantable failures to comply with the cited standards, where alleged.

I. STIPULATIONS

The parties stipulated as follows:

1. Original Sixteen to One Mine, Incorporated, is the owner and operator of the Sixteen to One Mine (hereafter "the mine"), MSHA I.D. No. 0401299.

2. The mine is an underground gold mine located near Alleghany, California.

3. The subject citations were properly served by a representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy, if any, of the statements asserted therein.

4. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

5. Photocopies of the parties' exhibits are presumed to be accurate copies of the originals.

6. Documents pertaining to violations and quarterly production that are downloaded from MSHA's on-line Data Retrieval System at MSHA.gov are presumed to contain accurate information.

[1] The parties reached a settlement on 15 of the 29 contested citations/orders. The total civil penalty proposed for the 14 remaining citations/orders adjudicated in this proceeding is $7,843.00.

[2] By my direction, a complete set of MSHA Inspectors William Edminister's and Roshan Gulati's field notes were provided by the Secretary and received in evidence as exhibits P-16 and P-17, respectively, post-hearing. See Tr. 540-43.

7. Documents reflecting information downloaded from the Security and Exchange Commission's on-line data retrieval system at SEC.gov are presumed to contain accurate information.[3]

Tr. 7-8.

For the reasons set forth below, I **VACATE** two citations; **AFFIRM** 10 citations and 2 orders, as issued; and assess penalties against Respondent.

II. FACTUAL BACKGROUND

Original Sixteen operates the Sixteen to One mine, an underground gold mine in Alleghany, California. Jt. Stip. 1. Michael Miller is the President of Original Sixteen. Tr. 543-44. Michael Miller, his son Reid Miller, Joseph Sauer, and Aaron (Chico) Aguirre were working in the mine during the 2012 inspections at issue. Tr. 389, 475, 430-31.

On March 20, 2012, William Edminister, an MSHA inspector since early 2009, conducted a regular inspection of the mine. Tr. 16, 19. He issued a citation to Original Sixteen for loose ground in the main haulageway. Ex. P-1A. Two days later, he returned to the mine and issued a citation for failure to maintain the 600 and 1000 level secondary escapeway in safe and travelable condition. Ex. P-2A.

On September 18, 2012, Inspector Edminister, accompanied by MSHA Inspector David Blankenship, conducted another regular inspection of Sixteen to One and cited several conditions. Tr. 362-63. Edminister issued a citation for failure to maintain the 600 and 1000 level secondary escapeway in safe and travelable condition (Ex. P-4A); a withdrawal order concerning a miner working alone where hazardous ground conditions existed (Ex. P-5A); a withdrawal order for loose ground in the 21 Tunnel secondary escapeway (Ex. P-6A); and an order withdrawing miners from all underground areas of the mine for failure to maintain the 21 Tunnel secondary escapeway in safe and travelable condition (Ex. P-7A). He also issued citations for failure to barricade an unsafe area beyond the 800 station (Ex. P-8A); failure to take down hazardous material in an elevated ore chute (Ex. P-9A); failure to provide fire protection for timbered construction in the 21 Tunnel secondary escapeway portal (Ex. P-10A); failure to guard or insulate output terminals on a welder (Ex. P-11A); failure to clear dry vegetation in close proximity to the Upper Bench mine opening (Ex. P-12A); and failure to accurately depict mine openings on the mine map (Ex. P-14A).

On October 10-11, 2012, MSHA Inspectors Roshan Gulati and Blankenship conducted a regular inspection of the mine. Tr. 320. Gulati issued citations for working in the face of the September 18 withdrawal order pertaining to the 21 Tunnel (Ex. P-3), and failing to repair a defect affecting the safety of an electric hoist in a timely manner (Ex. P-13A).

[3] No SEC documents were offered or received in evidence, and the only testimony relating to Original Sixteen's filings with the SEC presumably bears on jurisdiction, which is not at issue in these proceedings. See Tr. 607-09.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8612839

Inspector Edminister issued 104(a) Citation No. 8612839 on March 20, 2012, alleging a violation of section 57.3200 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[4] The "Condition or Practice" is described as follows:

> Loose ground was found approximately 1800 ft from the 800 Level Mine Portal along the main haulage way. There is large fractured rock overhead along the slip plain that has come free from the plain and dropped down about ¼ inch. This rock is about 2 ft by 3 ft by about 6 inches thick and about 5-7 ft over the travel way which is about 6 ft wide. There was other unscaled or unsupported ground conditions around the slip plain in this area. This condition exposes miners traveling through the area to fatal type injuries had this condition been allowed to further exist.

Ex. P-1A.[5] The citation was terminated on March 22 after Original Sixteen barred down the fractured rock, and installed a wood sprag and two additional stalls. Ex. P-1B.

1. 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)).

The Secretary contends that the cited ground conditions were hazardous and unsafe. Sec'y Br. at 9-10. Original Sixteen argues that the ground conditions were not hazardous, and that Edminister lacks the qualifications to inspect the Sixteen to One mine. Resp't Br. at 6-7.

As a preliminary matter, I note that Original Sixteen stipulated to Gulati's and Blankenship's competence to inspect the Sixteen to One mine. Tr. 318; 361. However, it

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[4] 30 C.F.R. § 57.3200 provides that "[g]round 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."

[5] In the context of a previous, analogous standard, 30 C.F.R. § 57.3-22, the Commission interpreted loose ground to refer "generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling." *Amax Chem. Co.*, 8 FMSHRC 1146, 1148 (Aug. 1986).

essentially raised a standing challenge to Edminister's qualifications to inspect the mine and make judgments respecting the cited hazards. Tr. 192-93.

Edminister came to MSHA with eight years experience as a safety representative at a surface mining operation, and six months of training in identification of loose ground and ground support systems; as an MSHA inspector, he had participated in several underground mine inspections. Tr. 13-18. Notably, when making determinations as to loose ground, he relied upon the array of techniques recognized by the Commission. Tr. 276-77; s*ee Asarco Inc.*, 14 FMSHRC 941, 952-53 (June 1992). Accordingly, I find that Edminister was qualified to inspect Sixteen to One and issue the citations and orders contested in this proceeding.

Edminister testified that section 57.3200 requires Original Sixteen to remove or support loose ground conditions in travel or work areas. Tr. 38-40. He stated that he observed a slip plane directly above the travelway, evidence of water seepage through it, and a 2′ by 3′ by 68″ rock slab that had dropped ¼ inch along the plane, indicating that it was loose.[6] Tr. 28, 30-31, 34; Exs. P-1C, P-1D, P-1E, P-1F, P-1G, P-1H; see P-16 at 3. It was his opinion that the slab had been scaled down by hand to terminate the citation, confirming his conclusion that it was, in fact, loose ground. Tr. 40; see Exs. P-1J, P-16 at 6. He also opined that, in the unlikely event that the slab were to fall on a miner from the height of five to seven feet, it could cause fatal injuries. Tr. 42-43.

Michael Miller testified that the roof was not loose, that there were ground supports near the cited slab, that experienced miners who pass through the travelway regularly and are trained to identify loose ground had not noticed the cited condition, and that the metamorphic geology of Sixteen to One makes it resistant to formation of loose ground. Tr. 545-46. Joseph Sauer testified similarly, that the roof was not unstable, and that there were ground supports near the slab. Tr. 502-03. He stated that he did not scale down the slab, that it was still in place, and that stalls were installed to support it. Tr. 487-88, 502-03.

The evidence indicates that the travelway was regularly used by the miners, and that the cited area of roof contained cracks or fractures. I credit Sauer's testimony that he did not scale down the slab. However, crediting Edminister's testimony that upon his return the next day, he observed fragments of the slab on the ground, it is clear that someone had scaled it down or that rock fragments had broken away from the roof. Furthermore, the loose ground created a hazard since crushing injuries from a falling slab, while unlikely, would be reasonably expected to be fatal. Accordingly, I find that the Secretary has established a violation of section 57.3200.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because the travelway was regularly used, but he considered as mitigating factors that the area was dimly lit and the unstable slab was not readily noticeable, and that Original Sixteen had no recent

[6] A slip plane is "[c]losely spaced surfaces along which differential movement takes place in a rock. Analogous to surfaces between playing cards." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 514 (2d ed. 1997) ("*DMMRT*").

violation for loose ground. Tr. 43-44. Original Sixteen offered no rebuttal. I find the lack of obviousness of the roof condition and Original Sixteen's clean history to be mitigating factors. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

B. Citation No. 8612841

Inspector Edminister issued 104(a) Citation No. 8612841 on March 22, 2012, alleging a violation of section 57.11051 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[7] The "Condition or Practice" is described as follows:

> The Secondary escape way designated and posted on the mine map along the 600 and 1000 level is not being maintained in safe or travelable condition. There are several areas along the 600 level escape way where there is a 3 inch air line crossing the tracks about 6-10 inches above the ground level creating a tripping hazard. There is a 3 inch metal pipe line crossing the travel way 48 inches off the pass away level. There are areas where the lagging for the stopes have given way allowing loose unconsolidated material to enter the passage way creating additional hazards.[8] There is a section of the passageway that is under up to 14 inches of water and has a 2″ x 12″ x 7′ long piece of timber floating in the water. There are two large boulders ranging up to 44 inches wide, 45 inches long and 20 inches thick that have fallen from a slip plain and or old stope workings. There is a section of unconsolidated and unsupported material from an overhead stope that is resting directly above the passageway exposing the miners to a hazard of being struck by falling material. These conditions exposed the miners needing to access the secondary escape in the event of an emergency to serious to fatal type injuries in the event of an accident. The miners access many different areas at the mine depending on maintenance and repairs.

Ex. P-2A. The citation was terminated on March 27 when Original Sixteen barricaded the area from which the secondary escapeway is accessed. Ex. P-2B.

1. Fact of Violation

Original Sixteen argues that the 600 and 1000 level secondary escapeway was not required because miners had not worked in the area served by the escapeway for several years. Resp't Br. at 7.

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[7] 30 C.F.R. § 57.11051 provides that "[e]scape routes shall be (a) [i]nspected at regular intervals and maintained in safe, travelable condition; and (b) [m]arked with conspicuous and easily read direction signs that clearly indicate the ways of escape."

[8] A stope is "[a]n excavation from which ore has been removed in a series of steps." *DMMRT* at 541.

Lagging is "[material that] wedges and secures the roof and sides behind the main timber or steel supports in a mine and provides early resistance to pressure." *DMMRT* at 302.

Edminister testified that section 57.11051 requires Original Sixteen to keep escapeways clear of tripping hazards and loose ground. Tr. 55, 57, 65. He stated that he observed numerous tripping hazards impeding a miner's emergency exit through the travelway, including a three-inch air line crossing in front of a ladder used to reach the secondary escapeway (Tr. 47; Ex. P-2C); an air or water line zig-zagging three inches off the travelway floor (Tr. 54; Exs. P-2D; P-2L); multiple piles of old shot rock in the travelway (Tr. 60, 62; Exs. P-2E; P-2F; P-2I; P-2K); an unsupported ledge from a mined-out stope (Tr. 57; Exs. P-2G, P-2H); and a piece of timber floating in a twelve-inch deep water accumulation (Tr. 61; Ex. P-2J). Edminister opined that, in the context of a mine emergency requiring use of the secondary escapeway, a miner would be exposed to tripping hazards, fatal crushing injuries from groundfalls, and drowning from slips and falls in accumulated water. Tr. 64-65. He also testified to the unlikelihood of the occurrence of injury, having relied on Michael Miller's assertion that no miners had been working in the affected area. Tr. 64.

Michael Miller testified that miners had not worked in the area served by the 600 and 1000 level escapeway in 2012. Tr. 549. Sauer testified that the pipe crossing the ladder posed no tripping hazard to an experienced miner, that the piles of material only partially blocked the travelway, that the line crossing the travelway was not a tripping hazard because it was waist-high, and that the hazards associated with the cited condition were not as severe as cited by the inspector. Tr. 522, 524-25; Resp't Br. at 7.

An operator's duty to maintain escapeways free of hazards impeding safe exit is not, as Original Sixteen argues, contingent upon whether they are required. Rather, by its plain language, section 57.11051(a) requires an operator to maintain all active escapeways in "safe, travelable condition." *Original Sixteen to One Mine, Inc.*, 23 FMSHRC 1158, 1173-74 (Oct. 2001) (ALJ) (holding that even if Original Sixteen's secondary escapeway was not required, it was not relieved of its duty to maintain designated escapeways safe and travelable). In this case, the 600 and 1000 level travelway was designated as a secondary escapeway on the mine map, and no barricade or warning signage removed from service either the escapeway or the area it serves. Thus, the evidence indicates that miners were able to access the area from which the secondary escapeway is accessed and the escapeway, itself. Accordingly, I find that Michael Miller's testimony that the area served by the 600 and 1000 level secondary escapeway had not been used in 2012, while unchallenged, fails to absolve Original Sixteen of its duty to maintain the escapeway in safe and travelable condition since it had not been taken out of service.

Original Sixteen presented no direct evidence that the conditions observed by Edminister did not exist, and I find no merit in contentions that the totality of the cited conditions was not as hazardous or serious as alleged by the Secretary. Even experienced miners would be faced with the "panic factor" where "it would be unrealistic to fail to take into consideration that miners may be hurrying, possibly with limited vision because of smoke." *Id.* at 1163. Therefore, I find that the combination of the hazards, each posing an obstacle to speedy exit in the event of an emergency, and risk of serious to fatal injury, amounted to failure to comply with the standard. Accordingly, the Secretary has established a violation of section 57.11051.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because, although miners had not been working in the area served by the secondary escapeway, it was designated on the mine map as an active escapeway. Tr. 65. While Original Sixteen may have believed that the escapeway was not required, Michael Miller is an experienced miner and mine owner who should have known that where a designated escapeway is accessible and, therefore, active, there is an obligation to maintain it in safe, travelable condition. Furthermore, it is noteworthy that Original Sixteen had been cited for similar violations in 1999 and 2011. *See id.* at 1161; *Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2227 (Aug. 2014) (ALJ). Accordingly, I find that Original Sixteen was moderately negligent in violating the standard.

C. Citation No. 8695844

Inspector Edminister issued 104(d)(1) Citation No. 8695844 on September 18, 2012, alleging a "significant and substantial" violation of section 57.11051 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard. The "Condition or Practice" is described as follows:

> The mine operator has removed the barricade put in place to impede access to the working and or travel areas where the secondary escape located on the 600 and 1000 Level would be needed in the event of an emergency. Miners travel this area as needed to metal detect for ore and get supplies as needed. The Mine President Mike Miller stated that there is no area in this mine that is abandoned and that they can travel and access any area of the mine. This secondary escape was under citation (8612841) issued on 03/22/2012 and was terminated based on the mine president's statement that the area has been abandoned and there was no need to access the area; therefore installed a barricade and warning sign. The cited condition along the secondary escape have not been corrected as required by the previous citations termination (8612841-01). Due to the actions and inactions of the mine operator, this condition/practice has been evaluated at higher than ordinary negligence.
>
> Standard 57.11051 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-4A. The citation was terminated on October 17 when the mine operator reinstalled a barricade blocking access to the secondary escapeway. Ex. P-4E.

1. Fact of Violation

The Secretary argues that Sixteen to One was in a production rather than exploration mode, which requires the operator to have and maintain a secondary escapeway and, irrespective

of whether it was producing or exploring, it was required to maintain its active secondary escapeways in safe, travelable condition.[9] Sec'y Br. at 8-9, 15.

Original Sixteen argues that no miners were working in the affected area at the time of the inspection, and that there were no workplaces or travelways on the 1000 level. Tr. 552-53; Resp't Br. at 12. It further contends that the mine was in an exploration mode, requiring no secondary escapeway and, therefore, access to the affected area was permitted. Resp't Br. at 12. In other words, Original Sixteen is essentially arguing that since no secondary escapeway was mandated, it was not required to either maintain the 600 and 1000 level escapeway or take it out of service.[10]

Edminister testified that upon returning to inspect the mine in September 2012, he observed that the barricade that Original Sixteen had installed to terminate Citation No. 8612841 had been removed, and that Reid and Michael Miller told him that the hazards cited in the 600 and 1000 level secondary escapeway in March had not been abated. Tr. 66; Exs. P-2, P-16 at 30. He testified that he was never told when or why the barricade had been taken down, or how frequently miners had been entering the area beyond the barricade. Tr. 72. He stated that Michael Miller told him that miners were free to travel anywhere in the mine, and that Original Sixteen was not required to have a secondary escapeway because the miners were engaged in exploration. Tr. 66; Ex. P-16 at 30. In his opinion, it would be reasonably likely that a miner attempting to exit the mine in an emergency situation would be unable to safely negotiate the unabated slipping, tripping, and crushing hazards in the travelway, thereby delaying timely escape. Tr. 81-82.

On cross-examination, Sauer testified that the secondary escapeway had not been cleaned up, that the barricade had been removed and, for approximately one week, the affected area had been open until a gate with a lock had been installed. Tr. 525-28, 535. He also stated that, to his knowledge, no miners had actually entered the affected area after Original Sixteen was cited in March. Tr. 525.

In each instance where Original Sixteen was cited for conditions relating to either the 600 and 1000 level secondary escapeway or the 21 Tunnel, the Secretary contends, and Original Sixteen contests, that Original Sixteen was in a production mode and, therefore, required by regulation to have a secondary escapeway. See Sec'y Br. at 8-9, 12-14. While I note that the evidence shows little, if any, material distinction between Original Sixteen's core mining methods for production and exploration, it is unnecessary to resolve this issue because, irrespective of the mine's operational mode, the standard clearly requires that active escape routes be maintained free of hazards impeding safe exit.

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[9] Section 57.11050(a) provides that "[e]very mine shall have two or more separate, properly maintained escapeways to the surface . . . . [a] second escapeway is recommended, but not required, during the exploration or development of an ore body."

[10] There are two separate secondary escapeways identified in these proceedings; the 600 and 1000 level escapeway at issue in Citation Nos. 8612841 and 8695844, and the 21 Tunnel at issue in Order Nos. 8695848, 8695849, and 8695846.

In this case, by Original Sixteen's own account, the hazards cited in the 600 and 1000 level secondary escapeway in March had not been cleaned up, and it had only been taken out of service temporarily. Without evidence to the contrary, by removal of the barricade and installation of the gate, it is reasonable to conclude that Original Sixteen intended that its miners have access to the area served by the secondary escapeway. Consequently, once the barricade was removed, miners were exposed to the hazardous conditions in the escapeway. Accordingly, I find that the Secretary has established a violation of section 57.11051(a).

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *Nat'l Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Since the "need for adequate escapeways will only arise in the context of an emergency evacuation from the mine . . . the S&S nature of an escapeway violation must be considered in the context of an emergency." *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1395 (July 2015). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2001-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established. Miners using the secondary escapeway in the event of an emergency would be exposed to slip and trip, crushing, and drowning hazards, thereby impeding speedy exit from the mine. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious. Here, miners impeded in exiting the mine through the 600 to 1000 level secondary escapeway during an emergency would be reasonably likely to suffer serious to fatal injuries. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Energy Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated"

in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high degree of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in abating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009).

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure to comply with section 57.11051(a), the Secretary contends that Original Sixteen deliberately left the affected area unbarricaded for, at least, a week, despite the fact that this secondary escapeway was cited in March for hazardous conditions that it had not cleaned up. Sec'y Br. at 16. Original Sixteen does not directly address the Secretary's contentions, but argues that no miners were working in the area at the time of the inspection, that there were no workplaces or travelways on the 1000 level, and that the mine was in an exploration mode. Resp't Br. at 12.

The hazardous conditions cited were obvious and existed in several locations throughout the escapeway. Furthermore, after Edminister cited the hazards in March, Original Sixteen was on notice that further efforts for compliance were necessary. Original Sixteen's conduct was aggravated by its removal of the barricade, permitting access to the area served by the secondary escapeway. Original Sixteen's argument that the mine was in an exploration mode does not mitigate the seriousness of its conduct, given that the operator was on notice from a previous violation that it had a duty to maintain active designated escapeways safe and travelable, regardless of whether they are required, or take them out of service.

Despite the initial barricade, Original Sixteen's subsequent removal of the barrier then replacement with a locking gate, without addressing the hazards, was egregious. I find that the violation posed a high degree of danger because of the consequences of delayed escape. Regarding duration, it is undisputed that the area was unbarricaded for, at least, a week - - a sufficient period of time to sustain an unwarrantable failure finding given the seriousness of the violation. *See*, *e.g.*, *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (upholding an unwarrantable failure designation where accumulations existed for more than one shift). Therefore, I find that the Secretary has established that Original Sixteen was highly negligent in violating the standard, and engaged in aggravated conduct that constitutes unwarrantable failure.

D. Order No. 8695848

Inspector Edminister issued 104(d)(1) Order No. 8695848 on September 18, 2012, alleging a "significant and substantial" violation of section 57.18025 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by

Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard.[11] The "Condition or Practice" is described as follows:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen. A miner was assigned to work alone in the secondary escape where the timbers and lagging had collapsed allowing material from the upper stope to fall into the travel way. There is unsupported and unstable ground conditions in the stope near the area the miner was performing his duties. It was stated that the miner was working in the area alone while clearing the fallen debris while the other two miners were working the heading near the 848 split where the miners cries for help would not be heard. This practice posses an imminent danger to the miners working alone where hazardous conditions exist.
>
> This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-5A, P-5B, P-5D. Gulati terminated the order during his October 12 inspection upon confirmation that Original Sixteen would be enforcing its applicable work policy. Ex. P-5C. On October 22, 2012, MSHA modified the order by deleting the following wording from the "Condition or Practice" section:

> This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore, no abatement time was set.

Ex. P-5D.[12]

1. Fact of Violation

Original Sixteen argues that Edminister did not actually observe anyone working alone in hazardous conditions and, therefore, the order should never have been issued. Resp't Br. at 13.

Edminister testified that several hazardous conditions existed in the 21 Tunnel. He noted two instances where ground failures had occurred, timbers and lagging that had not been properly maintained, material that had collapsed into the travelway due to improperly maintained timbers and lagging, and a nearby ground support that was at risk of collapse. Tr. 83-85, 90, 306. He opined that section 57.18025 requires Original Sixteen to prevent its miners from working alone in an area with groundfall hazards, where a miner's call for help would not be heard. Tr.

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[11] 30 C.F.R. § 57.18025 provides that "[n]o employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen."

[12] Imminent Danger Order No. 8695845 was vacated by the Secretary on November 21, 2012, and is not at issue in these proceedings. P-3D, P-3E, P-3F.

83-84. According to Edminister, Reid Miller told him that approximately two weeks before the inspection, Michael Miller had assigned him to work by himself in the 21 Tunnel to clear timbers that had fallen two weeks before that, and Reid Miller agreed with Edminister's assessment that the 21 Tunnel was unsafe. Tr. 84, 302-06; Ex. P-16 at 32. He estimated the distance between Reid Miller and other miners to have been several hundred feet, explaining that the sound of distress cries would have had to have traveled around a ninety degree angle, and that the miners told him that they would not have been able to hear the lone miner's cries from where they were working. Tr. 84-85. Edminister also opined, in light of previous and impending groundfalls, that it was reasonably likely that a miner would suffer fatal injuries from head trauma and asphyxiation. Tr. 85-86, 309.

Michael Miller testified that Original Sixteen had never assigned or permitted any miner to work alone in hazardous conditions. Tr. 553; Ex. P-17 at 9. Reid Miller testified that he told Chico Aguirre to pick up old wood laying in the drift by the 849 Station, and that he would return to check on him. Tr. 392. Aguirre testified that it was he who was working alone in the 21 Tunnel, taking out and replacing old timbers laying on the rib. Tr. 431. Aguirre also testified that the old timbers had not fallen, but had been pulled out by the miners. Tr. 431. He stated that he did not notice any hazardous conditions when he began work, and that a landline phone is located some 200 feet from where he was working. Tr. 433-35.

Notwithstanding the fact that Edminister may have been told by Reid Miller that it was he who had been working alone, I credit Reid Miller's and Aguirre's testimony that Aguirre was the solitary miner. I also credit Edminister's testimony that there had been previous ground failures, and that another was imminent, absent any credible challenges by Original Sixteen. Indeed, Aguirre's testimony that there had not been a ground failure, and that he had not noticed any hazardous conditions while he was working is unconvincing, given his overall nervousness and unwillingness to answer questions directly. Likewise, Original Sixteen failed to rebut Edminister's contention that other miners would not have been able to hear Aguirre's calls for help, and the presence of the landline telephone does not negate the violation, given the likelihood that a miner in distress would be in no condition to access the landline, much less use it. According to Gulati's field notes respecting termination of the order, miners told him that they check on each other every 20 minutes. Ex. P-17 at 9. However, there is no evidence of Reid Miller's oversight beyond his assurance to Aguirre that he would check on him - - evidence that falls short of the structured monitoring necessary to satisfy the standard. *See Cotter Corp.*, 8 FMSHRC 1135, 1139 (1986) (holding that while contact with the solitary miner need not be continual, it must be regular and dependable, and commensurate with the hazard presented). Accordingly, I find that the Secretary has established a violation of section 57.18025.

2. Significant and Substantial

The fact of violation has been established, and I find that the lone miner was exposed to impending groundfalls, without benefit of being heard by nearby workers. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

I find, in the context of continued normal mining operations and the impeding threat of groundfall, that the lone miner was reasonably likely to sustain serious to fatal crush injuries, suffocation, and/or head trauma. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure, the Secretary contends that the hazardous ground conditions were open and obvious, that Reid Miller, as lead miner, had knowledge of them and, by permitting work under such conditions, set an unsafe example for other miners. Tr. 86; Sec'y Br. at 16-17. Original Sixteen only addresses the Secretary's contentions by arguing that the conditions in the 21 Tunnel were not hazardous. Resp't Br. at 13.

The record indicates that the ground conditions were obvious and extensive, as there was more than one area where a groundfall had already occurred, and loose ground in the area was likely to fail. Reid Miller, as lead miner, had assigned Aguirre to work alone in an area with obvious hazards. Since the task involved replacing old timbers where a ground failure had occurred, I find that Reid Miller knew or should have known that working alone under these conditions would be perilous. The relatively short duration of this violation, having occurred during one shift, and the absence of any violation history, is counterbalanced by the seriousness of the hazard posed by the miner working alone in an area of loose ground, and by Original Sixteen's lack of any effort to comply with the standard. Accordingly, I find that the Secretary has established that Original Sixteen displayed a high degree of negligence in violating the standard, and aggravated conduct that constitutes unwarrantable failure.

E. Order No. 8695849

Inspector Edminister issued 104(d)(1) Order No. 8695849 on September 18, 2012, alleging a "significant and substantial" violation of section 57.3360 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence and "unwarrantable failure" to comply with the standard.[13] The "Condition or Practice" is described as follows:

> The ground supports used at the secondary escape along the 800-21 tunnel are not being maintained to support the ground. There is a section near the entrance about 60 feet in that has collapsed due to old deteriorated timbers. The old stalls and lagging was not being maintained in good condition which allowed the material from the old upper stope above the escape way to collapse into the travel way. There is loose unsupported ground along the back (roof) of the old stope which

[13] 30 C.F.R. § 57.3360 provides that "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area."

> would enter into the escape way that is not immediately obvious to persons accessing the area. The unsupported ground in the stope area ranges up to about 3 x 2 feet thick. The miner felt the area was too unsafe to continue through the area and stated that other work along the secondary escape was done about 2 weeks ago by accessing through the secondary escape portal. The affected area at this point is about 15 feet long. There is another stall and lagging along the rib just beyond this point that is on the erg [sic] of failing. There is another section further down the escape way that has unsupported ground directly over head in the escape way. There is material that had previously fallen from the back (roof) at this location. The loose deteriorating material ("serpentine slip," steeply dipping vertically above the travel way) is not supported nor miners protected from the falling material. The miners stated that they did not want to scale down the loose material due to it may cause additional roof fall, nor would barring be an option due to the vibration could also cause the slip to give way. This area affected by the slip is about 40 ft in length.
>
> Standard 57.3360 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Exs. P-6A, P-6B, P-6G. The order was terminated when Original Sixteen scaled down the loose material, installed additional lagging and stalls, and conducted a safety talk with the miners. Ex. P-6H. On October 17, 2012, MSHA modified the order by deleting the following wording from the "Condition or Practice" section:

> There is another stall and lagging for another old stope just beyond this point that is on the erg of failing. This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore no abatement time was set.

Ex. P-6G.

1. Fact of Violation

Original Sixteen argues that if the ground support conditions in the 21 Tunnel existed, as cited, they would have been noted in Original Sixteen's monthly examinations, and during previous MSHA inspections. Resp't Br. at 11-12, 14-15.

Edminister opined that section 57.3360 requires Original Sixteen to maintain ground support in proper condition, and to support loose ground before miners can perform work in the vicinity of inadequate support. Tr. 86-87. Upon entering the 21 Tunnel secondary escapeway during the September inspection, Edminister observed two sections of ground support that had collapsed, and noted another section that was on the verge of collapse. Tr. 87, 90, 285; Exs. P-6I, P-6J, P-6O. He opined that one of the sections had failed because ground support stalls were not being properly maintained. Tr. 91, 93; Ex. P-16 at 17. He testified that Reid Miller was working where a rib had collapsed, and that he issued an imminent danger order and

discontinued the inspection out of concern for his own safety and that of the miners. Tr. 87-89; Ex. P-16 at 33. According to him, Reid Miller stated that he, too, felt the 21 Tunnel to be too unsafe for the inspection to continue. Tr. 88, 285; Ex. P-16 at 33. Edminister noted that a month later the hazardous conditions had been abated and he continued farther into the 21 Tunnel, where he observed a "seam of serpentine" overhead, indicating that the roof was unstable. Tr. 91-92; Exs. P-6K, P-6L, P-16 at 58-60. He testified that the miners abated the condition by scaling down some of it, and installing stalls and lagging over the travelway to protect passers-by from falling ground. Tr. 92-93; Exs. P-6M, P-6N. Edminister explained that based on these observations, he surmised that Original Sixteen was in the habit of waiting until its ground supports fail before maintaining or replacing them. Tr. 87.

Joseph Sauer testified that he accompanied Edminister during the inspection, that the 21 Tunnel is designated for use in an emergency, and that he participated in abating the hazards cited by Edminister in the travelway. Tr. 484, 506. He explained that, in identifying loose ground, he looks for evidence of stalls taking on weight, or splitting or rotting from age. Tr. 520. He testified that he never saw the potential for a hazard in the 21 Tunnel, but noted that there was a lot of material on the floor that he estimated to have had been there for 50 or 60 years. Tr. 486. He also stated that miners clear a path through the travelway, as needed, by throwing material off to the side. Tr. 519. In his opinion, the material in the travelway was "not necessarily something that has collapsed due to bad ground," but appeared to be lagging that "gave out." Tr. 530-31.

Reid Miller testified with great difficulty, clearly carrying the weight of being questioned by his father while under the expectation of being truthful and, in any event, supportive of his father and the family business. Despite his apparent nervousness and conflicted responses, however, Miller's testimony essentially corroborated Edminister's account of the hazards in the 21 Tunnel, and lent credence to Edminister's contention that Miller had agreed that it was unsafe to proceed with the inspection. See Tr. 393-94.

In crediting Edminister's contention that he had observed two sections of failed ground support and another close to collapsing, I find that Sauer's and Reid Miller's accounts of the 21 Tunnel's condition fall short of mounting a successful challenge to the charges levied by the Secretary. Furthermore, Original Sixteen's own witness, Sauer, described old timber in the escapeway that he estimated to be extremely old, as well as the mine's common practice of pitching material to the side to clear a pathway. The evidence lends some credence to the suggestion that Original Sixteen maintains its ground support only after it fails, although that conclusion remains in the realm of speculation. However, the record amply supports a conclusion that the ground supports cited in the 21 Tunnel were deteriorated or otherwise damaged and in need of maintenance or replacement. Accordingly, I find that Original Sixteen violated the standard.

2. Significant and Substantial

The fact of violation has been established, and I find that inadequately maintained ground supports exposed miners to potential groundfalls. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Since the 21 Tunnel is a secondary escapeway, I find that miners requiring access to the travelway in an emergency situation, exposed to the impending threat of groundfalls, would be reasonably likely to sustain crushing injuries and head trauma. Therefore, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

In arguing that Original Sixteen's conduct was characterized by high negligence that rose to the level of an unwarrantable failure, the Secretary asserts that the deteriorated condition of the ground supports in the 21 Tunnel was open and obvious, that Original Sixteen had knowledge of the hazard, and that no action was taken to address it over a period of four weeks. Sec'y Br. at 17-20. Original Sixteen argues the contrary, that the ground supports were not hazardous, and that MSHA had not cited these conditions previously. Resp't Br. at 8-12, 14-15.

The evidence indicates that this violation was extensive and obvious because there were two areas where a groundfall had occurred, and another where a groundfall was at risk of occurring. Regarding notice and duration, I fully credit Edminister's testimony that Reid Miller told him that one of the ground failures had occurred four weeks prior to the inspection. While Original Sixteen points out that MSHA had not identified or cited these ground support deficiencies in the 21 Tunnel previously, the operator was fully aware of the age of the timbers used in this secondary escapeway, and the previous groundfalls coupled with the miners' practice of pitching aside fallen material put Original Sixteen on notice that greater efforts were necessary for compliance. As previously stated, the violation was very serious, in that it exposed miners to head trauma and fatal crushing injuries. Furthermore, while Aguirre had been replacing old timbers in the 21 Tunnel two weeks before the inspection, Original Sixteen failed to taken any further remedial measures. Accordingly, I find that the Secretary has established that Original Sixteen displayed a high degree of negligence in violating the standard, and aggravated conduct that constitutes unwarrantable failure.

F. Citation No. 8695846

Inspector Edminister issued 104(a) Citation No. 8695846 on September 18, 2012, alleging a "significant and substantial" violation of section 57.11051 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence.[14] The "Condition or Practice" is described as follows:

> The designated secondary escape at the 800-21 tunnel is not being maintained in safe travelable condition. There is a section near the entrance about 60 feet in that has collapsed. The old stalls and lagging was not being maintained in good condition allowing the material from the old upper stope above the escape way to collapse into the travel way. There is lose unsupported ground along the back (roof) of the old stope. The unsupported ground in the stope area ranges up to about 3 x 2 feet thick. The miner felt the area was too unsafe to continue through the area and stated that other work along the secondary escape was done about 2 weeks ago by accessing through the secondary escape portal. The affected area at this point is about 15 feet long. There is another stall and lagging along the rib just beyond this point that is on the erg [sic] of failing. The entrance to the secondary escape at the 800-21 tunnel is not barricaded or posted with a warning sign. The tunnel is not being maintained in a safe travelable condition. There are numerous locations throughout the secondary escape tunnel that present a tripping hazard due to numerous hoses ranging up to about 3 inches in diameter crossing the travel way. There are locations where timbers protrude across the travel way with pot holes on each side that are covered with water creating additional tripping hazards. Heading towards the exit of the secondary escape tunnel there are even more tripping hazards due to the travel way not being maintained and washed out from the mines drainage. There are large rocks and 2 x 12 planking

[14] This citation was originally issued as a 104(d)(1) order withdrawing miners from all underground areas of the Sixteen to One mine. By subsequent action on October 22, 2012, MSHA modified the order to a 104(a) citation, and deleted the following wording from the "Condition or Practice" section:

> There is another stall and lagging for another old stope just beyond this point that is on the erg of failing. This condition was a factor that contributed to the issuance of Imminent Danger Order No. 8695845 dated 09/18/2012. Therefore no abatement time was set. Standard 57.11051 was cited 2 times in two years at mine 0401299 (2 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-7D.

crossing the escapeway with about a 12 inch clearing for the mines drainage. This secondary escapeway is used for emergencies in the event of an accident.

Exs. P-7A, P-7B, P-7D, P-7E. The citation was terminated on October 18, 2012, when Original Sixteen cleared the tripping hazards from the travelway, and a safety talk was conducted with the miners. Ex. P-7C.

1. Fact of Violation

The Secretary asserts that at the time of the inspection, Original Sixteen was in a production mode and, therefore, required to have and maintain the 21 Tunnel secondary escapeway; furthermore, he argues, Original Sixteen was required to maintain its secondary escapeways in safe and travelable condition, regardless of whether the mine was engaged in exploration.[15] Sec'y Br. at 8-9. In response, Original Sixteen argues that the conditions cited were not hazardous, and that the mine was in an exploration mode. Resp't Br. at 12, 15.

Edminister testified that the 21 Tunnel was identified on the mine map and referred to by the miners as a secondary escapeway. Tr. 281. He stated that he observed several tripping hazards in the escapeway, including a 2′ to 3′ thick rock located in the middle of the travelway (Ex. P-7G); an unsecured ladder resting against the rib (Ex. P-7H); uneven ground covered in slippery, wet clay-like sediment (Exs. P-7H, P-7I, P-7K); old hoses or pipes laying in the travelway (Ex. P-7H); at least two holes in the middle of the walking lane that were obscured by standing water (Exs. P-7I, P-7K); uneven ground due to timber and channels that had been created by running water (Ex. P-7L); and a pinch point in the walking lane that restricted miners' passage to a narrow path between the rails and a pipe (Ex. P-7J). Tr. 94-101; Ex. P-16 at 58-60. He also testified that he based this violation on the same ground conditions that he had cited earlier, i.e., two sections of loose ground support that had already collapsed, and another section that was on the verge of collapse. Tr. 94-95; see Exs. P-7M, P-7N, P-7O, P-16 at 32-33. According to him, Michael Miller slipped while walking along the travelway during the inspection. Tr. 293-94; Ex. P-16 at 56.

Michael Miller testified that he did not remember slipping in the 21 Tunnel during the inspection. Tr. 555-56. Sauer testified that he did not find any of the conditions cited by Edminister to be hazardous to an experienced miner. Tr. 480, 486-87. He also opined that the significant amount of material strewn along the 21 Tunnel was from collapsed lagging along the side of the travelway, not from an overhead groundfall. Tr. 486, 493. Sauer explained that the mining process consists of rounds of drilling and blasting and that, in general, gold is not found in every round, but tends to appear randomly in large pockets; if gold is found in sufficiently large quantities, the miners notify Michael Miller, who then develops an extraction plan. Tr. 507, 510-11. He stated that the last time Original Sixteen found gold was two years prior to the 2012 inspections. Tr. 489-90.

[15] The Secretary's arguments in their entirety were based on MSHA originally charging Original Sixteen with an unwarrantable failure under a withdrawal order, and make no reference, whatsoever, to MSHA's modification of the order to a 104(a) citation.

I credit Edminister's observations as to the hazardous conditions in the 21 Tunnel, and that such conditions posed tripping hazards to passing miners. For the same reasons stated earlier, I find that the ground supports in the 21 Tunnel were deteriorated or otherwise damaged and in need of maintenance or replacement. Obviously, any miner requiring use of the 21 Tunnel to exit the mine in an emergency situation, experienced or not, should not be subjected to navigating an obstacle course. As noted earlier, irrespective of whether Original Sixteen was in a production mode, it was required to maintain its active secondary escapeways safe and travelable. Accordingly, I find that the Secretary has established a violation of section 57.11051.

2. Significant and Substantial

The fact of violation has been established, and I find that inadequately maintained ground supports in the 21 Tunnel secondary escapeway exposed miners to impending groundfalls, and the debris in the walkway would likely result in slips, trips, and falls. The focus then, is the third and fourth *Mathies* criteria, i.e., whether the hazards were reasonably likely to result in an injury, and whether the injury would be serious.

Edminister opined that the risk of a groundfall, combined with the tripping hazard posed by the large rock in the center of the escapeway, would likely subject miners to fatal crushing injuries. Tr. 95. Additionally, he testified that miners travel the 21 Tunnel, at least, monthly in order to perform examinations. Tr. 95. Original Sixteen confirmed that miners examine the 21 Tunnel, but argues that the cited conditions could not contribute to injury or death. Resp't Br. at 15-16.

The record indicates that the 21 Tunnel secondary escapeway was used, at least, monthly for examination purposes. I find that miners subjected to the impending threat of groundfalls, whether from the roof or the lagging, combined with the slip, trip, and fall hazards in the walkway, would be reasonably likely to sustain serious to fatal musculoskeletal and crushing injuries. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that the deteriorated condition of the ground supports and slip, trip, and fall hazards were open and obvious. Sec'y Br. at 20-21. Conversely, Original Sixteen argues that the ground supports were adequate, and that the 21 Tunnel escapeway did not pose slip, trip, and fall hazards. Resp't Br. at 15-16.

As noted earlier respecting Order No. 8695849, the record indicates that this violation was extensive and obvious, given that loose, unsupported ground and fallen timber existed in several locations, in addition to other slip, trip, and fall hazards that were dispersed throughout the 21 Tunnel. I find that Original Sixteen had been aware of the ground failures for, at least, four weeks, and while it had not been cited previously for these ground support and tripping hazards in this travelway, the threat of groundfalls and the variety of slip and fall hazards throughout it put the operator on notice that greater efforts were necessary for compliance. Accordingly, I find that Original Sixteen was highly negligent in violating the standard.

G. Citation No. 8695857

Inspector Edminister issued 104(a) Citation No. 8695857 on September 18, 2012, alleging a violation of section 57.20011 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.[16] The "Condition or Practice" is described as follows:

> The area beyond the 800 Station is not barricaded or posted with a warning sign to impede access. The area was deemed unsafe to enter by the miner due to the area not being examined and may pose a danger. The area was open for travel and was being used as a storage area. This condition exposed the miners entering into the area to fatal type injuries in the unlikely event of an accident.
>
> Standard 57.20011 was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-8A. The affected area was barricaded and a warning sign was posted. Ex. P-17 at 6, 8.

1. Fact of Violation

Original Sixteen argues that ore cars stored in the area created a barrier, that a barricade or warning sign was unnecessary and would only desensitize miners to legitimate safety concerns, and that Edminister was wrong to have requested that Reid Miller examine the ground in the cited area. Resp't Br. at 17.

Edminister testified credibly that in response to questioning Reid Miller as to what activities, if any, were conducted in a cut-out where ore cars were parked, Miller stated that the area was out of service, that it was unsafe to enter because the ground had not been examined, and that he, himself, refused to examine the area. Tr. 102-03, 265-66; Exs. P-8C, P-16 at 31. Edminister stated that he did not see any hazards or evidence of previous groundfalls. Tr. 103, 268. Therefore, finding no reason for miners to be in the cited area, and observing no obvious hazards, he opined that a groundfall would be unlikely to result in fatal crushing injuries. Tr. 126, 267.

Michael Miller testified that there were no hidden hazards in the cited area, and that the only way to have determined whether hazards existed would have been to conduct an examination. Tr. 556-57. I credit Edminister's uncontradicted testimony that Reid Miller alerted him to the danger of entering the unexamined area, and that were a groundfall to occur, it would be unlikely to result in serious injuries, given the unlikelihood of miners entering the area. The record establishes that the area was open to access, and that the mine cars did not create an

[16] 30 C.F.R. § 57.20011 provides that "[a]reas where health and safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required."

effective barrier or explicit warning to miners of the hazards posed by unexamined ground. Accordingly, I find that the Secretary has established a violation section 57.20011.

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate based on lack of any open and obvious hazards in the cited area, and because Reid Miller was aware that the area had not been examined. Tr. 126. Original Sixteen argues that experienced miners would know not to enter this or other out-of-service areas without first examining them. Resp't Br. at 17. Since Reid Miller was a lead miner who knew that this area was unexamined, and because Original Sixteen had not taken the area out of service by placing a barricade or posting warning signage, I find that Original Sixteen was moderately negligent in violating the standard.

H. Citation No. 8695859

Inspector Edminister issued 104(a) Citation No. 8695859 on September 18, 2012, alleging a "significant and substantial" violation of section 57.3200 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.

The "Condition or Practice" is described as follows:

> Safe means of access is not being maintained at the 2nd Ore Chute along the 800 S[p]lit leading to the 848 Split. This is due to the Ore Chute being wedged open with timbers and has loose unconsolidated material over head. There is a large rock ranging about 8″ by 10″ by 12″ resting on top of the unconsolidated material that would fall into the travel way. The large rock is about 9 ft up along the 7 ft wide travel way. Miners access this area daily to the work heading. This condition exposed the miner traveling in the area to serious type injuries in the event of an accident.

Exs. P-9A, P-9B (October 22, 2012 modification charging a violation of section 57.3200). The condition was abated by removing the rock and installing boards to keep unsecured material from falling onto the travelway. Tr. 493-94; Ex. P-17 at 7.

1. Fact of Violation

Original Sixteen contends that the rock situated in the chute was not hazardous because if it were, it would have been noted by miners who regularly use the travelway, or cited by MSHA during previous inspections. Resp't Br. at 18.

Edminister testified that he observed an old ore chute elevated over a travelway, wedged open by two timbers, containing a large rock resting on unconsolidated material. Tr. 127-28, 130; Exs. P-9C, P-9D, P-16 at 32. He opined that the loose material and rock were angled directly toward the center of the travelway. Tr. 134.

Michael Miller testified that the chute had been out of service, and that the rock posed no danger of striking a miner because the design of the chute had been altered to prevent loose ground from falling into the travelway where people walked. Tr. 558. Sauer testified that the rock had been lodged in the chute for at least 10 years, and had never fallen. Tr. 493-94.

The record establishes that the travelway was regularly used by miners, that the ore chute door was wedged open, and that the rock, resting on unconsolidated material, created a groundfall hazard. Accordingly, I find that the Secretary has established a violation of section 57.3200.

2. Significant and Substantial

The fact of violation has been established. The second criterion of the *Mathies* test has been met, in that the large rock, resting on loose material, contributed to the danger of a groundfall. Respecting the third and fourth *Mathies* criteria, the evidence establishes that, while the chute had been out of service for several years, there was a reasonable likelihood that a groundfall would result in musculoskeletal injuries, and those injuries, including lacerations, contusions, and fractures were reasonably likely to be serious. Tr. 135. Therefore, I find that the violation was S&S.

3. Negligence

Original Sixteen argues that the hazard had not been cited previously by MSHA, and Edminister opined that the miners may not have had actual knowledge that the condition posed a hazard. Resp't Br. at 18; Tr. 134. However, because the rock was situated on unconsolidated material, and this condition had existed for at least 10 years without any action by Original Sixteen to correct it, I find that Original Sixteen should have known that the condition was hazardous and required attention. Therefore, I find that Original Sixteen was moderately negligent in violating section 57.3200.

I. Citation No. 8695860

Inspector Edminister issued 104(a) Citation No. 8695860 on September 19, 2012, alleging a violation of section 57.4560(c) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "low" negligence.[17] The "Condition or Practice" is described as follows:

> The area within 200 feet inside the mine 21 Tunnel Secondary escape portal is not provided with a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages; or covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or coated

[17] 30 C.F.R. § 57.4560(c) provides that the area "at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be . . . (c) [c]oated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition."

with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition. The portal is constructed with timber stalls and 2″ x 12″ lagging. This condition exposed the miners underground to fatal type injuries in the unlikely event of a fire.

Standard 57.4560(c) was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-10A.

1. Fact of Violation

At hearing, Original Sixteen stipulated to the fact of violation, and limited its contest to the fatality allegation. Tr. 261. Original Sixteen's arguments, however, relate to the fact of violation, rather than the gravity designation. See Resp't Br. at 18-19.

2. Gravity

Edminister testified that section 57.4560(c) requires Original Sixteen to apply fire resistant coatings to timber stalls and lagging in intake or exhaust openings that are designated secondary escapeways and lack fire suppression systems. Tr. 136. Addressing the gravity of the violation, he opined that the timbers in the 21 Tunnel secondary escapeway were very dry, and that if a fire were to occur and smoke entered the mine, miners could suffocate from smoke inhalation, but could escape if they overcame panic and were wearing self-rescuers. Tr. 136, 138, 220-21.

Michael Miller testified that even if the secondary escapeway were filled with smoke, the primary escapeway would be available for use. Tr. 558-59. Specifically, he testified that the primary escapeway is comprised of very hard rock and contains an insubstantial amount of timbers; therefore, he opined, miners would be able to exit the mine through the primary escapeway in the event of an emergency in the secondary escapeway. Tr. 558-59.

The evidence makes clear that Original Sixteen was required to maintain in safe and travelable condition its active secondary escapeways. In the event of a fire, smoke inhalation would reasonably be expected to be fatal, were miners to access the 21 Tunnel to exit the mine without benefit of self-rescuers. Accordingly, I find that the Secretary has proven the gravity designation that the violation could result in a fatality, as charged by the citation.

J. Citation No. 8695861

Inspector Edminister issued 104(a) Citation No. 8695861 on September 19, 2012, alleging a violation of section 57.12023 that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[18] The "Condition or Practice" is described as follows:

> The welding lead terminals on the Miller Bobcat 225G welder located behind the lower shop was not provided with either a guard or insulating covers. The welder is not in a regular travel way, and no other items were stored in the immediate area. The welder is used as a back up as needed for welding repairs. The welder was not in use at the time of the inspection. This exposes miners to serious shock and burn related injuries if contacting the unprotected terminals in the event of an accident.

Ex. P-11A. The citation was terminated after the lead terminals were guarded.

1. Fact of Violation

Original Sixteen contends that this condition should have been cited, if at all, as a failure to tag-out equipment, so that it would not have been forced to spend time and money repairing equipment that it does not use, and that miners were protected from the terminals by the location of the welder. Resp't Br. at 19.

Edminister testified that section 57.12023 requires Original Sixteen to guard or insulate welding lead terminals that are not otherwise protected from contact by being situated out of reach of persons traveling or working around the equipment. Tr. 140-41. He explained that the welding lead terminals are electrical connections between the stinger and the lug nuts on the welder, that the terminals were not insulated or guarded, that the welder was not tagged out of service, and that he could reach the terminals from his position in the travelway. Tr. 142-144; Exs. P-11B, P-16 at 36. He opined that the welder had been used since the leads were attached to the welder, and that it was designated as a back-up unit. Tr. 144-45; Ex. P-11B. Furthermore, Edminister testified that contact with the terminals could be reasonably expected to result in injuries including shocks and burns. Tr. 147. He also stated that in determining that the risk of injury was unlikely, he relied on statements by Reid Miller or Michael Miller that the welder was designated for back-up use only, and his observation that miners only infrequently entered the storage area. Tr. 144-47.

Michael Miller testified credibly that the battery had been removed from the welder, and that the welder was located in a heavy-duty, long-term storage area with very limited space. Tr. 560-61.

I find that the welder was in service as a back-up unit and, although the unguarded and uninsulated terminals were within reach of passing miners, they posed no shock or burn hazard

[18] 30 C.F.R. § 57.12023 provides that "[e]lectrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location."

because the battery had been removed. However, replacement of the battery, no matter how infrequently, subjected miners to the exposed terminals and, therefore, electrical shock and burn injuries. While the citation could have been issued for failure to lock- and tag-out the equipment, the Secretary has broad discretion in identifying the standard by which he charges a violation. Moreover, Original Sixteen had the option of removing the welder from service rather than repairing it. *See E. Assoc. Coal Corp.*, 1 FMSHRC 1473-74 (Oct. 1979) (holding that cited equipment may either be repaired or withdrawn from service). Accordingly, I find that the Secretary has established a violation of section 57.12023.

2. Negligence

Edminister testified that Original Sixteen had not been cited previously for failure to guard or insulate the welder under section 57.12023, that there was no evidence that a guard had ever been in place, and that the welder was being used infrequently for back-up. Tr. 147-48. I credit Michael Miller's testimony that he had a good-faith belief that he had complied with the standard by removing the battery. However, given that the welder was in service for back-up use, it posed a safety hazard. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

K. Citation No. 8695863

Inspector Edminister issued 104(a) Citation No. 8695863 on September 19, 2012, alleging a violation of section 57.4131(c) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.[19] The "Condition or Practice" is described as follows:

> The area around the Upper Bench mine opening used for ventilation is not being kept clear of dry vegetation within 25 feet of the opening. The area within 25 ft of the opening has tall dry vegetation ranging up to 4 ft tall. This area is accessed annually for the required fan maintenance inspections. This condition exposes miners working underground to smoke related injuries in the unlikely event of a fire.

Ex. P-12A.

1. Fact of Violation

In support of affirming the violation, the Secretary argues that there is no evidence that the blockage of the Upper Bench opening was air- or smoke-tight. Sec'y Br. at 26-27, 30. Original Sixteen counters that section 57.4131(c) applies only to openings that affect ventilation. Resp't Br. at 19-20.

Edminister testified that he observed dry vegetation within 25 feet of the Upper Bench mine opening, and that an electrical box was located near the opening. Tr. 149; Exs. P-12B, P-

[19] 30 C.F.R. § 57.4131(c) provides that "[d]ry vegetation shall not be permitted within 25 feet of mine openings."

12C, P-16 at 43, R-1, R-2, R-3. He opined that the standard does not require that the opening affect ventilation. Tr. 199. Despite the location of the electrical box, he stated that he did not find an ignition or heat source in the vicinity of the Upper Bench opening. Tr. 212.

Michael Miller testified that the Upper Bench area had one of seven mine openings listed in Original Sixteen's Compliance Book. Tr. 599; Exs. P-14C, P-14D. According to him, the Upper Bench opening has been completely blocked off by a natural cave-in since 1978 or 1979, and there was "no possibility of air to get from the outside through the cave-in." Tr. 601. He stated that in the 1970s the lessee of the Upper Bench had tried to get air into the opening by installing a fan, but failed, because it was totally blocked. Tr. 602. He further stated that the Upper Bench opening had never been used for ventilation, and that he had informed Edminister of this fact. Tr. 564-65, 600. He also stated that he offered to perform a diagnostic test to determine whether air was flowing into or out of the opening, but Edminister declined, responding that the only relevant question was whether there was an opening. Tr. 564-65.

I fully credit Michael Miller's testimony that there had been a cave-in which completely sealed-off what once had been an opening into the mine. Aside from Edminister's conclusory testimony that the Upper Bench has an opening, the Secretary merely relies upon Original Sixteen's Compliance Book to support this allegation. However, as discussed more fully below, the Compliance Book is demonstrably inaccurate. For lack of supporting evidence, I find that the Secretary has not carried his burden of demonstrating that there was, in fact, a mine opening at the Upper Bench requiring a 25 foot clearance, and proving a violation of section 57.4131(c). Therefore, I vacate the citation.

L. Citation No. 8613455

Inspector Gulati issued 104(a) Citation No. 8613455 on October 11, 2012, alleging a violation of section 104(d)(1) of the Act that had "no likelihood" of causing an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's "high" negligence.[20] The "Condition or Practice" is described as follows:

> The mine operator is continuing to operate the mine underground even though a 104(d)(1) order No. 8695849 for non compliance was issued was on September 18, 2012. The order required the mine operator or his agent to withdraw all persons from all underground areas of the mine, except those persons required for elimination of the conditions described in the order. The mine was engaged in production and other unrelated activities in areas outside the area cited in the order. The President of the company said that they have been mining a heading on the 816 level and had blasted five times (each round about 4 feet). The condition has not been designated "significant and substantial," because the conduct violated a provision of the Mine Act, rather than a mandatory safety or health standard.

Ex. P-3A.

1. Fact of Violation

According to the Secretary, because Original Sixteen was in a production mode and required by section 57.11050 to have a secondary escapeway, Order No. 8695849, though restricted to the 21 Tunnel, effectively withdrew miners from all underground areas. Sec'y Br. at 9, 13, 14. The Secretary also contends that withdrawal orders can only be lifted by inspection confirming that underlying conditions have been abated. Sec'y Br. at 14.

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[20] Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides, in pertinent part, that:

> If . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation . . . . If . . . an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Original Sixteen argues, conversely, that the mine was in an exploration mode, requiring no secondary escapeway, and that it was not working while under a withdrawal order because Randy Cardwell, a conference and litigation representative in MSHA's Vacaville field office, had advised Original Sixteen by phone that the withdrawal order was lifted. Resp't Br. at 8-12.

Gulati testified that section 104(d)(1) of the Act required Original Sixteen to withdraw all miners from all underground areas of the mine, except for those required to abate the conditions identified in the order. Tr. 332-33, 339. He stated that Michael Miller had told him during the pre-inspection conference that they had been mining at the 816 heading, that they had blasted one round the day before, and four rounds the week before inspection. Tr. 329-30; Ex. P-17 at 3, 6. He testified that each blast advanced the face of the tunnel four feet and, in his opinion, there was no possibility that the blasting was related to abatement of any outstanding withdrawal order. Tr. 330-33. Gulati stated that Michael Miller told him that he had called MSHA's Vacaville field office, and been advised that the withdrawal order had been lifted. Tr. 349; Ex. P-17 at 6-7. Gulati also testified that there was no written indication of Miller's contention, and that MSHA's policy is to lift withdrawal orders in writing, rather than over the telephone. Tr. 355, 358. Inspector David Blankenship testified that he was also present for the pre-inspection conference, and that he heard Miller state that they had been blasting during the preceding week. Tr. 363-64.

Edminister opined that while Order No. 8695849, on its face, withdrew miners from the 21 Tunnel only, it had the effect of withdrawing them from all underground areas of Sixteen to One because the mine was in a production mode, requiring a secondary escapeway. Tr. 89-90.

Aguirre testified that the last time he had engaged in blasting was approximately 2010, that he imagined that there was blasting in 2012 but he did not know by whom, that he did not know whether any blasting had been performed to advance the face, and that he did not remember being told that the mine was under a withdrawal order. Tr. 455, 461, 463. Sauer testified that sometime in October 2012, Michael Miller directed him to drill and blast in the 16-1 shaft in order to explore for gold. Tr. 489. He also stated that he did not recall being put on notice that the mine was under withdrawal orders or what the miners were required to do in light of them. Tr. 528-29. Michael Miller testified that he received a phone call from CLR Cardwell stating that "Order 8613455 was lifted." Tr. 550.

At the time of Gulati's inspection, the mine's only two secondary escapeways, the 600 and 1000 level travelway and the 21 Tunnel, had been taken out of service. The 600 and 1000 level escapeway was taken out of service to terminate Citation No. 8612841; the 21 Tunnel was, apparently, under two withdrawal orders: Order No. 8695849 withdrew miners from the 21 Tunnel only; Order No. 8695846 withdrew miners from all underground areas of the mine based on a determination that Original Sixteen was operating in a production mode without a mandatory secondary escapeway in service. During the pre-inspection conference, Gulati was advised that mining had been taking place in the 816 heading. Interestingly, following the Secretary's theory that Original Sixteen was producing rather than exploring, it is curious that Gulati did not cite the operator for failure to have a secondary escapeway in service under section 57.11050. Even more puzzling is Gulati's failure to cite Original Sixteen for working in the face of withdrawal Order No. 8695846, the order affecting the entire underground mine.

Here, the Secretary is advancing an expansive construction of 21 Tunnel-specific Order No. 8695849 to cover a scenario where work was being performed elsewhere underground. Evidently, however, there was activity going on behind the scenes at MSHA respecting Order No. 8695846, which provides, at least, one plausible explanation for Gulati's election not to cite that order.

Michael Miller contends that Cardwell had advised him that a withdrawal order had been lifted. Gulati's testimony, intended to cast doubt on this contention, was that MSHA lifts withdrawal orders in writing, rather than telephonically. Less than two weeks after Gulati's inspection, however, MSHA modified withdrawal Order No. 8695846 to a 104(a) citation. When considering that action, in conjunction with Gulati's election to cite Original Sixteen for violating the withdrawal order that was restricted to an area other than where the miners were actually working, Miller's contention rings true. Miller's obvious misidentification of the order number, as 8613455, in no way diminishes the credibility of his testimony. The evidence as a whole makes it likely that MSHA had already decided to lift withdrawal Order No. 8695846 at the time of Gulati's inspection on October 11, that Gulati was aware of this fact, and that the paperwork, completed on October 22, was a mere formality. Therefore, having found that no mining was taking place in the 21 Tunnel, as prohibited by cited withdrawal Order No. 8695849, I find that the Secretary has not established that Original Sixteen was operating in the face of that withdrawal order in violation of section 104(d)(1) of the Act.

M. Citation No. 8613452

Inspector Gulati issued 104(a) Citation No. 8613452 on October 10, 2012, alleging a violation of section 57.14100(b) that was "unlikely" to cause an injury that could reasonably be expected to result in "permanently disabling" injuries, and was caused by Original Sixteen's "moderate" negligence.[21] The "Condition or Practice" is described as follows:

> It is mandatory 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. This was not done for the 2 ton electric hoist (located in the 800 station), in that the safety latch was missing from the hook. The purpose of the latch is that it retains slings or chains under slack conditions. This defect affected safety, in that, an inadvertent detachment of slack sling or a load from the hook could result in serious injuries to the miners in the vicinity. According to President and miner, the hoist had not been used for about 7 years. This was neither taken out of service, nor tagged to prohibit further use and was connected to power supply. The miner said that he did not notice it, because the hoist was not in operation.

[21] 30 C.F.R. § 57.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

> Standard 57.14100b was cited 1 time in two years at mine 0401299 (1 to the operator, 0 to a contractor).

Ex. P-13A. The citation was terminated on October 15 after a safety clip was installed. Ex. P-13C.

1. Fact of Violation

Original Sixteen argues that its window of opportunity to correct the defect in a "timely manner" had not elapsed at the time of inspection, and that it should have been cited, if at all, for a failure to lock- and tag-out the hoist, because compliance with section 57.14100(b) required it to undergo costly repairs to abate the citation. Resp't Br. at 20. It further argues that the hoist was tied behind a wooden barrier until the inspector entered the area, and that the barrier to entry into the abandoned workings extended into the "hoisting area." Resp't Br. at 20.

Gulati testified that the standard requires Original Sixteen to repair equipment defects or withdraw defective equipment from service through lock- and tag-out procedures. Tr. 320-21. Gulati stated that in a workstation adjacent to an inclined shaft that had been barricaded for several years, he observed a hook connected to a two-ton hoist, which was plugged into a power supply. Tr. 320-23, 343; Ex. P-13D. He stated that he did not observe evidence that the hoist was barricaded or tagged out of service, or that it had been recently operated, but he observed that the hook lacked a safety clasp, i.e., a latch bridging the hook's opening. Tr. 321-23. The absence of the clasp, he explained, rendered the hook defective, because a rope or sling gone slack during lifting would be at risk of inadvertent slippage from the hook. Tr. 321. If a two-ton load were to detach from the hook, he testified, such weight would be reasonably expected to cause serious musculoskeletal crushing injury to a nearby miner's feet. Tr. 324-25. Such injury would be unlikely to occur, he concluded, because Michael Miller had represented to him, and Gulati agreed based on the condition of the hoist's chain, that the hoist had not been used for a long period of time. Tr. 323-24.

Michael Miller testified that he did not challenge Gulati's observations, and agreed that the hook lacked a safety clasp. Tr. 578-80. However, he opined, Original Sixteen should have been cited for failing to lock- and tag-out the hoist, if at all, since section 57.14100(b) allows for repair of defects before equipment is put back in service. Tr. 578-80. Miller stated that the safety clasp had been missing for "a while," and contended that there was no electric power in the hoist area, and that the hoist was off to the side of the travelway. Tr. 577, 579-80.

The record establishes that the missing safety clasp was a defect affecting safety, that the hoist was not barricaded or tagged out of service, and that the absence of the safety clasp posed a risk of inadvertent detachment of a heavy load, creating a crushing hazard to nearby miners. Regarding whether Original Sixteen failed to correct the safety defect in a timely manner, the evidence supports a finding that the incline shaft had not been used for several years, and that the hoist had been used to perform work related to the shaft. Therefore, I find that the safety defect had existed, at least, for several years before the 2012 inspection. As stated previously, the Secretary cited Original Sixteen within its discretion, and nothing prevented the operator from abating the violation by removing the hoist from service, rather than repairing it. Accordingly, I

find that the safety defect was not corrected in a timely manner, and that the Secretary has established a violation of section 57.14100(b).

2. Negligence

Gulati opined that Original Sixteen's negligence was moderate because the hoist was in an open and obvious location, although not in an active heading. Tr. 325, 346. Original Sixteen offered no countervailing evidence regarding negligence. In light of the evidence that the violation had existed for several years and was open and obvious, I conclude that Original Sixteen was moderately negligent in violating the standard.

N. Citation No. 8695892

Inspector Edminister issued 104(a) Citation No. 8695892 on October 18, 2012, alleging a violation of section 57.8520(b)(8) that had "no likelihood" of causing an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's "moderate" negligence.[22] The "Condition or Practice" is described as follows:

> The provided plan of the mine ventilation system did not include the location of known openings adjacent to the mine. Revisions of the system shall be noted and updated at least annually. The Ventilation Plan/Mine Map and revisions thereto shall be submitted to the District Manager for review and comments.

Ex. P-14A. The citation was terminated on November 2 based upon submission of a revised Ventilation Plan showing changes to the mine's ventilation network. Ex. P-14B.

1. Fact of Violation

The Secretary argues that the list of mine openings in the Compliance Book did not satisfy the standard, and that there is no evidence that the blockage in the Upper Bench opening was air- or smoke-tight. Sec'y Br. at 30. Original Sixteen contends that the standard only requires openings affecting ventilation to be depicted on the mine map and, therefore, only the primary escapeway and the 21 Tunnel were needed in the Ventilation Plan. Resp't Br. at 21.

Edminister testified that the standard requires that mine openings be identified on the mine map, or depicted through a schematic or series of schematics that are correlated to the map. Tr. 196, 200. He asserted that Michael Miller told him that there were seven openings to the mine that provided ventilation, each of which were listed as mine openings in a hand-written addendum to Original Sixteen's Compliance Book and that, depending on barometric pressure, the air flow through those openings changes. Tr. 152, 198-99; Exs. P-14C, P-14D, P-14E, P-14F,

[22] 30 C.F.R. § 57.8520(b)(8) provides that "[a] plan of the mine ventilation system shall be set out by the operator in written form . . . . The plan shall, where applicable, contain the following: . . . (b) The current mine map or schematic or series of mine maps or schematics of an appropriate scale, not greater than five hundred feet to the inch, showing: (8) Locations of known underground mine openings adjacent to the mine."

P-16 at 67. He explained that even if an opening does not affect ventilation, it is required to be depicted on the map so that mine openings are easily identifiable in the event of an emergency. Tr. 199. Edminister also contended that only the primary portal and the 21 Tunnel secondary escapeway were depicted on the mine map, and that he cited Original Sixteen for a paperwork violation only, because those locations were not depicted on the map as mine openings. Tr. 156-57; Exs. P-14H, P-14I. He also testified that, in hindsight, the gravity of the violation was more accurately "unlikely" to cause an injury that could reasonably be expected to be "fatal," because inadequately documented mine openings would not be inspected for evidence of collapse, and pose some likelihood of exposing miners working underground to asphyxiation. Tr. 157-58.

Michael Miller testified, in essence, that rather than cluttering the mine map with all seven openings, Original Sixteen diagrammed the openings, which satisfied section 57.8520(b)(8). Tr. 583, 589-90. He also explained that those seven openings had been used for ventilation at various times up until 2000, when the primary escapeway and the 21 Tunnel secondary escapeway, exclusively, became Sixteen to One's ventilation system. Tr. 588-89. Miller did acknowledge, however, that the openings listed in the Compliance Book were not accurate, and identified one of them as the Upper Bench opening at issue in Citation No. 8695863; he also conceded that the schematics were not drawn to scale. Tr. 600-03.

By Original Sixteen's own account, the mine openings listed in the Compliance Book were inaccurate and the schematics were not to scale; at least one opening, at the Upper Bench, was completely sealed and, thus, no longer an "opening." In accordance with the plain language of the standard, I find that neither the mine map nor the Compliance Book satisfied the requirements of the standard. Despite these inaccuracies, I find no reason to escalate the level of gravity charged by the citation beyond a paperwork violation because Original Sixteen's Compliance Book, at the very least, included, and put MSHA on notice of, all operative mine openings. Accordingly, the Secretary has established a violation of section 57.8520(b)(8).

2. Negligence

Edminister opined that Original Sixteen's negligence was moderate because the deficiencies in the mine map had not been cited previously by MSHA. Tr. 159. Michael Miller testified credibly that Original Sixteen did not knowingly violate this standard or omit the openings from the mine map in order to avoid inspection requirements. Tr. 582. Notwithstanding Original Sixteen's intent, I find that it was moderately negligent in violating the standard because it knew or should have known the requirements for a compliant ventilation plan, that the mine map entries were incomplete, and that the schematics in the Compliance Book were inaccurate and not to scale.

IV. PENALTIES

While the Secretary has proposed civil penalties totaling $7,843.00, 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).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Original Sixteen is a very small operator, only employing a skeletal crew of three miners in addition to the owner/operator, with an overall history of violations that is not an aggravating factor in assessing appropriate penalties. I also find that Original Sixteen generally demonstrated good faith in achieving rapid compliance after notice of the violations. Original Sixteen asserts that it is "broke." Resp't Br. at 10. The Commission has held that the mine operator has the burden of proving that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IMBA 226, 247-48 (Sept. 1973)). As has been noted in an earlier *Original Sixteen* decision, the operator's failure to submit an audited financial report to substantiate its contention provides an insufficient basis for an inability-to-pay defense. 36 FMSHRC at 2251. Without proof of Original Sixteen's financial status, I find that the proposed penalties will not affect Original Sixteen's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations, and Original Sixteen's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8612839

It has been established that this violation of section 57.3200 was unlikely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

B. Citation No. 8612841

It has been established that this violation of section 57.11051 was unlikely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

C. Citation No. 8695844

It has been established that this S&S violation of section 57.11051 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

D. Order No. 8695848

It has been established that this S&S violation of section 57.18025 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was

timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

E. Order No. 8695849

It has been established that this S&S violation of section 57.3360 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Therefore, I find that a penalty of $2,000.00, as proposed by the Secretary as the statutory minimum, is appropriate.

F. Citation No. 8695846

It has been established that this S&S violation of section 57.11051 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's high negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $500.00 is appropriate.

G. Citation No. 8695857

It has been established that this violation of section 57.20011 was unlikely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

H. Citation No. 8695859

It has been established that this S&S violation of section 57.3200 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

I. Citation No. 8695860

It has been established that this violation of section 57.4560(c) was unlikely to cause an injury that could reasonably be expected to be fatal, that it was caused by Original Sixteen's low negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $100.00 is appropriate.

J. Citation No. 8695861

It has been established that this violation of section 57.12023 was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

K. Citation No. 8695863

The Secretary has failed to establish a violation of section 57.4131(c). Therefore, I **VACATE** this citation.

L. Citation No. 8613455

The Secretary has failed to establish a violation of section 104(d)(1) of the Act. Therefore, I **VACATE** this citation.

M. Citation No. 8613452

It has been established that this violation of section 57.14100(b) was unlikely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's small size, I find that a penalty of $100.00 is appropriate.

N. Citation No. 8695892

It has been established that this violation of section 57.8520(b)(8) had no likelihood of causing an injury that could reasonably be expected to result in no lost workdays, that it was caused by Original Sixteen's moderate negligence, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

V. APPROVAL OF SETTLEMENT

The parties have filed an Unopposed Motion to Approve Partial Settlement respecting 15 of the 29 citations/orders involved in these dockets. A reduction in penalty from $2,298.00 to $1,199.00 is proposed.[23] The citations and orders, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation/Order No.	Initial Assessment	Proposed Settlement
WEST 2013-323-M	8613451	$100.00	$60.00
	8695841	$100.00	$0.00
	8695850	$100.00	$60.00
	8695851	$243.00	$200.00
	8695852	$243.00	$200.00
	8695853	$100.00	$100.00
	8695854	$100.00	$0.00
	8695855	$243.00	$0.00
	8695856	$100.00	$100.00

[23] Corrections made to the Motion for the Initial Assessment and Proposed Settlement amounts for Citation No. 8695856 have adjusted the subtotals for Docket No. WEST 2013-323-M, and the grand totals for all three dockets. See Penalty Petition.

	8695858	$243.00	$100.00
	8695862	$112.00	$112.00
	SUBTOTAL:	**$1,684.00**	**$932.00**
WEST 2013-365-M	8695896	$207.00	$207.00
	8695897	$100.00	$0.00
	8695898	$100.00	$60.00
	SUBTOTAL:	**$407.00**	**$267.00**
WEST 2013-486-M	8695895	$207.00	$0.00
	SUBTOTAL:	**$207.00**	**$0.00**
	TOTAL:	**$2,298.00**	**$1,199.00**

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8613455, 8695841, 8695854, 8695855, 8695897, 8695895 and 8695863 are **VACATED**.

It is further **ORDERED** that Citation Nos. 8612839, 8612841, 8613452, 8695844, 8695846, 8695853, 8695856, 8695857, 8695859, 8695860, 8695861, 8695862 and 8695892; and Order Nos. 8695848 and 8695849 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** the following citations as follows: the degree of negligence in Citation No. 8695850 to "none" and Citation Nos. 8695851 and 8695852 to "low;" the level of gravity in Citation Nos. 8613451 and 8695858 to remove the "significant and substantial" designation, and Citation No. 8695898 to "lost workdays or restricted duty;" and Citation No. 8695896 to incorporate the "Condition or Practice" language of Citation No. 8695897; and that these citation are **AFFIRMED**, as modified.

It is further **ORDERED** that Original Sixteen to One Mine, Incorporated, **PAY** a civil penalty of $8,499.00 within thirty (30) days of the date of this Decision.[24] **ACCORDINGLY**, these cases are **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

[24] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

Distribution:

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/tcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004
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June 16, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2015-528 A.C. No. 15-19475-381445 Mine: Beech Creek Surface Mine

DECISION

Appearances: Dominique C. Gutierrez, Esq., U.S. Department of Labor, Nashville, Tennessee, for Petitioner

James F. Bowman, Midway, West Virginia, for Respondent

Before: Judge Moran

Introduction

This matter involves a single section 104(d)(1) order, Order No. 8296433, (hereinafter "Order 433"), issued on December 16, 2014, for an alleged violation of 30 C.F.R. § 77.1606(c). The standard, titled "Loading and haulage equipment; inspection and maintenance," provides in the cited subsection (c) that "[e]quipment defects affecting safety shall be corrected before the equipment is used."[1] For the reasons that follow, the Court affirms Order 433 and each of its associated findings, including that the violated standard was significant and substantial ("S&S") and constituted an unwarrantable failure. The Court further determines that the proposed specially assessed civil penalty of $21,900.00 represents an appropriate penalty upon application of the statutory criteria set forth at 30 U.S.C. §820(i).

[1] The predicate for correcting defects, namely finding them, is expressed in the same standard, at subsection (a), which requires that "[m]obile 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." 30 C.F.R. § 77.1606(a).

Findings of Fact

Order 433, issued on December 16, 2014, asserts:

> The John Deere 200C Excavator (SNFF200CX507060) in operation at this mine had defects affecting safety (Excessive oil leaks, Back-up Alarm) recorded in the pre-operational ["pre-op"][2] exam record book on 12-14-2014. No corrective action was taken to correct these conditions prior to the operator placing the equipment in service on this day. The pre-operational exams are turned in to the operator and filed on a daily basis. Failure to correct defects affecting safety prior to placing equipment into operation constitutes more than ordinary negligence and would reasonably likely contribute to a serious accident. Standard 77.1606(c) was cited 7 times in two years at mine 1519475 (7 to the operator, 0 to a contractor. This violation is unwarrantable.[3]

The events which led up to the issuance of Order 433 are important to understand as they involve three other violations involving the same excavator. Each of those three violations was issued on the same day as Order 433, and each was paid and each represents a final order. MSHA Inspector Douglas Rutherford, the inspector who issued the alleged violations in this case, testified in this proceeding. Inspector Rutherford is an experienced and knowledgeable inspector, with ten years' experience in the private mining sector. Tr. 28-30. He was at the Beech Creek Mine on December 16, 2014 to perform an E01, (i.e. regular), inspection. Tr. 32.

Testifying as to the matters which led up to the issuance of Order 433, the inspector first identified Ex. P4 as the citation he issued on December 16, 2014, Citation No. 8296430, (hereinafter "Citation 430"), for a non-functioning automatic backup alarm on an excavator, a John Deere 200C. Tr. 36. Moments later, Inspector Rutherford issued Citation No. 8296431, (hereinafter "Citation 431"), on the same equipment, this time for an insulator wire that was not properly bushed. The wire ran from the cab's roof. Tr. 36. Finally, again only minutes later, a third citation was issued on the same piece of equipment, Citation No. 82964342 (hereinafter "Citation 432"), "for accumulations of combustible material – oil, oil-soaked rags, leaves – that were present on the machine." Tr. 37; see also Exs. P6 A, B. As noted, all three citations involved the same piece of equipment, the John Deere excavator, and all three citations became final orders prior to the commencement of this proceeding. Tr. 37; Exs. P10, P11, P12, P13.

The inspector then testified about the order at issue in this proceeding, Order 433, which was issued the same day, on December 16, 2014. Ex. P7. Order 433, issued for the same John Deere excavator, alleged that "the two hazards [cited in Citation 430 and Citation 432 for a non-functioning backup alarm and accumulations of combustible material] were not corrected prior to

[2] The pre-operational exam was more frequently referred to by the parties as the "pre-op" exam.

[3] The inspector recommended Order 433 for special assessment and the recommendation was adopted by MSHA. The Secretary then proposed a specially assessed civil penalty of $21,900.00.

putting the machine in service on December 14th, 2014." Tr. 39. Initially, Order 433 was issued as a citation for a violation of 30 C.F.R. §77.1606(a), but the inspector subsequently viewed the pre-op exam records for the equipment, which led him to conclude that the mine operator knew of the hazards on the excavator.[4] Tr. 40. Thus, he concluded that the operator put the machine in use, though aware of the defects. *Id.*

The inspector confirmed that, as to the same excavator, he later learned that the pre-op exam records that the operator provided to him applied to December 14th, 2014. Those records documented the hazards cited in Citations 430, 431, and 432, which were issued around noon. He concluded that the operator was aware of the hazards, as his initials were at the bottom of those pre-ops, noting the hazards. Tr. 41. Those exhibits and the associated testimony support the Court's finding of such operator awareness as to the backup alarm and excessive oil or hydraulic leaks.

Each of the four Pre-shift Safety Check List exhibits, Exs. P7 A, B, C, and D, which were admitted into the record, will now be discussed. Ex. P7 A is from the operator's pre-op book ("Equipment Operator's Pre-Shift Safety Check List") and it is the carbon (yellow) copy of the pre-op check that was performed by Ricky Justice on December 13, 2014 on the John Deere 200 excavator in issue. The box for "Back Alarm," has an "X" in it, signifying that "Repairs Required." It lists the equipment machine engine's hours as "75791."[5] Ex. P7 B is the second photo the inspector took of the pre-ops, and it shows the top (white) copy for Ex. P7 A. Thus, Exs. P7 A and P7 B involve the same pre-op: the white top copy and the yellow carbon copy for December 13, 2014 for the same equipment performed by Justice and initialed by superintendent Perry Ryder. As they are copies, the recorded machine hours of 75,791 are the same for Exs. P7 A and P7 B. The difference is that, for Ex. P7 B, superintendent Ryder's initials are on the white top copy and, oddly, the white copy had, admittedly, been wadded up.

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[4] As the inspector further explained:

> The pre-op examination record that the operator provided me with actually went back to December 14th of 2014. So it documented the hazards that I wrote at noon, you know, [at] 12[:]13 [p.m.], 12[:]14, [and] 12[:]15. So the operator was aware, due to the fact that he had initialed at the bottom of those pre-ops, the fact that the equipment operator had noted those hazards existing. So it wasn't until I was provided with those records that I knew that the operator actually knew that that had occurred.

Tr. 41.

[5] As the inspector explained, the equipment hours figure represents approximately the number of hours "that the engine has actually ran [sic]." Tr. 123. Those numbers indicate that the equipment ran about 10 hours between December 13th and 14th, 2014.

The third photo, Ex. P7 C, is a pre-op white copy made on December 14th for the same John Deere 200 excavator. This copy, as with the pre-op for the December 13th, also lists an "X" for the "Back Alarm," meaning "Repairs Required." Only the initials "BH," appear on Ex. P7 C, referring to foreman Bernie Harper. Tr. 127. It also reflects the machine's engine hours, this time recorded as 75,890.1.

Last, is Ex. P7 D. It is a photograph of another top, (i.e. white copy), pre-op for the same equipment, bearing the same date as Ex. P7 C, December 14th, 2014. As with Ex. P7 B, Ex. P7 D is another perplexingly "crumpled up" pre-shift safety pre-op. Ex. P7 D is signed by Ricky Justice and initialed by superintendent Ryder. Tr. 44-45.

The following is also noted regarding the first box for the pre-shift safety check list items. For Ex. P7 A, the top box on the form, which is designated for excessive oil or hydraulic leaks, is blank. Blanks are not allowed. One is to either leave a check mark, indicating the item is okay; a zero to indicate that repairs have been made, or an X to mark that repairs are required. The box for excessive oil or hydraulic leaks is also blank in Exs. P7 B and P7 C, but in P7 D, applying to the same date, December 14, 2014, an X is marked, indicating repairs required.

Accordingly, two of the photos deal with December 13th, and two deal with December 14th, yet there are other differences. Ex. P7 A, the yellow copy, and Ex. P7 B, the white copy, plainly represent *the same* pre-shift safety check for the John Deere excavator on December 13th. However, Ex. P7 C lists the backup alarm box as repair required, and the box for excessive oil or hydraulic leaks left blank, while Ex. P7 D lists the box for excessive oil or hydraulic leaks as "repairs required," but identifies the backup alarm as okay. Both are white top copies and therefore they are clearly different pre-shift safety checks for the day shift for that equipment. A comparison of the check marks on Exs. P7 C and P7 D obviously shows that, unlike Exs. P7 A and P7 B, they are not copies of the same safety check for December 14th. Further, Ex. P7 C has only Bernie Harper's initials on it, whereas Ex. P7 D, as noted, is signed by Ricky Justice and initialed by superintendent Ryder. What Exs. P7 A through D share is that, except for Ex. P7 D, the equipment's backup alarm box was marked as "Repairs Required." In addition, Exs. P7 A, P7 B, and P7 C leave the box for excessive oil or hydraulic leaks blank, but Ex. P7 D, dated December 16, 2014, lists "Repairs Required" for that topic.

As stated, Order 433, citing 77.1606(c), deals with correcting hazardous conditions prior to placing equipment in service. In sum, setting the stage for the alleged 77.1606(c) violation, there was Citation 430, dealing with the inoperative backup alarm, Citation 431 pertaining to the un-bushed insulated wire passing through the cab roof, and Citation 432, involving the accumulation of combustible materials. Tr. 49. With those predicate violations, there is then Order 433 – the charge at issue here – that the operator placed the vehicle back into service, knowing of those predicate violative conditions and failing to correct them.

For the backup alarm citation, Citation 430, the inspector stated that he issued that violation upon observing the excavator's alarm not working. Tr. 57. This was not immediately obvious, as there was clearly an element of deception attempted about the alarm's operability. When the equipment operator was first directed to back up the equipment, an alarm sounded. However, the inspector then discerned that the alarm was triggered by a manual toggle switch,

not by an automatic backup feature. Thus, the inspector's take on the manual switch's presence did not place the operator in a good light, as he expressed that:

> the toggle switch where the [equipment operator] made it appear that the alarm was working as he traveled to [the inspector's] location[.] [However] when [the inspector] asked [the equipment operator] to push the lever, that hand was [then] being used to push the lever; [and] therefore, he couldn't reach over and flip that toggle alarm. That toggle alarm is actually illegal, and it's only there to make it appear that the machine was motion-activated.

Tr. 64.

The inspector noted this issue to the operator and the response was "that the equipment was leased and that the manual toggle alarm was present on the machine *when it was delivered to the mine*."[6] Tr. 58 (emphasis added). In contrast, the motion-activated backup alarm was not working. Tr. 58. The inspector reiterated that the mine superintendent, Perry Ryder, stated to him that the equipment was leased, and the manual toggle alarm *was present on the machine when it was delivered to the mine*. That is, the superintendent was initially contending to the inspector that the equipment had been leased and that the toggle alarm had been added to it *prior* to the machine's delivery to the mine. Tr. 50, 65, 69.

For Order 433, again with the standard at issue here requiring that safety defects be corrected before the equipment is used, the inspector listed the violation as reasonably likely, lost work days or restricted duty, and S&S. For the accumulation of oil, Citation 432, he marked the gravity as reasonably likely, lost work days or restricted duty and S&S. The latter concern was that, in the event of a fire, a miner could receive burns. Ex. P6 A shows the accumulations and the inspector pointed out oil and dust and oil-soaked leaves and materials. Ex. P6 B reflects the rags which were in the battery compartment. Tr. 52. Ex. P6 C shows the battery compartment with the dark areas showing oil accumulations too. Tr. 53. This was hydraulic oil, which the inspector stated has a flash point of approximately 400 degrees Fahrenheit. The insulating wire coming through the cab was identified as an ignition source for that oil. Tr. 53.

The inspector stated that he issued the 104(d) order because of "the extent of the cited conditions and the evidence that was provided . . . that the operator had initialed off on two separate pre-op examination records, that those existing hazards were marked on those records." Tr. 66. The inspector was first provided with "the actual record book itself with the carbon copy provided. That was dated for December the 13th, 2014." Tr. 66-67.

The mine superintendent told the inspector that the pre-op procedure involved the equipment operator performing the pre-op checklist and then tearing off the white copy and bringing that to the supervisor at the mine office at the start of the shift. The operator would then determine what hazards to correct. Tr. 67.

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[6] Whether the manual toggle switch was present when delivered to the mine, or installed later at the mine, it is hard to appreciate the value of such a non-automatic device.

The inspector stated that Order 433 was not duplicative of the previously-issued citations because it was not issued for the same standard on the same day for the same piece of equipment. Tr. 74. He explained the difference: his earlier issued citations were because of the obvious nature of the conditions he observed, namely the added manual toggle switch and the inadequate pre-op for safety hazards before putting the equipment in service. However, the inspector again acknowledged that at 4:16 p.m. that day the operator did provide a record, showing that those hazards had been listed.[7] Tr. 74. While thereby escaping a violation of section 77.1606(a) by showing that an inspection occurred, albeit an incomplete inspection since no entry was made for the oil leaks box in Exs. P7 A, B, or C, those three exhibits disclosed the defective backup alarm. By using the equipment in the face of the inoperative backup alarm, the operator's own pre-shift records disclosed that defect affecting safety and the operator's use of that equipment before it was corrected was established, per Citation 430.

In terms of the oil accumulations, considering the amount the inspector observed and that accumulations were observed on leaves, and further considering that, as it was December, such leaves had not fallen recently, the inspector modestly estimated that the condition had existed for "multiple shifts." Tr. 76. This was based on "the amount of oil in accumulation and the ability for the float dust to actually soak up in the oil on the machine, all stated that, you know, they had not cleaned that machine off prior to my inspection." Tr. 77. This translated into his opinion that the condition had existed for four or five days. Because the operator provided no mitigating circumstances, he deemed the negligence to be high for Order 433. The inspector also concluded that the operator knew of the condition, as it disclosed to him by the operator that the equipment was in that condition when it was brought to the mine.[8] Tr. 78.

Though no 110(c) violation charges were ever filed, the inspector did file the matter with MSHA as a possible knowing and willful violation. His recommendation was based on the wadded up sheets and "[t]he conditions themselves being as obvious as they were and the sheets being wadded up and no mitigating circumstances, you know, to be given, I would consider that

[7] In issuing Order 433, the inspector listed that if an equipment fire were to occur, a miner (with one person affected) would be reasonably likely to receive a burn resulting in lost work days or restricted duty. Tr. 74-75. The involved standard, 77.1606(c), had been cited seven times in the last two years. Tr. 75.

[8] The inspector rejected the possibility that the condition had been repaired and that it then reoccurred because "if that was the case, it would have been documented by the equipment operator as repaired, which is a circle, on the pre-op records. . . . [and t]he extent of the accumulation, it had not been removed from the time that the machine had been dropped off." Tr. 78.

– you know, I consider that constituting more than ordinary negligence," and also because the operator made no effort to correct the problems. [9] Tr. 80.

Respondent's cross-examination of the inspector began with Citation 431, in which the inspector asserted that there were bare wires exposed at the top of the excavator's cab. As noted, the deficiency was a failure to provide a rubber bushing. The wire was insulated except for the location where it entered the machine. This did not create an electric shock hazard. Rather, the hazard was an ignition source. Tr. 91. In terms of the accumulations, the inspector recalled that there was oil in the bottom of the battery compartment, and he maintained that in Ex. P6 B, though the rags had been moved to the front of the excavator for disposal, the cable wire itself was still touching the oily rags. Tr. 94. Regarding the location of the wire, it could not be simply described as on the exterior of the door. More accurately, "it was the exterior of the door above the compartment but it was *inside* the door in the compartment." Tr. 94-95 (emphasis added). Accordingly, "[i]t extended from the cab through that compartment over to the battery." Tr. 95.

[9] Asked to explain why he marked the gravity and negligence as more severe in Order 433 than he had for the earlier issued citations, the inspector stated:

> [t]he underlying citations were issued at moderate negligence because the mine operator does train his miners to perform proper pre-operational exams prior to placing the machine in service. The reason I cited the order as high is because there were no mitigating circumstances after the operator was provided [with the] record from the equipment operator that those hazards existed, [ ] they weren't corrected.

Tr. 81-82. As noted, the matter was specially assessed at $21,900.00, per Ex. P15, versus the $4,600.00 figure that a regular assessment would have yielded under Part 100. Also, Ex. P14, the underlying "d" citation, was admitted into the record, as it had become a final order. Tr. 85.

Speaking to Citation 432, the inspector made it clear that he had not contended that he observed *oil leaks*, but rather that his citation was for accumulations of combustible material. Tr. 96. [10]

The inspector stated that he issued Order 433 based on what he saw in the pre-op records. Tr. 107. Those records were not provided when he was at the machine but only later that day, at 4:16 p.m. Tr. 107.

The inspector marked the backup alarm citation, Citation 430, as unlikely "because there was no visible foot traffic around the machine that day." Tr. 111. The negligence was marked as moderate because miners are trained by the operator to look for those defects prior to operating such machinery. *Id.* Ex. P4 A, is a photo of the manual toggle switch. Tr. 112. The Court would note that the toggle switch is not a subtle or miniscule addition to the excavator. The inspector

[10] The Court did acknowledge that, in Order 433, the inspector referred to "[e]xcessive oil leaks." Tr. 106. Respondent made much of the description as an "oil leak." The problem is that it was not a legitimate or pertinent issue. The inspector did not dispute that oil leaks had been corrected prior to his issuance of the citation for the accumulations, stating that the "oil leaks would have been corrected or I would have physically seen oil leaks." Tr. 104. The inspector also agreed that for Order 433, the accumulations violation was abated in two minutes. Tr. 102. When he went back to the excavator at 18:02 or 18:04, (i.e. at 6:02 and 6:04 p.m.) he did not observe any oil leaks at that time. Asked to consider that if oil leaks had been previously written up two days earlier, and then to postulate that one subsequently sees the machine after that and that no leaks are then present, if the leaks could be considered to have been repaired, the inspector agreed with that hypothetical. Tr. 103. The inspector was asked, in light of that hypothetical, why he included excessive "oil leaks" in Order 433. His response was that "[t]hat is what the operator recorded on his pre-operational exam." Tr. 103. He agreed that there was no evidence of any leaks after the pre-op exam for the 14th, as his citation was issued for "accumulations of oil [which] were only there because of the preexisting oil leaks." Tr. 104. He discounted the notion that the oil could've been from a spill, because it was over the entire equipment. Tr. 104. Again, the inspector did not dispute that the oil leaks were corrected at some point prior to his issuing the order on the 16th. Tr. 104. The inspector expressed that the photos in Exs. P6 A-D, are supporting documentation for Citation 432. They relate to Citation 432, he explained, as contributing to the issuance of that order. As Respondent continued to refer to the problem as "oil leaks," though that was never the inspector's contention, the Court finally pointed this out: "Mr. Bowman, you've hit this like three times now. . . . [h]e said there was no oil leak . . . . [h]is focus was accumulation of combustible materials . . . ." Tr. 106. The inspector stated that he wrote excessive oil leaks instead of accumulation of oil-soaked material because that is the condition miners are trained to look for, not accumulations of combustible materials, and therefore he was documenting the defects that the miner was recording for the operator to address, using the term employed in the pre-shift check list. *Id.*

did not inquire as to how the backup alarm was repaired, but he did require that the miner demonstrate to him that it had been repaired. Tr. 112.

Understandably, the inspector did consider the wadded up pre-ops as reflecting high negligence, taking note that both of the wadded up pre-ops were the only ones initialed by the foreman. Tr. 114-15. As he stated: "I have no way of knowing why they were wadded up, but both of the wadded-up pre-ops were initialed off of by the superintendent. That was the proof that he knew of those conditions existing prior to my order." Tr. 115.

Respondent later presented a claim to justify wadding up the pre-ops. Respondent suggested to the inspector that the respondent will contend that "when he goes to the machine, they leave the . . . yellow copy on the machine, they take the white copy and they wad it up so they can toss it down to him so it doesn't blow back under the machine." Tr. 116. The inspector was not persuaded by the contention, because, as it was explained to him, "the operator stated that the original, which would be the white copy you're referring to, is turned in to the foreman at the mine office." *Id*. Noting that he found no wadded up yellow copies, the inspector also rejected the notion that the yellow copy is the one that is kept, as the yellow copy is "the one that's retained normally at the piece of equipment, but at this piece of equipment this day, there were no records of any kind [on the equipment]. That's why we traveled back to the mine office, because the operator referred to me that they were located at the mine office." *Id*.

As to the claim that the violations in Citation 430 (citing section 77.410, for the manual motion switch) and Order 433 (citing section 77.1606(c)), for a defect affecting safety), were duplicative, the inspector noted that they cited different standards. Tr. 117. Despite attempts to muddle the issue by the Respondent, the inspector made it clear that he did not cite the same condition in Citation 430 and Order 433. In Order 433 he was citing section 77.1606(c) for putting the machine in service prior to correcting a safety defect. Tr. 129. The Court agrees there is no duplication.

The key consideration in this matter is that the defective conditions had been noted in the December 13th and 14th pre-ops, yet the operator placed the machine in operation prior to correcting those conditions. Tr. 118.

Trying to paint a different picture, Respondent's representative asked the inspector about Ex. P7 A , the yellow copy of the pre-op check in which the backup alarm was marked with an "X." Tr. 119. That pre-op check was made by Ricky Justice. Accordingly, the inspector noted that the pre-op marked the alarm as defective. Tr. 120. When that occurs, the equipment operator is obligated to inform his immediate supervisor of the issue and, following that, the equipment is to be repaired or taken out of service. *Id*.

The Court, with witness Inspector Rutherford agreeing, noted that Exs. P7 A and P7 B are *not* the same. The foreman's initials are at the bottom of Ex. P7 B, the crumpled up copy, whereas those initials are not present on Ex. P7 A. Tr. 121. Further, while Respondent made a claim that the photo of one sheet, Ex. P7 A, was incomplete, critically, the line for the foreman's signature is visible in all four photos of the pre-shift check list. Thus, that empty claim is inconsequential and the respondent did not attempt to introduce, as it could have, its own copy of

that exhibit. The inspector stated that Ex. P7 A reflects the full sheet and Court finds that to be the fact. That is to say, there are no lines or room for additional information below the line for "Mine Foreman." Tr. 124. Per the testimony, the line for the initials or signature for the mine foreman would only be on the white copy. *Id*.

The Court has noted that the record reflects two white copy pre-shift safety check lists for December 14th. Exs. P7 C, D. There would be two pre-ops performed if the equipment were used on two shifts. Tr. 126. This was the starting point for Respondent's farfetched theory that during the day shift somebody did a pre-op and found something wrong and that it was then corrected. This claim rests on the idea that foreman Harper did a pre-op on December 14th, and then employee Ricky Justice did another pre-op that same day. Tr. 127. The Ricky Justice-signed pre-shift check was one of the two crumbled up sheets. Ex. P7 D. That pre-shift check has a check beside the back alarm category, indicating that the alarm was okay. Tr. 128. Thus, Respondent contended that those two pre-ops support its claim that after Harper noted the condition it was repaired and that Justice's failure to note a problem shows it was repaired by the time of his inspection. Tr. 128. The inspector's answer to this is that the mine superintendent, Perry Ryder, admitted to him that the machine was in the cited toggle-switch-installed condition when it was dropped off on December 13th. Tr. 128. Further, the two sheets both list the safety check list as applying to the day shift for the same day.

Perry Ryder, mine superintendent, was called by the Respondent. He stated that on December 16, 2014, the day the citations were issued, he was at the mine. Tr. 133-134. He stated that the job was shut down, in idle status, on the day the inspector arrived. Present were foreman Harper, Justice, the machine operator, and Greg Wyatt, a mechanic. The equipment in issue had arrived at the mine site around December 11th. Tr. 135-136. Ryder stated that on that day he arrived at the mine site and looked at the excavator with foreman Harper. On that day, he found no problem with that equipment and proceeded to tram it to the top of the hill, a four to five hour process because the equipment moves so slowly. Tr. 136-137. Ryder stated that the excavator's backup alarm was "definitely working" that day. Tr. 137. He acknowledged that the backup alarm is automatic; it is to alarm automatically whenever the foot pedal is used. Tr. 137-38.

However, Ryder also conceded that there was a point in time when the alarm was not working. The fix, he stated, was simple: a mechanic only had to clean the switch, as it was only occasionally not making contact. Tr. 139. As to the other switch on a mounted bracket, Ryder asserted at the hearing that the manual toggle switch was *not* on the equipment when he first got the excavator.[11] Tr. 140-141. Referring to that other switch, Ryder stated: "there's a – a mounted bracket there with a switch on it. That is the one that – that the inspector said the backup alarm was hooked to, but, now, that switch was not on there when I got the excavator." Tr. 140. Ryder asked Justice if he installed the additional, (i.e. manual), toggle switch on the machine and Justice told him he did not. Justice did not know who installed the switch. Very oddly, given the small number of personnel at the operation, while asserting at the hearing that the switch had been installed after the excavator arrived at the mine, no one knew who installed the switch. This claim, in the Court's estimation, is hard to accept as true and it is not accepted as credible. Ryder

[11] Ryder confirmed that, per Ex. P4 A, the two red wires which connect to the toggle back up switch, is the manually operated backup switch. Tr. 142.

reaffirmed his version of the events, affirming that "between the time that [he] took the excavator up the hill and the time that the inspector saw this condition, this switch had been added to it." Tr. 141-42. Again, the Court would comment that this story does not make sense and further it doesn't explain why anyone would add a manual backup switch to the equipment, especially if the automatic switch was really working.

Ryder stated that he didn't challenge the 104(a) citation but took issue with the 104(d) order, stating:

> I didn't argue with the 104, because evidently when I got to the machine, when I told him that the backup alarm did work, it did work, because I'd had a problem with the operator telling me one time that it didn't work, and then when I went to the machine, it was working. I had no problem with the 104 on that. But when he come back and abated the one – the second citation as a (d) order, I thought personally that was ridiculous, because we was working on the machine, doing our best to get it right to get it fixed, because if something don't work, it's hard to find out what it is unless you can work on it when it ain't working. But when it is working, you don't know where the problem's at.

Tr. 145.

In this regard, Ryder noted that the negligence regarding the backup alarm, Ex. P4, was marked as moderate but that for Ex. P7, it was marked as high. Tr. 145-46. Regarding the pre-ops, for Ex. P7 A, performed on the 13th, Ryder agreed that there is an X marked for the backup alarm and he admitted that meant the alarm was not working. Tr. 147-48. Ryder stated that he took possession of that pre-op exam form. Tr. 148. On that day, he asserted that, upon noting the non-working backup alarm notation, he inquired about it with Mr. Justice, asking him to move the equipment forward and back, and that the alarm worked when he did that. Therefore, he agreed that Justice "went ahead and operated the machine." Tr. 150.

A more fantastic claim accompanied that story, as Ryder attempted to explain why the pre-op form was crumpled up. Ryder stated that he picks up the pre-ops. The procedure for transferring those pre-ops forms from the operator who performed the pre-op to him is unusual, to say the least.

Asked how the machine operator transfers his pre-op report from his machine down to him, Ryder asserted:

> [w]ell, it all depends on the location that he's in. If he's working in a ditch where there's mud and there's water and he's a-digging a ditch, a lot of times they'll just fold it up in their hand and swing that machine around, and I'm standing there,

and they'll pitch it on the ground to me, and I get it. But I always straighten them back out.

Tr. 150-51. Thus, he asserted that the pre-op is delivered to him as a crumpled up ball of paper. This method, he contended, prevents the pre-op report from landing in a mudhole. Tr. 151. Again, Ryder reasserted that the backup alarm was "absolutely" working. Tr. 151.

As for Ex. P7 C, Ryder stated that Harper made that pre-op, finding that the alarm was not working. Tr. 152. Ex. P7 D reflects another pre-op exam on the same day and also for the day shift made by Ricky Justice. It was stated that this second pre-op was done because Justice was a new operator of the equipment that day and each new operator must perform his own pre-shift. Justice found oil leaks, but recorded nothing about any backup alarm problem. Tr. 153. This led Ryder to conclude that, while the alarm was not working on the 13th, it was working on the 14th. Further, Ryder stated that no backup alarm issues were reported to him on the 15th or 16th. Tr. 154. As to the "oil leak" issue, Ryder maintained that there were no such leaks on the equipment. Rather, there were only "oil spots" from the O-ring that had blown. Tr. 154. However, this claim is also doubtful as he admitted that the O-ring is located in an entirely different area of the equipment than the area depicted in photograph in Ex. P6 A, and further Ryder agreed that any oil depicted in Ex. P6 A would not be due to a blown O-ring. Tr. 163. On cross-exam, Ryder agreed that the excavator was available for use on the 16th as it was not tagged out. As to his procedure, he was asked if, per his deposition testimony, his practice is to write "corrected" when equipment has been repaired, at the hearing he stated, "[n]ot always." Tr. 158. The Court inquired about the repair of the backup alarm. Ryder confirmed that a mechanic came out from Wayne Equipment to fix the alarm, but he couldn't give the name of the individual, nor the date that the work was done. Tr. 160. Nor did he know if there was a bill for that work, as the mechanic worked full-time for Bevins Branch, which is part of the same company as Kentucky Fuel. Tr. 161.

Discussion

One must not lose sight of the fact that each of the predicate citations, identified in this proceeding as Citations 430, 431 and 432, were all conceded as violations. That left the one matter in this litigation – whether 30 C.F.R. §77.1606(c) was violated in Order 433. The Court concludes that the preponderance of the credible evidence clearly establishes that standard 77.1606(c) was violated and that Order 433 was both an unwarrantable failure and an S&S violation, though, technically, to sustain the order, only the unwarrantable failure finding must be explored, as the underlying section 104(d)(1) citation was not contested and had become a final order. The evidence shows that the backup alarm was not working on December 13th and 14th, and that excessive oil or hydraulic leaks were also present, at least on December 14th. The bushing issue, in Citation 431, found by the inspector on December 16th, and later conceded to be a violation and a final order, also presented a risk of fire.

The credible evidence establishes that the backup alarm and oil accumulation defects were recorded and the operator continued to use the excavator in contravention of section 77.1606(c). The Respondent's claims in defense are too tall to be believed. Whether one considers – either the story that the excavator came with the toggle switch, or the alternative

story that it did not, but instead that some unknown person at the mine later installed the switch, for purposes unknown; or the story that the operator employed the highly unusual method of delivering pre-shift reports by wadding them up into a ball, though a more plausible method of delivery was first presented to the inspector; or the story that the backup alarm was not working on December 14th, per Ex. P7 C, but must have been fixed by someone that same day, as the other pre-shift box for that category, per Ex. P7 D, was checked as okay – all of these stories are too much to be deemed credible, collectively or individually. Very simply, the evidence establishes that the equipment, though defective, continued to be used on December 16, 2014, in violation of 30 C.F.R. § 77.1606(c).

Significant and substantial determination

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

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

Id. at 3-4; *see also Austin Powder Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

For the reasons discussed above, the Court finds that the cited standard, section 77.1606(c), was violated. The Court agrees with the Secretary's identification of the several discrete safety hazards as

> [t]he accumulations of oil and other combustible materials, rags and leaves soaked in oil, combined with a bare wire at one location not secured by a bushing and touching the metal frame of the cab of the excavator created a safety hazard of an ignition. Exhibits P-6 and P-5. The motion-detector back-up alarm being inoperative while in reverse created another hazard of a collision. Exhibit P-4.

Sec'y Br. at 12.

The Court further agrees that the violation presented a reasonable likelihood of injury. Though there was no foot traffic on that day, it is undeniable that foot traffic would occur during continued normal mining operations. Further, the excavator could strike one of the other pieces of equipment at the site. A manually operated toggle switch contravenes the essential purpose of backup alarms – *they are to operate automatically*, as the standard, 30 C.F.R. §77.410(a)(1), provides that mobile equipment with an unobstructed rear view shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse. And, though the backup alarm issue was sufficient in its own right, there was the improperly bushed wire and the accumulations of combustible materials, each independently presenting an S&S violation. Nor can those findings be collaterally attacked now, as the backup alarm, the bushing deficiency, and the accumulations of combustible material are all final orders, with their special findings included. The failure to correct those defects listed in the pre-shift check list, and those not listed or left blank, each constituted equipment defects affecting safety and they were to be corrected before the equipment is used. Testimony also supports the Court's conclusion that any injury which might occur would be reasonably serious. The cited standard, requiring that equipment defects affecting safety shall be corrected before the equipment is used, is inextricably tied to the hazardous conditions found on the excavator by the inspector and cited in the predicate citations, each of which were affirmed and became final orders of the Commission.

Unwarrantable failure determination

The Commission has spoken definitively on the subject of unwarrantable failure. In *ICG Hazard, LLC*, 36 FMSHRC 2635 (Oct. 2014) ("*ICG Hazard*"), it modified a judge's finding of unwarrantable failure to a section 104(a) citation, holding that such a finding must be based on an examination of specific criteria. Noting that it has "defined 'unwarrantable failure' as 'aggravated conduct constituting more than ordinary negligence,'" *Manalapan Mining Co*., 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987))," it reviewed that the criteria for determining whether conduct is "aggravated," includes

> (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were

> necessary for compliance. *See IO Coal Co*., 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999).

Id. at * 2637. Though the Commission acknowledged that "not all factors may be relevant to every case, all relevant factors must be examined." *Id.*

Similarly, in *Mach Mining, LLC*, 34 FMSHRC 1769 (Aug. 2012) ("*Mach Mining*"), the Commission earlier noted that

> . . . 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, and we characterized it in such terms as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2003-04. The Commission has further recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Factors relevant to that consideration include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *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). **6 The Commission has repeatedly made clear that it is necessary for a judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *Windsor Coal Co*., 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co*., 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co*., 31 FMSHRC 1346, 1351 (Dec. 2009).

Id. at 1775.

Here, upon weighing the factors relevant to a finding of an unwarrantable failure, the Court concludes that the operator's conduct in using the excavator without correcting the recorded defects amounted to aggravated conduct constituting more than ordinary negligence.

Specifically, the very nature of the operator's conduct – that is, the decision to place the excavator into service with explicit knowledge of existing hazardous defects – based on previously-issued citations and pre-op hazard reports – is demonstrative of the obviousness of the conditions, and its knowledge of them. It is also noteworthy that there was more than one defect that was allowed to exist on the excavator and that these various defects presented discrete hazards, thus increasing the degree of danger from the Respondent's conduct. Additionally, the evidence reflects that the subject excavator had been periodically operated from at least the time the December 13th pre-op examinations identified hazards, until the time Order 433 was issued three days later. In view of these aggravating factors, the Court finds that the violation was an unwarrantable failure. When one also considers the toggle switch installation, and the varying stories about its origination, the attempt to mislead the inspector about the backup alarm's functioning, the wadded up pre-shift check lists, those all add up to indifference or a serious lack of reasonable care.

Penalty Determination

The Mine Act sets forth a bifurcated penalty scheme under which the "Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty." *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) (quoting *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)). Under this bifurcated scheme, "[t]he Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i) [of the Mine Act]." *Id.* (quoting 30 U.S.C. § 820(i)). The six section 110(i) factors are: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). *Original Sixteen to One Mine, Inc*., 38 FMSHRC __, slip op. at 6 (May 3, 2016) (ALJ).

Findings on the Statutory Penalty Criteria

History of previous violations[12]

Kentucky Fuel Corporation's history of violations is reflected in Ex. P2. With the mine history assessed at 10 points, that translates to a medium history, as does the 9 points given for its repeat violation history. Apart from the point structure, the Court finds that the Respondent's violation history may be fairly described as medium.

Mine Size

Under the Part 100 point system, the mine was awarded 9 points, which characterizes it to be in the medium range and the controlling entity category, at 8 points, was determined to be in the high medium range. Apart from the point structure, the Court finds that the Respondent's mine size may be fairly described, at the least, as medium.

Ability to continue in business

There was no claim that the proposed special assessment amount would impair the mine's ability to continue in business.

Good Faith

This was a non-factor under the Part 100 calculation. The operator did tag out the equipment but this occurred in the context of order being issued. The Court also finds that the good faith factor does not impact the penalty determination.

Negligence

As set forth above, the Court agrees that, in light of the pre-shift safety check list, the negligence was properly characterized as high. The Court has found that the violation was unwarrantable.

Gravity

The Court, having found that the violation was significant and substantial, agrees that the injury was reasonably likely to occur, that, at a minimum, lost workdays or restricted duty is the injury that could be reasonably expected, with one person affected.

[12] The mine size, its history of violations, and its good faith, were all calculated the same under the regular and special assessment. That is, under the special assessment for those categories, there was no increase in the point calculations over the points awarded under the regular assessment.

Based on the application of the statutory criteria, as set forth at 30 U.S.C. §820(i), the Court imposes a civil penalty of $21,900.00 for the violation of 30 C.F.R. §77.1606(c).

ORDER

For the reasons set forth above, Order No. 8296433 is **AFFIRMED**. Respondent is **ORDERED TO PAY** the civil penalty of $21,900.00 for that violation. Upon **PAYMENT** of the full civil penalty hereby imposed, the captioned proceeding is **DISMISSED**.

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

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June 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NEWMONT USA LIMITED, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-819 A.C. No. 26-02512-386028 Mine: Leeville

DECISION DENYING MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge Moran

This Court, tired of the Secretary's continuing and habitual practice of providing empty explanations for its settlements, has no option but to deny the present settlement motion and to publish for public consumption the basis for the denial. As explained on numerous occasions, the Court has an obligation, pursuant to Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), to approve settlements. This is not a ministerial task, though the Secretary views it as such, because the statutory language does not support such a claim and the Court must presume that Congress does not include empty provisions in legislation of any sort, much less in matters impacting the safety and health of miners. On this issue, while the Commission has a legislative mandate to follow, the Secretary possesses only pretentiousness.

For each settlement, the Secretary offers *the same* empty chatter, advising:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest

> and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above.

See, as a representative sample, Motion for Settlement, at 2 (Apr. 1, 2016) ("Motion"). With that offering, the Secretary then offers the same rote justification that

> the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. §820(k).

Id.

It is plain that were the Commission to accept the same mantra from the Secretary, the effect would be to endorse the Secretary's view that Congress' express language of the Commission's role in settlements per Section 110(k) was an empty gesture.

The Secretary then routinely moves on in its settlement motions to its secondary stance that, in view of litigation over the meaning and effect of Section 110(k), per *The American Coal Co.*, 36 FMSHRC 1489 (May 2014) (ALJ) (appeal to the Commission pending), to offer what it purports to constitute as "information in support of the penalties agreed to by the parties." *Id.* at 3.

In this case, one in which the Secretary seeks a fifty percent (50%) reduction from the proposed penalty under 30 C.F.R. Part 100, the supporting information consists of 101 words, of which 60 provide nothing useful at all, to wit:

> The representative for the Secretary has reviewed the factual circumstances surrounding Citation No. 8869188 and is persuaded that there were mitigating circumstances that warrant a reduction in the gravity of the violation. … The Secretary is willing to stipulate that the likelihood of injury is less than 'reasonably likely', and in the interest of settlement, a reduction in gravity is warranted.

Id. The remaining 41 words are completely insufficient. In its entirety, the following is offered up:

> The *respondent contends* the small amount of material was along the rib on a windrow.[1] *Respondent further contends* no material had fallen in the middle of the drift where persons would travel and the wire ground support was still in place.

Id. (emphasis added).

[1] A "windrow" is defined as a long low ridge of road-making material scraped to the side of a road; a bank, ridge or heap. MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/windrow (last visited June 24, 2016). In short, it is a fancy term for a pile of material.

The reader will take note that the Secretary says absolutely nothing about the accuracy of the Respondent's contentions. Rather, the contentions are merely laid out, in a vacuum, free of endorsement or comment from the Secretary. All that the Secretary adds is that he is "*willing* to stipulate that the likelihood of injury is less than 'reasonably likely', and in the interest of settlement, a reduction in gravity is warranted." *Id.* (emphasis added). But, neither the Commission, nor the public, nor any miner, is told why *the Secretary* is willing to so stipulate that the likelihood of injury is less than reasonably likely. The truth is that the Secretary's grudgingly offered alternative is every bit as empty as his default position that he is not obligated to provide any solid reasoning for his settlements. This is inconsistent both with Congressional intent and with the protection of miners. It also does a disservice to the dedicated MSHA mine inspectors in their efforts to provide such protection.[2]

The issuing inspector's section 104(a) citation presents a different picture, which is completely unaddressed by the Secretary. The inspector's written citation provides that the ground support was not being maintained, for a 12 foot length which had a 18 foot height, in that wire was missing, bolts damaged, and shotcrete missing. Speaking to the likelihood of the hazard occurring, the inspector stated that there was loose material, which was scaled down easily, and that it was 13 inches by 9 inches by 3 inches and smaller. The inspector assessed the hazard presented by the cited condition as reasonably expected to present a permanently disabling injury in the event of the loose material falling and striking a miner. The Respondent's contention that "the wire ground support was still in place," is factually at odds with the inspector's statement that the wire was "missing." Where the Secretary stands on that factual conflict is anybody's guess. Nor does the Secretary shed any light on the Respondent's claim that there was a small amount of material along the rib on a windrow, presumably from the scaling that was then performed, and that no material had fallen in the middle of the drift where persons would travel. But scaling is a somewhat controlled process and therefore may not be indicative of what would have occurred if the material had simply fallen in an unplanned event.

Accordingly, the Secretary is directed to either provide a legitimate factual basis to support the 50% reduction it seeks, or to prepare for a hearing.

So Ordered.

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

[2] When the Court denies insufficiently justified settlement reductions, it routinely asks the Secretary to advise whether, in the course of reaching a settlement, it has consulted with the issuing inspector. After all, the issuing inspector is the administration's eyewitness to the violative condition. The Secretary has never responded to this reasonable informational inquiry from the Court. Such a declaration, which does not require the particulars of the inquiry, is a way of ensuring that a settlement is factually reasonable from the Secretary's point of view and therefore does not rely only on unverified assertions from a respondent.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WEST ALABAMA SAND & GRAVEL, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2009-870-M A.C. No. 01-02738-194100 Mine: West Alabama Sand & Gravel

DECISION ON REMAND

Before: Judge Feldman

I. Procedural History

This single citation civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involves Citation No. 6511548 issued to West Alabama Sand and Gravel, Inc., ("West Alabama") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 6511548 alleges that a truck driver climbed on top of his truck without fall protection on West Alabama's mine property, in violation of 30 C.F.R. § 56.15005, which provides that "[s]afety belts and lines shall be worn when persons work *where there is danger of falling*. . . ." (emphasis added). Specifically, Citation No. 6511548 alleges:

> A customer truck driver [Johnny Koger, who was employed by Denbar Transportation,] was observed climbing on top of the loaded trailer. [Koger] was not wearing a safety belt and lanyard or any other type of restraining device to prevent a fall to the ground below. [Koger] was on his knees pulling on tarp within inches of the side of the trailer. [Koger] was exposed to a fall of ten feet to ground level. Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this failure to comply with a mandatory standard.

As there was no dispute of material facts, the initial disposition affirmed, through summary decision, the violation and its significant and substantial (S&S) designation, but ruled that it did not result from an unwarrantable failure[1] to comply with the standard in question. Consequently, the initial decision reduced the penalty from the proposed assessment of $15,971.00 to $760.00. 34 FMSHRC 1651 (July 2012) (ALJ). The Secretary appealed the deletion of the unwarrantable failure designation, which was based on a reduction in the degree of negligence attributable to West Alabama's conduct, from "high" to "moderate," and the resultant reduction in proposed civil penalty.

The Commission now has vacated the initial decision with respect to the deletion of the unwarrantable failure, the reduction in negligence, and the reduction of the proposed penalty, directing my further consideration of these issues consistent with its remand decision. 37 FMSHRC 1884, 1891 (Sept. 2015).

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).

2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of "high" negligence level.

West Alabama's Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Given West Alabama's stipulation to the Secretary's unwarrantable failure designation, the issue remains the appropriate penalty to be imposed for Citation No. 6511548. The statutory penalty range for a violation attributable to an unwarrantable failure under section 104(d)(1) of the Mine Act is between $2,000.00 and $70,000.00. 30 U.S.C. § 820(a)(1), (a)(3)(A).

In considering the appropriate civil penalty, the parties were ordered to address the applicability of the section 110(i) statutory criteria, outlined below. 38 FMSHRC 383 (Feb. 2016) (ALJ). In addition to addressing the section 110(i) penalty criteria, the Secretary noted:

> . . . that Respondent continues to consistently violate safety standards and essentially stopped paying assessed penalties in approximately January 2010, according to the Mine Data Retrieval System ["MDRS"]. Respondent's history,

[1] The Commission has determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987).

> present refusal to pay assessed penalties, along with the admitted gravity and high negligence of this violation, support the Secretary's assessed penalty.

Sec'y Resp., at 12 (Mar. 9, 2016). Consequently, on May 9, 2016, the parties were further ordered to address whether delinquency in paying civil penalties is a relevant consideration in determining the appropriate penalty to be assessed. 38 FMSHRC __, slip op. (May 9, 2016) (ALJ). A discussion of the applicability of the section 110(i) criteria and delinquency follows.

II. Application of Section 110(i) Criteria

The Secretary proposes a $15,971.00 civil penalty. The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
>
> > [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that the *de novo* consideration of the appropriate civil penalty to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising my discretion, each penalty criterion shall be evaluated with regard to whether it is a mitigating, neutral, or aggravating factor.

1. History of Violations

The Commission has addressed the appropriate considerations for evaluating the effect of the history of violations criterion in section 110(i) of the Mine Act:

> The Commission has recognized that "the language of section 110(i) does not limit the scope of history of previous violations to similar cases." *Secretary of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (Apr. 1996). The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of all safety and health standards are considered for this component." *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992) (emphasis added); *see also Glover*, 19 FMSHRC at 1539 (remanding to the judge with instructions to consider the operator's general history of violations, not only its prior section 105(c) violations).

Cantera Green, 22 FMSHRC at 623.

The Secretary asserts, and the MDRS reflects, that 17 citations were issued to West Alabama in the two-year period preceding the July 1, 2009, issuance of Citation No. 6511548. Of these 17 citations, 14 were designated as non-S&S in nature, and none of the subject 17 violations were attributable to an unwarrantable failure. While the general violation history should be considered, it is noteworthy that, of these 17 citations, none cited section 56.15005—the mandatory standard at issue in this matter. As only three of the 17 relevant cited violations evidence gravity of a reasonably serious nature, **West Alabama's history of violations is a mitigating factor**.

2. Appropriateness of Penalty to Size of Business

The evidence of record reflects that West Alabama has approximately eight employees. The Secretary does not dispute that West Alabama has a small workforce. However, the Secretary disputes that a small workforce precludes imposition of a relatively high penalty, arguing that such limitation "goes directly against the deterrent purposes of the Act." *Sec'y Resp.*, at 12. I conclude that **the size of West Alabama's business operations, with respect to the Secretary's $15,971.00 proposed penalty, is a neutral factor**.

3. Negligence

The Secretary's unwarrantable failure designation fundamentally is based on a "gotcha" question from the MSHA inspector. Clay Junkin, Vice President of West Alabama, was asked by the inspector if he knew that truck drivers had to tie down when climbing on their trucks to secure loads. This confronted Junkin with the unenviable choice of admitting liability or admitting ignorance. Citation No. 6511548 informs that Junkin responded that he knew that haul truck drivers were required to tie down when covering their loads with tarp.

Attempting to rehabilitate himself in this proceeding, Junkin now maintains that he was not aware that he was responsible for the contractor's violative conduct. The Commission's remand noted that I erred in the initial decision when I opined that Junkin's purported lack of awareness of his responsibility for contractor conduct was based on a "reasonable and apparent good faith belief" that was a mitigating factor that reduced West Alabama's degree of negligence. 37 FMSHRC at 1886.

Of course, it is a "knew or should have known" standard that imposes the responsibly on mine operators to fulfill their obligations under the Mine Act. Thus, it is true that a mine operator's professed ignorance of its responsibility for the unsafe conduct of its contractors is irrelevant. As the Secretary has acknowledged, absent aggravating circumstances, a mine operator's accountability for the violative conduct of its contractor commonly is based on strict liability. *Sec'y Resp.*, at 17. That is why such "gotcha" questions are inappropriate.

Although the initial decision unsuccessfully attempted to pay lip service to West Alabama's claim that it did know that it was responsible for its contractor's conduct, the intended emphasis in the initial decision with respect to notice, which admittedly was not made clear, was that West Alabama had not been previously cited for a violation of section 56.15005. I view this as somewhat mitigating in nature.

More significantly, it is noteworthy that the cited violation is predicated on the spontaneous action of a contract haul truck driver. The Secretary does not contend that Junkin was aware of the violation in that Junkin was not present, did not observe, and did not otherwise supervise or encourage, Johnny Koger, the subject truck driver, as he covered his load with a tarp. In this regard, it is significant that the negligence of an hourly employee ordinarily is not imputed to a mine operator unless there is evidence of inadequate supervision and control. *Reading Anthracite Co.*, 32 FMSHRC 399, 411 (April 2010); *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (Aug. 1982). While the Secretary has the discretion to cite a mine operator, its contractor, or both, it is unfortunate that MSHA did not cite Denbar Transportation, Koger's employer, which is better suited to encourage the tie down compliance of its drivers. *See Sec'y Resp.*, at 17-18.

West Alabama has stipulated to "high" negligence. While the negligence remains high, in sum, for the purposes of assessing a civil penalty, I conclude that West Alabama's derivative liability for the acts of its contractor, in the absence of a history of similar violations, **is a mitigating factor with respect to its degree of negligence**.

4. Ability to Continue in Business

It has neither been contended nor shown that the Secretary's proposed penalty will affect West Alabama's ability to continue in business. As such, I conclude that **this criterion is a neutral factor**.

5. Gravity

The gravity penalty criterion requires an evaluation of the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In evaluating the seriousness of a violation, the Commission has focused on "the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Citation No. 6511548 was designated as S&S and affecting one person. As noted in the initial decision:

> West Alabama does not deny that it is reasonably likely that the continued practice of working on an uneven surface elevated ten feet above the ground will result in an accident involving a fall that is reasonably likely to result in serious injury. Consequently, the cited violation is properly designated as S&S.

34 FMSHRC at 1654. Accordingly, the violation is serious in gravity. **I view this criterion as neutral with regard to the appropriate penalty to be assessed**.[2]

6. Good Faith Abatement

West Alabama's abatement is troubling. Instead of installing signage requiring all contract haul drivers to tie down when installing tarp, West Alabama posted a sign prohibiting truck drivers from installing tarp on mine property by advising drivers "not to climb on vehicles." *West Alabama Resp.*, at 6. (Mar. 24, 2016). In other words, if a haul truck operator was inclined to expose himself to the danger of falling, he must do so off mine property. Although approved by MSHA, this is questionable good faith abatement, at best. Consequently, **I view West Alabama's abatement efforts as an aggravating factor**.

On balance, applying the traditional section 110(i) analysis would provide for a meaningful reduction of the $15,971.00 penalty proposed by the Secretary.

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[2] The mandatory standard in section 56.15005 requires "[s]afety belts and lines shall be worn when persons work *where there is danger of falling*. . . ." (emphasis added). Section 56.15005 must, of necessity, be broad because the myriad circumstances requiring safety lines cannot be foreseen. However, the securing of loads on haul trucks is an everyday occurrence. I am concerned that the Secretary appears to take the position that the failure to tie down when installing tarp on a haulage truck is a *per se* violation of section 56.15005. In view of the Secretary's *per se* approach, it is difficult to assess the degree of hazard posed by the facts surrounding the violation at issue in Citation No. 6511548, wherein the truck operator was observed installing the tarp "on his knees." To avoid arbitrary enforcement, the Secretary should consider initiating a rulemaking to promulgate a mandatory standard to require *truck operators to tie down when securing their load*. By way of example, the mandatory standard at 30 C.F.R. § 56.12016 requires that *all* electrically powered equipment must be de-energized before mechanical work is performed on such equipment. It is noteworthy that section 56.12016 does not require de-energizing electrical equipment *only* when there is a danger of electric shock or other injury.

III. Delinquency

As previously noted, the Secretary has alluded to West Alabama's civil penalty payment delinquency as a relevant consideration in determining the appropriate penalty to be assessed for Citation No. 6511548. *See Sec'y Resp.*, at 12. Specifically, the MDRS reflects that of the $27,890.00 in civil penalties assessed for the 59 citations and orders issued to West Alabama during the period June 2010 to November 2015, West Alabama has paid $200.00 in satisfaction of two citations. The MDRS further reflects that West Alabama is delinquent in its payment of the $27,690.00 total civil penalty for the remaining 57 citations and orders. Thus, with the exception of two citations, West Alabama has been delinquent in its payment of assessed civil penalties for approximately six years.

With respect to delinquency as it relates to the imposition of civil penalties, in the past, the Commission has narrowly construed the civil penalty criteria in section 110(i). In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), the Commission stated: "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Id.* at 850.

However, in *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012), the Commission departed from its narrow interpretation of section 110(i) by emphasizing the role of deterrence as a proper consideration in assessing civil penalties. In this regard, the Commission noted:

> Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, and it explicitly called for consideration of the protection of the "public interest" - which includes such compliance - before a [penalty is assessed]. Consequently, it is eminently appropriate for a Judge to acknowledge the need for deterrence in [considering the appropriate civil penalty], with the understanding that the [ultimate civil penalty], consistent with fundamental principles underlying the penalty provisions of the Mine Act, discourage operators from violating health and safety regulations and laws in the future.

Id. at 1866. In sum, the Commission stated:

> Simply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties - to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties.

Id. at 1869.

On May 9, 2016, the parties were ordered to address whether delinquency is a relevant consideration in determining the appropriate penalty to be assessed. 38 FMSHRC __, slip op. (May 9, 2016) (ALJ). West Alabama responded on May 31, 2016, asserting that "while the Court may consider the matter of Respondent's delinquent payment history," *Black Beauty* does not

compel the Court to do so. *West Alabama Resp. to Order to Show Cause*, at 1 (May 31, 2016). West Alabama further argues that its delinquent payment history does not adversely affect deterrence because "there is no history of relevant violations with respect to drivers climbing on their trucks and failing to tie down, and accordingly no history of delinquent payment for such violations." *Id.* at 2.

The Secretary responded on June 14, 2016, asserting that West Alabama's numerous unpaid civil penalties "have done nothing to deter safety infractions at Respondent's mine or to compel Respondent to honor its obligations under the Mine Act." *Sec'y Resp. to Order to Show Cause*, at 2 (June 14, 2016). Consequently the Secretary avers that West Alabama's "six-year delinquent payment history should be given great weight in assessing the penalty in this matter." *Id.*

The ultimate goal of the Mine Act is to promote a general culture of safety by deterring violations of the Mine Act and the Secretary's mandatory safety regulations. In this regard, the Commission in *Black Beauty* stated:

> The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates.
>
> The Senate Report, for example, acknowledged that civil penalties are "an enforcement tool," and recognized that the "settlement of penalties often serves a valid enforcement purpose." Legis. Hist. at 632-33. It emphasized that:
>
> > [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards….
> >
> > …To be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.
> >
> > … [T]he Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, [but] is indeed for the purpose of encouraging operator compliance with the Act's requirements….

Black Beauty, 34 FMSHRC at 1865-66 (quoting S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978)). Although *Black Beauty* concerns the propriety of considering deterrence in the context of approving settlements of civil penalties, it is clear that deterrence is also an appropriate consideration in determining civil penalties in contested cases. *See id.*

West Alabama acknowledges the deterrent effect that the payment of civil penalties has in promoting compliance with the Mine Act and the Secretary's regulations. *See West Alabama Resp. to Order to Show Cause*, at 2. Yet West Alabama did not provide any explanation for its six-year history of delinquency. There was no claim of oversight or regret. Rather, in an unabashed reliance on a distinction without a difference, West Alabama asserts that, despite its extensive history of delinquency, deterrence has not been compromised simply because it has not previously been cited for, and thus has not previously failed to pay a civil penalty for, a violation of the safety belt requirement in section 56.15005. *Id.*

Succinctly put, the Mine Act's legislative history makes clear that the purpose of a civil penalty is to induce compliance. *Id.* at 1867. Suffice it to say that West Alabama's six-year non-payment history cannot be ignored, as it frustrates this purpose and may expose miners to hazardous working conditions. I decline to elevate form—by the purposeless assessment of civil penalties—over substance—by encouraging that civil penalties be paid.

In the final analysis, West Alabama's delinquency must be considered as a *significant* aggravating circumstance that warrants a meaningful increase in the civil penalty assessed for Citation No. 6511548. I am cognizant that increasing the civil penalty in view of West Alabama's pattern of delinquency raises an obvious question: How will raising the civil penalty foster compliance in view of West Alabama's apparent disinclination to pay? Encouraging compliance is a two-step process. As noted, compliance is achieved through the payment of civil penalties. Thus, step one involves motivating delinquent mine operators to pay civil penalties by increasing future assessed penalties that, if not paid, become a debt owed to the federal government, collectable through an action brought by the Department of Justice. In step two, by encouraging the payment of civil penalties, the Mine Act's goal of deterrence and future compliance hopefully will be achieved.

As previously noted, *de novo* consideration of the appropriate civil penalty to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Consequently, consistent with the Commission's holding in *Black Beauty* that the deterrent goal of assessing civil penalties under the Mine Act is a proper consideration, West Alabama's long-standing pattern of delinquency warrants increasing the proposed penalty sought by the Secretary. Accordingly, **a civil penalty of $22,450.00 shall be assessed against West Alabama**.

ORDER

In view of the above, **IT IS ORDERED** that West Alabama Sand & Gravel, Inc. pay, within 40 days of the date of this Decision, **a total civil penalty of $22,450.00** in satisfaction of the single violation at issue. Upon timely receipt of this amount, Docket No. SE 2009-870 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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June 30, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2014-0255 A.C. No. 21-00282-343682
v.	Docket No. WEST 2014-0202-RM A.C. No. 21-00282-8740887
CONVEYOR BELT SERVICES, INC., Respondent.	Mine: Minntac Mine

AMENDED DECISION AND ORDER

Appearances: Laura Ilardi Pearson, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO, for Petitioner;

Justin Winter, Esq., Law Office of Adele Abrams, PC, Beltsville, MD, for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves one section 104(d)(1) citation, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Conveyor Belt Services, Inc. ("CBS") at the U.S. Steel Company's Minntac Mine ("the Mine"). The parties presented testimony on December 9, 2014, in Duluth, Minnesota.

The contested issues at trial for Citation No. 8740887 ("the Citation") included whether CBS violated 30 C.F.R. § 56.11027, whether CBS had fair notice of the Secretary's interpretation of the standard, whether the violation warranted enhanced enforcement, and whether the penalty was properly assessed.

For the reasons set forth below, I find CBS violated 30 C.F.R. § 56.11027 and had fair notice that the conveyor belt bed and temporary structure were working platforms under the standard. I also find CBS's violation was properly classified substantial and significant ("S&S"), and an unwarrantable failure. Finally, I find the violation involved high negligence and was reasonably likely to result in lost workdays or restricted duty. I assess a penalty in the amount of $2,000.00.

Stipulations

The joint stipulations were read into the record at the hearing: (Tr. 92:20-94:16)

1. At all times relevant to this proceeding Conveyor Belt Service, Inc., which is known as CBS, Contractor ID# G10, was engaged in mining operations and subject to the jurisdiction of Federal Mine Safety and Health Act of 1977.

2. At the time the citation that is that the subject of this case was issued, Conveyor Belt Service was engaged in mining operations at the Minntac Mine. Mine. Mine ID# 21-00282.

3. MSHA has jurisdiction over CBS's operations at the Mine because CBS was an operator as defined in Section 3(b) of the Act, 30 U.S.C., Section 803, and the products of the Mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Act. 30 U.S.C. Section 803.

4. The Administrative Law Judge has subject matter and personal jurisdiction over these proceedings pursuant to Section 105 of the Act.

5. CBS's operations affect interstate commerce.

6. On or about December 11, 2013, MSHA inspected the Mine.

7. MSHA Inspector Thaddeus Sichmeller was acting in his official capacity as an authorized representative of the Secretary when he inspected the Mine and issued the subject citation.

8. CBS abated the alleged violation in good faith.

9. The proposed penalties in this matter will not affect CBS's ability to remain in business.

10. Stipulation as to the authenticity of exhibits. The certified copy of the MSHA Assessed Violations History, Exhibit GX1, reflects the history of the Mine for the 15 months prior to the date of the Citation and may be admitted into evidence without objection by CBS.

11. The parties stipulated to the authenticity but not the truthfulness or relevance of the content of the following exhibits:

    a) Citation 8740887.

    b) Citation documentation related to 8740887.

    c) Photographs associated with citation 8740887.

d) Citation 8664341.

e) Complete inspection report for event number 6631817.

f) Deposition transcript of Thaddeus Sichmeller.

g) MSHA Program Policy Letter P12-IV-01.

Background

On December 11, 2013, MSHA Inspector Thaddeuys Sichmeller[1] ("Inspector Sichmeller") issued the Citation to CBS, alleging a violation of 30 C.F.R. § 56.11027, pursuant to § 104(d)(1) of the Mine Act. The regulation requires that "[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition." 30 C.F.R. § 56.11027. Section 56.11027 is a mandatory safety standard. The citation alleges:

> Two employees were observed conducting belt work on the 003-01 conveyor in the basement area of Step 1 and 2 Fines Crusher. The two employees were working from a makeshift work platform making a belt splice. The two employees were not protected from a fall from the work area. The top of the work area to the concrete floor below measured 51 inches on the south side and 55 inches on the north side due to the sloped concrete floor. The company has had similar violations in the past. The company has engaged in aggravated conduct by allowing the work to conduct in this area with out [sic] the proper protection of from [sic] a fall from the work platform. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX 1)

U.S. Steel contracted with CBS, a company specializing in conveyor belt maintenance, to perform work at the Mine.[2] (Tr. 8:1-2; 9:2-4) On the date of the alleged violation, six CBS employees, supervised by CBS foreman Kelly Theil[3] ("Theil"), were performing conveyor belt

[1] Inspector Sichmeller has worked for MSHA since February 24, 2003. (Tr. 13:19-20) Prior to starting at MSHA, he worked at a molybdenum mine in Idaho for about eight-and-a-half years. (Tr. 14:4-24) As a miner, Sichmeller repaired between ten and fifteen conveyor belts. (Tr. 16:4-10) As an MSHA inspector, Sichmeller is responsible for conducting sixty to eighty mine inspections a year. (Tr. 16:22-17:1) Sichmeller also acts as an MSHA accident investigator. (16:11-17)

[2] The Mine is a multi-level, surface iron-ore mine. (Tr. 22:1-6; 17:24-18:2)

[3] Theil works for CBS as a "belt technician." (Tr. 65:23-25) At the time of litigation, Theil had worked for CBS for 29 years. (Tr. 66:7-9)

maintenance on multiple levels of the Mine. (Tr. 67:2-10) The two employees cited[4] were replacing a fifty-four-inch wide conveyor belt in the "basement" area of the Mine.[5] (Tr. 72:22-73:4)

To replace the conveyor belt, the employees had to splice the ends of the new belt together. (Tr. 9:25-10:15) This process involved punching holes in the ends of the belt, putting clips in the holes to attach the belt, and sealing the belt. *Id.* Because the belt was one-inch thick and very stiff, attaching the ends required flattening the belt. (Tr. 74:10-14; 75:19-25) To flatten the belt, the employees placed it on a temporary structure fashioned from a stepladder, two steel toolboxes, and a piece of plywood. (Tr. 76:10-15) This temporary structure rested on the conveyor belt bed, which measured forty-one inches from the ground. (Tr. 76:21) The temporary platform measured fifty-one inches from the ground on its south side and fifty-five inches on its north side.[6] (Tr. 23:19-23; *see also* Ex. G6)

Once the employees laid the conveyor belt ends on the temporary structure, they stood on the conveyor belt (which was placed on the conveyor belt bed) to attach the middle portion of the belt. (Tr. 10:25-11:4) When Inspector Sichmeller observed the alleged violation, one of the employees was standing on the conveyor belt and the other was kneeling on the belt. (23:4-23:10) However, Inspector Sichmeller's testimony does not make clear whether the employees were on the portion of the conveyor belt resting directly on the conveyor belt bed or the portion resting on the temporary structure. (Tr. 23:3-17; 38:7; 39:13) Both the conveyor belt bed and temporary structure lacked handrails, and the employees were not wearing fall protection. (Tr. 24:13-16) Inspector Sichmeller testified that a fall from the conveyor belt bed or temporary structure could cause sprain-strains, broken bones or, even, fatalities. (Tr. 25:4-15; 27:2-9) The employees were on the conveyor belt for an estimated forty-five minutes to an hour. (Tr. 75:24-25; 81:17-19)

Theil testified he was on an upper level of the Mine when Inspector Sichmeller saw the employees on the conveyor belt. (Tr. 78:1-6) However, Inspector Sichmeller testified that Theil was present in the "basement" area when he observed the violative condition. (Tr. 35:11-14)

About a year-and-a-half before issuing the Citation, Inspector Sichmeller issued Citation No. 86604341 ("citation 341") to CBS for a similar violation at another U.S. Steel mine. (Tr. 29:8-30:6) Citation 341 alleged that Theil, who was supervising the job, and two CBS

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[4] The employees had two and eight years of experience working on conveyor belts, respectively. (Tr. 73:7-9) The employee with two years of experience had changed about ten belts at the time the Citation was issued, while the employee with eight years of experience had changed over 100 belts. (Tr. 73:10-18)

[5] The "basement" is the second lowest level of the Minntac Mine. (Tr. 22:11-16) The lowest level of the Mine is called the "subbasement." *Id.*

[6] The height difference was due to the sloped design of the floor in the "basement" area. (Tr. 23:18-23)

employees, violated 30 C.F.R. § 56.15005[7] by standing on an elevated conveyor belt and cable tray without fall protection. (Tr. 30:7-12) The conveyor belt involved in citation 341 was fifty-two inches high and fifteen inches wide. (Ex. G9) The cable tray was about thirty-eight inches high. (Tr. 32:18-24) When Inspector Sichmeller issued citation 341, he spoke to Theil about fall hazards and the need for fall protection or hand railings when working on elevated surfaces. (Tr. 33:4-11)

Inspector Sichmeller classified the violation as S&S, high negligence and an unwarrantable failure, in part, because he had previously cited CBS. (Tr. 8:18-22; 61:10-13) Additionally, he considered the presence of tools, mud, and water on the belt when he issued the Citation an aggravating factor. (Tr. 60:3-10)

Prior to beginning the job at Minntac Mine, Theil reviewed U.S. Steel's safety policies, which included an Occupational Health and Safety Administration ("OSHA") rule requiring fall protection at heights of six-feet or more. (Tr. 19:5-11; 20:1-6) In June, 2012, MSHA issued Program Plan Letter P12-IV-01 ("PPL") on fall protection. (Ex. R5) The PPL included OSHA's six-foot rule for inspectors to consider when issuing citations for violations of MSHA standards 56.15005 and 57.15005. (Tr. 20:7-20) Inspector Sichmeller testified that MSHA inspectors view the PPL as a "guideline." *Id.*

CBS also held a safety meeting with U.S. Steel before commencing work on the job. (Tr. 68:15-17) During this meeting, the companies discussed the safety equipment needed for every segment of the job and determined that fall protection was not required for work in the "basement" area. (Tr. 68:18-69:16; 70:22-25) However, the companies did not discuss the possibility of the employees constructing a temporary structure of the kind they ultimately made. (Tr. 85:24-86:7) Theil testified the decision to make the temporary structure was "spur-of-the moment," and that he did not witness the employees erect the structure. (Tr. 85:15-86:7) However, he testified he had seen platforms of this kind used to flatten belts in the past. (Tr. 86:8-21)

When Inspector Sichmeller issued the citation, the employees came to the ground. (Tr. 36:21-25) Subsequently, the employees used handrails, surrounding the conveyor belt, to complete the belt splice. (Tr. 81:7-11)

Brief Summary of the Parties' Arguments

Secretary of Labor

The Secretary argues the Citation was properly issued because CBS violated § 56.11027 by failing to equip a working platform with handrails. (Tr. 8:18-19) The Secretary argues the

[7] The standard reads: "[s]afety belts and lines shall be worn when persons work 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. § 56.15005.

temporary structure was a working platform.[8] (Sec. Br. 12) He defines a working platform as "a place from which miners may perform work on areas they otherwise could not reach," regardless of height. (Sec. Br. 12) The Secretary contends the violation warranted enhanced enforcement because Inspector Sichmeller's testimony supported findings of S&S and an unwarrantable failure. *Id.* at 13-17. The Secretary argues the penalty was properly assessed based on CBS's high negligence and the likelihood that the injury would result in lost workdays or restricted duty. (Ex. GX 2)

Conveyor Belt Service, Inc.

CBS argues the Citation should be vacated because the Secretary failed to prove the company violated § 56.11027. (Resp. Br. 2) CBS contends the Secretary erred in interpreting the regulation to require handrails on working platforms of any height. *Id.* at. 7. Alternatively, CBS argues the citation should be vacated because the company did not have fair notice that the standard mandated the use of handrails on surfaces less than six feet high. *Id*. at 2. CBS also challenges the Secretary's finding that the violation warranted enhanced enforcement. *Id.* CBS argues the violation was not S&S because there were many factors that made a fall unlikely to occur. *Id.* at 13. Additionally, CBS argues the violation was not an unwarrantable failure because their actions did not meet the six requirements of an unwarrantable failure. *Id.* at 16-17. Finally, CBS argues the violation should be reclassified as low or no negligence because Theil was not aware of the violation and there were mitigating factors. *Id.* at 14-15.

Violation

Under the Mine Act, mine operators are strictly liable for violations, provided the conditions violating the regulation existed. *Asarco v. Comm'n*, 868 F.2d 1195, 1197 (10th Cir. 1989). If such conditions existed, the Secretary is not required to demonstrate that the violation creates a safety hazard. *Allied Prods, Inc. v. Comm'n*, 666 F.2d 890, 892 (5th Cir. 1982).

The Conveyor Belt was a Work Platform Under § 56.11027

CBS argues the Secretary failed to prove they violated § 56.11027 because the temporary structure was not a working platform. (Tr. 9:21-24)[9] The Secretary argues the standard mandates the use of handrails on all working platforms, which he defines as places "from which miners may perform work on areas they otherwise could not reach." (Sec. Br. 12; Tr. 52:14-17) CBS believes this interpretation is erroneous because it would lead to the absurd result of requiring handrails on all elevated surfaces, even those that are only two or three inches off the ground.

[8] The Secretary argues the temporary structure was a working platform, but he does not contend the conveyor belt bed was also a working platform. (Sec. Br. 12) However, the conveyor belt bed is a working platform under the Secretary's definition of the term.

[9] CBS argues the temporary structure was not a working platform but, like the Secretary, makes no mention of the conveyor belt bed. (Tr. 9:21-24) Presumably, CBS intended to argue neither surface was a working platform, since they argue fall protection was wholly unnecessary in the "basement" area. (Tr. 72:8-15)

(Resp. Br. 7) Additionally, CBS argues this interpretation contradicts MSHA's PPL on the minimum height at which fall protection is necessary. *Id.*

"The language of a regulation or statute is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The Commission has found, when the language of a regulation is clear, "the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). "In the absence of a statutory or regulatory definition of a term, or a technical usage, we look at the ordinary meaning of the terms used in the regulation." *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997). Whether a regulation is ambiguous is determined by "referring to the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

When a mandatory standard of the Mine Act is ambiguous, "the courts and the Commission defer to the Secretary's reasonable interpretation of the regulation." *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012 (Aug. 2014). An interpretation is reasonable if it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (quoting *Rollins Envtl. Serv., Inc.*, 937 F.2d 649, 652 (D.C. Cir. 1991)). Deference to an agency interpretation can be due even if the interpretation is articulated in a legal brief. *See Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012).

The term working platform is not defined in the Mine Act or any MSHA regulations. Also, there is no technical definition of the term as it relates to the facts surrounding the Citation.[10] However, MSHA regulations define a working place as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Merriam Webster's Online Dictionary defines platform as "a flat surface that is raised higher than the floor or ground and that people stand on when performing or speaking" or, "a usually raised structure that has a flat surface where people or machines do work." *Merriam Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary (last accessed Jun. 10, 2016). Taken together, the definitions of working place and platform indicate that a working platform is a flat, elevated surface where work is performed.

This plain meaning comports with the purpose of the regulation—to "prevent a fall"—as to fall, one must generally be on a surface above ground level. *See Granite Rock Co.*, 32 FMSHRC 1792, 1794 (Nov. 2010) (ALJ Weisberger). Therefore, I find the standard unambiguous. Additionally, I find that the plain meaning of § 56.11027 does not thwart the purpose of the statute or lead to an absurd result because it protects against falls that could

[10] The American Geological Institute defines a work platform as "a board or small platform placed at a suitable height in the drill tripod or derrick so that a worker standing on it can handle the drill rod stands." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 631 (2d ed. 1997) ("*DMMRT*"). However, neither drill tripods nor derricks were involved in the issuance of the Citation.

potentially injure miners. Judges have also interpreted working platform in a way consistent with the term's ordinary meaning. *See Voss Sand Works, Inc.*, 34 FMSHRC 906, 913 (Apr. 2012) (ALJ Miller) (holding a boat was a working platform because it was "an elevated, horizontal, flat surface"); *Lakeview Rock Products*, 19 FMSHRC 321, 359 (Feb. 1997) (ALJ Koutras) (holding that an overturned 55-gallon drum elevated 34.8 inches off the ground was a work platform). Therefore, I find the plain meaning of the regulation should govern here.

As I find the regulation unambiguous, there is no need to defer to the Secretary's interpretation of the standard.[11] I find the conveyor belt bed and the temporary structure served as working platforms because they were elevated, flat surfaces the employees stood on to perform a belt splice. Because the conveyor belt bed and temporary structure were working platforms and lacked handrails, I find CBS violated § 56.11027. Even if it were possible to claim some ambiguity remains in the regulation, I find the deference accorded to reasonable interpretations by the Secretary outweighs CBS's argument that handrails were not required on the conveyor belt bed and temporary structure.

The Operator Had Fair Notice of § 56.11027

CBS argues it did not have notice handrails were required on a surface less than six feet above the ground. (Resp. Br. 12) This argument is based on MSHA's issuance of a PPL, which says inspectors may use the OSHA six-foot rule in interpreting 30 C.F.R. §§ 56.15005 and 57.15005. (Resp. Br. 8; *see also* Ex. 5R)

Under the due process clause, an agency may not enforce a new interpretation of a regulation without advance notice of the conduct prohibited or required by the standard. *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986). The notice requirement is generally satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. *LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). In the absence of sufficient evidence of actual notice, the Commission applies the "reasonably prudent person" test. *See id.* In *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982), the Commission articulated the reasonably prudent person test as follows: "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."

However, actual notice or notice via the "reasonably prudent person" test is not required when a regulation is clear, as an unambiguous standard itself provides fair notice to operators of its requirements. *See Jim Walter Resources, Inc.*, 28 FMSHRC 983, 988 n.6 (Dec. 2006) (citing *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997)). Because the meaning of "working platform" under § 56.11027 is clear, I find CBS had fair notice the conveyor belt bed and temporary structure were working platforms, and, therefore, required handrails. Even if it could be argued the standard is ambiguous, I find citation 341 provided CBS with actual notice or, at a

[11] At this point, I will not address the validity of the Secretary's interpretation of § 56.11027 or the exact elevation at which a working place becomes a working platform.

minimum, fair notice under the "reasonably prudent person" test that handrails were required on the conveyor belt.

Enhanced Enforcement

To invoke the enhanced enforcement provisions for mandatory safety standards set out in § 140(d), the Secretary must prove the violation satisfies the S&S and unwarrantable failure standards. *See Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (Jul. 2003).

Significant and Substantial

The Secretary designated the citation S&S. (Ex. G2). S&S determinations are made based on the specific facts of the case. *See Cumberland Coal Res.*, *LP*, 33 FMSHRC 2357, 2369 (Oct. 2011); *National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). A finding of S&S requires that the Secretary prove:

> (1) underlying violation of a mandatory safety standard; (2) a discrete safety standard—that is, a measure of danger to safety—contributed to by the violation; (3) 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 (Jan. 1984). The violation satisfies the first element of the test because § 56.11027 is a mandatory safety standard. (Ex. GX 2)

"The second element of *Mathies* requires the Secretary to demonstrate that the violation contributed to a safety hazard." *Oak Grove Res., LLC*, 37 FMSHRC 2687, 2696 (Dec. 2015). The Commission has said to be a "hazard," a violation must contribute to a specific danger. *See Mathies*, 6 FMSHRC at 3-4. A violation is not S&S if it is non-dangerous. *See U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Gypsum*, 3 FMSHRC at 827. However, even if a hazard is unlikely to occur, a violation can be deemed S&S. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Whether a violation is S&S is determined in the context of continued mining operations and "cannot ignore the dynamics of the mining environment or process." *U.S. Steel*, 6 FMSHRC at 1574. I find the Secretary demonstrated the violation contributed to a safety hazard, satisfying the second element of the test, because the lack of handrails contributed to the risk of falling off the conveyor belt from either side. (Tr. 20:25-21:3)

The Commission has held element three does not require the Secretary to show it is more probable than not that an injury will result from violation. *See U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1986). The hazard, rather than the specific violation, must be "reasonably likely to result in an injury" for the violation to be deemed S&S. *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014). An inspector's judgment is an important factor in determining whether there is "a reasonable likelihood that the hazard contributed to will result in an injury." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998) (holding an inspector's belief that hanging drawrock posed a reasonable likelihood of injury to miners was persuasive). In *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th

Cir. 1995), the Seventh Circuit held no evidence beyond the testimony of an experienced mine inspector is necessary to support a finding of S&S.

Inspector Sichmeller testified an injury was reasonably likely because the employees were exposed to a fall hazard without fall protection, and there were tools and mud on the belt. (Tr. 26:12-22) Earlier that year, Inspector Sichmeller witnessed a fatal fall from a work platform of less than six feet. (Tr. 25:12-26:9) Theil testified the employees only would have been on the conveyor belt for about forty-five minutes and that CBS employees have used temporary structures to complete belt splices in the past. (Tr. 75:19-75:25) Additionally, Theil testified fall protection was not necessary because the employees were standing on a flat, wide area. (79:19-80:2) However, Inspector Sichmeller estimated the employees were on the conveyor belt for closer to an hour. (Tr. 36:2-9) Also, Theil's testimony that he has seen similar structures used in the past indicates he was aware the employees might stand on the belt because it would be difficult to reach an elevated temporary structure from the ground. Although the employees were only on the belt for forty-five minutes to an hour, and the conveyor belt was wide and flat, the tools and water on the belt made an injury reasonably likely. I credit Inspector Sichmeller's judgement that the violation was reasonably likely to result in an injury.

The remaining factor in the S&S designation, the fourth element of the *Mathies* test, is concerned with the likely gravity of an accident. To be of a "reasonably serious nature" an injury does not need to "result in hospitalization, surgery, or a long period of recuperation." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). Injuries such as "muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature," and have been deemed "reasonably serious." *Id.* Additionally, the Secretary is not required to show a similar type of injury has actually occurred. *See Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) I find the violation meets the fourth element of the test because a fall from the conveyor belt bed or temporary structure is reasonably likely to result in sprain strains, broken bones and fatalities. (Tr. 25:10-15) As stated earlier, Inspector Sichmeller observed an injury of this kind when a miner died as a result of a fall from a similar height. (Tr. 25:12-26:9) All of these injuries are considered reasonably serious under the test. Since all the *Mathies* elements are proven, I find the violation was S&S.

Unwarrantable Failure

The Secretary argues the violation satisfies the unwarrantable failure criteria because aggravating factors were present. (Sec. Br. 17) CBS argues the facts with which the Secretary supports a finding of unwarrantable failure are not aggravating factors. (Resp. Br. 16)

An unwarrantable failure is characterized by conduct such as "reckless disregard," "intentional misconduct," indifference," or a "serious lack of reasonable care." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991). The Commission has defined an unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery*, 9 FMSHRC at 2001.

> Whether conduct is 'aggravated' in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed,

> the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation.

Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2011). "While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered." *Alden Resources, LLC*, 37 FMSHRC 753, 767 (April 2015) (ALJ Andrews).

The Secretary argues the violation was long because any exposure to a fall hazard is "too long." (Sec. Br. 17) Although it is uncertain how long the employees were on the conveyor belt, the court must take even imperfect evidence in the record into account when evaluating whether a violation was an unwarrantable failure. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). Even if violation occurs for a relatively short period, it can be deemed of long duration for unwarrantable failure purposes if there is a high degree of danger. *See Engineering & Constructors*, 24 FMSHRC 669, 679-80 (Jul. 2002) (finding a four to five foot gap in a hand rail, 70 feet above the ground, was a violation of long duration even though it only existed for two days); *Midwest Material Company*, 19 FMSHRC 30, 34-36 (Jan. 1997) (holding a violation was an unwarrantable failure, even though it only occurred for a few minutes, because it posed a high degree of danger, involved a foreman, and may have continued, but for occurrence of accident). Although the violation here only lasted for forty-five minutes to an hour, it posed a high degree of danger and a fall, resulting in a serious injury, was possible within the short period of time the employees were on the conveyor belt.

The Secretary also argues any exposure to a fall hazard is "too extensive." The extent of a violation "has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). "In some situations . . . extensiveness depends on the number of persons affected by the violation." *Id.* at 3079-80. CBS's violation only affected a small area of one conveyor belt and two employees; therefore, I find the violation was not extensive.

The Secretary argues CBS was on notice that handrails were necessary on the conveyor belt for compliance with § 56.11027. (Sec. Br. 15-16) "The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard." *Brody Mining, LLC*, 37 FMSHRC 1687, 1698 (Aug. 2015). As discussed earlier, CBS was cited for a similar violation a year-and-a-half earlier. Although a single citation does not rise to the level of "repeated" violations, the same foreman supervised both jobs and was expressly put on notice that fall protection was necessary when performing work on elevated conveyor belts. (Tr. 31:16-25) For this reason, I find CBS was on notice that greater efforts were necessary for compliance with the standard.

The Secretary argues the violation was obvious. (Sec. Br. 17) A condition is obvious when it could be observed by a supervisor or inspector. *See E. Associated Coal Corp.*, 32 FMSHRC 1189, 1200 (Oct. 2010). The violation at issue meets this definition because Inspector

Sichmeller saw the employees standing on the conveyor belt as soon as he walked into the "basement" area.

Finally, CBS claims Inspector Theil did not know the employees planned to stand on the belt to complete the splice. (Resp. Br. 14) They argue the employees' violation cannot be imputed to the company because the employees acted unilaterally in standing on the belt. *Id.* However, there is contradictory testimony regarding Theil's location when the employees were on the conveyor belt, meaning it is possible Theil witnessed the employees use the belt as a work platform. Theil testified he had seen employees use a temporary structure, like the one built by the employees, to flatten out conveyor belts in the past. (Tr. 76:2-4) This testimony, along with Theil's admission that, before receiving citation 341, CBS had done similar conveyor belt changes fifty times without fall protection, indicates Theil should have known the employees might stand on the belt to complete the splice. (Tr. 72:4-7) Therefore, I find Theil knew, or had reason to know, of the violation.

Because CBS's actions meet the majority of requirements for an unwarrantable failure, I find the violation was an unwarrantable failure. Additionally, as the violation was S&S and an unwarrantable failure, I find enhanced enforcement was warranted.

Penalty

The Secretary proposed a $2,000 penalty for CBS's violation.[12] (Ex. G2) CBS argues this penalty is too high because the violation was low or no negligence. (Resp. Br. 14-15)

The Mine Act sets forth the following criteria for the Commission to weigh in assessing civil penalties:

> (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition.

30 U.S.C. § 820(i). The Secretary uses the same criteria in determining proposed penalties. *See Sellersburg Stone Co.*, 736 F.2d 1147, 1151 (7th Cir, 1984). While Commission judges may weigh some of the six penalty assessment criteria more heavily than others, they must address each of the criterion in his or her decision. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

Commission judges may set civil penalties, provided the penalty serves as an effective deterrent against future violations. *See Cantera Greene*, 22 FMSHRC 616, 620 (May 2000). Commission judges are not bound to the Secretary's proposed penalty assessments. *See Sellersburg*, 736 F.2d at 1151. However, if the Commission's assigned penalty differs

[12] The proposed penalty is the minimum amount for 104(d)(1) citation, which the Commission may not lessen if the violation is deemed S&S and an unwarrantable failure. 30 U.S.C. 820(a)(3)(A); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3103 (Dec. 2014).

substantially from the penalty proposed by the Secretary, the Commission must provide an explanation justifying the change. *Sellersburg*, 5 FMSHRC at 293. It is appropriate for a judge to raise the penalty significantly based on his or her findings of extreme gravity and unwarrantable failure. *Spartan Mining*, 2008 W.L. 4287784, at *23 (FMSHRC Aug. 28, 2008). Judges are free to give greater weight to the negligence and gravity of a violation when assessing penalties. *See Lopke*, 23 FMSHRC at 713.

Negligence

Inspector Sichmeller cited the violation as high negligence because he issued CBS and Theil a citation for a similar violation a year-and-a-half earlier. (Tr. 34:21-35:4) Inspector Sichmeller argues this prior citation indicates the operator knew of the fall protection requirement. *Id.* CBS argues the violation should be reclassified as low or no negligence because Theil did not know, or have reason to know, of the violation and there were mitigating circumstances. (Resp. Br. 15)

The Mine Act is a strict liability statute, so negligence plays no role in citation issuance. 30 U.S.C. § 814(1). Inspectors must issue citations for violations of mandatory safety standards, regardless of operator negligence. *Musser*, 32 FMSHRC at 1272. However, negligence is considered in assessing civil penalties. *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). In determining negligence for penalty purposes, "the conduct of a rank-and-file miner is not imputable to the operator." *Whayne Supply*, 19 FMSHRC 447, 451 (Mar. 1997) (quoting *Fort Scott Fertilizer*, 17 FMSHRC 1112, 1116 (July 1995). However, factors used to determine negligence include 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).

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 violation is not negligent "when the operator exercised diligence and could not have known of the violative condition or practice." *Id.* A violation is low negligence "when an operator knew or should have known of a Mine Act violation, but there are considerable mitigating circumstances." *Id.* A violation is moderately negligent when "an operator knew or should have known of a Mine Act violation, but there are mitigating circumstances." *Id.* Finally, a violation is high negligence "when an operator knew or should have known of Mine Act violation, and there are no mitigating circumstances." *Id.*

Mitigating factors are also weighed in this analysis. A mitigating factor is something an 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.

As discussed in terms of the unwarrantable failure analysis, CBS argues Theil did not know, or have reason to know, of the violation. I find this argument unpersuasive. CBS also argues the citation should be reclassified as low or no negligence because there were mitigating circumstances. (Resp. Br.15) Firstly, CBS argues MSHA's issuance of the PPL, which indicated inspectors may use the OSHA six-foot rule as guidance, was a mitigating factor. *Id.* However,

the PPL addressed citations issued under § 56.15005, not § 56.11027. (Ex. R5-001) More importantly, the PPL "leaves room for site specific evaluation." *Boart Longyear Co.*, 35 FMSHRC 3680, 3687 (Dec. 2013) (ALJ Barbour). Inspector Sichmeller testified the PPL was a "guideline for inspectors to use," but that they were not bound to follow the OSHA six-foot rule. (Tr. 44:12-45:19) Thus, Inspector Sichmeller was not bound to the interpretation put forth by MSHA in the PPL, and it was not a mitigating factor.

Secondly, CBS argues its meeting with U.S. Steel prior to the start of the job was a mitigating factor. (Tr. 12:9-13) However, the employees deviated from the plan discussed at the meeting when they used the conveyor belt as a working platform. (Tr. 85:1-86:7) Theil testified building the temporary structure and standing on the conveyor belt was a "spur-of-the-moment decision," and that the employees had to "improvise." *Id.* There is also no proof CBS told U.S. Steel that work on the basement conveyor belt would be performed from any surface other than the floor. For these reasons, I find the meeting was not a mitigating factor. Additionally, I believe allowing employees to change work plans without supervisor approval is a dangerous business practice.

I find CBS knew, or should have known, handrails were required when the employees were on the conveyor belt bed and temporary structure. Since there were no mitigating circumstances, I find the violation was properly cited as high negligence.

Gravity

Inspector Sichmeller testified a fall from the conveyor belt could reasonably be expected to result in lost workdays or restricted duty. (Tr. 25:6-9) In assessing civil penalties, the Commission also considers the "gravity of the violation." 30 C.F.R. § 820(i). Gravity is usually viewed in terms of "the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg*, 5 FMSHRC at 294-95). Specifically, the standard refers to "the effect of the hazard if it occurs." 18 FMSHRC at 1550. 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.

Inspector Sichmeller's gravity designation was based on his belief that a fall from 55-inches could result in a sprain-strain, broken bones, and, even, a fatality. (Tr. 25:10-15) Inspector Sichmeller found such injuries were likely to result from a fall based on his experience as an MSHA inspector and accident investigator. (Tr. 25:17-26:6) The citation alleges two people would be affected, which is reasonable given that two employees were working on the "basement" conveyor belt. (Ex. GX 2) Based on these assertions, I find an injury was reasonably likely and would have been serious, possibly resulting in lost work days or restricted duty.

Other Considerations

In addition to negligence and gravity, the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business, and the demonstrated good faith abatement of the violative condition when assessing penalties. 30

U.S.C. § 820(i). The parties agreed to the stipulations that the penalty will not affect CBS's ability to stay in business and that CBS abated the violation in good faith. (Tr. 93:22-35)

As discussed earlier, Inspector Sichmeller cited CBS and Theil for a violating another fall protection standard a year-and-a-half before the incident at the Minntac Mine. (Ex. G9) This shows CBS had a previous history of violations. Finally, while there is no information about CBS's size in the record, there is no evidence to support a finding that the penalty was inappropriate in proportion to the size of the business.

I find CBS was highly negligent in failing to require the use of handrails on the conveyor belt. Additionally, I find this violation was reasonably likely to result in lost work days and restricted duty. I do not believe there are any additional considerations supporting a lessened penalty. Moreover, because I find the violation was S&S and an unwarrantable failure, $2,000 is the lowest possible penalty for the citation. 30 U.S.C. 820(a)(3)(A); *Hidden Splendor Res., Inc.*, 36 FMSHRC at 3103. For the foregoing reasons, I find the penalty was properly assessed at $2,000.

WHEREFORE, it is **ORDERED** that Conveyor Belt Services, Inc. pay a penalty of **$2,000.00** within thirty (30) days of the filing of this decision.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 1, 2016

SECRETARY OF LABOR, MSHA, on behalf of **JENNIFER MORREALE**, Complainant, v. VERIS GOLD USA, INC., JERRITT CANYON GOLD, LLC, WHITEBOX MANAGEMENT, & ERIC SPROTT, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-793-DM MSHA Case No.: WE MD 14-13 Mine: Jerritt Canyon Mill Mine ID: 26-01621

AMENDED ORDER OF DISMISSAL[1]

Before: Judge Simonton

This case is before me upon a discrimination complaint filed pursuant to section 105(c)(2) 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. Jennifer Morreale (Complainant) against Veris Gold USA, Inc. (Respondent).

On May 20, 2016, this court issued an Order Conditionally Approving Joint Withdrawal Motion stating that this matter would be dismissed with prejudice after confirmation of full satisfaction of the parties' private settlement agreement. May 20, 2016 Order. On May 23, 2016, Complainant and counsel for the Respondent both represented that the terms of the settlement agreement had been completed and satisfied.

Accordingly, this matter is **DISMISSED** with prejudice.

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

[1] The Order was amended because the first sentence incorrectly stated that this was a 105(c)(3) complaint, when it was in fact a 105(c)(2) complaint.

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June 2, 2016

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER ON RESPONDENT'S MOTION FOR INTERLOCUTORY REVIEW

Before: Judge Moran

Dorsey & Whitney LLP, on behalf of Jerritt Canyon Gold, LLC, ("JCG") has filed a motion seeking interlocutory review, per 29 C.F.R. § 2700.76. JCG's Motion requests that the Court "certify that [its] ruling to add JCG as a respondent in this matter, involves a controlling question of law and that immediate review *will* advance the final disposition of the proceeding." JCG Mot. for Cert. of Interlocutory Rev., at 1 (Apr. 13, 2016) ("Mot.") (emphasis added).[1]

[1] In pertinent part, the provision addressing interlocutory review by a judge provides:

> (a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. . . . (1) Review cannot be granted unless: (i) The judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review *will materially advance the final disposition of the proceeding*; or (ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. . . .

29 C.F.R. § 2700.76 (emphasis added). Given this Court's denial of the motion, the provisions in Commission Rules 76(a)(1)(ii) and (a)(2) come into effect. JCG's counsel is fully aware of these provisions.

For the reasons that follow, the Court, by not having determined that immediate review will materially advance the final disposition of the proceeding, DENIES the motion.

JCG's Motion essentially repeats the arguments it has advanced many times before, most recently in the parallel ongoing discrimination proceeding, *Varady v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC* ("*Varady*"). In its most recent ruling in the *Varady* matter, the Court denied JCG's request to certify that an interlocutory ruling in that matter involved a controlling question of law and that immediate review of the Court's opinion *would materially advance the final disposition of the proceeding.* 38 FMSHRC __, slip op., WEST 2014-307 DM (Apr. 26, 2016) (ALJ). That order in *Varady* is hereby incorporated by reference.[2]

JCG's Motion contends that there is no jurisdiction to add JCG as a party. It then revisits all of the arguments previously made to, and rejected by, this Court in support of its claim of lack of jurisdiction, which will not be repeated here.[3, 4]

JCG's Motion incorrectly describes the "Issue" as whether allowing the Complainant to amend his discrimination complaint "to add JCG as an additional respondent in the case [is] in contravention of the Canadian and U.S. Bankruptcy Courts' automatic stay, prior adjudication, discharge and free and clear sale of the Veris Gold assets to JCG under Section 363(f) of the Bankruptcy Code." Mot. at 7. The issue, however, is whether the asserted jurisdictional bar involves a controlling question of law and whether, in the Court's opinion, immediate review of that issue will materially advance the final disposition of the proceeding.[5]

Among the many arguments advanced by JCG, all rejected by this Court in its previous rulings, are: that any actions taken in violation of the bankruptcy court's automatic stay are void *ab initio*; that only the bankruptcy courts can modify the automatic stay; and, because of that, all MSHA proceedings are stayed. *Id*. at 10. JCG then continues with citations to the Canadian and U.S. Bankruptcy Courts' holding that JCG acquired the assets of Veris Gold free and clear of any

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[2] In issuing this Order, the Court read and considered Complainant Lowe's Opposition to Respondents' Motion for certification of interlocutory review, Respondents Reply in support of its motion, and Complainant's Reply in further opposition. The Court would add that the reply filed on behalf of Whitebox Entities seems to be an initially unpersuasive exercise in parsing the various relationships among the various respondents, which only demonstrates the importance of discovery so that their true nature can be understood.

[3] In fact, and as a matter of practicality, the motion essentially repeats, verbatim, large portions from previous submissions to this Court.

[4] The Court's March 4, 2016, Order on Complainant's Motion to Amend addresses JCG's contentions. *See* 38 FMSHRC __, slip op., WEST 2014-614-DM (Mar. 4, 2016) (ALJ).

[5] JCG also requests that "in the interest of judicial economy and fairness to the parties, [the] proceedings in th[is] docket . . . be stayed pending a final determination on the issue of jurisdiction." Mot. at 2, 8. This request is DENIED. The proceedings are stayed, but only until the Commission rules on the motion for interlocutory review.

interest, claim, or liability. *Id*. at 10-12. These claims rest upon the asserted legitimacy of the section 363(f) proceeding under the Bankruptcy Code. In its prior ruling, the Court has addressed this issue as well.

The Essential Problem with JCG's Motion

It is not the job of a Federal Mine Safety and Health Review Commission administrative law judge to do the laundry for another court. The Court acknowledges that, should the Commission decline to adopt JCG's contentions, it is possible that another court may determine that JCG's purchase of certain Veris Gold assets was free and clear of all liens, claims, and interests, that section 363 of the Bankruptcy Code provides a total corporate welfare cover to that and other potentially related entities, and that there was no need to employ the due process hearing procedure found in section 1141 of that Code. It may also be that some other court, *but not this Court*, may determine that Veris Gold, JCG, and the bankruptcy monitor fully informed such bankruptcy courts about the nature of Lowe's and Varady's Mine Act claims, and that due process was fully satisfied, that Mine Act discrimination proceedings are indistinguishable from those debts owed to traditional business creditors, and that the hearing which was ostensibly held regarding Lowe's (and Varady's) claims, demonstrates a record that evinces fairness.[6]

However, that is not this Court's role in deciding discrimination matters under the Mine Safety and Health Act. This Court upheld Mr. Lowe's discrimination complaint after a hearing. That hearing afforded Veris Gold a full opportunity to challenge Lowe's claim. Indeed, Veris Gold hired an attorney to do just that, and that attorney conducted discovery and vigorously defended Veris Gold in that action until, only a few days before the Lowe hearing was to commence, that attorney announced that he had been instructed to withdraw his representation. The attorney also acknowledged on the record at the start of Lowe's discrimination proceeding, that Veris Gold fully understood the consequences of that withdrawal.[7]

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[6] No record of any hearing transcript before a Bankruptcy Court addressing Lowe's or Varady's claims has been provided to the Court by JCG's Counsel.

[7] As the Court noted in its October 15, 2015 decision:

> At the outset of the hearing, Attorney David Stanton, privately retained legal counsel for Veris Gold, appeared. The Court noted that Attorney Stanton filed a motion for his withdrawal as the Respondent's representative. Tr. 6. The Court had previously received word of Attorney Stanton's motion to withdraw at the conclusion of the prior week, one day after another section 105(c)(3) hearing against Veris, *Matthew Varady v. Veris Gold USA, Inc.*, WEST 2014-307-DM, had concluded. This Court presided in the Varady discrimination case. That case involved the pro se discrimination claim brought Matthew Varady against Veris Gold, and a decision finding for Mr. Varady was issued on September 2, 2015. Attorney Stanton represented Veris in the Varady discrimination matter for the entirety of the hearing. As noted, *infra*, the Varady hearing did not go well,
>
> (continued…)

With liability for discrimination having been established by this Court, apart from whatever may come to pass regarding Veris Gold's employment of bankruptcy protection, the next step *under the Mine Act* is to determine if successorship applies to any or all of those entities that now run the Jerritt Canyon Mill, which, it is noted, continued to hum along essentially without interruption throughout the whole bankruptcy process.[8] Because the Court is

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[7] (…continued)
evidentiary-wise, from Respondent's perspective, and it was obvious that Attorney Stanton correctly gauged the adverse evidentiary consequences of the proceeding, owing to the poor credibility of Respondent's various witnesses. Therefore, it was not a surprise to the Court that the attorney moved to withdraw from representation. As the Varady and Lowe matters are closely linked, it followed that withdrawal would be sought in the Lowe matter as well. Due to the indefinite nature of Attorney Stanton's initial email request to withdraw his representation of Veris, it was not clear whether the attorney's request was confined to the Lowe and Varady matters or whether the attorney was withdrawing completely from all representation of Veris. Attorney Stanton was equivocal about his continuing role, in that he indicated that it would continue until the bankruptcy monitor in Canada acts. Tr. 6. At the time of and prior to the hearing's start, Veris had been involved in a bankruptcy proceeding. Attorney Stanton confirmed that mining would continue at the Veris site and it was his understanding that Veris would continue as a legal corporate entity and he represented that the Veris entity would 'remain in existence for some period of time while the monitor addresses some … lingering issues,' although he did not know exactly what those issues were. Tr. 8. Emphasizing that the mine would be a continuing operation, albeit under a successor, 'White Box' or the debtor in possession, Attorney Stanton hoped that his legal representation would continue with the new ownership. Tr. 9. Thus, it is fair to state that the mining operation and attorneys representing it would continue to move along nicely, while apparently simultaneously attempting to evade responsibility, through bankruptcy legal mechanisms, for acts of discrimination under the Mine Act.

Lowe v. Veris Gold USA, Inc., 37 FMSHRC 2337, 2238-39 (Oct. 2015) (ALJ).

[8] In a recent, related, development, the Court notes that in *Sec'y o/b/o Morreale v. Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, Whitebox Management, and Eric Sprott*, 38 FMSHRC __, slip op., WEST 2014-793 DM (May 25, 2016) (ALJ) ("*Morreale* "), yet another discrimination proceeding initially against Veris Gold, the parties reached a private settlement and the judge in that case dismissed the proceeding upon the parties' representation that "the terms of the [private] settlement agreement had been completed and satisfied." *Id.* at 1. This Court is aware of the putative distinction in *Morreale* that the discrimination proceeding was brought by the Secretary. Substantively, the Court sees no difference, and it would note that Congress, in enacting the Mine Act's discrimination provisions, did not characterize section 105(c)(3) claims as inferior. The Court believes that, it is in the interests of all for the parties to explore settlement in the Lowe and Varady matters.

duty bound to attend to the relevant discrimination issues before it, the Respondent must be entitled to conduct legitimate discovery in order for the Court to determine if the Commission's adopted successorship principles should apply to JCG, and/or Whitebox, and/or Eric Sprott.[9]

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[9] As pertinent in this matter as it was in the Court's April 26, 2016, Order addressing JCG's motion for interlocutory review in the *Varady* matter, it should be

> . . . noted that fellow Administrative Law Judge David Simonton recently issued a briefing order relevant to these issues. After noting that there is legal ambiguity concerning the 'correct interaction of bankruptcy law and the Commission's successorship doctrine,' Judge Simonton concluded that 'the most prudent course of action is to first resolve the factual question of JCG's successorship status before proceeding to potential bankruptcy protection issues,' and, in line with view, that stated 'further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine is necessary to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris.' Briefing Order at 2, *Sec'y of Labor on behalf of Morreale v. Veris Gold U.S.A. Inc.*, WEST 2014-793 (FMSHRC Apr. 21, 2016). Helpfully, Judge Simonton directed the respondents to respond to the following non-exclusive, preliminary questions regarding successorship:
>
> > 1) Did JCG management learn of the finalized settlement agreement between the Secretary, Ms. Morreale, and Veris prior to JCG's purchase of the Jerritt Canyon Mill mine?
> >
> > 2) Did JCG management learn of any pending 105(c) discrimination claim against Veris Gold USA prior to JCG's purchase of Veris?
> >
> > 3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine?
> >
> > 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control?
> >
> > 5) What percentage of Veris employees employed at the Jerritt Canyon Mill mine did JCG rehire following their assumption of mining operations in June 2015?
> >
> > 6) What percentage of Veris supervisory agents at the Jerritt Canyon Mill mine were retained by JCG? In addition to senior management personnel, the Commission generally considers supervisors with production and safety responsibilities agents of
>
> (continued…)

Once such discovery is completed, the Court will be in an informed position to rule upon those successorship issues. Should the Complainant prevail against some or all of those other entities, the final step for the Court would be to make a ruling on the appropriate damages.

Accordingly, for the reasons expressed in this Order on JCG's Motion for Certification of Interlocutory Review, JCG's Motion is **DENIED**.

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

[9] (…continued)

the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who conducted safety examinations and assigned tasks were agents of the operator).

7) Has JCG substantially altered production methods at the Jerritt Canyon Mill mine?"

38 FMSHRC __, slip op. at 4 n.3, WEST 2014-307 DM (Apr. 26, 2016) (ALJ).

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June 2, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JACOB HAMILTON, Complainant v. AMERICAN MINING AND TUNNELING, LLC Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2016-326-DM MSHA No. WE MD 2016-04 Fire Creek Mine Mine ID 26-02691 A4880

ORDER CONCERNING PROPOSED TESTIMONY OF STEVEN ROGERS

The hearing in this discrimination case is set to commence on June 22, 2016. In my notice of hearing, I required the parties to exchange witness and exhibit lists by no later than June 8, 2016. Under Commission Procedural Rule 56(e), discovery should have been completed by June 2, 2016. 29 C.F.R. § 2700.56(e). By email on May 31, Joseph Lake, counsel for Complainant, asked that the discovery deadline be extended until June 10 because certain individuals could not be scheduled for deposition until the week of June 6. Donna V. Pryor, counsel for Respondent, does not oppose this extension of the discovery period.

Late in the day on May 31, Mr. Lake also disclosed via email that he intends to call an expert witness at the hearing and that his written report would be produced later this week. Ms. Pryor, via email, opposed the request because it is only about twenty-two days until the hearing, discovery is coming to a close, and she needs this time to prepare her case. She contends that the Complainant should have disclosed the identity of this potential witness in response to discovery much earlier so that she could have scheduled his deposition in May. This delay does not give her much time to schedule a deposition and determine whether Respondent needs to call an expert witness.

I scheduled a conference call for June 1. During the call, Jessica Flores, counsel for Complainant, advised me that the expert she wants to call is Steven Rogers, a safety and health specialist with MSHA in the Vacaville, California, office. He would be called as a rebuttal witness in response to expected testimony from Respondent's witnesses that certain actions taken by Jacob Hamilton, the complainant in this case, were unsafe and that he was discharged for those unsafe actions. Rogers was not present at the mine during the disputed events and, as I understand it, he would testify generally about the safety of Hamilton's actions when he discovered drill holes underground that had not been shot during the most recent round of blasting.

Ms. Flores stated during the conference call that she first learned of this defense during depositions of Respondent's witnesses taken in mid-May. She also stated that she had planned

on using a different MSHA safety specialist as a rebuttal witness but he became unavailable because of a death in the family. Counsel stated that the process of finding a second safety specialist to testify contributed to the delay.

Ms. Pryor objected to Complainant's request during the call primarily because of the delay in notifying her that an expert would be called. She had requested the names of potential witnesses during discovery. She stated that she will not be able to depose Mr. Rogers next week because of scheduling issues but that she could depose him on June 14 in Denver, if I grant the Complainant's request. Counsel did not indicate whether she will now be seeking to call an expert on Respondent's behalf.

It is **ORDERED** that Complainant shall be permitted to call Steven Rogers as a rebuttal witness at the hearing on June 22-23, 2016. Although the disclosure of this witness is later than is optimal, given the sequence of events, the delay was not unreasonable. The hearing is three weeks away, which gives the parties time to prepare for hearing.[1] At the hearing, Complainant will be required to qualify Rogers as an expert in his field before he will be allowed to testify. Although Commission judges are not bound by the Federal Rules of Evidence, I will use them as a guide. Fed. R. Evid. 702 *et seq.* Complainant **SHALL** serve Rogers' written report on counsel for Respondent via email by no later than 5:00 p.m. Mountain Time on Friday, June 3, 2016. Counsel for Complainant **SHALL** make Steven Rogers available for deposition on June 14, 2016, in Denver, Colorado, or on another date agreed to by the parties.

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

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RWM

[1] I also note that in *Mark Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349 (August 2013), the Commission reversed a judge's order excluding the testimony of late-identified expert witnesses and remanded the case back to the judge. The identities of the two proposed expert witnesses were not disclosed to the respondent until about 15 days before the hearing. Although that case raised issues not present in this case, the Commission held that "the exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." 35 FMSHRC at 2360 (citations omitted).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2016

UNITED STATES STEEL CORPORATION – MINNESOTA ORE OPERATIONS, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING: Docket No. LAKE 2016-193-RM Citation No. 8896708; 02/01/2016 Mine: Minntac Mine Mine ID: 21-00282

ORDER ON

CROSS MOTIONS FOR SUMMARY JUDGEMENT

Before: Judge Barbour

This case is before the court upon a notice of contest filed by United States Steel Corporation – Minnesota Ore Operations ("the company") challenging the validity of a citation (No. 8896708) issued at its Minntac Mine, a surface iron ore operation located in St. Louis County, Minnesota. The citation is dated February 1, 2016, and it charges the company with a violation of 30 C.F.R. § 56.12028, a mandatory safety standard for the nation's surface metal and nonmetal mines. The standard requires:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or [his inspector].

The citation states in part:

> When requested, the . . . operator was unable to produce current documentation that the annual continuity and resistance test of [its] portable electric welders had been conducted. The continuity/ground resistance test ensures The portable welders are properly grounded. This condition exposes the miners using the portable welders to burns, shock and/or electrocution.

Notice of Contest, Exh. A.[1]

Shortly after receiving the citation the company contested its validity asserting the issue of whether section 56.12028 is applicable to the equipment in question (the portable welders, including their power cables) previously was decided against the Secretary and that the citation should be vacated on *res judicata* grounds.[2] Notice of Contest (February 26, 2016).

The prior decision to which the company refers is *USX Corporation –Minnesota Ore Operations*, 21 FMSHRC 346 (March 1999) (ALJ), a case that arose at the Minntac Mine and that involved the same company as the subject case, albeit under the name of its holding company (USX Corporation). In the decision, now retired Commission Administrative Law Judge, T. Todd Hodgdon held that section 56.12028 does not apply to grounding conductors in trailing cables, power cords and cords supplying power to tools and portable or mobile equipment. Although the Secretary of Labor's Mine Safety and Health Administration issued a policy statement interpreting the standard as applicable to such cables and cords, Judge Hodgdon, for several reasons, held that the policy statement constituted a substantive change in section 56.12028 and that notice and comment rulemaking, which the Secretary did not institute, was required before the change could be implemented. 21 FMSHRC at 355. The decision was not appealed by the Secretary.

Despite the lack of an appeal, the *USX* case is not the end of the story regarding the courts and section 56.12028 because in a subsequent proceeding in which an operator contested the application of the standard to the cables and cords of its electrical equipment and power tools, a case decided on cross motions for summary decision, Commission Administrative Law Judge Alan Paez reached a different conclusion. *Tilden Mining Company, LC*, 33 FMSHRC 876 (April 2011). Unlike Judge Hodgdon, Judge Paez found the Secretary's interpretation that the

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[1] The citation also contains findings that the cited condition was unlikely to cause a fatal injury and was the result of the company's low negligence. Notice of Contest, Exh. A.

[2] Although Citation No. 8896708 refers to a failure to document resistance testing of portable welders, it is clear that the citation was issued for a failure to test the power cables or cords supplying power to the welders. The court reaches this conclusion because the parties essentially agree that the issue before the court is the applicability of section 56.12028 to cords supplying power to the welders. *See,* Secretary's Response 13; Company's Reply Br. 3

standard applied to such cables and cords to be both reasonable and entitled to deference. 33 FMSHRC at 880-881. Judge Paez concluded that rulemaking was not required (33 FMSHRC at 880-883), and he therefore affirmed the contested citations and granted the Secretary's cross motion for summary decision. 33 FMSHRC at 885. The matter was appealed to the Commission, which affirmed Judge Paez in all respects. 36 FMSHRC 1965 (Aug. 2014). The Commission's decision then was appealed to the United States Court of Appeals for the District of Columbia Circuit, which has yet to rule. D.C. Cir. 14-1170 (2014).

In the case before the court, U.S. Steel asserts the primacy of the *USX* decision and seeks to foreclose re-litigation of an issue it contends was tried and decided as to U.S. Steel and its mine in a final judgment on the merits, a judgement that involved the same parties as the subject case. The company argues that the "issue of the applicability of the standard is a matter of *res judicata* between the parties and that the issuance of the [c]itation is improper and illegal." Company's Mot. For Sum. Dec. 2.

The doctrine of *res judicata* encompasses limits on both the claims and the issues that may be raised in subsequent proceedings, and the company essentially contends that both forms of preclusion apply in this case. *Id.*3-7. The Secretary asserts they do not, and the parties argue at length about it. *See* Company's Mot. for Sum. Dec.; Company's Mem. of Law In Support of Mot. for Sum. Dec.; Company's Reply Br.; Sec.'s Response to [Co.'s] Mot.for Sum. Dec. and Sec.'s Cross Mot. for Sum. Dec. While the court appreciates the parties' efforts, it concludes that a more fundamental concept compels the court to short circuit the issue of preclusion and succinctly rule in the Secretary's favor.

RULING

Summary judgement on behalf of the company is inappropriate because the court is compelled to follow the Commission, which has spoken on the issue. Unless and until the D.C. Circuit reverses the Commission's holding, the court **must** conform to the Commission's decision. As the Secretary notes, "[*Tilden*] is binding precedent."[3] Resp. to [Co.]'s Mot. For Sum. Dec. 8. Were the court to rule in favor of the company and follow Judge Hodgdon, the court would allow the preclusions argued for by the company to trump *res judicata,* and the result would be to grant U.S. Steel a variance from a requirement that governs all other of the nation's metal and nonmetal mine operators.[4] *See*. Sec.'s Resp 11 ("To . . . allow [the company] to abide by the 1999 decision rather than current law would accord [the company] different treatment from that given to other miner operators. *Id.*] Section 101(c) of the Mine Act, 30

[3] Moreover, and again as the Secretary points out, *Tilden* represents a change in controlling legal principles and therefore cautions against the application of *res judicata.* "[A] subsequent modification in controlling legal principles . . . may make [a] prior determination obsolete for future purposes." Sec.'s Resp. to Contestant's Mot. For Sum. Dec. 11 (*citing Commissioner v. Sunnen,* 333 U.S. 591, 598-599 (1948).

[4] The company and the court clearly hold opposite views as to whether the Commission's decision in *Tilden* is controlling. As stated, the Secretary and the court believe a Commission decision must be followed until it is reversed or otherwise nullified and that carving out exceptions based on a prior contrary decision is not allowed. The company finds this belief to be "without merit." Company's Reply Br.3 n. 3.

U.S.C. §, 811(c), provides a way to obtain a variance, but the Act does not allow an operator to end run a principal that assures even handed uniformity in the application of the law.

For these reasons the court holds that the cited standard applies to the cited equipment. Therefore, the company's motion for summary judgement **IS DENIED.** While it is clear from the record that the company did not annually test the grounding systems for its electric welders and hence did not (and indeed, could not) produce documentation that the annual tests were conducted, the company asserts this proceeding should continue so there can be "a full record surrounding the issuance of the [c]itation." Company's Rep. Br. 10. In arguing for further proceedings, the company is not taking a new position. In its notice of contest the company raised reasons other than *res judicata* as to why the contested citation is invalid. Notice of Contest 2 at 3 (a) – 3(c). The company is entitled to prove these reasons. Accordingly, the Secretary's cross motion also **IS DENIED**. This proceeding **IS STAYED** pending a ruling by the United States Court of Appeals for the District of Columbia Circuit in *Tilden* and/or the assessment of a proposed civil penalty for the violation alleged in Citation No. 8896708 followed by the subsequent filing of a civil penalty petition by the Secretary.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 14, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-74 A.C. No. 46-01968-361667 Docket No. WEVA 2015-425 A.C. No. 46-01968-371547
v.	Docket No. WEVA 2015-473 A.C. No. 46-01968-373553 Docket No. WEVA 2015-509 A.C. No. 46-01968-374332
CONSOLIDATION COAL COMPANY, Respondent.	Docket No. WEVA 2015-632 A.C. No. 46-01968-377533 Mine: Blacksville No. 2

SEVERANCE ORDER
AND
PREHEARING ORDER

Before: Judge Feldman

The captioned matters are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(d). The focus of these proceedings is Order No. 8059209 in Docket No. WEVA 2015-632, issued on July 30, 2014, which has been designated as a repeated flagrant violation under section 110(b)(2) of the Mine Act.[1] Order No. 8059209 alleges extensive accumulations of loose coal and coal fines, many of which were in

[1] Section 110(b)(2) provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or *repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

contact with turning rollers, in violation of the mandatory standard in 30 C.F.R. § 75.400. The Secretary proposes a $121,300.00 enhanced civil penalty for Order No. 8059209. Specifically, Order No. 8059209 provides:

> Accumulations of combustible material is allowed to accumulate over previously rock dusted surfaces on the 5-West company #1 belt conveyor in the following locations: 1) Accumulations of loose coal, and coal fines is allowed to exist from 6 block to 34 block. The accumulations measured 16 feet wide, 1/8 inch thick, and approximately 3400 feet long. These accumulations are located on the mine floor, roof, ribs, and belt structure. The accumulations are dry in spots, and very dry on belt structure. The accumulations are dark brown in color. 2) Accumulations are present 10 1/2 block and in contact with both bottom rollers. These accumulations of coal fines/belt fines measured 3 feet wide, 2 foot long, and 16 inches deep. 3) Also, accumulations of dry coal fines/belt fines are present at 12 1/4 block and in contact with both bottom rollers. These accumulations measured 3 feet long, 3 feet wide, and 24 inches deep. 4) Accumulations of loose coal, and coal fines is present at 12 1/2 block, and are in contact with on bottom roller that is turning in accumulations. These accumulations measured 3 feet long, 3 1/2 fee wide, and 20 inches high. 5) Also, accumulations of coal fines, and loose coal is in contact with bottom roller at 17 1/2 block. These accumulations measured 1 foot wide, 2 feet long, and 20 inches deep. 6) Also, accumulations of coal fines/belt fines is present at 21 3/4 block and contacting both bottom rollers. These accumulations measured 2 feet wide, 2 feet long, and 22 inches high. 7) Also, accumulations just inby 23 block are in contact with inside part of both bottom rollers, allowing rollers to turn in accumulations. These accumulations are coal fines, and belt fines. These accumulations measured 3 feet long, 1 foot wide, and 10 inches deep. 8) Also, accumulations of coal fines/belt fines is in contact with both bottom rollers at 23 1/2 block. The accumulations measured 2 feet wide, 2 foot long, and 12 inches deep. 9) Also, accumulations of coal fines/belt fines is present at 24 block and in contact with both bottom rollers. These accumulations measured 3 feet long, 1 foot wide, and 10 inches wide. These accumulations were dry and black in color. 10) Also, accumulations of dry coal fines/belt fines are in contact with 2 consecutive bottom rollers at 25 1/2 block. The accumulations measured 3 feet wide, 1 1/2 wide, and 10 inches deep in both locations. 11) Also, accumulations of coal fines/belt fines is allowed to exist on mine floor, and in contact with bottom roller. Accumulations measured 1 1/2 feet wide, 1 foot long, and 18 inches deep at 19 3/4 block. This mine is on a 5-day 103 (I) spot inspection for liberating over 1 million cubic feet of methane in a 24 hour period. Citation #8059210, and Citation #8059211 are issued in conjunction with this order for damaged rollers, and belt rubbing metal components in the same areas as the cited accumulations. This creates a confluence of factors. Miners work and travel in these areas each shift in performance of their duties. There is evidence that these accumulations have existed for an extended period of time, due to amount of accumulations present, and foot prints in the walkway through accumulations. A certified mine examiner travels this belt conveyor 3 times a day, and should have been aware that these conditions were present. Accumulations/roller spillage was visible to the most casual observer.

> Examinations are the first line of defense for the health and safety of the miners. These conditions were obvious and extensive and should have been reported and corrected. History has shown that frictional heat sources such as belt rubbing structure causes mine fires. If normal mining operations were to continue and these conditions were left unabated it is reasonably likely that friction sources present will ignite accumulations, and/or contribute to a fire and/or explosion occurring nearby. The operator removed the belt from service to correct ignition sources. Numerous 75.400 citations have been issued at this mine in the past. This is the third 75.400 order issued on belt conveyors at this mine in the past 6 months. The operator has engaged in aggravated conduct constituting more than ordinary negligence. The belt was in operation at the time of issuance. A mine fire occurred at this mine on 3-12-12. This violation is an unwarrantable failure to comply with a mandatory health and safety standard.

Also at issue in this proceeding is Order No. 8059212 in Docket No. WEVA 2015-509, which alleges a failure to conduct an adequate examination with respect to the cited violative accumulation condition in Order No. 8059209. The Secretary seeks a civil penalty of $40,300.00 for Order No. 8059212.

The Secretary has identified three predicate 104(d) orders contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his repeated flagrant designation in Order No. 8059209. The Secretary does not assert that the alleged predicate violations in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, are themselves flagrant in nature. The Respondent objects to the Secretary's consideration of these predicates as arbitrary and immaterial.

Given the Secretary's asserted relevance of the alleged predicates, the five captioned dockets were consolidated and stayed on May 12, 2016, pending the final disposition of *Oak Grove Res., LLC*, 38 FMSHRC __, slip op. (May 3, 2016) (ALJ) ("*Oak Grove*"), which addressed the evidentiary requirements for a repeated flagrant designation with respect to an alleged violation of section 75.400.[2] *Oak Grove* held that a violative condition that does not otherwise meet the statutory definition of flagrant cannot be elevated to flagrant status simply based on a history of violations. *Id.* at 4. Thus, *Oak Grove* stands for the proposition that, although a history of violations may be a relevant consideration with respect to the appropriate civil penalty, individual alleged predicate violations are not dispositive of the question of whether a cited condition is properly designated as flagrant. As petitions for discretionary review were not filed in *Oak Grove*, the May 3, 2016, decision in *Oak Grove* constitutes a final ALJ decision.

[2] The May 12, 2016, stay of the captioned dockets will remain in effect pending the parties' responses to this Order.

In view of the finality of the ALJ holding in *Oak Grove* that individual alleged predicates, alone, are not a prerequisite for a repeated flagrant designation, Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, which contain violations alleged to be predicates supporting the flagrant designation in Order No. 8059209, shall be severed from WEVA 2015-509 and WEVA 2015-632. Severance will permit the focus to be on the principle issue in this matter: whether the cited accumulation condition in Order No. 8059209 is properly designated as flagrant.

Section 75.400 is the most frequently cited mandatory standard in underground coal mines. For example, section 75.400 violations constituted eleven percent of all citations issued at underground coal mines in 2015. MSHA, Most Frequently Cited Standards, http://arlweb.msha.gov/stats/top20viols/top20viols.asp (last visited June 10, 2016). As such, *Oak Grove* further stands for the proposition that the vast majority of routine section 75.400 coal dust accumulations violations that do not involve proximity to existing ignition sources cannot be properly designated as flagrant. However, *Oak Grove* also noted:

> There may be exceptional cases where the depth of prohibited coal dust accumulations and their contact with multiple turning rollers causes demonstrable suspension of coal dust that could be construed as reasonably expected to be the proximate cause of propagation and resultant serious bodily injury or death, thus satisfying the statutory definition of flagrant.

38 FMSHRC __, slip op. at 7 n.4.

Specifically, *Oak Grove* noted the following criteria necessary for a repeated flagrant designation:

1. A repeated flagrant violation is a flagrant violation that is demonstrated by either:
    a. A repeated failure to eliminate the violation properly designated as flagrant, or
    b. A relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.[3]
2. A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.

[3] This criterion that predicate violations must also meet the requirements for a flagrant violation was included at the suggestion of the Secretary. *See Oak Grove* Order, 36 FMSHRC 1777, 1789 n.13 (June 2014) (ALJ). However, under certain circumstances, I believe a history of relevant violations can provide a basis for a "repeated" designation for a violation otherwise properly designated as flagrant, regardless of whether the previous violations satisfy the statutory definition of flagrant.

3. A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.

    a. A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.

    b. A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.

    c. Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

Id. at 5.

ORDER

In view of the above, **IT IS ORDERED** that Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 **ARE SEVERED** from WEVA 2015-509 and WEVA 2015-632.

Furthermore, assuming the accumulations conditions cited in Order No. 8059209 accurately reflect the conditions as they existed when Order No. 8059209 was issued on July 30, 2014, **IT IS FURTHER ORDERED** that the Secretary should address in writing, **on or before July 15, 2016**, whether the cited accumulation violation is properly designated as flagrant, in that it satisfies the criteria in (2) and (3) above.

With respect to the Secretary's alleged repeated designation, MSHA's database reflects that in the two years preceding the July 30, 2014, issuance of Order No. 8059209, the Respondent received 147 citations and orders for violations of section 75.400 at its Blacksville No. 2 mine. Of these 147 violations, five were attributed to an unwarrantable failure, and 64 were designated as significant and substantial. (Three of these five 104(d) violations are pending in the captioned proceedings.) Consequently, **IT IS FURTHER ORDERED** that the Secretary should address whether the Respondent's history of previous section 75.400 violations provides an adequate basis for designating Order No. 8059209 as a repeated flagrant violation. *See* footnote 3, *supra*.

IT IS FURTHER ORDERED that the Respondent file a written response to the Secretary's submission **on or before August 5, 2016.**

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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June 24, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. BHP COPPER, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-636-M A.C. No. 02-01049-315370 Mine: Pinto Valley Operations
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. TETRA TECH CONSTRUCTION SERVICES, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-587-M A.C. No. 02-01049-315369 Mine: Pinto Valley Operations

ORDER DENYING MOTION FOR RECONSIDERATION
ORDER DENYING MOTION TO CERTIFY

Before: Judge Miller

These cases are 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"). The cases involve a fatal accident that occurred at the Pinto Valley Mine on September 22, 2012. In response to the accident, Respondent BHP Copper, Inc. ("BHP") conducted an internal investigation into the accident, in which Respondent Tetra Tech Construction Services ("Tetra Tech") also participated pursuant to a common interest agreement. On March 21, 2016, the Secretary filed a motion to compel production of the mine's fatal accident report and related documents. I granted in part and denied in part the Secretary's motion to compel in an order dated April 25, 2016. On April 29, 2016, BHP filed a motion requesting that I stay the order and reconsider it, or, in the alternative, certify the order for interlocutory review by the Federal Mine Safety and Health Review Commission. Tetra Tech joined in the motion. I stayed the order in an email to the parties on May 2, 2016, pending further review. The Secretary filed a response in opposition to BHP's motion, and BHP filed a reply.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

BHP argues that reconsideration is appropriate because the order is contrary to law. The order requires BHP to provide any documents containing factual information, with any deliberation, attorney opinion, comment, legal strategy, or mental impression redacted. Order at 7. BHP argues that this conclusion erroneously applies the Supreme Court's holding in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and is contrary to Ninth Circuit precedent in *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz*., 881 F.2d 1486, 1493-95 (9th Cir. 1989). It further argues that it is uncertain how to comply with the order to the extent that it is required to separate facts from opinions. Finally, BHP further argues that my conclusion that the materials sought were prepared in the ordinary course of business and thus not protected by the work product privilege is contrary to law. It argues that this conclusion ascribes a single purpose to the documents, which is inappropriate under Ninth Circuit precedent.

The Secretary argues that reconsideration is not warranted because there has been no change in controlling law, the order did not contain a clear error of law, and the order will not result in any injustice. The Secretary argues that the order correctly applies the holding in *Upjohn* that "a party cannot conceal a fact merely by revealing it to his lawyer." 449 U.S. at 396. The Secretary also argues that the conclusion that the materials in question were not protected by work product privilege was correct.

II. LEGAL STANDARD

The Commission has held that reconsideration of a final order is appropriate if the Commission has "overlooked or misapprehended significant facts or legal arguments." *Island Creek Coal Co*., 23 FMSHRC 138, 139 (Feb. 2001). Similarly, reconsideration of a final judgment in federal court is appropriate only if the court is "presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (emphasis omitted) (interpreting Fed. R. Civ. P. 59(e) regarding alteration of a judgment).

Regarding intermediate orders, Federal Rule of Civil Procedure 54(b) provides that

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Accordingly, a showing of clear error or a change in law may not be necessary for modification of an interlocutory order. *See Agapito Assocs., Inc*., 30 FMSHRC 1187, 1188-89 (Dec. 2008) (ALJ) (deciding that an *Island Creek* showing was not necessary for reconsideration of an order denying a motion to stay).

III. DISCUSSION

A. Work Product Privilege

BHP asks that I reconsider my conclusion that the materials addressed in the motion to compel, an accident investigation report and related documents, were not protected by the work product privilege. BHP asserts that its investigation of the accident that killed Jon Vanoss was conducted in preparation for litigation. However, BHP also had a regulatory obligation to investigate the accident. The Secretary's regulations require that "Each operator at a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each accident." 30 C.F.R. § 50.11(b). In addition, BHP had an internal policy requiring an investigation after any accident at the mine. The issue in this case is whether the work product doctrine limits discovery of materials that were prepared in anticipation of litigation but also pursuant to a regulatory requirement or internal business policy.

The Supreme Court has recognized that in order to effectively prepare a case, a lawyer must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393 (1947). Accordingly, the Federal Rules of Civil Procedure limit discovery of "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" unless the party seeking to discover the materials demonstrates a substantial need. Fed. R. Civ. P. 26(b)(3); *see also United States v. Nobles*, 422 U.S. 225, 237-38, 95 S. Ct. 2160, 2170 (1975) ("The Court therefore recognized a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'")

Materials that are prepared in anticipation of litigation as well as for another purpose are often referred to as having a "dual purpose." Courts that have addressed the issue of work product protection of these materials have adopted the "because of" test. *See, e.g., United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *United States v. Adlman*, 134 F.3d 1194, 1203 (2d Cir. 1998); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). Under this test, materials should be considered "prepared 'in anticipation of litigation,' and thus within the scope of [Rule 26(b)(3)], if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Adlman*, 134 F.3d at 1202 (internal quotations omitted) (citing 8 Charles Alan Wright et al., *Federal Practice & Procedure* § 2024 (1994)). In *Adlman*, the Second Circuit explained further that:

> Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision. Conversely, it should be emphasized that the "because of" formulation … withholds protection from documents that are prepared in the ordinary course

> of business or that would have been created in essentially similar form irrespective of the litigation.

Id.; *see also Richey*, 632 F.3d at 568 (holding that an appraisal report required by the IRS for a tax deduction was not covered by the work product doctrine because the report would have been prepared even in the absence of litigation).

The Ninth Circuit addressed a situation similar to the one at hand in *Torf*, which involved a "dual purpose" investigation conducted in part because of regulatory requirements. *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900 (9th Cir. 2004). An agent of the company's attorney had conducted an investigation into hazardous substances at the company's plant in response to a request from the EPA as well as in preparation for litigation with the government. *Id*. at 904. A grand jury later sought to subpoena documents produced as part of the investigation. *Id*. The Ninth Circuit held that the documents were protected by the work product doctrine because the litigation purpose of the documents "so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Id*. at 910. In reaching its conclusion, the court emphasized that the company had hired an attorney "only after learning that the federal government was investigating it for criminal wrongdoing" and that it was not "assigning an attorney a task that could just as well have been performed by a non-lawyer." *Id*. at 909.

In this case, the company had a clear regulatory obligation to conduct an investigation of the accident and produce a report. The company also had a policy requiring an investigation of any accident, and detailed procedures for how to conduct the investigation. Thus, I find that BHP's accident report "would have been created in essentially similar form irrespective of the litigation." *See Adlman*, 134 F.3d at 1202. I also find that this case is distinguishable from *Torf*. While in that case the company hired an attorney only after learning that the government was investigating it, here the company contacted its attorney soon after learning of the accident. Further, I find that unlike in *Torf*, the investigation here was "a task that could just as well have been performed by a non-lawyer." *See Torf*, 357 F.3d at 909. The deposition testimony submitted by the Secretary indicates that investigations were at times conducted without the supervision of an attorney. Sec'y Ex. 7 at 129. The only exception to this is notes by the attorney or his agents regarding legal strategy, which could not have been produced by a non-attorney and would not have been produced but for anticipated litigation. *See Upjohn Co. v. United States*, 449 U.S. 383, 400 (Jan. 1981) ("Rule 26 accords special protection to work product revealing the attorney's mental processes.") Accordingly, I find that, with the exception of those notes, the materials relating to the investigation were not protected by the work product doctrine.

B. Attorney-Client Privilege

In my initial order, I concluded that parts of the investigation report and related materials were protected by the attorney-client privilege, but that factual matter contained in the documents was not privileged. BHP asks that I also reconsider this conclusion.

Materials for which BHP claims attorney-client privilege include the incident report summarizing findings of the investigation; drafts of the report; slide presentations, memoranda, and flow charts summarizing the report; memoranda to and from counsel regarding the investigation; notes taken by counsel regarding the accident; emails to and from counsel relating to logistics, procedures, and legal strategy for carrying out the investigation; and emails to and from counsel discussing the findings of the investigation.

The attorney-client privilege is intended to "encourage full and frank communication between attorneys and their clients." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation" to enable the lawyer to effectively advise and advocate for the client. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

To successfully assert attorney-client privilege, the party claiming the privilege must demonstrate that

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998).

The Secretary argues that BHP has not proven part 3(c) of the test with regard to most of the documents requested because the accident investigation was not conducted for the purpose of obtaining legal advice, but rather to determine the cause of the accident and identify measures to prevent a recurrence.

In *Upjohn*, the Supreme Court ruled that attorney-client privilege extended to communications made during an internal investigation conducted to ensure compliance with the law. 449 U.S. at 392. The Court noted that "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.'" *Id*. As in the area of work product privilege, communications made to an attorney can often have more than one purpose. To resolve the issue of whether such communications are covered by the attorney-client privilege, courts apply the "primary purpose test." *In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 760 (D.C. Cir. 2014). The D.C. Circuit has described the test as asking "whether obtaining or providing legal advice was *one of* the significant purposes of the attorney-client communication." *Id.* (emphasis added); *cf. United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (finding that privilege did not apply because communications were "not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value" of

property). In *Kellogg*, the court concluded that communications made as part of an internal investigation were privileged because one of the significant purposes of the investigation was to obtain or provide legal advice, even though the investigation was also conducted as part of a compliance program required by federal regulations. *Id*.

I find that, while the investigation at issue was conducted in part for business reasons, it was also done for the purpose of obtaining legal advice. The investigation was led by counsel, and the attorney claims that he provided legal advice as a part of that investigation.

However, it is not clear from the record that all of the documents withheld were communications by a client to counsel. In *Upjohn*, the Court made clear that the attorney-client privilege extended only to "the responses to the questionnaires" the attorney had sent to employees "and any notes reflecting responses to interview questions." 449 U.S. at 397. In this case, many of the documents at issue were written by the attorney and his investigation team rather than by clients. *See, e.g*., Privilege Log ¶¶ 1, 9-16. These documents are protected only insofar as they reflect statements by employees or managers given directly to counsel or his agents seeking legal advice and documents that include that legal advice. Conclusions or impressions of the attorney, including attorneys' notes, are protected by the work product privilege as discussed above. Any emails from clients to counsel regarding the investigation are protected if the statements relate to the procurement of legal advice, but emails that simply include an attorney as one of many recipients are not protected. The work of an attorney in giving advice and legal conclusions and impressions is protected by privilege, but the facts of the case are not, and may not be shielded by privilege.

IV. INTERLOCUTORY REVIEW

BHP asks that if I deny its motion for reconsideration, I certify the April 25 Order for interlocutory review by the Commission. Commission Rule 76 provides that the judge should certify a ruling for interlocutory review if the ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1).

I find that a controlling question of law is involved: whether materials relating to a mine's internal investigation of an accident are protected by the attorney-client privilege or work product doctrine. However, the resolution of this question will not materially advance the final disposition of this proceeding. BHP states that an Arizona state court has ruled in related civil litigation that BHP's investigation materials are protected from discovery under state law. Nevertheless, the issue is not dispositive as to the entire case. The parties have already engaged in extensive discovery for a case that involves only two citations. The case is set to be heard nearly four years after the subject accident occurred. Appellate review of this issue would merely delay the proceeding further.

V. ORDER

For the reasons above, Respondent's Motion for Reconsideration is hereby **DENIED**. Respondent's Motion for Certification for Interlocutory Review is also **DENIED**. Consistent

with the April 25 Order, BHP and Tetra Tech are **ORDERED** to provide all requested documents to the Secretary except for documents that include the impressions, thoughts and conclusions of Respondent's attorneys. Reports, slide presentations, drawings, photographs, memoranda, fact statements and other materials summarizing the findings of the investigation must be provided. Statements by employees and management to counsel seeking advice or advice from the attorney, contained in the documents may be redacted. Discussions of legal strategy by counsel may also be redacted.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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