

March 2016

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Review was granted in the following case during the month of March 2016:

Scott D. McGlothlin v. Dominion Coal Corporation, Docket No. VA 2014-233-D (Judge Feldman, February 8, 2016)

Review was denied in the following case during the month of March 2016:

Michael Wilson v. Jarrod Farris, et al, Docket No. KENT 2015-672-D (Judge Moran, February 3, 2016)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 2016

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

v.

HIBBING TACONITE COMPANY

Docket Nos. LAKE 2013-231-RM
LAKE 2013-232-RM
LAKE 2013-233-RM
LAKE 2013-234-RM
LAKE 2013-348-M

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

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), a Commission Administrative Law Judge sustained four orders which were issued to Hibbing Taconite Company pursuant to section 104(b) of the Mine Act.¹ The orders were issued by the

¹ Section 104 provides in relevant part:

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated . . . any mandatory health or safety standard, . . . he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation In addition, the citation shall fix a reasonable time for the abatement of the violation. . . .

(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation 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 of such mine . . . to immediately cause all persons . . . to be withdrawn from . . . such area until an authorized representative of the Secretary determines that such violation has been abated. . . .

30 U.S.C. § 814(a), (b).

Department of Labor’s Mine Safety and Health Administration (“MSHA”) because of Hibbing Taconite’s failure to abate three housekeeping violations and one violation that alleged a failure to maintain a fan housing. 35 FMSHRC 2535, 2553 (Aug. 2013) (ALJ). Hibbing Taconite asserts that the inspector abused his discretion in issuing the orders. For the reasons discussed more fully below, we vacate the failure to abate orders on the basis that the inspector abused his discretion by setting arbitrary times for abatement of the underlying citations.

I.

Factual and Procedural Background

Hibbing Taconite operates a large plant in St. Louis County, Minnesota. The plant produces taconite pellets by filtering powder material, forming it into small balls, and hardening the balls through an indurating process.² The facility has multiple levels and sublevels, some of the floors between levels are grates, and the bottom floor is cement. There is regular spillage, and material from the upper levels falls to the lower levels, including while the upper levels are hosed down during the cleaning process. During the week, approximately 50 miners work at the plant, while during the evenings and weekends, an operating crew of approximately eight or nine miners works at the plant.

Beginning on December 12, 2012, an MSHA inspector, Thaddeus Sichmeller, inspected the plant and, over the course of a few days, issued various citations and the subject orders. As stated more particularly below, the inspector verbally issued citations each day based on conditions he observed. On each following day, upon arriving at the mine, the inspector issued the written version of the citations he had verbally issued the day before, and reexamined the cited areas.

At approximately 5:30 p.m. on December 12, Inspector Sichmeller issued a verbal citation for a significant and substantial (“S&S”)³ violation of 30 C.F.R. § 56.20003(a)⁴ for conditions he observed inside the 505 mandoor of the pellet plant. 35 FMSHRC at 2538; Tr. 99. Inspector Sichmeller believed that a housekeeping violation existed because there were pellets, entangled hoses, and slurry in the walkway near a conveyor, and that those conditions created slip and fall hazards. Tr. 28, 31-32.

² Induration is the “hardening of a rock or rock material by heat, pressure, or the introduction of cementing material.” American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 279 (2d ed. 1997).

³ 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).

⁴ 30 C.F.R. § 56.20003(a) provides that, at all mining operations, “[w]orkplaces, passageways, store-rooms, and service rooms shall be kept clean and orderly.”

The following morning, December 13, the inspector returned to the mine to continue the inspection. He was accompanied by the operator's safety representative of the pellet plant, Tiara Marcus. The inspector then issued the written versions of the verbal citations he had issued on December 12, including Citation No. 8665946 for the violation of section 56.20003(a). Citation No. 8665946 set forth an abatement time of 8:00 a.m. that morning. Upon re-inspecting the cited area, the inspector verbally issued an extension to abate the citation because he observed miners cleaning the area and progress had been made. Tr. 37.

At approximately 10:30 or 11:00 the following morning, Friday, December 14, the inspector arrived and met with safety representative Marcus, and Tim Angelo, the pellet plant's operations manager, among others. Tr. 116. At that meeting, the operator received the written extension for Citation No. 8665946, which had an abatement time of 8:00 a.m. In addition, they discussed the citation and Angelo's concerns about the abatement times set by the inspector. Tr. 116. Inspector Sichmeller explained that he was setting short abatement times in order to get immediate corrective action. Tr. 70.

The inspector continued his inspection, and traveled to the cited area. Upon re-inspecting the area, the inspector verbally issued another extension of time to abate the condition because, although progress had been made, more corrective action needed to be taken. Tr. 38.

In addition, the inspector issued other verbal citations. As relevant to this proceeding, on December 14, the inspector issued a verbal citation (later written as Citation No. 8665957) alleging a housekeeping violation of section 56.20003(b)⁵ because he observed an accumulation of wet slurry and taconite pellets on the north walkway of the scrubber pump area. The inspector considered the violation to be non-S&S because the scrubber pump was down for maintenance and the condition did not extend the entire width of the walkway.

That same day, Inspector Sichmeller issued another verbal citation for a housekeeping violation of section 56.20003(a) (later written as Citation No. 8665959) because he observed an accumulation of taconite pellets in an area that was about 8x8 feet and 3 to 4 inches deep in front of an electrical disconnect. He believed the condition was not S&S because miners were not in the area.

The inspector also verbally issued a citation (later written as Citation No. 8665960) alleging a violation of 30 C.F.R. § 56.14100(b)⁶ because he observed that the metal housing of an exhaust fan was not being properly maintained. The inspector believed that the condition was not S&S because there was little access by miners to the area.

⁵ 30 C.F.R. § 56.20003(b) provides in part that, at all mining operations, "[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition."

⁶ 30 C.F.R. § 56.14100(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."

At approximately 3:00 p.m. later that day, all of the mine's crew except for the operating crew of eight to nine miners left for the weekend. At the end of the inspection day on December 14, there were 12 open enforcement actions.

On the following day, Saturday, December 15, at approximately 11:45 a.m., the inspector issued the written version of eight citations that had been verbally issued on December 14, including Citation Nos. 8665957, 8665959, 8665960, and some extensions, including the extension for Citation No. 8665946. The time listed for abatement on each of the enforcement actions was 8:00 a.m. Tr. 133.

The inspector then re-inspected the areas that were the subject of Citation Nos. 8665946, 8665957, 8665959, and 8665960. The inspector noted that there were no miners working on the cited conditions in the areas, the conditions had not been abated, there were no posted barricades or warnings, and he found no mitigating circumstances. Tr. 40-41, 51, 57, 65. The operator explained that the plant was being cleaned from top to bottom, which impacted some of the cited areas. Tr. 140, 150, 215.

Pursuant to section 104(b) of the Act, Inspector Sichmeller issued Orders Nos. 8665965, 8665970, 8665968, and 8665969 for the operator's failure to abate Citation Nos. 8665946, 8665957, 8665959, and 8665960, respectively. At the end of that inspection day, Sichmeller indicated in a close-out conference that, going forward, Hibbing Taconite should assume that abatement times would be set for 8:00 a.m. the following day. Tr. 152, 163, 215-16.

The operator challenged the failure to abate orders, and the matter proceeded to hearing before the Judge.

The Judge sustained the four section 104(b) orders. She found that the inspector did not abuse his discretion in issuing the orders and that, in refusing to grant the extensions, the inspector had a clear understanding of the law and that his primary concern was the safety of miners. 35 FMSHRC at 2542-43, 2546, 2548, 2551. In so holding, the Judge credited the inspector's testimony regarding the condition of the cited areas and lack of abatement efforts. *Id.*

Hibbing Taconite filed a petition for discretionary review challenging the Judge's decision. The operator argues in part that the inspector arbitrarily set abatement times and that the inspector's refusal to extend the abatement times was unreasonable given various circumstances relevant to the citations underlying the orders. We granted the petition and heard oral argument.

II.

Disposition

Under section 104(b) of the Mine Act, it is the operator's duty to abate the "violation described in [the] citation issued pursuant to [section 104(a)]." 30 U.S.C. § 814(b). When issuing a section 104(a) citation, the inspector must "describe with particularity the nature of the violation" as well as "fix a reasonable time for the abatement of the violation." 30 U.S.C.

§ 814(a). Section 104(b) provides that an inspector shall issue a failure to abate order when a cited violation has not been “totally abated” within the abatement time originally fixed or as subsequently extended, and if he determines “that the period of time . . . should not be further extended.” *See* n.1, *supra*.

The Commission has held that it is the Secretary, as the proponent of a section 104(b) order, who bears the burden of proving that the violation has not been abated within the time period originally fixed or as subsequently extended. *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). The Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the citation had been abated within the time period fixed in the citation, but had recurred. *Id.*

In contesting a section 104(b) order, an operator may challenge the reasonableness of the time set for abatement or the Secretary’s failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (Nov. 1989). The Commission has applied an “abuse of discretion” standard in reviewing an inspector’s issuance of a failure to abate order.⁷ *See Energy West*, 18 FMSHRC at 569 (applying an abuse of discretion standard in reviewing Secretary’s failure to extend abatement time). An abuse of discretion has been found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Id.* (citations omitted).

Here, Hibbing Taconite challenges both the reasonableness of the times set for abatement in the underlying section 104(a) citations and the Secretary’s failure to extend those times. Because we conclude that the inspector set arbitrary abatement times, we need not reach Hibbing Taconite’s remaining arguments.

When considering an operator’s challenge to a section 104(b) order, the Commission has clarified that “in fixing a reasonable time for abatement, the inspector must necessarily specify the violative conditions found and determine the time reasonably required for the abatement of the specified conditions.” *Mid-Continent*, 11 FMSHRC at 510. We conclude that the record reveals that the inspector failed to set abatement times that were based upon those times reasonably required for the abatement of the cited conditions.

⁷ The Secretary must prove by a preponderance of the evidence that the inspector did not abuse his discretion in issuing the section 104(b) orders. *Mid-Continent*, 11 FMSHRC at 509; *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996). The Commission thereafter applies a substantial evidence standard in reviewing the Judge’s factual determinations. *Cf. Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993). The Judge erroneously applied a substantial evidence standard in affirming the four failure to abate orders. 35 FMSHRC at 2542-43, 2546, 2548, 2551.

Rather, Inspector Sichmeller testified that he universally set abatement times of 8:00 a.m. the morning after he verbally issued citations in order to prompt the operator to quickly abate the violations. Tr. 70. The inspector explained that, for instance, he did not want to give an abatement time of three days and have the operator not take any action on abating the condition until the third day.⁸ Tr. 89.

On December 14, the inspector verbally issued eight citations and set an abatement time of 8:00 a.m. on December 15 for each of the eight citations. Tr. 133. The inspector's field notes set forth the explanation that he gave Angelo for setting the abatement times:

Tim [Angelo] has brought up issues about termination times & extensions. Discussed that due to past experiences that when given extended termination time I've found conditions are not being tended to within allotted time frame so the basis of short termination times is to ensure that items are being addressed. [D]iscussed that I understood that sometimes that all conditions may not be taken care of in that time & if finding appropriate action is being done have no reason for not extending citation at that time.

Gov't Ex. P13 at pp. 30-31. Thus, the inspector conceded that the cited conditions may not be capable of being abated within the abatement times that he set.

With respect to the citations that led to three of the subject orders, the record reveals that the inspector was aware that setting an abatement time of 8:00 a.m. the next morning would not have provided the operator with sufficient time to correct conditions. For instance, Inspector Sichmeller verbally issued Citation No. 8665946 at approximately 5:30 p.m. on December 12, set an abatement time of 8:00 a.m. on December 13, and thereafter extended the abatement time until 8:00 a.m. on Dec. 14 and until 8:00 a.m. on December 15. Tr. 36-39, 99, 113, 117; Gov't Exs. P1-3, P1-4, P1-5 at p. 5. In his notes for December 12, the inspector acknowledged "[t]his is a vast area affected due to the multiple conditions present." Gov't Ex. P1-5. The inspector also testified that it took the operator from December 15, the date the order was issued, until December 18 to abate the order due to the "extensiveness" of the cleanup required. Tr. 68. He stated that he was "surprised they got it done in three days as extensive as it was." Tr. 68. Safety Representative Marcus also described the condition as "obviously a pretty massive project." Tr. 113.

Similarly, the inspector verbally issued Citation No. 8665957 for pellets and slurry in the walkway of the scrubber pump area on December 14 at approximately 1:30 p.m., and set an abatement time of December 15 at 8:00 a.m. Gov't Ex. P3-1. The inspector testified that after the order was issued on December 15, it "took them to the 17th to get this done because of the extensiveness of the conditions." Tr. 53.

⁸ The Secretary referred to the inspector's practice of setting an 8:00 a.m. abatement time as the inspector's abatement "policy." S. Br. at 7 n.8; *see also* Oral Arg. Tr. at 38.

Inspector Sichmeller verbally issued Citation No. 8665960 for the deteriorated condition of the fan housing at approximately 2:15 p.m. on December 14, and set the abatement time for 8:00 a.m. on December 15. Gov't Ex. P7-1. The inspector explained that the operator "had to get some manlifts and stuff in there" and grind down the rough edges of the fan housing, and that the order was terminated on December 17. Tr. 66-67; Gov't Ex. P8-3.

Inspector Sichmeller also failed to set an abatement time that reflected the time reasonably required for the abatement of the conditions cited in Citation No. 8665959 involving the 8x8 feet accumulation of pellets in the walkway by the electrical disconnect. The inspector verbally issued the citation at approximately 2:00 p.m. on December 14, and set an abatement time of 8:00 a.m. on December 15. Gov't Exs. P5-1, P5-2 at p. 104. Sichmeller acknowledged, however, that the cited conditions would only take about five minutes to clean up. Tr. 57, 60. The inspector conceded that "sometimes [the] eight o'clock termination time is way too long based on the conditions and the hazard that's presented." Tr. 71.

We conclude that the inspector did not fix the abatement times based upon "the time reasonably required for abatement of the specified conditions," as he is required to do by the Mine Act and Commission precedent. *Mid-Continent*, 11 FMSHRC at 510. The record indicates that the inspector did not base the abatement times on such factors as the extent of the violative conditions, the availability of miners to undertake cleaning work, and competing safety concerns. Rather, the inspector set an arbitrary abatement time of 8:00 a.m. the next morning, regardless of the amount of time that the conditions required for abatement.⁹ The inspector's issuance of the failure to abate orders was based upon a misunderstanding of the law, and amounted to an abuse of discretion.

While the inspector's concern with exacting immediate corrective action from the operator in order to keep miners safe is a laudable and important concern, the Mine Act sets forth a scheme in sections 104(a) and (b) by which to achieve that end. The inspector must take enforcement action consistent with those provisions. For instance, the inspector must set an abatement time based upon the amount of time necessary to fully abate a violation. Thereafter, if the operator does not fully abate within that time, the inspector must determine whether an extension in abatement time is warranted or whether he should issue a section 104(b) order. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition. Thus – responsive to Inspector Sichmeller's concern about delaying commencement of abatement – if, for example, the conditions reasonably require three days to complete abatement, and the operator unjustifiably fails to begin the process until the third day, an inspector may determine that further extension of the abatement time is not warranted, and instead issue a section 104(b) order.

⁹ The arbitrary nature of the 8:00 a.m. termination time is apparent from Inspector Sichmeller's statement during the close-out conference on December 15, which the operator has not disputed, that the inspector would set an 8:00 a.m. abatement time on all citations going forward. Tr. 152, 215-16. The inspector could not have known what conditions would be cited, let alone that 8:00 a.m. the following morning would be a reasonable time for abatement.

Accordingly, for the reasons discussed above, we hold that the inspector abused his discretion in issuing Orders Nos. 8665965, 8665970, 8665968, and 8665969.

III.

Conclusion

For the foregoing reasons, we hereby reverse the Judge's decision and vacate Orders Nos. 8665965, 8665970, 8665968, and 8665969.

/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, DC 20004-1710

March 30, 2016

SCOTT D. MCGLOTHLIN

v.

DOMINION COAL CORPORATION

Docket No. VA 2014-233-D

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), a Commission Administrative Law Judge issued a decision granting summary decision in favor of the Complainant, Scott D. McGlothlin, and affirming his discrimination complaint. 37 FMSHRC 1256, 1265 (June 2015) (ALJ). In September 2015, the parties filed a Joint Motion to File under Seal and to Dismiss, which included a proposed settlement agreement regarding relief for McGlothlin. On October 21, 2015, the Judge issued an order denying the motion. 37 FMSHRC 2511, 2514 (Oct. 2015) (ALJ).

On November 11, 2015, in response to the Judge's denial, the parties filed a Joint Motion to Approve Settlement, to File under Seal and to Dismiss, which included a revised settlement agreement proposal. Thereafter, following the issuance and filing of various orders and pleadings, the Judge issued a Decision on Relief and Final Order. 38 FMSHRC ____ (Feb. 8, 2016). In that decision, the Judge awarded McGlothlin back pay, consistent with the terms of the revised settlement agreement, and ordered other relief. *Id.* at ____, slip op. at 8.

However, the Judge rejected the attorneys' fees portion of the revised settlement agreement and awarded attorneys' fees to the Complainant's attorneys in an amount approximately 35 percent less than the amount agreed to by the parties. *Id.* at ____, slip op. at 4-5, 15. The Commission subsequently granted McGlothlin's petition for discretionary review, challenging the Judge's rejection of those provisions.

Oversight of proposed settlements is committed to the Commission's sound discretion. *Sec'y of Labor on behalf of Hopkins v. Asarco, Inc.*, 18 FMSHRC 2081, 2082 (Dec. 1996) (citations omitted). The Commission has exercised this discretion in the past in section 105(c)(3) discrimination proceedings. *See, e.g., Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (Mar. 1993). The Commission has explained that the grant of authority set forth in section 105(c) to provide appropriate relief necessarily includes the authority to review settlement agreements in

discrimination cases. *Sec'y of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707 (July 1998).¹

In the matter before us, our review is limited to the Judge's rejection of the proposed settlement terms, agreed to by the parties, regarding attorneys' fees. In his February decision, the Judge determined that the revised settlement proposal provided appropriate relief to the discriminatee, Mr. McGlothlin. Furthermore, this proceeding does not involve the review of a proposed settlement of a civil penalty.

¹ Commissioner Cohen notes that in *Secretary of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 708 (July 1998), in response to a partial dissent by Commissioner Beatty which questioned the Commission's authority to review settlement agreements in discrimination cases, the Commission made clear that the purpose of its authority to review settlement agreements under section 105(c) of the Mine Act was "to ensure that discriminatees are made whole." The Commission stated, "... for if no such authority existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be severely curtailed, a result at odds with the intent of the Mine Act." (citing S. Rep. No. 95-181, at 13 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978)). *Id.*

Where, as here, the parties have agreed to a stipulated amount of attorneys' fees and there are no allegations or evidence that such an amount would adversely affect the remedy afforded the discriminatee, the Judge erred in rejecting the settlement based upon the agreed upon amount of attorneys' fees.

Accordingly, we vacate those portions of the Judge's decision rejecting the revised settlement agreement as to attorneys' fees, and we approve the settlement agreement as to those provisions.²

/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

² We are approving the provisions in the revised settlement agreement filed on November 11, 2015, relating to attorneys' fees. Because of our disposition, we do not reach any other matters discussed in McGlothlin's petition for discretionary review, including the recovery of attorneys' fees incurred after submission of the revised settlement agreement.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 2016

IN RE: DISCIPLINARY REFERRAL

Docket No. D 2016-0001

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

ORDER

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

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), the Complainant referred this matter for a determination of whether circumstances involving an attorney’s statements during a June 18, 2015, hearing warrant disciplinary proceedings under 29 C.F.R. § 2700.80.¹ The Commission

¹ 29 C.F.R. § 2700.80 provides in relevant part:

(a) Standards of conduct. Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(1) Disciplinary referral. Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(continued...)

subsequently received a response to the referral from the attorney and the Complainant's reply to the attorney's response. For the following reasons, we conclude that disciplinary proceedings are not warranted.

In 2014, the Complainant filed a complaint, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), alleging that the operator of the mine at which he was employed had discriminated against him in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). A hearing on the discrimination complaint was ultimately scheduled for June 18, 2015.

A few days prior to the hearing, the attorney, on behalf of his law firm, filed a motion to withdraw as counsel for the operator in the discrimination proceeding. In the motion, the firm explained in part that the operator had filed for bankruptcy protection in Canada the prior year, and the Canadian proceedings had been subsequently recognized in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Based upon information provided by the bankruptcy monitor regarding the operator's lack of financial resources, the operator instructed the firm to perform no further work for it.

On the morning of the hearing, the attorney reiterated his firm's request to withdraw from representation. The Judge and attorney engaged in a colloquy, in which the Judge inquired about the attorney's continuing role in representing the operator or in representing the successor operator. Tr. 6-9. The attorney essentially indicated that his firm still had an ongoing attorney-client relationship with the operator, although they were in the process of winding down the relationship, and that he "hoped" that he and his firm would represent the successor-in-interest at the mine. Tr. 6-9. The Judge subsequently granted the motion to withdraw and, after receiving the Complainant's evidence, held that the operator had impermissibly discriminated against the Complainant. 37 FMSHRC 2337, 2339, 2347 (Oct. 2015) (ALJ).

On October 7, 2015, the Complainant filed the subject disciplinary referral with the Commission. In the referral, the Complainant alleged that the attorney had provided false testimony to the Judge because although the attorney stated that he "hoped" his firm would represent the successor owner of the mine, the attorney's firm was listed as a registered agent for the successor owner since June 9, 2015.

On November 16, 2015, the Commission received the attorney's response to the Complainant's disciplinary referral. In the response, the attorney asserts that he never indicated that his firm did not represent the successor in any capacity at the time of the hearing, and he did

¹ (...continued)

(2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

not understand the Judge to be asking that question. The attorney stated that he was aware that the new ownership of the mine had already retained a different law firm to assist with the transfer of property in the event the sale of the mine and other assets out of bankruptcy closed. He noted that the only matter in which his firm was involved on behalf of the successor was in the capacity of being the Nevada registered agent.

Commission Procedural Rule 80 provides that individuals practicing before Commission Judges must conform to standards of ethical conduct required of practitioners, and that disciplinary proceedings may be instituted against anyone who is practicing before the Commission who has engaged in unethical conduct. 29 C.F.R. §2700.80(a), (b). Rule 3.3(a)(1) of the Model Rules of Professional Conduct, which has been adopted by the Nevada Rules of Professional Conduct, provides that “A lawyer shall not make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” Thus, if the attorney made a false statement of fact to the Judge, disciplinary proceedings may be warranted.

The attorney’s statement that he hoped that his firm would represent the successor operator when his firm was acting as the successor’s registered agent does not warrant disciplinary proceedings. Acting as a registered agent is essentially an administrative action. In order to be a registered agent in Nevada, an individual must be a resident of Nevada, but need not be an attorney. *See* Nev. Rev. Stat. § 77.305 (2013) (a provision of the Model Registered Agents Act, adopted by Nevada). The purpose of a registered agent is to provide the Secretary of State with a Nevada address where process may be served and certain forms may be received. Nev. Rev. Stat. § 77.390 (2007), Nev. Rev. Stat. § 77.400 (2013). We accept the attorney’s statement that although his firm was acting as a registered agent for the successor, his firm was not providing legal services.²

² We take administrative notice of the fact that pleadings filed in the discrimination proceeding since the Judge issued his decision by alleged successors to the operator have been filed by law firms other than the attorney’s law firm.

We further observe that the Complainant was not prejudiced by the firm's withdrawal as counsel to the operator. After the attorney withdrew as the operator's counsel in the proceeding, the operator was not represented at the hearing. As a result, the Complainant submitted evidence of the alleged discrimination without rebuttal by the operator.

Accordingly, we conclude that no disciplinary proceedings are warranted.

/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 on the basis that I would have the Commission conduct further inquiry pursuant to 29 C.F.R. § 2700.80(c)(2).

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 2016

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JENNIFER MORREALE

v.

VERIS GOLD USA, INC.

Docket No. WEST 2014-793-D

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (“Mine Act” or “Act”). The case was dismissed by an Administrative Law Judge who denied, for lack of jurisdiction, complainant Jennifer Morreale’s motion to compel payment of monetary damages by the operator, Veris Gold USA, Inc. (“Veris Gold”), pursuant to a settlement agreement. Subsequently, Morreale filed with the Commission a motion to reopen this proceeding. For the following reasons, we reopen this matter and remand this case to the Judge for further proceedings.

I.

Factual and Procedural Background

Morreale was employed by Veris Gold at the Jerritt Canyon Mill in Elko, Nevada. Morreale alleged that she was discriminated against by Veris Gold on March 11, 2014 for raising health and safety concerns at the mine. Subsequently, she filed a complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) alleging that she was discharged in violation of section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). On July 28, 2014, the Secretary of Labor filed a discrimination complaint on Morreale’s behalf pursuant to section

105(c)(2) of the Act. 30 U.S.C. § 815(c)(2).¹ The Secretary's complaint alleged that Morreale was constructively discharged² for raising health and safety concerns.

On February 20, 2015, the Secretary, the complainant, and Veris Gold entered into a confidential settlement agreement. The agreement provided in relevant part that Veris Gold would pay a civil penalty of \$1000 to MSHA and an undisclosed amount of damages to Morreale. Within the agreement, Veris Gold represented that it had received approval from a bankruptcy monitor to make the payment, as the operator had previously filed U.S. Chapter 15 bankruptcy proceedings concurrent with Canadian bankruptcy filings and was subject to the financial oversight of a bankruptcy monitor. The Judge issued a decision approving the settlement agreement, which required payment of \$1000 to MSHA within 30 days, and payment of the undisclosed amount to Morreale in accordance with the terms of the settlement agreement. Three months later, however, Morreale filed a *pro se* motion to compel claiming that she never received the payment.

On June 1, 2015, the Judge presided over a conference call with the Secretary, the complainant, and Veris Gold's counsel in order to discuss the issue of the operator's failure to make the payment. During the course of the call, it became clear that the bankruptcy monitor overseeing the bankruptcy proceedings had withheld payment to both the Secretary and Ms. Morreale pending the resolution of an asset sale of the mine by the operator to a separate entity, Jerriitt Canyon Gold, LLC ("Jerriitt Canyon"). Given the limited ability of the Commission to enforce its own judgments, the Judge requested an update within 30 days regarding the status of Veris Gold's ability to make the payment. The Judge also notified the parties that he was reserving judgment on Morreale's motion to compel the payment until he received the update.

¹ 30 U.S.C. § 815(c)(2) provides in pertinent part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary 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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

² The Secretary claims that Morreale was constructively discharged because she was transferred to a prior position at the mine, in which she had been previously exposed to sexual harassment from her supervisor.

On June 15, 2015, Morreale notified the Judge that she had filed a motion to stay the sale of the operator's assets with the U.S. Bankruptcy Court for the District of Nevada. The bankruptcy monitor subsequently objected to Morreale's motion to stay, stating that it never consented to making the payment to Morreale absent approval of the Canadian Bankruptcy Court. Based on this objection, the U.S. Bankruptcy Court denied Morreale's motion to stay and finalized Veris Gold's asset sale.

On June 24, 2015, Jerritt Canyon commenced operations at the mine site in order to ensure that there would be no disruption to operations once Veris Gold was to cease operations. The next day, Veris Gold ceased operations at the mine.

On July 8, 2015, the Judge denied Morreale's motion to compel because he believed that the Commission lacked jurisdiction. The Judge reasoned that, pursuant to section 113(d)(1) of the Act, 30 U.S.C. § 823(d)(1), his February 27, 2015 decision approving settlement had become a final order of the Commission on April 9, 2015, and that enforcement of the payment could only be sought in the federal courts by the Secretary or Morreale. The Judge stated that he was nevertheless "troubled that the [operator] specifically assured the [Judge] that payment would be made promptly when obtaining approval for the settlement motion and then failed to honor that commitment." Unpublished Order at 3 (July 8, 2015). The Judge was "especially concerned that the change in circumstances cited by the U.S. bankruptcy monitor to justify withdrawing payment to Ms. Morreale occurred in 'mid-February,' apparently *before* the parties submitted their joint settlement motion on February 20, 2015." *Id.* (emphasis added). The Judge stated that the Secretary or Morreale may petition the Commission directly to obtain relief.

On October 9, 2015, the Commission received Morreale's motion to reopen. The motion requests that the case be reopened so that the Commission could decide whether Jerritt Canyon, Eric Sprott³ and Whitebox Asset Management⁴ are successor entities that should be held liable for the actions of the predecessor entity, Veris Gold.

On January 6, 2016, the Commission also received Morreale's Motion for Expedited Consideration from the Commission, Motion to Reopen Case, and Motion to Amend. In the motion, Morreale seeks to expedite the case and add Jerritt Canyon as a successor-in-interest. On February 3, 2016, the Commission also received a Motion to Amend and Request for Expedited Consideration, which requests that the complaint be amended to add Jerritt Canyon, Eric Sprott and Whitebox Asset Management as parties.

³ Eric Sprott is a principal asset manager of Jerritt Canyon who, according to the motion to reopen, "owned a percentage of Veris Gold before it became Jerritt Gold LLC." Mot. Reopen at 3.

⁴ Whitebox Asset Management was the controlling DIP ("debtor in possession") Lender that provided ongoing funding of \$15 million for Veris Gold's operations during its insolvency. Subsequently, Whitebox acquired Veris Gold's assets. According to Morreale's subsequent February 3, 2016 Motion to Amend and Request for Expedited Consideration, Whitebox Asset Management is "comprised of Eric Sprott and others."

On February 17, 2016, the Commission received from Jerritt Canyon a Special Limited Appearance on behalf of Jerritt Canyon Gold, LLC to Contest Jurisdiction in Response to Complainant's Motion to Amend. Jerritt Canyon asserts that the Commission lacks jurisdiction over the complainant's motion to reopen because the complainant is time-barred from petitioning the Commission for discretionary review under the 30-day rule in section 113 of the Mine Act. Jerritt Canyon further asserts that, due to the effect of the Chapter 15 bankruptcy proceedings, successor liability cannot attach to Jerritt Canyon.

II.

Disposition

We reopen this case under the “catch all” or “extraordinary circumstances” provision in Rule 60(b)(6) of the Federal Rules of Civil Procedure in the interest of justice. Rule 60(b)(6) states that a court may relieve a party or its legal representative from a final judgment, order, or proceeding, even though the case does not fit into one of the other, more specific provisions of Rule 60(b), if there is “any other reason that justifies relief.”⁵ Fed. R. Civ. P. 60(b)(6).

The Commission has previously reopened a case under Rule 60(b)(6) where an operator repudiated a settlement agreement and the case had been dismissed on the basis of that agreement. Specifically, the Commission in *Johnson v. Lamar Mining Co.* reopened a case arising from a discrimination claim when an underlying settlement agreement was materially breached by the operator's failure to pay monetary damages owed to the complainant. 10 FMSHRC 506, 508-09 (Apr. 1988). We hold that *Johnson* is directly on point here and strongly supports reopening under Rule 60(b)(6). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990) (reopening case under Rule 60(b)(6) when operator refused to comply with Judge's order to pay penalty to complainant upon a finding of discrimination).

Federal court case law further supports reopening this case under Rule 60(b)(6). In *Fairfax Countywide Citizens Ass'n. v. Fairfax County*, 571 F.2d 1299, 1302-03 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978), the Fourth Circuit affirmed a district court's authority to reopen a case where a settlement agreement had been breached. *See also Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371-72 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976). The Sixth Circuit in *Aro Corp.*, 531 F.2d at 1371, reasoned that reopening cases in such scenarios may be required in the interests of justice. Similarly, the Commission has a firm basis for reopening this case under Rule 60(b)(6). Accordingly, we conclude that this case should be reopened.

⁵ In analyzing the applicability of Rule 60(b)(6), it is important to recognize that the Commission is not strictly bound by the language of this provision nor the case law interpreting it. Specifically, under 29 C.F.R. § 2700.1(b), “the Commission and its Judges shall be guided [only] so far as *practicable* by the Federal Rules of Civil Procedure.” *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993) (emphasis added). Thus, the Commission has discretion in tailoring the rules to fit within the Mine Act framework and implementing the authority granted by Congress.

No person filed an opposition to Morreale's motion to reopen. However, Jerritt Canyon opposed Morreale's subsequently filed motion to amend. Because we remand the motion to amend to the Administrative Law Judge for review, we need not address all of Jerritt Canyon's arguments here. We do find, however, that Jerritt Canyon's argument contesting jurisdiction is unavailing. We construe Morreale's request as a motion to reopen the case – not as a petition for discretionary review of a final decision. The Commission has long held that it has the authority to reopen cases under appropriate circumstances. *Johnson*, 10 FMSHRC at 508-09; *Tolbert*, 12 FMSHRC at 618-19. Based upon the circumstances of this case, the case is not time barred by section 113 and warrants reopening.

We also hold that Morreale filed her motion to reopen within a "reasonable time," as required by Rule 60(b)(6). The Judge issued his order dismissing Morreale's case for lack of jurisdiction on July 8, 2015. Morreale filed her motion to reopen on October 9, 2015, three months later. We hold that this constitutes a "reasonable time" under the circumstances of this case. The remaining arguments in Jerritt Canyon's opposition to the motion to amend may be considered by the Judge on remand.

III.

Conclusion

We grant Morreale's motion to reopen and remand this case to the Judge for further proceedings. The Judge shall consider Morreale's motion to amend her complaint to add Jerritt Canyon Gold, LLC; Eric Sprott; and Whitebox Asset Management as successors-in-interest.

/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, DC 20004-1710

March 8, 2016

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

v.

TEN-MILE COAL COMPANY, INC.

Docket No. WEVA 2014-532
A.C. No. 46-09060-334458

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 February 3, 2014, the Commission received from Ten-Mile Coal Company, Inc. (“Ten-Mile”) 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 November 5, 2013, and

became a final order of the Commission on December 5, 2013. Ten-Mile asserts that while the mine manager at the mine received the assessment, it became lost when the manager sent the assessment to the office of the Secretary and Treasurer of the company, which was located 60 miles away. The operator asserts that it has since changed its procedures by instructing the mine manager to scan and e-mail all future assessments to the Secretary and Treasurer's office. The Secretary does not oppose the request to reopen, however he urges Ten-Mile to take steps to ensure that future penalty contests are timely filed.

Having reviewed Ten-Mile'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 because I believe that Ten-Mile has failed to demonstrate that its failure to timely contest the proposed assessment was the result of excusable neglect. My review of Ten-Mile's previous motions to reopen previous assessments, along with its current filing, demonstrates to me that the operator's failure to timely file was the result of an inadequate or unreliable internal processing system.

On September 26, 2011, the Commission granted Ten-Mile's request to reopen a civil penalty proceeding. *Ten-Mile Coal Co., Inc.*, 33 FMSHRC 2188 (Sept. 2011). Notably, in its motion to reopen, Ten-Mile stated prospectively that it would use a computer system to process civil penalty assessments. *Id.* at 2189-90.

On February 14, 2013, the Commission again granted a request from Ten-Mile to reopen a civil penalty case. *Ten-Mile Coal Co., Inc.*, 35 FMSHRC 356 (Feb. 2013). The operator asserted that its superintendent inadvertently mixed the proposed assessment with other paper work. The Commission granted the motion, but "urg[ed] Ten-Mile to take all steps necessary to ensure that future penalty contests are timely filed." *Id.* at 357.

This leads us to the filing currently before the Commission. On February 3, 2014, Ten-Mile filed a motion to reopen a civil penalty proceeding, asserting that the proposed assessment was lost after it arrived at the mine site. Mot. at 1. Ten-Mile once again assures the Commission that it will prospectively amend its procedures for contesting citations; specifically, once assessments arrive at the mine site Ten-Mile plans to scan the form and email it to the appropriate office.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored whether the operator has demonstrated a pattern of behavior in other cases that is attributable to inadequate or unreliable internal processing systems. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011).

While a single lost penalty assessment form may be the result of excusable neglect, this is the third time that Ten-Mile has come before the Commission and contended that it missed a filing deadline because of misplaced documents. In fact, Ten-Mile has previously recognized that its own filing system was inadequate and volunteered to use a computer system rather than paper copies. Moreover, less than a year before this current motion was filed, the Commission urged the operator to take all necessary steps to ensure timely filings.

For these reasons, I conclude that Ten-Mile has not demonstrated good cause to reopen the captioned matter and would deny its motion to reopen.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 2016

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

v.

ALEX ENERGY, INC.

Docket No. WEVA 2014-1100
A.C. No. 46-08977-347009

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 July 2, 2014, the Commission received from Alex Energy, Inc. (“Alex Energy”) 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”) demonstrate that the proposed assessment was delivered on April 9, 2014, and became a final order of the Commission on May 9, 2014. Alex Energy asserts that it has no

record of ever having received the proposed assessment, and that its lack of any record of receipt was attributable either to an external mailing error or internal clerical error. Alex Energy's counsel further asserts (without an affidavit) that two days after receiving the underlying citation, its safety supervisor wrote to MSHA to dispute the citation and to request a safety and health conference. The Secretary does not oppose the request to reopen. However, he notes that the proposed assessment was mailed by certified mail and signed for by the operator on April 9, 2014. The Secretary offers a copy of a certified mail receipt to this effect and urges Alex Energy to ensure that future penalty assessments are contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 9, 2016

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

v.

PINNACLE MINING COMPANY,
LLC

Docket No. WEVA 2014-963
A.C. No. 46-01816-339181

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 20, 2014, the Commission received from Pinnacle Mining Company, LLC (“Pinnacle”) 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 December 27, 2013, and became a final order of the Commission on January 27, 2014. Pinnacle asserts that it failed to timely contest the proposed assessment because its safety manager, who is responsible for handling proposed assessments, was on Christmas vacation when the proposed assessment was

delivered. Another individual at the company signed for the proposed assessment but failed to give it to the safety manager, who was thus unaware of the proposed assessment. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on March 13, 2014.

In response, Pinnacle has submitted the affidavit of its safety manager who represents that Pinnacle has no record of having received the delinquency notice, and that Pinnacle was unaware of such delinquency until being notified by counsel in May 2014.¹

Having reviewed Pinnacle'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

¹ The dissent notes that we have held that a failure to explain a delay in responding to a delinquency notice may be grounds for denial of a motion to reopen. *Slip op.* at 4, *citing Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009). While this is true, Pinnacle has provided an explanation for its delay. Nothing in our decision today excuses an operator from acting promptly once it has discovered its failure to timely respond, or to explain any delay in acting later than 30 days from discovery of the delinquency.

Commissioner Cohen dissenting:

I dissent from my colleagues' decision and would deny Pinnacle's motion to reopen.

In its motion, Pinnacle argues that it failed to timely file the contest form due to mistake, inadvertence or excusable neglect. Pinnacle represents that customarily an employee of the operator picks up mail at the mine's Post Office Box and then distributes its contents to the appropriate employees. For instance, Pinnacle's past practice is for an MSHA proposed assessment to be delivered to the internal company mailbox of the mine's safety manager, David Meadows, after it is picked up from the Post Office Box. Mot. at 2.

However, in this instance, Mr. Toler, an employee from the human resources department, picked up the mail from the Post Office, signed for the proposed assessment, but neglected to deliver it to Mr. Meadows. Pinnacle represents that Mr. Meadows' absence on December 27, 2013 (the date Mr. Toler signed for the proposed assessment), somehow contributed to Mr. Toler's failure to deliver the assessment to the appropriate mailbox. Mot. at 2.

As a result of Pinnacle's failure to file the associated contest form, the proposed assessment became a final order on January 26, 2014.

Although Pinnacle submitted affidavits from Mr. Meadows, it did not submit an affidavit or other evidence from Mr. Toler, the person with actual knowledge. Hence, Pinnacle has not provided any information regarding what Mr. Toler actually did with the proposed assessment after he received it. This makes it difficult for the Commission to determine whether Pinnacle actually established excusable neglect in failing to timely contest the proposed assessment.

On March 13, 2014, MSHA notified the operator that it was delinquent in payment of the assessed civil penalties by a letter addressed to the mine's Post Office Box. Pinnacle represents that this letter also failed to reach the desk of Mr. Meadows. Included in Pinnacle's filings to the Commission is an affidavit from Mr. Meadows stating that he did not receive the letter. However, absent from its filings is an affidavit from any individual actually responsible for processing the mail.

The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Maggio v. Wisconsin Ave Psychiatric Center, Inc.*, 987 F.Supp.2d 38, 41 (D.C. Cir. 2013) (citing *Hagner v. United States*, 285 U.S. 427, 430 (1932), *Rosenthal v. Walker*, 111 U.S. 185 (1884)). I conclude that Pinnacle failed to rebut the presumption that the delinquency letter was delivered.

The Commission has repeatedly held that when a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

I conclude that the facts demonstrate that Pinnacle continues to exhibit an inadequate or unreliable internal processing system. In this case, Pinnacle failed to timely respond to either the proposed assessment or the delinquency letter. *See Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009) (“Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion.”). The motion to reopen was filed more than two months after receipt of the delinquency letter.

I dissent from my colleagues’ decision. A closer examination of the operator’s representations demonstrates that Pinnacle has failed to establish grounds warranting reopening.

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/ FAX 303-844-5268

March 4, 2016

TRAYLOR MINING, LLC,
Applicant

v.

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

EQUAL ACCESS TO JUSTICE ACT
PROCEEDING

Docket No. EAJA 2016-0002
Formerly WEST 2014-351-M

Mine ID: 05-00413 X940
Bulldog Mine

DECISION

Before: Judge Manning

This case is before me upon an application for an award of fees and expenses under the Equal Access to Justice Act (“EAJA”) 5 U.S.C. § 504 and the Commission’s regulations at 29 C.F.R. Part 2704. Traylor Mining, LLC (“Traylor”) filed the application against the Department of Labor’s Mine Safety and Health Administration based upon my decision in *Traylor Mining, LLC*, 37 FMSHRC 2307 (Oct. 2015) (ALJ). Traylor was an independent contractor performing work at the Bulldog Mine, which was an underground silver mine near Creede, Colorado.

Traylor seeks an award in the amount of \$43,615.09 under 29 C.F.R. § 2704.105(a) and alternatively 29 C.F.R. § 2704.105(b). Traylor attests that it satisfies the eligibility requirements of 29 C.F.R. § 2704.104. The Secretary argues that its decisions to try the citation as an unwarrantable failure and high negligence citation and to specially assess a penalty of \$52,500 are substantially justified.

I find that while Traylor is an eligible party under EAJA, Traylor is not entitled to an EAJA award under 29 C.F.R. § 2704.105(a) because the Secretary’s position with respect to the citation at issue was substantially justified. Consequently, I do not consider the parties’ arguments concerning the reasonableness of the fee request.

I. BACKGROUND

The underlying case concerned Citation No. 8597320 that MSHA issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(d)(1) (the “Mine Act” or “Act”). A hearing was held on June 30, 2015, in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

On June 3, 2013, MSHA Inspector David M. Sinquefield issued Citation No. 8597320 alleging a violation of section 57.9100(a) of the Secretary’s safety standards. Section 57.9100(a) provides in part that “[r]ules governing speed, right-of-way, direction of movement, and the use

of headlights to assure appropriate visibility, shall be established and followed at each mine[.]” 30 C.F.R. § 57.9100(a). The standard requires mines to establish and follow right-of-way procedures to ensure the safe movement of mobile equipment. The inspector designated Citation No. 8597320 as significant and substantial (“S&S”) and reasonably likely to cause an injury that could reasonably be expected to be fatal. He also alleged that the violation was the result of Traylor’s high negligence and unwarrantable failure. The Secretary proposed a specially assessed penalty of \$52,500 for this citation.

Citation No. 8597320 alleged that Lowell Hicks, Traylor’s production supervisor, was injured by the roadheader on a Bobcat excavator when the boom on the excavator was inadvertently activated by the excavator operator as he backed out of a mucked out area. After Hicks and the excavator operator, Michael Reagan, determined that no further cutting was necessary, Hicks removed the water line and Reagan, once certain that all miners were clear of the excavator, began to tram backwards. At this time, Hicks walked inby on the left side of the excavator. Reagan did not see Hicks advance and, as the excavator moved over uneven ground, Reagan turned to his right to look behind him and inadvertently hit the swing lever. The lever caused the boom to swing and strike Hicks. Hicks was evacuated from the mine and taken to a hospital in Denver to address his injuries.

Following the accident, Inspector Sinuefield traveled to the Bulldog Mine to take photos and measurements at the scene of the accident. He did not interview the miners that were present at the accident. Inspector Sinuefield based his conclusions upon his inspection of the accident site and his interview with Hicks that occurred the following day at the Denver hospital. The inspector interpreted Hicks to say that standing in front of the blade of the operating excavator during cleanup was his normal practice. The citation alleged that Hicks was standing too close to the excavator during its operation and, as a result, failed to follow the right-of-way rules established in Traylor’s Job Hazard Analysis (“JHA”). The citation also alleged that Hicks engaged in aggravated conduct by failing to yield the right-of-way to the excavator while it was in operation.

At hearing, Traylor conceded the violation, the S&S designation, and gravity-related designations, but contested (1) the unwarrantable failure designation, (2) the high negligence designation, and (3) the \$52,500 special assessment. (Tr. 6-7).¹ Traylor provided evidence to show that the Secretary based its high negligence and unwarrantable failure designations on Inspector Sinuefield’s misinterpretation of Hicks’s statement made during the interview at the hospital following the accident, as well as the inspector’s failure to interview other miners present during the accident. *Traylor Mining*, 37 FMSHRC at 2313. Traylor also argued that the Secretary’s special assessment procedures constituted substantive rules that should have undergone notice and comment rulemaking, and thus should be disregarded. (Traylor Br. at 19-20).

I issued a decision on the merits on October 15, 2015. I vacated the unwarrantable failure designation, modified the violation to a 104(a) citation, reduced the negligence designation from high to moderate, and reduced the penalty from a special assessment of \$52,500 to a regular

¹ Transcript and exhibit references are to the record in the June 30, 2015 hearing on the merits.

assessment of \$1,000. As a result of these modifications, I did not address the parties' arguments regarding the proposed specially assessed penalty or the Secretary's special assessment process. *Traylor Mining*, 37 FMSHRC at 2317.

II. PARTIES' ARGUMENTS

On December 14, 2015, Traylor submitted an application for fees and expenses under EAJA. Traylor argues that it is entitled to fees and expenses under 29 C.F.R. § 2704.105(a) because it was a prevailing party and the position of the Secretary was not substantially justified. Traylor notes that the judge vacated the Secretary's unwarrantable failure designation and modified Citation No. 8597320 to a 104(a) citation because the violative condition "was not extensive, did not exist for a long period of time, the operator did not have notice that greater efforts were necessary for compliance, and [Traylor] had taken significant steps towards preventing an accident of just this kind." *Traylor Mining*, 37 FMSHRC at 2316. Traylor also argues that the Secretary's high negligence designation relied upon the inspector's incomplete investigation and incorrect interpretation of Hicks's statements during his post-accident interview.² (Traylor App. at 3). Finally, Traylor notes that upon modifying the negligence and unwarrantable failure claims, the judge reduced the penalty from its special assessment amount of \$52,500 to \$1,000, and that the reduction indicates that the Secretary's decision to issue a specially assessed penalty and the amount of that penalty were not substantially justified. (Traylor App. at 5).

In addition, Traylor argues that it is entitled to attorney's fees in excess of EAJA's prescribed \$125 per hour maximum because its attorney, Jason Hardin, is one the few attorneys in the nation with significant experience contesting MSHA violations, charges a competitive hourly rate relative to the market in which he practices, and possesses a unique science and engineering background that enhances his practice in this area. (*Id.* at 6-8).

On January 27, 2016, the Secretary filed an objection to Traylor's application, arguing that even as a prevailing party, Traylor was not eligible under EAJA to receive attorney's fees, and even if it were eligible, the Secretary's positions were substantially justified. (Sec'y Obj. at 2-3). The Secretary also questioned Traylor's rationale for raising the fees to be awarded above the statutory limit. (*Id.* at 3). Traylor filed a reply to the Secretary's objection on February 19.

On March 1, 2016, the Secretary withdrew its contest of Traylor's eligibility in light of additional documentation provided by Traylor in its Reply. (Sec'y Letter, at 1). The Secretary continues to argue that his position was substantially justified because the judge found that a

² Traylor argues alternatively that if it is not a prevailing party it is entitled to relief under section 2704.105(b). I find that because Traylor was the prevailing party in the underlying case, I need not consider it. A party that does not prevail may be entitled to attorney's fees under EAJA if "the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision[.]" 29 C.F.R § 2704.105(b). Section 2704.105(b) does not apply to prevailing parties because prevailing parties "could argue that they meet the requirements of the 'excessive demand' prong of section 504(a)(4) in nearly every instance, rendering it essentially meaningless (although the Secretary's demand must also be determined to be 'unreasonable')." *Colorado Lava, Inc.*, 27 FMSHRC 186, 189 (Mar. 2005).

number of the criteria in designating unwarrantable failures were present based on the facts and circumstances of the case, that the violation presented a high degree of danger, and that Traylor had knowledge of the danger. (Sec’y Obj. at 8-10). The Secretary argues that his high negligence designation was substantially justified because the judge modified the designation based on crediting the testimony of Traylor’s witnesses over that of the Secretary’s. (*Id.* at 11). The Secretary also notes that Traylor’s settlement offer prior to the hearing supported a high negligence designation. (*Id.* at 11-12). In addition, the Secretary argues that the special assessment of \$52,500 was substantially justified. (*Id.* at 12-13).

The Secretary also argues that Traylor’s claim for fees is excessive. The Secretary cites Traylor’s failure to provide sufficient documentation of fees and expenses and a full itemized statement showing the hours connected to making the prevailing arguments. (*Id.* at 14). Without full documentation, the Secretary argues that it is impossible to exclude hours dedicated to issues that Traylor conceded during hearing, hours that were inadequately documented, or hours that were “excessive, redundant, or otherwise unnecessary.” (*Id.* at 14, quoting *Precision Concrete v. NLRB*, 362 F.3d 847, 853 (D.C. Cir. 2004); *Hensley v. Eckerhart*, 461 U.S. 434, 443 (1983)). Finally, the Secretary argues that Traylor’s assertions of attorney specialization, educational background, and complexity of the underlying litigation are insufficient to justify a request exceeding the EAJA maximum. (*Id.* at 16-17).

III. DISCUSSION AND ANALYSIS

Commission procedural rules state that “[a] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified.” 29 C.F.R. § 2704.105(a). The “position of the agency” includes the “position taken by the Secretary in the adversary adjudication” and “the action or failure to act by the Secretary upon which the adversary adjudication is based.” *Id.*

The applicant bears the burden to establish eligibility under EAJA. 29 C.F.R. § 2704.104(a). The applicant must show that it has a net worth of less than \$7 million and employs fewer than 500 employees. 29 C.F.R. § 2704.104(b)(3)(iii). The applicant must also provide a detailed exhibit in any form “convenient to the applicant that provides full disclosure of the applicant’s assets and liabilities[.]” 29 C.F.R. § 2704.202(c). Requests for attorney’s fees should not result in major litigation, and thus “some informality of proof is appropriate.” *United States v. 88.88 Acres of Land*, 907 F.2d 106, 108 (9th Cir. 1990) (citation omitted). If the underlying litigation bestowed significant benefits on entities other than the applicant, the worth of those entities should be aggregated to determine eligibility under EAJA. *Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 509 (2003).

Once a party is established as an eligible prevailing party, EAJA mandates that the Commission award fees and expenses to the prevailing party unless the Secretary proves that “the position of the agency was substantially justified or that special circumstances make an award unjust.” 29 C.F.R. § 2704.100. The Government bears the burden to show that its position was substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). The Secretary is not required to justify his position to a high degree, but must justify his position “to a degree that

could satisfy a reasonable person” to prove that his actions were substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 564-566 (1988). The position must be “substantially justified on the law and the facts.” *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1340 (D.C. Cir. 2000) (quoting *Cinciarelli v. Reagan*, 729 F. 2d 801, 806 (D.C. Cir. 1984)). A position may still be justified even if incorrect, and it may be substantially justified if a reasonable person could think it is correct. *Pierce*, 487 U.S. at 564-66.

As Commission Judge McCarthy observed: “Litigation is a crapshoot. The parties relinquish control, and when the dust settles, reasonable minds can differ about the legal import of the facts established and the cogency of the legal arguments advanced.” *McGruder Limestone Co., Inc.*, 36 FMSHRC 3288 (Dec. 2014) (ALJ). “[i]t would be a war with life’s realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified.” *United States v. Paisley*, 957 F. 2d 1161, 1167 (4th Cir. 1992) (quoting *Evans v. Sullivan*, 928 F. 2d 109, 110 (4th Cir 1991)).

Traylor’s Eligibility and Prevailing Party Status

Both parties now agree that Traylor Mining is an eligible prevailing party under 29 C.F.R. § 2704.105(a). (Traylor App. at 3; Sec’y Letter at 1). Traylor has met its burden under 29 C.F.R. § 2704.104(b) because it has established that it has a net worth of less than \$7 million, employs less than five hundred employees, and is the only party to which the underlying litigation bestowed significant benefits. Traylor’s December 14, 2015 EAJA application for attorney’s fees and expenses included balance sheets indicating that it had a net worth well below the threshold and no more than 80 employees. (Traylor App. at 2; Ex. A). In its February 19, 2016 Reply, Traylor also provided sworn declarations from its Secretary and Treasurer, a general ledger, asset depreciation report, and trial balance. (See Traylor Reply Exs. A, B). These materials properly supplemented Traylor’s position as an eligible party and established Traylor’s net worth and employee count as well below EAJA eligibility limits.

Traylor also established that it had sole direct interest in the underlying decision. Net worth of an applicant’s related corporate entities should not be aggregated in determining EAJA eligibility unless the underlying litigation substantially benefited the related entities. See *Lion Raisins, Inc.* 57 Fed. Cl. at 510. Traylor’s sworn declarations state that Traylor was in no way indemnified or reimbursed by Traylor Bros. for legal fees, and that Traylor is a separately incorporated entity. (Traylor Reply Ex. A ¶¶ 5-9; Ex. B ¶¶ 12-13). Aggregation of additional financial information is therefore improper.

Traylor has sufficiently met its burden of eligibility under EAJA.

Substantial Justification

After the applicant proves prevailing party status and eligibility, the government bears the burden of proving that its position in the underlying litigation was substantially justified. 29 C.F.R. § 2704.100. The Secretary must substantially justify his position on both the law and facts to satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. at 564-66. Here, the Secretary has met that burden. The Secretary provided evidence that the facts and circumstances reasonably

justified the inspector's determination that the violation was the result of Traylor's unwarrantable failure and high negligence, and that the Secretary's decision to specially assess a penalty of \$52,500 was reasonable. While the investigator did not perform the most comprehensive investigation, his consideration of the high level of danger and that Hicks, the production supervisor, knew he was committing a violation indicate that the Secretary's assertions of fact and law were reasonable.

Unwarrantable Failure

The Secretary's position that the violation constituted an unwarrantable failure was substantially justified. Proper designation of unwarrantable failure must be based on the facts and circumstances of each case and consider the (1) obviousness of the violation, (2) length of time the violation existed, (3) the extent of the violative condition, (4) the degree of danger of the violative condition, (5) the operator's knowledge of the existence of the violation, (6) the extent of operator's notice that greater efforts were necessary for compliance, and (7) efforts to abate the violative condition. *I.O. Coal Co., Inc.*, 31 FMSHRC 1346 (2009). No single factor of the test is dispositive and the presence of a majority of the factors is not always necessary to determine an unwarrantable failure. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001 (1999).

I determined that three factors supported the unwarrantable failure decision while four factors did not. *Traylor Mining*, 37 FMSHRC at 2314-17. The high degree of danger associated with Hicks placing himself in front of the blade between the excavator and the rib, the obvious nature of the violation, and the operator's imputed knowledge that Hicks's position posed a danger, all supported finding an unwarrantable failure. *Id.* at 2316. The fact that the violation was not extensive, that Traylor was not put on sufficient notice of the violative condition, and that Traylor properly enforced its safety standards all mitigated an unwarrantable failure finding. *Id.* at 2315. The decision to vacate the unwarrantable failure designation essentially turned on crediting the testimony of Traylor's witnesses that Hicks did not have a history of walking in front of the blade when the excavator was operating. *Id.* at 2314-15.

I find that the Secretary's reliance on his inspector's investigation of the violation and post-accident interview with Hicks do not render the unwarrantable failure designation unjustified. The Secretary argued that Hicks's own statements during the post-accident interview indicated that walking in front of the blade while the excavator was running constituted a normal practice. (Tr. 36). Traylor's witnesses persuasively claimed that they only ever saw Hicks violate the safety standard on the day of the accident. (*Traylor Mining*, 37 FMSHRC at 2314-15). Yet persuasive witness testimony on one factor does not render the entire unwarrantable failure designation unreasonable. While the Secretary failed to prove that Hicks normally walked in front of the blade, he nonetheless established that Hicks knowingly stood in an area of danger while the excavator was running. *Id.* at 2317.

Traylor argues that the inspector's misinterpretation of an "innocuous" comment by Hicks during post-accident interview was due to his failure to fully investigate the matter and his misunderstanding of the equipment and the JHA. (Traylor Reply at 18). The Secretary's investigation may not have been as fully comprehensive as Traylor believes it should have been, but the JHA does contemplate that the excavator must stop operating if "personnel need to be in

the area.” (Ex. G-7, p. 2). The JHA explicitly recognizes a zone of danger around the excavator. The fact that the inspector did not understand that the blade was more than two feet in front of the cab does not render the Secretary’s investigation insufficient.

The Secretary’s unwarrantable failure designation was substantially justified in law and fact.

High Negligence

The Secretary was substantially justified in applying MSHA’s section 100 regulations to designate the violation as highly negligent.³ Section 100 designates a violation as constituting high negligence when the operator “knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3.

Commission Judges, however, are not limited to a restricted evaluation of allegedly mitigating circumstances, but may take the opportunity to consider all of the evidence presented after a full hearing to “take a more nuanced approach to the degree of negligence.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-02 (Aug. 2015) (citation omitted). “In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Id.* at 1702 (citations omitted). As discussed above, I credited Traylor’s witnesses in finding that the violation was an isolated incident under the reasonably prudent person standard and modified the negligence designation accordingly. 37 FMSHRC at 2313. This modification does not render the Secretary’s high negligence determination under section 100.3 unjustified.

Traylor argues that the Inspector failed to interview the other miners present during the accident to corroborate Hicks’s statements and this failure resulted in an unreasonable designation of high negligence. (Traylor Reply at 16). While the Inspector undoubtedly could have conducted a more thorough investigation, the Secretary’s decision to rely upon Hicks’s interview and the Inspector’s examination of the accident scene was nevertheless reasonable. While the judge determined that walking in front of the excavator blade was not a normal practice, Hicks’s testimony indicated that he knew his action was dangerous. Hicks’s knowledge of the danger of the violative behavior sufficiently supports the Secretary’s high negligence determination under section 100.3.

³ In addition to the following arguments, the Secretary asserts that Traylor’s settlement offer to pay a reduced penalty and accept high negligence indicate the validity of the designation. (Sec’y Obj. at 12). I decline to consider the settlement negotiation in determining whether the Secretary’s position was substantially justified. The Secretary argues that judges may exercise their discretion in considering an “undisputed, fully documented settlement proposal as an element of determining whether a demand is excessive. (Sec’y Obj. at 11-12, *citing Georges Collieries, Inc.*, 24 FMSHRC 572 (Jun. 2002) (ALJ) (subsequent history omitted)). Aside from choosing to exercise my discretion to the contrary, it is disputed whether the settlement negotiation is fully documented. Traylor Mining asserts that the exhibit is merely one of approximately 20 emails discussing settlements. (Traylor Reply at 4).

The Secretary's high negligence designation was justified in law and fact.

The Secretary's Decision to Specially Assess the Penalty

The Secretary proposes penalties using its special assessment procedures in accordance with 30 C.F.R. § 100.5, which was promulgated after notice and comment rulemaking. This provision simply provides that MSHA may elect to waive its regular assessment regulation "if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a).

Two factors contributed to the Secretary's decision to specially assess the penalty in this case. First and foremost was the fact that someone was seriously injured as a direct result of the violation. The Secretary's criteria for determining whether to consider specially assessing a violation lists "violations that contributed to a fatal or serious injury" as a key factor. (Tr. 99-101; Ex. G-12 p. 1). Although the criteria used by the Secretary was not promulgated as a regulation and therefore was not subjected to notice and comment rulemaking, it is contained in MSHA's Program Policy Manual. The violation here was directly responsible for a very serious injury that could have been fatal. The Secretary followed its published procedures when electing to specially assess the penalty. As a consequence, the Secretary's decision to specially assess the violation was reasonable.

Second, because the violation was committed by the supervisor of the crew, the citation alleged that Traylor unwarrantably failed to comply with the safety standard. This fact played a significant part in the Secretary's decision to specially assess the penalty. As stated above, the Secretary's decision to issue the citation under section 104(d)(1) was reasonable and substantially justified.

Commission administrative law judges have criticized the rather opaque nature of the special assessment process. *See e.g. Douglas R. Rushford Trucking*, 23 FMSHRC 1418, 1419-20 (Dec. 2001) (ALJ); *American Coal Co.*, 35 FMSHRC 1774, 1821-24 (June 2013) (ALJ). These criticisms have arisen because Commission judges, in exercising their authority to assess a civil penalty, are required to explain the basis for the penalty addressing the six penalty criteria and must justify significant deviations from the Secretary's proposed penalty. *Performance Coal Co.*, 35 FMSHRC 2321, 2322-23 (Aug. 2013); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). I agree that this task is more difficult when a proposed penalty has been specially assessed by the Secretary. Nevertheless, it does not follow that the Secretary's reliance on his special assessment procedure in this case was unreasonable.

I find that the Secretary presented a reasonable explanation for his decision to specially assess the violation

The Secretary's Proposed Specially Assessed \$52,500 Penalty

MSHA's Office of Assessments prepared a "Special Assessment Narrative Form" to calculate the proposed penalty. (Ex. G-14, p. 3). In completing this form, the assessment officer relied upon MSHA's general procedures for calculating special assessments. (Tr. 101-04; Ex. G-13). Although these procedures are not part of the Program Policy Manual, they are presently

available on MSHA's website. These calculations take into account the six penalty criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). The MSHA assessment officer has little discretion in assigning penalty points when calculating special assessments, but there is some discretion in adjusting the penalty at the bottom of the form. (Tr. 108; Ex. G-14, p 3). Without these adjustments, the proposed penalty in this case would have been \$70,000.

I find that the proposed penalty in this case was calculated in accordance with MSHA's special assessment guidelines. The Secretary called a witness at the hearing with knowledge of the special assessment process who explained how the special assessment was applied and calculated with respect to the subject citation. (Tr. 94-112). I credit his testimony. His testimony and the exhibits he relied upon establish that the Secretary did not deviate from the guidelines. (Tr. 103-04).

There is no question that the \$52,500 proposed penalty was substantially higher than what the Secretary would have proposed if the regular assessment formula were used, \$2,000. I reduced the penalty to \$1,000 when I vacated the unwarrantable failure designation. Evidence in the record establishes that the \$52,500 penalty was calculated correctly using the formula developed by MSHA. (Tr. 103-04; Exs. G-13 & 14). This formula considered all six penalty elements specified in the Mine Act. Consequently, I find that the Secretary's proposed penalty was substantially justified.⁴

⁴ My holding in this case is consistent with my decision in *North County Sand & Gravel, Inc.*, 36 FMSHRC 1214, 1221-23 (May 2014). In that case I granted an application for attorney's fees filed by counsel for the mine operator because, in large part, I determined that the Secretary's proposed special assessment was not substantially justified. In that case, the Secretary did not seek to justify his special assessment at the hearing and, indeed, withdrew the special assessment after the close of the hearing upon a motion filed by the operator to strike the special assessment. 36 FMSHRC at 1222.

Conclusion

As discussed above, the result on the merits of the citation could have been different depending upon credibility resolutions and the weighing of the evidence presented. The Secretary's litigating position and proof could have satisfied a reasonable person. The Secretary has met its burden in establishing that its position was substantially justified in law and in fact. Accordingly, an EAJA award is not appropriate and I need not discuss either party's arguments regarding fee claims.

IV. ORDER

For the reasons set forth above, it is **ORDERED** that Traylor's EAJA application for attorney's fees and expenses is **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

March 9, 2016

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

PRAIRIE STATE GENERATING
COMPANY, LLC,
Respondent.

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

STEVEN B. REES, employed by PRAIRIE
STATE GENERATING COMPANY, LLC,
Respondent.

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

MICHAEL WELCH, employed by PRAIRIE
STATE GENERATING COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2013-187
A.C. No. 11-03193-296240

Mine: Lively Grove

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-130
A.C. No. 11-03193-366707A

Mine: Lively Grove

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-144
A.C. No. 11-03193-366708A

Mine: Lively Grove

DECISION

Appearances: Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois, for Petitioner;
Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Paez

This case is before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(c). In dispute are one section 104(d)(1) order issued to Prairie State Generating Company, LLC (“Prairie State”) and two companion

section 110(c) penalty assessments issued to Steven B. Rees (“Rees”) and Michael Welch (“Welch”), alleging their personal liability as agents of Prairie State. To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001). To establish a violation under section 110(c), the Secretary must prove that (1) an agent knew or had reason to know of a violative condition, and (2) failed to act to correct the condition. *See* 30 U.S.C. § 820(c); *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).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket No. LAKE 2013-187, which I stayed on January 31, 2014, pending MSHA’s completion of a related section 110(c) investigation. In separate orders, Chief Judge Lesnick assigned to me Docket Nos. LAKE 2015-130 and LAKE 2015-144, which contain the Secretary’s petitions for the assessment of civil penalty under section 110(c), and I consolidated them with Docket No. LAKE 2013-187 for hearing and disposition. Docket No. LAKE 2013-187 involved two violations. The parties settled one of these violations, Citation No. 8440270, and I disposed of it in a separate Decision Approving Partial Settlement on September 21, 2015.

The remaining alleged violation in Docket No. LAKE 2013-187 was issued at Lively Grove Mine on June 26, 2012. Order No. 8440269 charges Prairie State with a violation of 30 C.F.R. § 75.360(a) for failing to conduct a pre-shift examination before sending miners to work underground.¹ The Secretary designated the order as significant and substantial (“S&S”)² and characterized Prairie State’s negligence as high. The Secretary also determined that the violation resulted from Prairie State’s unwarrantable failure to comply with a mandatory health

¹ Section 75.360(a) provides, in relevant part: “[A] certified person designated by the operator must make a pre-shift examination within [three] hours preceding the beginning of any [eight]-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a pre-shift examination has been completed for the established [eight]-hour interval.” 30 C.F.R. § 75.360(a).

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

or safety standard.³ The Secretary proposes that Prairie State pay a penalty of \$2,000.00. Additionally, in Docket Nos. LAKE 2015-130 and LAKE 2015-144, the Secretary proposes that Rees and Welch each pay a penalty of \$1,500.00 under section 110(c) of the Mine Act in connection with Order No. 8440269. Thereafter, I held a hearing on September 23, 2015, in St. Louis, Missouri.

At the hearing, the parties stipulated to the following:

1. Prairie State is engaged in mine operations in the United States, and its mining operations affected interstate commerce.
2. Rees was the afternoon shift mine manager at the times relevant to this matter.
3. Welch was the midnight shift mine manager at the times relevant to this matter.
4. Prairie State is the owner and operator of the subject mine, Mine ID No. 11-03193.
5. Prairie State, Rees, and Welch are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
6. The administrative law judge has jurisdiction in this matter.
7. Order No. 8440269 was properly served by a duly authorized representative of the Secretary upon an agent of Prairie State on the date and place stated therein and may be admitted into evidence for the purposes of establishing its issuance.
8. The assessed penalties, if affirmed, will not impair Prairie State's ability to remain in business.

(Ex. S-1.)⁴ The Secretary then presented testimony from MSHA inspector Robert Hatcher and MSHA special investigator Robert Bretzman, as well as Prairie State mine examiner Daniel Bertelsman. Prairie State presented testimony from shift managers Rees and Welch. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Order No. 8440269, the Secretary asserts that Respondents failed to fulfill the duty imposed by 30 C.F.R. § 75.360(a) by not examining an area of the mine for hazardous conditions

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁴ In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S-#," and "Ex. R-#," respectively.

before miners were sent to work there. (Sec’y Br. at 7.) Testimony at the hearing established that Prairie State did not record a pre-shift or supplemental examination of this area in any of its logs. (Exs. S-3, R-10 at 7 [20]; Tr. 42:17-43:4.) The Secretary also contends that his section 110(c) allegations and his proposed penalties against Rees and Welch are valid and appropriate. (Sec’y Br. at 20-23.)

In response, Prairie State does not contest its failure to conduct the required examination but challenges the Secretary’s gravity and negligence determinations, specifically the S&S and unwarrantable failure designations. (Resp’t Br. at 7-17.) Rees and Welch deny the section 110(c) allegations against them. (*Id.* at 17-22.) Specifically, Rees argues that he did not know he needed to conduct a pre-shift examination of the area because his supervisor never told him when and where miners would be sent to work. (*Id.* at 18-19.) Additionally, Welch asserts that due to his limited experience as a mine manager, he reasonably believed the required pre-shift examination had occurred based on his reading of the mine’s examination book. (*Id.* 20-22.)

Accordingly, the following issues are before me: (1) whether Order No. 8440269 issued for a violation of 30 C.F.R. § 75.360(a) is S&S; (2) whether Prairie State’s negligence in committing the violation is “high” and constitutes an unwarrantable failure; (3) whether Rees is liable under section 110(c); (4) whether Welch is liable under section 110(c); and (5) whether the Secretary’s proposed penalties against Prairie State, Rees, and Welch are appropriate.

For the reasons set forth below, Order No. 8440269 is **AFFIRMED**. Additionally, the section 110(c) liability of Steven B. Rees is **AFFIRMED**, and the section 110(c) liability of Michael Welch is **AFFIRMED**.

III. FINDINGS OF FACT

A. Operations at Lively Grove Mine

Lively Grove Mine is an underground bituminous coal mine located in Marissa, Illinois. (Sec’y Pet.; Tr. 11:5-6.) The mine contains long, corridor-like entries and perpendicular crosscuts driven through the coal seam, with rectangular pillars of coal remaining in place to support the mine’s roof and keep it from collapsing. (*See* Ex. S-4.) The distance between each crosscut measures approximately 100 feet. (Tr. 48:10-49:15.) Together, the entries and crosscuts form a grid if viewed from above. (Exs. S-4, R-3(b).) The entry and crosscut walls, which are called ribs, may over time loosen or separate from the pillars that support the mine roof, creating a hazard of falling rock to miners working in those areas. (Tr. 46:19-21, 54:18-25.) Pre-shift examinations help to identify such hazards before miners are sent into areas to work. (Tr. 54:23-55:3.)

During the time at issue, Lively Grove Mine operated on three overlapping 10-hour shifts. (Tr. 157:3-18.) During the time at issue, the first shift operated from 6:30 a.m. to 4:30 p.m. (Tr. 139:18-19, 157:10-14.) The second, or afternoon, shift operated from 3:30 p.m. to 1:30 a.m. (Tr. 139:19, 157:18.) The third, or midnight, shift operated from 10:30 p.m. to 8:30 a.m. (Tr. 156:19-20, 157:4-9, 189:23-24.) The third shift was a maintenance shift that did not produce coal. (Tr. 170:21-22, 188:14-24.) Each shift had a manager responsible for executing

the work orders received from Superintendent Aaron Jackson. (Tr. 160:12–23, 161:10–22, 189:6–10, 189:24–190:10.) On the dates of the inspection in this case, Rees was the shift manager for the second shift from 3:30 p.m. to 1:30 a.m., and Welch was the shift manager for the third shift from 10:30 p.m. to 8:30 a.m. (Ex. S–1.)

Whenever Prairie State has planned work for an upcoming shift, its examiners must perform a pre-shift examination of the work area to ensure the area is safe for miners. (Tr. 27:13–17, 36:8–10, 121:4–15.) Miners are not permitted to work or travel underground unless an examiner has conducted a pre-shift examination of that area within three hours prior to the shift’s start. (Tr. 27:13–17, 28:1–2, 36:8–10.) If, during a shift, miners must enter an area that has not undergone a pre-shift examination, the mine operator must conduct a supplemental examination before miners enter that area. (Tr. 181:9–14, 220:24–221:3.) Each shift’s manager is responsible for assigning pre-shift and supplemental examinations and ensuring work areas have been properly examined. (Tr. 105:3–13.)

Additionally, mine operators must maintain records of pre-shift examinations. 30 C.F.R. § 75.360(g). Prairie State’s examiners recorded examinations in a book kept in the mine’s office aboveground. (Tr. 25:13–16, 168:10–15; Exs. S–3, R–2(a), R–2(b).) A shift manager must sign the examination book every shift. (Tr. 168:10–18, 190:22–25.) Moreover, mine examiners must record dates, times, and initials (“DTIs”) throughout the mine to certify that an area has been examined. 30 C.F.R. § 75.360(f). At Lively Grove, examiners listed their DTIs on date boards located underground throughout the mine. (Tr. 41:3–43:14.)

Federal and state laws also require Prairie State to conduct routine examinations of the mine’s escapeways. (Tr. 29:15–23, 124:14–15, 125:18–24.) In the mine’s Main North Intake section, Prairie State maintained a primary escapeway to provide miners a safe pathway to exit in the event of an emergency. (Ex. R–4; Tr. 137:3–11.) Along the escapeway, the mine installed a lifeline, a cable hung from the mine’s roof to guide miners out of the mine. (Tr. 137:12–138:3.) In this section, the escapeway route began at a mechanical escape hoist called the Avro. (Ex. R–4(a); Tr. 42:11–16.) Escapeway examinations must be performed once every 24 hours under state law and once a week under federal law. (*Id.*) During an escapeway examination, examiners at Lively Grove follow the escapeway’s lifeline, inspecting for hazards. (Tr. 135:12–20; Ex. S–4(a).)

B. Hatcher’s Inspection of the Lively Grove Mine

Inspector Robert Hatcher arrived at Lively Grove for a routine quarterly inspection at approximately 8:25 p.m. on June 25, 2012. (Ex. R–10 at 1 [1]; Tr. 22:1–5.) Upon his arrival, Inspector Hatcher visited the mine’s office to review the mine’s examination books for hazards and violations that had been reported by the mine’s pre-shift and on-shift examiners. (Tr. 25:13–16.) Inspector Hatcher found no hazards listed in the books. (Tr. 32:6–10.)

Hatcher then went underground to inspect the mine with Kim Morgan, a safety technician at Prairie State. (Tr. 36:15–24.) During the inspection at around 1:05 a.m., a group of miners complained to Hatcher about rockdust coming into the area where they were working. (Tr. 93:24–94:14, 37:9–13; Ex. R–10 at 5–6 [14–15].) By this time, the third shift that began at

10:30 p.m. was well under way, so Hatcher asked third shift manager Welch where rockdusting was taking place. (Tr. 38:1–8.) Welch informed Hatcher that miners were rockdusting in the Main North Intake area. (Tr. 38:4–8; 199:13–19.) Indeed, by 10:00 p.m. Welch had received written orders from Jackson to rockdust an area of the Main North Intake, consisting of Entry Nos. 7, 8, 9, 10, and 11 from crosscut No. 6 to the Avro, or an area of at least 5,200 feet. (Exs. S–4(a), S–11, R–8(b); Tr. 48:10–49:15, 192:21–193:6, 212:7–14.)

Hatcher then traveled a few thousand feet to the Main North Intake area, where he found three miners rockdusting.⁵ (Tr. 39:5–18, 40:15–16, 198:17–200:22; Ex. R–3(b).) This area being rockdusted was not an area normally traveled. (Tr. 203:23–204:5.) As Hatcher approached the three miners, he came across an area of loose, unsupported rib. (Ex. S–4(a), Tr. 39:19–21, 40:8–10.) The loose rib was large, measuring 15 feet in length, seven feet in height, and one to 12 inches in thickness after being scaled down. (Exs. S–5, S–6.) Hatcher issued Citation No. 8440268 for failing to support the loose rib. (Ex. S–6.) Hatcher designated the violation as S&S and characterized Prairie State’s negligence as high.⁶ (*Id.*)

Hatcher then checked whether an examiner had conducted a pre-shift examination of the area being rockdusted. (Tr. 40:23–41:6.) Hatcher started searching for DTIs at the Avro located at the end of the Main North Intake escapeway. (Ex. S–4(a); Tr. 42:6–20.) Inspector Hatcher weaved throughout an area that appeared to be freshly rockdusted, covering Entry Nos. 8, 9, and 10 and Crosscut Nos. 3, 4, 5, 6, and 7. (Tr. 44:7–16; Ex. S–4(a).) He found DTIs at only two locations along the Main North Intake escapeway but none outside the escapeway. (Tr. 42:17–21, 43:2–4; Ex. R–10 at 7 [20].) Although DTIs were absent outside the escapeway, the entire area, including areas outside the escapeway, appeared to have a fresh coating of rockdust. (Tr. 45:8–13; Ex. S–4(a).)

Hatcher learned that earlier during the second shift, Superintendent Aaron Jackson instructed Rees to send equipment for rockdusting to the Main North Intake section. (Tr. 67:8–14; Exs. R–10 at 6 [17], R–8(a), S–10 at 1.) When Hatcher later summoned Welch and asked him whether a pre-shift examination had been conducted, Welch could not confirm that an examiner had conducted one of the area. (Tr. 46:22–25, 94:18–21, 199:21–22; Ex. R–10 at 6 [16].) Hatcher then asked Welch whether he had conducted a supplemental examination, and Welch replied he had not. (Tr. 47:1–2, 222:17–20.)

⁵ Hatcher learned that these three miners had relatively little experience. Two of the miners had approximately one year of experience working in an underground mine, and the third miner had only five months of experience. (Tr. 45:24–10.) None of these miners were certified to examine for hazards. (Tr. 46:12–13.)

⁶ Citation No. 8440268, originally issued as a section 104(d)(1) citation, was modified to a section 104(a) citation as part of a later settlement. *Prairie State Gen. Co., LLC*, FMSHRC Docket No. LAKE 2012-900 (Mar. 20, 2013) (ALJ) (order approving settlement). The citation retains its S&S designation but is no longer designated as an unwarrantable failure. *Id.*

Hatcher subsequently issued Order No. 8440269 for the failure to conduct a pre-shift examination in the area miners were rockdusting. (Tr. 47:3–4; Ex. S–8.) Hatcher wrote:

Three miners were observed working in the intake air course and had been rockdusting from cross cut #6 in entries #7 through #11 to the intake air shaft. A pre-shift examination for hazardous conditions had not been conducted in this area as required on the previous shift. Also the shift manager failed to conduct a supplemental examination for hazardous conditions for the miners. Citation #8440268 has been issued in conjunction with this order. This violation is an unwarrantable failure to comply with a mandatory standard constituting more than ordinary negligence.

(Ex. S–8.) Hatcher designated the order as an S&S violation that was reasonably likely to result in lost work days or restricted duty for three affected miners. (Ex. S–8; Tr. 62:11–24.) He also characterized Prairie State’s level of negligence as high. (Ex. S–8; Tr. 62:25–63:4.)

When back on the surface, Hatcher reviewed the mine’s examination book once more. (Tr. 60:19–25.) This time, Hatcher noted an entry under the pre-shift side of the mine’s examination book, indicating that the Main North Intake escapeway had been examined during the afternoon shift. (Ex. S–3 at 1; Tr. 26:4–8, 60:22–25.) However, Hatcher did not find any entries indicating that the area where rockdusting took place had been examined. (Tr. 83:22–84:3.)

To abate Order No. 8440269, Prairie State examined the affected area and removed all hazards. (Tr. 60:11–18; Ex. S–8 at 2.) Large loose ribs were found and scaled down in nine different locations. (Exs. S–8 at 2, S–4(a); Tr. 69:7–74:4.) Each of the three entryways and five of the six crosscuts that Prairie State’s miners rockdusted contained these loose ribs. (Exs. S–4(a), S–8 at 2.) After Prairie State removed the hazards, Hatcher re-inspected the affected area and terminated the order. (Tr. 84:7–12; Ex. S–8 at 2.)

Hatcher’s issuance of the section 104(d)(1) violation triggered an investigation of Rees and Welch under section 110(c) conducted by MSHA special investigator Bretzman. (Tr. 102:24–103:12.) Bretzman interviewed Rees and Welch, as well as superintendent Jackson and Prairie State’s staff and mine examiners, including Bertelsman. (Tr. 103:13–22.) Bretzman reported his findings and recommendations on liability, resulting in the decision by MSHA to file civil penalties against the two shift managers, Rees and Welch. (Tr. 128:10–129:16.)

IV. PRINCIPLES OF LAW

A. Pre-Shift Examinations under 30 C.F.R. § 75.360(a)

Section 75.360(a) requires operators to conduct a pre-shift examination in the three hours preceding the beginning of any shift during which any person is scheduled to work or travel underground. 30 C.F.R. § 75.360(a)(1). The person conducting the pre-shift examination shall examine for hazardous conditions in all areas where work or travel during the oncoming shift is

scheduled. 30 C.F.R. § 75.360(b). If an operator has not conducted a pre-shift examination of an area, the operator must perform a supplemental examination for hazardous conditions before any miner may enter that area. 30 C.F.R. § 75.361(a). The pre-shift examination is intended “to prevent hazardous conditions from developing” in a mine. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The pre-shift examination requirement “is of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).

B. Significant and Substantial (S&S)

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

In providing guidance for the application of the *Mathies* test, the Commission has observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation – i.e. that the violation present a *measure* of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission also has indicated that “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 & n.13 (Aug. 2012). The Commission further has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

The S&S designation of a pre-shift violation must be evaluated apart from an associated violation that led to its issuance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1700 (Aug. 2015) (vacating and remanding ALJ’s decision that removed pre-shift violation’s S&S and unwarrantability designations solely because underlying violation had neither designation). However, factors associated with an underlying condition are relevant to whether an inadequate examination that failed to detect that condition was S&S. *Id.* Additionally, unknown hazards that “may have existed at the time the area should have been examined” may be relevant to a pre-shift violation’s S&S determination. See *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (affirming ALJ’s S&S designation for pre-shift violation despite no hazards discovered during supplemental exam performed on next shift).

C. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Id.* at 2003-04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a 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 was obvious, whether the violation posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor’s conduct is aggravated or if mitigating circumstances exist. *Id.*

In applying these factors to a pre-shift violation, the Commission analyzes the pre-shift violation in context with any associated violation that led to the pre-shift violation’s issuance. *Brody Mining, LLC*, 37 FMSHRC at 1700. However, the unwarrantability of a pre-shift violation is not entirely dependent on the unwarrantability of an underlying violation. *Id.*

D. Section 110(c) of the Mine Act – Agent Liability

Section 110(c) liability “is generally predicated on aggravated conduct constituting more than ordinary negligence.” *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012). Under section 110(c), a violation committed “knowingly” constitutes aggravated conduct. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). “Knowing” in the context of section 110(c) does not require specific intent, and includes both actual and constructive knowledge. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997).

Thus, corporate directors, officers, or agents are liable under section 110(c) when they know or had reason to know of a violative condition, and fail to act to correct the condition. *See* 30 U.S.C. § 820(c); *Kenny Richardson*, 3 FMSHRC at 16 (Jan. 1981). Agents of an LLC may also be held liable under section 110(c). *Sumpter v. Sec’y of Labor*, 763 F.3d 1292, 1298 (11th Cir. 2014). An unreasonable belief that a practice is safe does not serve as a defense to section 110(c) liability, even if held in good faith. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1150 (Oct. 1998).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Order No. 8440269 – Failure to Conduct Pre-Shift Examination

Prairie State violated section 75.360(a) by not conducting a pre-shift examination of the Main North Intake section that Prairie State assigned miners to rockdust on June 25, 2012. Prairie State did not record a pre-shift or supplemental examination of this area in either its examination book or by DTIs on its date boards underground. (Exs. S-3, R-10 at 7 [20]; Tr. 42:17-43:4.) Prairie State does not deny that it failed to conduct the required examination but disputes the violation's S&S and unwarrantable failure designations. (*See* Resp't Br. at 1-6.)

1. Gravity and S&S

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Prairie State's violation of section 75.360(a) establishes the first element of an S&S violation.

As for the second *Mathies* element, the Secretary must show that the violation contributed to a discrete safety hazard. Prairie State exposed miners to dangerous conditions by failing to identify safety hazards in the working area through a pre-shift examination. (Tr. 85:13-18) These hazards included multiple instances of loose rib that could fall and strike a miner. (Ex. S-8 at 2.) Sending miners into the unexamined area contributed to these safety hazards, thus satisfying the second element of the *Mathies* test.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. Prairie State claims the Secretary has not proven that the loose rib material would be reasonably likely to injure a miner.⁷ (Resp't Br. at 9-10.) Additionally, Prairie State asserts that the area was not a regular travelway, and the work assignment required the miners to pass through the area only once. (*Id.*)

The miners assigned to rockdust in the Main North Intake covered an area spanning multiple entries and crosscuts. (Ex. S-4(a).) Within this area, Prairie State found nine different locations where loose rib had to be scaled down. (Exs. S-4(a), S-8 at 2.) The numerous locations of loose rib greatly increased the likelihood of rib material striking miners as they traversed the section. Indeed, at one location, the scaled rib covered over half an entry and measured 15 feet in length, seven feet in height, and one to 12 inches in thickness. (Tr. 54:8-9; Exs. S-5, S-6.)

⁷ Contrary to Prairie State's assertion that the loose rib conditions do not warrant the pre-shift violation's S&S designation, the underlying violation—Citation No. 9440268—retained its S&S designation as part of a settlement. *Prairie State Gen. Co., LLC*, FMSHRC Docket No. LAKE 2012-900 (Mar. 20, 2013) (ALJ) (order approving settlement). Moreover, the loose rib was just one of nine problematic locations Hatcher identified in his inspection. (Ex. S-4(a); Tr. 69:7-74:4.)

Moreover, certain mine conditions are transitory in nature; thus, a later examination of an area is not sufficiently indicative of the hazards that may have existed at the time the area should have been examined. *Jim Walter Res., Inc.*, 28 FMSHRC at 604 (citing *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996)). An operator's failure to conduct a pre-shift examination allows various hazardous conditions in a mine to develop without notice. These hazards include poor roof conditions, low oxygen, and high methane concentrations. (Tr. 85:13–18.) Because Prairie State did not perform an examination, its miners did not know of all the potential hazards that might have existed in the area at the time the miners were sent down to work. Furthermore, the miners assigned to rockdust were relatively inexperienced and were not certified to perform examinations to identify hazards on their own. (Tr. 45:20–46:18.)

Consequently, I determine that the hazard of loose ribs falling and striking a miner, in conjunction with exposing miners to unknown hazards, was reasonably likely to result in injury, thus satisfying the third element of the *Mathies* test.

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood the resulting injury will be of a reasonably serious nature. With regard to this element, Prairie State asserts that any injury caused by the loose ribs would not be serious because the miners traveled in a ram car equipped with a steel canopy and side panels. (Resp't Br. at 9–10.)

If loose rib falls and strikes a miner, the resulting injuries may include lacerations, fractures, and contusions. (Tr. 62:20–24.) Although the miners traveled in a semi-protected ram car, the car still left the miners exposed along the front and sides of the vehicle. (Exs. R–5(a), R–5(b); Tr. 55:14–56:15.) Moreover, additional preventive safety measures do not eliminate the S&S nature of a violation. *See Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013) (rejecting operator's argument that other equipment safety measures reduced the degree of danger and rendered an accumulations violation non-S&S).

Given the magnitude and numerous locations of loose rib Prairie State had failed to identify before sending miners into the area for rockdusting, I determine that the injuries which could have resulted from these hazards would have been reasonably serious, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that Order No. 8440269 was appropriately designated as S&S.

2. Unwarrantable Failure and Negligence

The Secretary asserts that Prairie State's conduct amounted to high negligence and was an unwarrantable failure. (Sec'y Br. at 10–20.) The Secretary states that the violation was highly negligent because prior incidents where examinations had not been conducted placed Prairie State on notice that it needed to be more careful in conducting pre-shift examinations before sending miners underground. (*Id.* at 10.) Additionally, the Secretary asserts Prairie State's actions were highly negligent and an unwarrantable failure particularly because two supervisors engaged in violative conduct, the violation was obvious, the supervisors should have known of the violation, and the violative condition posed a high degree of danger. (*Id.* at 13.)

In contrast, Prairie State asserts that the negligence and unwarrantable failure designations are inappropriate because Rees did not know to perform a pre-shift examination, and Welch believed, in good faith, that an examiner had checked the area prior to the third shift. (Resp't Br. at 10–17.) Specifically, Prairie State argues that the violation was not extensive, did not last an extended length of time, was not obvious, and did not pose a high degree of danger. (*Id.* at 12–14.) Additionally, Prairie State asserts it was not on notice and had no knowledge of the violation. (*Id.* at 13–17.)

In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350–51. When applying these factors to a pre-shift violation, the Commission considers the pre-shift violation's unwarrantable failure designation in context with any underlying violative conditions the operator failed to identify as a result of its insufficient examination. *See Brody Mining, LLC*, 37 FMSHRC at 1700; *Consolidation Coal Co.*, 23 FMSHRC 588, 597–98 (June 2001) (remanding for consideration of the extent, duration, and obviousness of an underlying accumulations violation when assessing unwarrantable failure of an inadequate pre-shift examination).

Prior to the June 25 inspection, MSHA twice told Prairie State that it needed to make better efforts to comply with the pre-shift examination requirement. On May 30, 2012, Inspector Hatcher cited Prairie State for failing to conduct a pre-shift examination of a work area for two shifts. (Ex. S–7.) A week later, on June 4, 2012, Hatcher again discovered that Prairie State had failed to record a pre-shift examination prior to sending miners into a work area. (Tr. 63:9–25, 66:6–7.) Although an examiner had performed a supplemental examination of the area in this June instance, Hatcher warned Superintendent Jackson that the operator needed to do a better job of performing and recording its pre-shift examinations. (Tr. 63:9–64:9.) Specifically, Hatcher warned Jackson that a superintendent should have a contingency plan for mine examinations, even for work assignments he had not anticipated. (Tr. 66:14–21.) Hatcher told Jackson that if the superintendent knows he has work planned in an area not normally examined, then the area needed to be pre-shifted. (Tr. 64:1–3.) Past violations and discussions with an MSHA inspector regarding a safety standard may demonstrate that an operator had notice of its need for greater compliance efforts. *Enlow Fork Mining Co.*, 19 FMSHRC at 11–12. Based on the facts here, I determine that Prairie State had notice of the need for greater compliance efforts with the pre-shift examination requirement.

In terms of the extent and danger of the violation, examiners identified loose ribs in nine different locations. (Ex. S–8.) Prairie State's miners actually completed rockdusting in an area that spanned three entryways (Entry Nos. 8, 9, 10) and six crosscuts (Crosscut Nos. 2 through 7), an area somewhat different from Jackson's written instructions. (Exs. S–4(a), R–8(b).) The area actually rockdusted covered approximately 3,000 feet. (*See* Tr. 192:23–193:6; Exs. S–4(a), S–9, S–10 at 2, R–8(b).) Jackson's written orders instructed Welch to rockdust an even larger area covering at least 5,200 feet across five entryways (Entry Nos. 7 through 11) and seven crosscuts (Crosscut No. 6 to the Avro). (Ex. R–8(b); *see* Tr. 48:10–49:7; Exs. S–4(a), R–8(b).) Yet Prairie State's examination of the primary escapeway at 4:30 p.m. covered only 800 feet, or about 15 percent of the assigned work area. (*See* Tr. 48:10–49:7; Exs. S–4(a), R–8(b).) Significantly, the Main North Intake's escapeway examination cannot be credited as a pre-shift because it took

place outside the three-hour window prior to the start of the third shift at 10:30 p.m. (Tr. 42:17–43:4, 142:24–143:1; 149:6–8, 17:2–3; 148:19–149:1; *see* Ex. R–10 at 7 [20].) As a result, Prairie State failed to identify loose ribs located in each of the three entryways and five of the six crosscuts that its miners had rockdusted. (Exs. S–4(a), S–8 at 2.) In sum, loose ribs posing a high degree of danger to miners were located in numerous places those miners were required to work and travel. *See* discussion *supra* Part V.A.2.

Regarding the obviousness of the violation, upon entering the Main North Intake area, Inspector Hatcher found before him a significant unsupported rib that, when scaled down, covered half the entryway. (Tr. 38:19–41:2, 54:3–17.) The unsupported piece of rib Hatcher discovered was 15 feet long, seven feet high, and up to a foot thick. (Exs. S–5, S–6.) The operator’s subsequent examination uncovered nine roof and rib hazards that required scaling. (Tr. 69:7–75:4, 120:19–121:3.) Given the number and size of the discovered hazards, these underlying conditions were obvious to a reasonably prudent miner in the area. Similarly, these obvious hazards make Prairie State’s failure to conduct a pre-shift examination obvious. The date boards in the Main North Intake section compounded the obviousness of the missing pre-shift examination, as all but two date boards contained no DTIs whatsoever. (Tr. 77:14–78:24, 111:17–112:9.)

Nevertheless, Prairie State asserts that its failure to perform a pre-shift examination was not obvious because the escapeway entry in the examination book suggested a pre-shift examination had been completed for the entire area. (Resp’t Br. at 2–3, 10–14.) In support, Prairie State points to Welch’s testimony, asserting that he believed in good faith a pre-shift examination had been performed. (*Id.* at 2–3, 13–14.) Prairie State further argues that because the violation was not obvious, the operator did not know and did not have reason to know that it had failed to conduct a pre-shift examination. (*Id.* at 13–14.)

Welch testified that he mistakenly believed the escapeway examination entry in the aboveground examination book showed a full pre-shift examination had been performed for the Main North Intake area. (Tr. 194:4–198:1.) Although Rees did not specifically recall his June 25 shift, he stated that he would have reviewed the recorded escapeway examination. (Tr. 168:10–169:16.) Rees suggested that based on the escapeway exam book entry he would not have believed a pre-shift examination of the North Main Intake area was necessary. (Tr. 170:23–171:10.) In contrast, however, MSHA Investigator Bretzman and Prairie State’s Bertelsman, who conducted the Main North Intake escapeway examination, testified that any reasonable miner would have understood from the entry that a full pre-shift examination had not been completed for the Main North Intake area. (Tr. 116:13–20, 142:15–144:22.) I credit the testimony of Bretzman and Bertelsman and determine that a reasonable shift manager should have known that the escapeway examination in the examination book did not mean the mine examiner had conducted a full pre-shift of the section. *See also* discussion, *infra*, Part V.B. Accordingly, both Welch and Rees’s readings of the escapeway examination entry were unreasonable.

Furthermore, any confusion created by the escapeway examination’s listing was created by Prairie State’s insufficient policy. At the time of the violation, Prairie State kept its pre-shift examination records in the same column as its on-shift escapeway examination records. (Tr. 17:2–3, 148:19–149:1; Ex. S–3.) The Commission has recognized that a lack of obviousness

does not mitigate an operator's negligence when the operator's actions caused the violation to be less obvious. *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1200 (Oct. 2010) (rejecting operator's argument that violative condition was not obvious because operator had clear control over an obstruction's removal). Here, Prairie State had clear control over its procedures for recording pre-shift and on-shift examinations. The operator chose to keep these records in the same column, despite the risk of confusing the mine's supervisors and thus endangering the lives of miners working in unexamined areas. Indeed, Prairie State's new manager, Welch, sent three miners with minimal experience to work in an area with significant unidentified hazards. If I am to believe any actual confusion occurred due to the escapeway exam book entry, Prairie State does not merit sympathy for maintaining poor recordkeeping that allowed such a mistake to happen. The missing pre-shift examination was obvious, and Prairie State reasonably should have known that it needed to conduct a full examination of the Main North Intake area prior to sending miners there to rockdust. *See San Juan Coal Co.*, 29 FMSHRC 125, 134 (Mar. 2007) (considering whether an operator "reasonably" should have known of a violation when analyzing the operator's knowledge of the violation).

With regard to the violation's duration, any amount of time a miner spends in an unexamined portion of a mine is prohibited, unless the miner is a certified examiner. 30 C.F.R. § 75.360(a). Here, an examination was only conducted after the violation was discovered and an order issued by Inspector Hatcher. However, the pre-shift violation lasted for less than one shift.⁸ Accordingly, I determine that the duration of the violation is neither a mitigating nor aggravating factor.

In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 17. Here, the record provides no evidence of any abatement efforts made prior to the order's issuance. In terms of being a mitigating factor, therefore, I afford it no weight.

Prairie State exposed miners to dangerous mine conditions by failing to conduct the required pre-shift examination. The unexamined area was extensive, covering over a 5,200-foot area, and posed risks to miners at each entryway they traveled. Prairie State's examination records in the aboveground book made it obvious that no pre-shift examination occurred, and thus Prairie State should have known of the violation. Despite prior warnings, Prairie State again failed to comply with the pre-shift requirement, leading the inspector to issue this withdrawal order. Although the duration of the violation and the operator's abatement efforts do not necessarily weigh in favor of either party, the notice that greater efforts were required, the

⁸ The violation began when Prairie State failed to conduct the required pre-shift examination. *See Jim Walter Res., Inc.*, 28 FMSHRC at 602. Prairie State should have conducted the pre-shift examination by the start of the third shift at 10:30 p.m. (*See* Tr. 156:4–24.) Inspector Hatcher issued Order No. 8440269 at 3:15 a.m., nearly five hours into the third shift, and withdrew the miners from the area until Prairie State examined the area. (Ex. S–8 at 1; Tr. 47:4–6.) The violation, therefore, lasted at least four hours and 45 minutes. *See Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979) (finding unwarrantable failure where violative accumulations had existed for less than one shift).

operator's knowledge of the violation, the extent, danger and obviousness of the violation, and all the facts and circumstances considered as a whole support a finding of aggravated conduct.

Accordingly, for Order No. 8440269 I conclude that Prairie State's violation of section 75.360(a) was an unwarrantable failure to comply with a mandatory health or safety regulation. For the same reasons explained above, I also conclude that Prairie State was highly negligent in failing to conduct a pre-shift examination.

B. Section 110(c) Liability

The Secretary seeks separate civil penalties against shift managers Rees and Welch for their conduct in connection with Order No. 8440269.⁹ To hold either Rees or Welch liable under section 110(c) of the Mine Act, the Secretary must prove that each miner (1) knew or had reason to know that Prairie State needed to conduct a pre-shift examination; and (2) failed to have the required examination performed before sending miners into the area. *See Kenny Richardson*, 3 FMSHRC at 16.

1. Rees – Section 110(c) Liability

The Secretary argues that Rees had reason to know an examination needed to be performed in the area. (Sec'y Br. at 21.) In support, the Secretary asserts that Rees's belief that the escapeway examination listed in the mine's aboveground book showed the entire work area had been pre-shifted was unreasonable. (*Id.* at 21–22.) The Secretary further asserts that Rees failed to act by neither ordering the pre-shift examination during his shift nor alerting Welch to perform a supplemental examination before workers were sent down to perform rockdusting. (*Id.* at 21–22.) The Secretary notes that Rees normally had the opportunity to speak to Welch prior to the midnight shift about conditions in the mine and any needed examinations. (*Id.* at 21.) The Secretary asserts that Rees's behavior resulted in exposing miners to danger and therefore amounts to reckless disregard. (*Id.* at 22.)

Rees claims he was not in a position to know that a pre-shift examination of the area was needed. (Resp't Br. at 18.) Rees asserts he should not be held liable under section 110(c) because he did not know when or where the rockdusting would occur. (*Id.*) Rees also implied the escapeway examination recorded in the mine's examination book meant that the area had undergone the required pre-shift examination. (Tr. 170:23–171:3.)

⁹ In their post-hearing brief, Respondents Rees and Welch again assert that the 110(c) civil penalties in this case should be dismissed because of MSHA's delay in completing its section 110(c) investigation. (Resp't Br. at 18–19.) On August 26, 2015, I issued an Order Denying Respondents' Motion to Dismiss 110(c) Dockets based on the same argument. Docket Nos. LAKE 2015-130 and LAKE 2015-144, unpub. order at 1–4 (Aug. 26, 2015) (ALJ). Given the Secretary's non-frivolous explanation for his delayed investigation and Respondents' failure to show they were prejudiced by the delay, I determined that the 110(c) dockets should not be dismissed. (*Id.*) Because Respondents have not presented any new evidence regarding this issue, my prior determination stands.

Prairie State superintendent Jackson left the authority to order examinations and assign examiners solely to the mine's shift managers. (Tr. 104:5–10, 105:2–7, 167:14–168:5.) Rees, the second shift mine manager, has 31 years of mining experience and is considered a very knowledgeable mine manager. (Tr. 172:14–15; 122:13–17.) On June 25, 2012, Jackson instructed Rees in a written note to haul dust to the Main North Intake during the second shift. (Ex. R–8(a).) Jackson's instructions directed Rees to a map but did not specifically indicate when miners would rockdust.¹⁰ (*Id.*; Tr. 173:8–14.) However, rockdusting typically occurred during the third shift, which was a maintenance shift. (Tr. 193:14–17.) Rees directed his miners to set up the equipment in the Main North Intake area. (Tr. 105:18–25, 177:7–11, 212:15–213:1; Exs. S–4 at 1, R–10 at 6 [17].)

A reasonable miner with Rees's experience would be familiar with the mine's normal work routine and would have known that the rockdusting equipment would likely be used in the area where it was set up. Inspector Hatcher learned from Welch that Jackson at 10:00 p.m. instructed him to rockdust in the Main North Intake area where Rees had set up the rockdusting equipment. (Ex. R–10 at 6 [15–17].) Rees ended his shift at 1:30 a.m. (Tr. 190:5–7, 139:19.) Rees therefore had the opportunity to talk with Welch about the third shift's assignment to rockdust the area and use the equipment Rees had set up. Based on these facts, I find Rees reasonably should have known rockdusting would occur in the Main North Intake section during the subsequent third shift. Accordingly, Rees should have known an examiner needed to perform a pre-shift examination of the area prior to that shift.

Given this knowledge, Rees was responsible for ordering the pre-shift examination of the areas in the Main North Intake that Jackson scheduled to have rockdusted for the oncoming third shift. (Tr. 105:2–13, 167:20–168:5.) Because Rees was responsible for ordering pre-shift examinations for the next shift, he normally reviewed the third shift's pre-shift examination report to see what his examiners entered into the book. (Tr. 168:10–169:16.) This review typically occurred toward the end of his shift when he returned aboveground from the mine. (Tr. 169:4–6.) The third shift's pre-examination report on the night of Hatcher's inspection had no pre-shift examinations listed for the Main North Intake area.¹¹ (Ex. S–3.)

Rees maintains he did not believe a pre-shift examination of the area was necessary because the aboveground examination book showed that an examiner examined the Main North Intake escapeway during that night's second shift. (Tr. 170:23–171:3.) However, special investigator Bretzman and examiner Bertelsman both testified that an experienced mine manager would know that escapeway examinations were limited to only the escapeway route.

¹⁰ Although Jackson's instructions mentioned a map, the map was no longer available at hearing, and Rees did not recall whether it was attached to the instruction sheet. (Tr. 183:2–184:3.) Nevertheless, Rees had the equipment delivered to the proper area. (Tr. 105:18–25, 177:7–11; Exs. S–4 at 1, R–10 at 6 [17].)

¹¹ Although the report listed an examination for the Main North Intake escapeway, the escapeway examination was not a pre-shift examination, but an on-shift examination. (Tr. 142:20–143:1.) At that time, Prairie State's practice was to list its on-shift escapeway examinations in the same section as its pre-shift examinations. (Tr. 17:2–3; 148:19–149:1.)

(Tr. 116:13–20, 142:15–144:22.) In fact, Bertelsman conducted a portion of the Main North Intake escapeway examination that day and only followed the normal route of the escapeway during such examinations unless a shift manager instructed him otherwise. (Tr. 134:12–18, 135:12–20.) According to Bertelsman, unless an examination was part of a routine daily duty, mine examiners only examined areas upon a shift manager’s request. (Tr. 134:11–18.) The Main North Intake area was not a normal travel area and thus was not routinely pre-shifted. (Tr. 203:23–204:5, 214:3–6.) In order to have a pre-shift examination performed in the Main North Intake, Rees therefore would have had to specifically ordered an examiner to conduct one. Rees did not order any examiners to perform such a pre-shift examination. (Tr. 186:19–25.)

Given this evidence, it was not reasonable for Rees to believe a pre-shift was performed for the Main North Intake on June 25. Accordingly, I do not credit Rees’s testimony regarding the escapeway examination book entry based on his inconsistent statements. Rather, I credit Bretzman and Bertelsman’s testimony and determine that Rees, an experienced mine manager, should have known the escapeway examination was not a pre-shift examination and did not include the areas outside the escapeway route.

As the second shift manager, part of Rees’s duties entail checking the examination books for hazards and other abnormalities and bringing them to the attention of the third shift manager, Welch. (Tr. 169:25–170:20.) When Rees had reason to know an examiner needed to perform a supplemental examination during the next shift, he normally would tell the oncoming shift manager. (Tr. 170:4–20.) In particular, Rees would discuss anything out of the ordinary, such as “equipment out of place or whatever.” (Tr. 169:22–170:20.) Such conversations allowed the managers to tie up any loose ends left from the previous shift. (*Id.*) Rees usually had ample opportunity to speak with Welch, as both managers were at the mine for four and one-half hours from Welch’s arrival at 9:00 p.m. until Rees ended his overlapping second shift at 1:30 a.m. (Tr. 190:5–7, 139:19.) Indeed, on the night of Hatcher’s inspection, Rees spoke with Welch at some point during their overlap. (Tr. 187:1–4, 190:5–7, 139:19.) Rees had delivered rockdusting equipment to an infrequently traveled area of the mine. Yet Rees never put the pieces together to inform Welch that a full pre-shift examination had not been performed for the Main North Intake and that a supplemental examination was necessary. (Tr. 185:18–21.)

The Mine Act demands a high level of care from mine supervisors. *See Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997). Given the evidence before me, I determine that Rees had a duty to either order a pre-shift examination or alert Welch that a supplemental examination was necessary. By neither conducting a pre-shift examination nor informing Welch that he needed to perform a supplemental examination, Rees failed in his responsibility to pass the baton to the oncoming shift and ensure that the necessary safety precautions took place before the third shift began work. A simple, brief conversation about each manager’s work assignments would have revealed that miners were headed to an unexamined work area, blind of the hazards that could be lurking therein. That simple conversation did not take place.

I therefore conclude that Rees should have known that a pre-shift examination was necessary for the Main North Intake area before the third shift on June 25, 2012. By neglecting to either order the pre-shift himself or inform the third shift manager that a supplemental examination was necessary, Rees failed to act as required by the Mine Act to protect miners.

Rees's inaction exposed miners to serious hazards. A simple discussion with Welch would have avoided such a dangerous situation. Given the danger presented and the ease of the solution, I conclude that Rees exhibited a serious lack of reasonable care constituting more than ordinary negligence. Accordingly, Rees engaged in aggravated conduct and is liable under section 110(c) of the Mine Act.

2. Welch – Section 110(c) Liability

The Secretary argues that Welch had reason to know an examination of the Main North Intake area needed to be performed and that Welch's reliance on the recorded escapeway examination was unreasonable. (Sec'y Br. at 23.) The Secretary asserts that Welch knew the escapeway examination was limited to the escapeway route and failed to act by not performing a supplemental examination of the other areas. (*Id.*) The Secretary claims that Welch exhibited reckless disregard in exposing miners to danger. (*Id.*)

In contrast, Welch asserts that he should not be held liable under section 110(c) because he reasonably believed the required examination had been performed. (Resp't Br. at 20.) Welch argues that his belief that the escapeway examination covered the entire work area was reasonable because the mine's examiners routinely listed pre-shift examinations by general location, rather than specific location. (Resp't Br. at 20–22; Tr. 195:7–17.) Welch also claims he was inexperienced as a mine manager, having only been in that position for a month at the time of the violation, and performed his duties in good faith to the best of his ability. (Resp't Br. at 20–22; Tr. 189:11–14.)

Upon arriving at the mine around 9:00 p.m. prior to the start of the third shift, Welch reviewed his work orders, which included Jackson's instructions to rockdust the Main North Intake. (Tr. 189:24–190:4, 190:5–7.) Jackson's written instructions were detailed about the area needing rockdusting, specifying exact entries and crosscuts. (Ex. R–8(b).) Welch subsequently checked the pre-shift examination book to see whether an examiner had examined the area where rockdusting was going to occur. (Tr. 194:14–18.) Welch saw that the second shift mine examiners had examined the Main North Intake escapeway and incorrectly concluded that the examination covered the entire area to be rockdusted. (Tr. 194:22–195:14.) However, most of the entries and crosscuts Jackson specified in Welch's instructions were outside of the Main North Intake escapeway. (Ex. S–4.)

Though a few examination book entries describe general areas, such as "Third North Construction Area," nearly all of the entries describe areas with specificity, listing particular entryway numbers, travelways, and belts. (*See* Exs. S–3, R–2(a), R–2(b).) Although Welch had only been a mine manager for one month before the violation, he had 17 years of mining experience. (Tr. 209:6–8.) Moreover, Welch obtained his mine examiner's papers before he began working in Prairie State's safety department in 2010. (Tr. 208:8–209:5.) Thus, Welch had significant experience, particularly in mine safety and in performing examinations.

A reasonably prudent mine manager would know that escapeway examinations do not include the areas outside the escapeway route. (Tr. 122:23–123:9.) If Welch was unfamiliar with Prairie State's examination procedures, as a mine manager he had a duty to inquire and know

about those practices, as they are fundamental to protecting the safety of the miners who work under him. Indeed, Welch had opportunities to do so before sending miners underground to rockdust. Not only did Welch speak to his superior, Superintendent Jackson, that evening, he could have checked with Rees, a more seasoned shift manager, about whether a pre-shift examination in the Main North Intake area had occurred. (Tr. 187:1–4, 190:5–7, 139:19, 213:2–7, 219:9–15.) Given the facts before me, I determine that Welch’s reliance on the Main North Intake escapeway examination as a pre-shift examination was unreasonable. Consequently, I determine that Welch should have known an examination of the area had not been performed.

Despite his reason to know an examination was necessary, Welch did not conduct a supplemental examination of the area during his shift. (Tr. 46:25–47:2, 197:21–198:1.) As a result, Welch sent miners down into an area that had not been examined and contained serious hazards. I therefore determine that Welch failed to act in protecting those miners.

Welch’s mistaken belief that the area had undergone a pre-shift examination does not satisfy the high duty of care required of mine supervisors. Welch knew or had reason to know an examination of the work area had not been performed, and he failed to act by not ordering a supplemental examination before miners began working in the area. Welch exhibited a serious lack of reasonable care by sending miners into an unexamined area and exposing them to serious danger. Accordingly, I conclude that the Secretary has also proven Welch engaged in aggravated conduct and is liable under section 110(c) of the Mine Act.

VI. PENALTY

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). These same section 110(i) factors are also applicable when assessing penalties under section 110(c) cases. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). In the section 110(c) context, the “relevant inquiries include whether the penalty will affect the individual’s ability to meet his financial obligations and whether the penalty is appropriate in light of the individual’s income and net worth” but should “not include the size of the mine [or] . . . the penalties levied against the corporation.” *Id.* at 1764–65.

A. Prairie State’s Penalty

The Secretary has proposed that Prairie State pay a penalty of \$2,000.00 for Order No. 8440269, the minimum penalty for an unwarrantable failure violation under section 104(d)(1). 30 U.S.C. § 110(a)(3)(A). Nothing in the record suggests that the proposed penalty is inappropriate for the size of Prairie State’s business, and the parties have stipulated that the proposed penalty will not affect Prairie State’s ability to remain in business. (Ex. S–1.) Additionally, nothing suggests that Prairie State failed to make a good faith effort to achieve rapid compliance with the safety standard after Inspector Hatcher issued the order. In fact, Prairie

State has since changed its examination recording procedures in order to help eliminate any possible confusion as to whether a pre-shift examination has been conducted in the mine. (Tr. 149:2-8; Ex. R-11.)

On the other hand, I have upheld the Secretary's S&S, unwarrantable failure, and negligence designations. Such conclusions ordinarily support the Secretary's proposed penalty. In addition, I considered the mine's history of violations concerning this safety standard. (Exs. S-2, S-7.) MSHA cited Prairie State for another violation of section 75.360(a) less than one month prior to the issuance of Order No. 8440269. (Ex. S-7.)

Prairie State's systemic failure to ensure that required examinations took place at the mine placed miners in grave danger, putting them at risk of serious injury. Prairie State had direct control over training its managers on the mine's examination recording procedures; yet it put in charge a new shift manager who apparently did not know how to read the examination book properly. Superintendent Jackson then gave written instructions to both Rees (second shift) and Welch (third shift) and was in the best position to know when work was to be done and when pre-shifts should be ordered. Yet Jackson not only failed to communicate adequately with Rees about work to be done on the third shift that would trigger a pre-shift examination, he also failed to adequately oversee Welch, a new shift manager, thus raising serious questions about the operator's procedures. These failures of Prairie State's management warrant an increased penalty. Given the gravity of the hazardous conditions found, coupled with Prairie State's failure to coordinate and supervise adequately its shifts to ensure compliance with examination requirements, I determine that a higher penalty is appropriate for Prairie State's unwarrantable conduct. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$4,000.00.

B. Steven B. Rees's Penalty

The Secretary has proposed that Rees pay a penalty of \$1,500.00 under section 110(c). Rees did not present evidence regarding his ability to meet his financial obligations or his individual income and net worth. Rees' failure to either conduct a pre-shift examination or inform the oncoming shift manager an examination was needed resulted in a violation of the pre-shift standard that was S&S, highly negligent, and an unwarrantable failure. However, no evidence in the record shows that Rees has engaged in any past violative conduct. The Secretary did not prove Rees's action or inaction was intentional. Nonetheless, the facts and circumstances establish that Rees failed to meet his high duty of care. Accordingly, I conclude a penalty smaller than the Secretary's proposal is appropriate in this case. Thus, I assess a civil penalty of \$500.00 against Rees under section 110(c).

C. Michael Welch's Penalty

The Secretary has proposed that Welch pay a penalty of \$1,500.00 under section 110(c). Welch did not present evidence regarding his ability to meet his financial obligations or his individual income and net worth. Welch's failure to act resulted in a pre-shift violation that was S&S, highly negligent, and an unwarrantable failure. His mistake in this case was objectively unreasonable and resulted in a serious hazard to miners. However, the absence of intentional

misconduct and the fact Welch had only been a manager for a short period before the violation occurred suggests some leniency is appropriate. In addition, the record contains no evidence demonstrating Welch's involvement in any past violative conduct. In light of the above criteria, I conclude a penalty smaller than the Secretary's proposal is appropriate in this case. Thus, I assess a civil penalty of \$500.00 against Welch under section 110(c).

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8440269 is **AFFIRMED**. The section 110(c) liability of Steven B. Rees and Michael Welch is **AFFIRMED**. Prairie State is **ORDERED** to **PAY** a civil penalty of \$4,000.00 within 40 days of the date of this decision. Steven B. Rees is **ORDERED** to **PAY** a civil penalty of \$500 within 40 days of this decision. Likewise, Michael Welch is **ORDERED** to **PAY** a civil penalty of \$500 within 40 days of this decision.¹²

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/ivn

¹² Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 22, 2016

CLINTWOOD ELKHORN MINING
COMPANY, INC.,
Contestant,

v.

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

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

v.

CLINTWOOD ELKHORN MINING
COMPANY, INC.,
Respondent.

CONTEST PROCEEDING

Docket No. KENT 2011-0041-R
Citation No. 6660595; 10/14/2010

Mine ID: 15-16734

CIVIL PENALTY PROCEEDING

Docket No. KENT 2011-0515
A.C. No. 15-16734-240621

Mine: Clintwood Elkhorn II

DECISION ON REMAND

Appearances: Matthew S. Shepherd, Esq., U.S. Dept. of Labor, Office of the Solicitor,
Nashville, TN, for the Petitioner,

Melanie Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC,
Lexington, KY, for the Respondent.

Before: Judge L. Zane Gill

This case is before me on remand by the Commission. Docket No. KENT 2011-0041-R was the subject of an expedited hearing held on October 19, 2010. The hearing took place 13 days after the events that led to Citation No. 6660595 and five days after the citation was issued. At the close of the Secretary's evidence, Clintwood Elkhorn Mining Co., Inc., moved for dismissal of Citation No. 6660595 and three other citations and orders that are not at issue here. The dismissal was granted, and only the dismissal of Citation No. 6660595 was appealed to the Commission.

In its decision, the Commission found that Clintwood violated 30 C.F.R. § 77.1607(b) because the operator failed to maintain full control of his haul truck while it was in motion. *Clintwood Elkhorn Mining Co., Inc.*, 35 FMSHRC 365, 370 (Feb. 2013). Citation No. 6660595 was remanded to me to determine whether the violation was significant and substantial, whether it was an unwarrantable failure to comply by the operator, and to assess an appropriate penalty. *Id.* at 371. After the remand, the record was reopened, a supplementary evidentiary hearing was held on October 15, 2014, in Pikeville, Kentucky.¹

Findings of Fact²

Clintwood operated a coal preparation plant in Pike County, Kentucky. *Clintwood Elkhorn Mining Co., Inc.*, 32 FMSHRC 1880, 1882 (Dec. 2010)(ALJ Gill). A steeply graded haul road, Coal Haul Road A, ran from the prep plant to a nearby coal mine operated by Hubble Mining. *Id.* at 1882-83; Tr.II 255:10-12.³ Clintwood owned the mineral rights to the coal that Hubble mined. Clintwood leased the mine property to Hubble to mine the coal, and contracted with Hubble to purchase the coal it mined. (Ex. R-3; Tr.I 38:17-19; Tr.II 239:19-21; Tr.II 240:5-7) Hubble contracted with Tattoo Trucking to haul the coal it mined to Clintwood's prep plant using Coal Haul Road A. (Tr.I 38:23- 39:1) Clintwood also owned Coal Haul Road A and leased it to Hubble. (Tr.II 240:8-10)

On the morning of October 6, 2010, Shane Bishop, an employee of Tattoo Trucking, was hauling coal in a Mack 800 haul truck on Haul Road A from the Hubble mine down to Clintwood's prep plant. 32 FMSHRC at 1882-84. On his ninth trip down to the prep plant, Bishop encountered mine equipment occupying the road. (Tr.I 187:2-17) He braked and waited for the equipment to clear and then continued on his way. (Tr.I 187:20 – 188:2) While descending the hill, Bishop heard a loud sound from the truck engine. He attempted to shift

¹ The contest docket was consolidated with the related penalty docket KENT 2011-0515.

² These findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

³ Tr.I refers to the hearing transcript from 2010 and Tr.II refers to the hearing transcript from 2014.

gears, the engine died, and the brakes failed.⁴ (Tr.I 187:20 – 188:2; Tr.I 188:12-17; Tr.I 203:1-5; Tr.I 204:1-5; Tr.II 60:13-20) The truck accelerated down Haul Road A about 100 to 150 feet before crashing through a berm and a utility pole at the base of the hill. 32 FMSHRC at 1884. The truck rolled onto its passenger side, where it came to rest with its front axle suspended over the 30-foot drop-off to the prep plant's dump area. (Tr.I 32:12-23) Bishop suffered only an abrasion and some bruising, despite not wearing his seatbelt. 32 FMSHRC at 1884. He was taken to a hospital emergency room, examined by a doctor, and released without treatment. *Id.*

Preliminary Matter: Jurisdiction

At the close of the evidentiary hearing in 2014, Clintwood moved to dismiss the case and requested the citation be vacated. I declined to rule on the record, and directed the parties to brief the issue. Clintwood argued that MSHA did not have jurisdiction to issue Citation No. 6660595 because Clintwood was not an “operator” of Tattoo’s truck. (Resp. Br. at 1) Clintwood further argued that its relationship with Tattoo was too tenuous for it to be an operator vis-à-vis Tattoo’s violation.⁵ *Id.* at 4.

The Secretary countered that Clintwood was an “operator” as defined by Section 3(d) of the Mine Act, 30 U.S.C. § 802(d). (Sec’y Br. at 5-6) Further, the Commission had already determined that Clintwood violated Section 77.1607(b),⁶ and that Clintwood misinterpreted the law. (Sec’y Br. at 5; Sec’y Reply Br. at 2) The Secretary argued that the test to determine whether Clintwood was an “operator” was whether Clintwood had “substantial involvement” with the mine, not with the truck. (Sec’y Reply Br. at 2) I agree with the Secretary.

In *Berwind Natural Res. Corp.*, the Commission held that the definition of “operator” must be resolved on a case-by-case basis using a “totality of the circumstances” test to determine whether the “entity has substantial involvement *with the mine*.” 21 FMSHRC 1284, 1293 (Dec. 1999)(emphasis added). The resulting Commission guidance is to “evaluate the participation and involvement of the entity in the mine’s engineering, financial, production, personnel, and health and safety matters to determine whether that entity qualified as an operator under the Act.” *Id.*

There is no dispute here that Clintwood owned and operated the coal preparation plant. Clintwood owned the mineral rights to the coal that Hubble mined and leased the property to Hubble to mine the coal. Clintwood also owned the land under Coal Haul Road A and leased it to Hubble. The accident happened on this road.

⁴ The circumstances of the engine and brake failure will be discussed in more detail below.

⁵ Clintwood argued that it did not have a contractual relationship with Tattoo Trucking, did not own the truck that was involved in the accident, did not employ the truck driver, and the truck was not in its supervision or control. (Resp. Br. at 4)

⁶ Despite the Secretary’s argument, subject matter jurisdiction can never be waived. Fed. R. Civ. P. 12(h)(3).

According to the agreement between Clintwood and Hubble, Hubble was responsible for mining the coal and transporting it to Clintwood's prep plant. (Ex. R-3, §§ 1.2, 3.1) Clintwood retained the right to use Coal Haul Road A and required Hubble to have a transportation plan for the haul road. *Id.* at §§1.4, 1.10. Additionally, Clintwood retained the right to enter the mine and inspect "any [...] aspect of [Hubble's] operations," and required its consent prior to Hubble subcontracting out any work required by the contract. (*Id.* at §§ 1.15, 12.2)

Hubble contracted with Tattoo Trucking, the owner of the truck involved in the accident, to haul the coal mined at Hubble along Coal Haul Road A to the Clintwood prep plant. (Tr.II 52:15-21) Each production shift, Tattoo's trucks, about 12 to 15 of them, were repeatedly loaded with coal at the Hubble mine, driven down the haul road to Clintwood's prep plant, where the loads were weighed and dumped. The trucks were then driven back up the haul road to the mine for their next load. (Tr.II 31:3-9; Tr.II 354:5-6)

Clintwood had a financial relationship with the Hubble mine arising from its ownership, lease, and contractual relationships. Clintwood also retained the authority to inspect the Hubble mine, and to approve all subcontractors who performed any work under the contract. The same Hubble contractors hauled and dumped the coal from the Hubble mine at the Clintwood prep plant, deepening the relationship between the prep plant, the mine, and the contracting parties. Regarding production, although Clintwood accepted coal from multiple mines, all of the coal produced at the Hubble mine was hauled to the Clintwood prep plant. Based on the totality of the circumstances, I find that Clintwood was an "operator" and subject to MSHA's jurisdiction because it had substantial involvement with the Hubble mine.⁷

Moreover, Clintwood stipulated that it operated the Clintwood prep plant, (Joint Prehearing Rep., Stipulation 1). The citation alleges that the violation occurred at the prep plant. Bishop lost control of his truck on Clintwood's haul road, crossed over Clintwood's main road, hit Clintwood's berm, and nearly fell into Clintwood's dump site. Therefore, by virtue of its stipulation, Clintwood was an operator for purposes of the violation, and Bishop lost control of his vehicle on Clintwood's property.

⁷ Clintwood also argued that the area where the accident occurred was a private way appurtenant to the mine, and therefore, not within MSHA jurisdiction. (Resp. Br. at 4-5) Even if the haul road was a private way appurtenant to the mine and under the control of the mine, the truck in question was used in mining activities, and was under MSHA jurisdiction. *See Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc., et. al*, 573 F.3d 788, 793-97 (D.C. Cir. 2009); *See Youngquist Brothers Rock, Inc.*, 36 FMSHRC 2492, 2493-97 (Sept. 2014) (ALJ Gill); 30 U.S.C. § 802(h)(1)(B),(C).

Citation No. 6660595

Inspector Robert Bellamy⁸ issued Citation No. 6660595 to Clintwood, alleging a violation of 30 C.F.R. § 77.1607(b). The Commission concluded that Clintwood violated the standard. The regulation states that “[m]obile equipment operators shall have full control of the equipment while it is in motion.” 30 C.F.R. § 77.1607(b). Section 77.1607(b) is a mandatory safety standard. The citation alleges:

On 10/06/2010, the contract driver of a loaded coal haulage truck failed to maintain control of the truck. The truck ran away down the mine coal haulage road, crossed the main prep plant access road and entered the prep plant stockpile before stopping. Overloading of the truck contributed to the driver losing control. This event caused exposure to employees from other mines, vendors and prop plant employees using the main access road and employees at the prep plant to a potentially fatal accident. The estimated weight of the loaded truck was 50,200 lbs. over the Gross Vehicle Weight Rating (GVWR) recommended by the manufacturer based on the average weight tickets for the previous eight loads for this truck on this date. Clintwood Elkhorn was aware that the trucks hauling to this prep plant are routinely overloaded and did nothing to stop this practice. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. S-12

The citation alleges that an injury occurred, the injury could reasonably be expected to be fatal, the violation was significant and substantial, one person was potentially affected, and the level of negligence was high. *Id.*

Negligence and Unwarrantable Failure

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

[R]ecognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the

⁸ At the time of the hearing, Bellamy had been working at MSHA for approximately twenty-four years and had conducted approximately 30 fatal accident investigations and numerous nonfatal accident investigations. (Tr.I 107:25 – 108:9)

relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Jim Walter Res. Inc., 36 FMSHRC 1972, 1975 (Aug. 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702. (Aug. 2015); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). “Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly ‘mitigating’ circumstances. Instead, the Judge may consider the totality of the circumstances holistically.” *Brody Mining, LLC*, 37 FMSHRC at 1702. Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

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

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“*R&P*”); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski).

The Secretary alleged high negligence and unwarrantable failure, and argued that Bishop’s truck was overloaded at the time of the accident, that the overload contributed to the accident, that Clintwood Elkhorn was aware that the trucks hauling to its prep plant were routinely overloaded, and it did nothing to stop this practice. (Sec’y Br. at 9-13; Ex. S-12) The Respondent argued that the Secretary did not prove that the vehicle was overloaded, did not prove that even if it were overloaded, the overload caused the accident, and that it was driver error that caused the accident because the truck ran out of fuel. (Resp. Br. at 7-14) It must be noted that the standard relates to Bishop losing control over his vehicle while it was in motion, not whether something caused or contributed to the accident.

The Secretary's evidence and argument at the 2010 and 2014 hearings focused largely on establishing an evidentiary link between Gross Vehicle Weight Ratings (GVWR)⁹ and the alleged consequences of overloading. The Secretary tried to convince the court that Bishop's truck was overloaded based on load records that showed loads in excess of the GVWR, and that the resulting overload contributed to the accident.¹⁰ The Secretary argued that overloading puts more strain on the brakes and can cause brake fade. (Tr.II 190:10 -191:10) This argument appears to be one of first impression. Neither the Mine Act nor the regulations defines "overload" or describes how MSHA determines that a truck is overloaded.

To prove high negligence, the Secretary attempted to show that Bishop's truck was overloaded by reference to an objective measure of what the truck could presumably safely haul -- the GVWR for a Mack 800 haul truck. However, Bishop's Mack 800 truck had been modified from the manufacturer's specifications to haul larger loads. (Tr.II 57:20 -58:16) Thus, the manufacturer's stated GVWR was practically useless to establish a proper load limit for Bishop's truck. The Secretary attempted to prove that the weight he proffered as the maximum load GVWR was for Bishop's modified truck. However, the Secretary's witness was unable to do anything more than speculate about the actual GVWR for Bishop's modified truck. His speculation was based on an inspection of seven or eight Mack 800 series trucks, but he never tested the actual haul limits or possible overload ratings of any of the trucks. (Tr.II 186-190; Tr.II 202:22 – 203:4; Tr.II 207:9-17) As a result, the Secretary failed to prove what the GVWR was for Bishop's truck, even assuming that the GVWR was relevant or a reliable means of determining overloading.¹¹ Since there was no baseline for comparison, the Secretary could not use the weight tickets for Bishop's truck from the previous eight loads before the accident to establish a pattern of overloading.

Even assuming the Secretary proved that Bishop's truck was overloaded, and further assuming that when a truck is overloaded it is harder to brake, I cannot find that the high negligence designation was appropriate. Bishop lost control of his truck because of driver error.

William Griffith, the owner of Tattoo Trucking, testified that driver error caused the brakes to fail and the truck to run away. Bishop allowed the truck to run out of fuel, which prevented it from restarting when he attempted to shift gears after the engine died. (Tr.II 26:18-25; Tr.II 60:21-24; Tr.II 66:17 – 67:2) This is consistent with Resp. Ex-5 and Griffith's testimony that there was no fuel leaking from the truck as it lay on its side after running through the berm and overturning. Further, the fuel tank was empty when the truck was inspected after the accident. (Tr.II 61:1-9; Tr.II 62:15 – 63:23)

⁹ The GVWR is assigned by the truck's manufacturer and is the maximum weight the manufacturer recommends that a truck can haul. (Tr.II 114:16-21; Tr.II 115:17-21)

¹⁰ The inspector testified that it was not MSHA's policy to issue a citation if a truck was overloaded past the GVWR, but MSHA considered loads in excess of the GVWR an aggravating factor for negligence and the unwarrantable failure analysis. (Tr.II 128:10-23; Tr.II 129:6-10)

¹¹ I need not discuss the notice issues with MSHA using GVWR as a threshold standard for overloading, or using it for enhanced enforcement.

At the time of the accident, Bishop had been driving for Tattoo Trucking for approximately five months. This was his first job working for a trucking company. (Tr.I 183:4-9) He did not have a commercial driver's license. (Tr.I 183:10-16) Based on Bishop's and Griffith's testimony, it was Bishop's inexperience that caused him to lose control of the truck. Bishop's truck ran out of fuel, causing the engine to make a loud noise, and when Bishop tried to shift, the engine stalled and died, which resulted in brake failure and loss of control. When an engine dies, as it did here, the steering and brakes do not work. (Tr.II 64:2-8) Normally, the jake brake, or engine brake, will still work even if the truck runs out of gas. However, the truck must still be in gear. (Tr.II 785:12-17) Here, since Bishop shifted the truck out of gear, the jake brake did not work either.

Bishop was driving on an empty tank. Instead of coasting down the hill, as an experienced driver would have done, he attempted to shift into another gear, which caused the engine to quit. A reasonably prudent person familiar with driving such haul trucks would not have allowed the truck to run out of gas, and would not have shifted out of gear. However, this is not where the analysis ends.

It is well settled that under the Mine Act, an operator is strictly liable for violations of the Act and mandatory standards committed by its employees. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (Aug. 1982) ("SOCCO") (citing *Allied Products Co. v. Fed. Mine Safety & Health Review Comm'n*, 666 F.2d 890 (5th Cir. 1982); *American Materials Corp.*, 4 FMSHRC 415 (March 1982); *Kerr-McGee Corp.*, 3 FMSHRC 2496 (November 1981); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (January 1981)). However, the imputation of a rank-and-file miner's acts to an operator departs from strict liability under certain circumstances. The negligence of a rank-and-file miner is not attributable to an operator for the purposes of negligence designations, unwarrantable failure determinations, and penalty amounts. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (Aug. 1982) ("SOCCO"); *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995). If "a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1462 (emphasis in original). The record indicates that at the time of the hearing, Clintwood did not supervise trucking operations at Hubble, did not issue directions to truck drivers at Hubble, and did not have authority to discipline truck drivers while they were at Hubble. (Tr.II 232:17 – 233:2)

Additionally, Tattoo gave its employees annual training (Tr.II 48:14-21), and since Bishop had been employed with Tattoo for only five months at the time of the hearing, he was "recently" trained. Clintwood did offer Tattoo's employees training, but Griffith could not recall if his drivers took advantage of the offer. (Tr. 49:3-9)

I cannot find Clintwood liable for Bishop's negligence as a rank-and-file miner. Therefore, I find that there was no negligence attributable to Clintwood. Additionally, I cannot find an unwarrantable failure to comply by the operator because there was no aggravating conduct constituting more than ordinary negligence.

Gravity

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

Inspector Bellamy designated this violation as injury “occurred;” the referenced injury could reasonably be expected to be a fatality; it was significant and substantial; and one person was potentially affected. (Tr.II 101:1-5) Clintwood argued that there was no “injury,” therefore, an injury did not “occur.” (Resp. Br. at 15) The Secretary argued that Bishop was injured because he received an abrasion and bruising. (Sec’y Reply Br. at 12)

The Commission stated in *Freeman* that the term “injury” is not defined in the Mine Act or regulations, but the ordinary meaning of the word is “an act that damages harms, or hurts” or “hurt, damage, or loss sustained.” *Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578-9 (July 1984)(quoting *Webster’s Third New International Dictionary (Unabridged)* 1164, (1978)). This plain meaning of “injury” has been used by the Commission and its ALJs in numerous decisions. Here, Bishop suffered a “hurt” or “damage” because he sustained an abrasion and bruising. Therefore, an “injury” occurred.

Bellamy designated the injury as reasonably expected to result in a fatality because this type of accident -- a runaway truck -- could have resulted, and had resulted, in fatalities in the past. (Tr.II 101:7-14) The fatality designation not only pertained to the driver of a runaway truck, but could also affect a pedestrian miner struck by a runaway truck. *Id.*

I find that an injury occurred; it could reasonably be expected to be a fatality; and, one person was potentially affected.

Significant and Substantial

The citation was designated by the Secretary as significant and substantial (“S&S”). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is

applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”)

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

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

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

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

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

The first and fourth prongs of the *Mathies* test have been met. There was a measure of danger to safety – a discrete safety hazard – which arose from Bishop losing control of his truck as it was coming down the steep haul road. This hazard could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

A runaway 40- to 60-ton truck carrying a full load down a steep haul road is extremely dangerous to the driver of the truck and to other miners on foot or to other mining equipment in the area. Before hitting the berm and landing on its side, Bishop's truck crossed over Clintwood's main access road. There was a reasonable likelihood that Bishop's truck could have struck a person or a piece of equipment on the haul road, could have struck a miner or a piece of equipment while crossing the prep plant's main road, could have crashed and fallen into the prep plant's dump site, or Bishop himself could have been thrown from the cab of the truck – all of which could reasonably result in a fatality. (Tr.II 108:13 – 109:2; Tr.II 154:18 – 155:11; Tr.II 155:19 – 156:4) I find that the Secretary proved by a preponderance of the evidence that significant and substantial designation was warranted here.

Penalty

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

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

In this case, Clintwood's history of violations is not an aggravating factor, however Clintwood is a moderate sized operator, controlled by a large entity. (Tr.II 93:17 -94:3) I found no negligence. Clintwood stipulated that the proposed penalty would not affect its ability to remain in business. (Joint Prehearing Rep., Stipulation 7) The gravity of the violation was very serious, because the runaway truck could have resulted in a fatality. At the initial hearing, there was a conflict whether Clintwood demonstrated good faith in abating the violation because the parties could not agree to an accident plan, but I consider Clintwood's abatement response appropriate. Considering all of these factors, I find that a penalty of \$1,140.00 is appropriate.

WHEREFORE, it is **ORDERED** that Clintwood pay a penalty of **\$1,140.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 6660595 be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 24, 2016

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

v.

CONSOL PENNSYLVANIA
COAL COMPANY LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2015-41
A.C. No. 36-07416-365834

Docket No. PENN 2015-42
A.C. No. 36-07416-365834

Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Anthony M. Fassano, Esq., U.S. Department of Labor, Philadelphia, PA,
for Petitioner

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, PA, for
Respondent

Before: Judge Lewis

These cases are before the Court upon two petitions for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). PENN 2015-42 contains one section 104(d)(2) order, and PENN 2015-41 contains 15 section 104(a) citations, two of which remain at issue.¹

A hearing in this matter occurred on Tuesday, July 14, 2015, in Pittsburgh, Pennsylvania. The Court heard testimony from three witnesses: Jason Tungate, MSHA Inspector; Chris Demidovich, maintenance supervisor; and Shane Jobes, outside shop and maintenance foreman. Two witnesses, Christopher O'Neil, assistant manager of maintenance for Pennsylvania operations, and Brian Henry, a hoistman, were allowed to provide testimony at subsequent depositions.

During the hearing, the parties entered the following joint stipulations into evidence:

1. At all relevant times, Respondent is/was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as "the Mine Act"), 30 U.S.C. § 803(d), of the Enlow Fork Mine.

¹ The parties settled 13 of the 15 citations contained in PENN 2015-41. That settlement is approved by the Court in this Decision and Order, and the terms of the settlement are contained in Appendix A.

2. The Enlow Fork Mine, at which the Citations and Order in contest were issued, is an underground coal mine subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individual whose name appears in Block 22 of the Citations and Order in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations and Order were issued.
5. The Citations and Order at issue, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of Respondent on the date and place stated therein.
6. Payment of the total proposed penalty of the citations and order at issue in this matter will not affect Respondent's ability to continue in business.
7. Consol demonstrated good faith in the abatement of the alleged violations.
8. The parties stipulate to the authenticity of the exhibits referenced in the parties Prehearing Statements (with all amendments thereto) but not to the relevancy or the truth of the matters asserted therein. The Secretary has not stipulated to the authenticity of Mr. Shane Jobes's notes, which were provided to Counsel for Consol and Solicitor Anthony Fassano on July 13, 2015.
9. With respect to Citation No. 7018138 Respondent admits that a violation of 30 C.F.R. § 50.10(d) occurred, and that the Citation was properly designated as "Unlikely" and Non-S&S.
10. With respect to Citation No. 7018138, the Citation was properly designated as "Lost Workdays or Restricted Duty."
11. With respect to Citation No. 7018138, the Citation was properly designated as "1 Persons Affected."
12. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "Unlikely" and Non-S&S.
13. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "Lost Workdays or Restricted Duty."
14. With respect to Citation No. 7018139, if a violation of 30 C.F.R. § 77.1401 occurred, the Citation was properly designated as "1 Persons Affected."
15. With respect to Order No. 7018140, Respondent admits that a violation of 30 C.F.R. § 77.1400-4 occurred.

16. With respect to Order No. 7018140, the Order was properly designated as “1 Persons Affected.”

JX-1 at 1-3.²

Given the stipulations of the parties, the remaining issues before the Court are: (1) whether Citation No. 7018138 was properly designated as high negligence; (2) whether, as set forth in Citation No. 7018139, there was a violation of 30 C.F.R. § 77.1401, and, if so, whether it was properly designated as low negligence; (3) whether Order No. 7018140 was properly designated as reasonably likely, significant and substantial, high negligence, and an unwarrantable failure; and (4) the appropriate penalty for each violation.

I. Summary of the Testimony

Enlow Fork Mine (“the Mine”) is an underground coal mine operated by Consol Pennsylvania Coal Company LLC (“Consol”) and is located in western Pennsylvania. The Mine is considered a large coal mine by the Mine Safety and Health Administration (“MSHA”). *See* Sec’y of Labor’s Petition for Assessment of Civil Penalty, Ex. A, No. PENN 2015-41; 30 C.F.R. § 100.3, Table I. The mine has two slope hoists, the Enlow slope hoist and the Oak Springs slope hoist. Tr. 97-98. The areas are located approximately six miles apart, which takes 10-15 minutes to drive. Tr. 82, 163. This proceeding concerns the Oak Springs slope hoist.

A slope is a diagonal entrance to a mine created by blasting into the ground until the operator of a mine reaches the coal seam. Tr. 150. The slope at Oak Springs is 2,700 feet long, and has a grade of 16 degrees. Tr. 157. Coal is transported out of Enlow Fork Mine up the Oak Springs slope via a belt, and the coal is then transported over land back to the Enlow area. Tr. 150.

A slope hoist consists of several parts, including the personnel or “brakeman” car, the rope, the spool, the motor, the gearbox, the driver, and the operator station. It is used to bring personnel and supplies into and out of the mine. Tr. 97, 99. The Mine has three hoists: the Enlow slope hoist, a vertical hoist, and the Oak Springs slope hoist. Tr. 98. The Enlow slope hoist is similar to the Oak Springs slope hoist, and the vertical hoist is effectively an elevator for the transport of personnel only. *Id.*

The Oak Springs slope hoist is the most technologically advanced of the three hoists. Tr. 98. The hoist is equipped with a Programmable Logic Controller (PLC) and a Hoist Safety Supervisor (HSS). RX-K at 6-7. Both systems monitor the operation and condition of the hoist as well as monitor each other. Tr. 65-67. If the systems detect a problem with the hoist (a “fault”), it will show up on a screen in a control room, and the HSS and PLC have the ability to stop the car slowly (controlled stop fault) or abruptly (emergency stop fault). Tr. 117-18, 120-21. The screen also shows the speed, torque, and position of the car for each fault. Tr. 122.

The Oak Springs slope hoist took approximately two years to construct. Tr. 27-28. It was built by a contractor, Frontier-Kemper Lake Shore (“Frontier-Kemper”). Tr. 102. Before a slope

² Joint exhibits will be cited as “JX,” the Secretary’s exhibits will be cited as “GX,” and Respondent’s exhibits will be cited as “RX.”

hoist can be put into operation, it must be commissioned. Tr. 100. In this instance, the commissioning ceremony (or “witness test”) was held on April 1, 2014, at which Frontier-Kemper performed a series of tests for Consol, the Pennsylvania Bureau of Deep Mine Safety, and MSHA. Tr. 60-62. If the tests are successful, the state of Pennsylvania approves the hoist for use, and the hoist gets a certification number. O’Neil Dep. 11.³ There is no equivalent requirement for MSHA to certify or approve the hoist prior to operation. *Id.*

Consol’s maintenance supervisor, Chris Demidovich, was present at the ceremony.⁴ Tr. 98-99. He stated that they tested the max load for the hoist, 107 tons, by assembling 100 tons to add to the weight of the brakeman car. Tr. 103. Once the hoist was loaded, they sent it down the slope shaft and hit the brakes to make sure the brakes would hold the weight. *Id.* They also demonstrated overtravel and overspeed safety features. *Id.* Demidovich testified that at the end of the ceremony on April 1, 2014, “[e]verybody seemed to be satisfied that [Consol] was okay to put this hoist in operation.” Tr. 104.

According to Christopher O’Neil, Consol’s Assistant Manager of Maintenance for the Pennsylvania Operations, Frontier-Kemper had additional items to complete after the ceremony.⁵ O’Neil Dep. 12; RX-E. Some of the items were from Consol, and some were from the State. *Id.* Consequently, O’Neil stated, the commissioning was not finished until the items were completed and he signed the “Commission Certification.” *Id.* He signed the Commission Certification,

³ The transcript from Christopher O’Neil’s deposition will be cited as “O’Neil Dep.” The transcript from Brian Henry’s deposition will be cited as “Henry Dep.”

⁴ At the time of the hearing, Chris Demidovich had worked for Consol at Enlow Fork Mine for thirteen and a half years. Tr. 94. During that time period, he had been a mechanic, maintenance foreman, maintenance supervisor, and senior electrical supervisor. Tr. 94-95. Prior to working at Enlow Fork, he performed maintenance at Dana Mining for four years. Tr. 95. He holds a Pennsylvania bituminous mining certification as a miner and is a Pennsylvania certified electrician. Tr. 95. In March and April of 2014, Demidovich was a maintenance supervisor. Tr. 96. His responsibilities included overseeing other mechanics, performing preventative maintenance, and ensuring generally that machines were in safe operating condition and permissible. Tr. 96.

⁵ O’Neil had worked for Consol Energy since graduating from college in 1995. O’Neil Dep. 4. He worked as an industrial engineer, shift maintenance foreman, electrical engineer, longwall maintenance coordinator, master mechanic, general maintenance mechanic, and assistant manager of maintenance. O’Neil Dep. 4. When he was deposed, he was currently working as the assistant manager of maintenance of the Consol Pennsylvania operations. O’Neil Dep. 4, 5. He has a B.S. in electrical engineering technology and a Master’s in Business Administration. O’Neil Dep. 5. He also has a federal electrician certification and an MSHA instructor certification for Part 48. O’Neil Dep. 5. As assistant manager of maintenance, his duties and responsibilities included involvement with underground, surface, and plant equipment, including the purchase of equipment and assuring written specifications are met. O’Neil Dep. 6. With reference to hoist installation, O’Neil acts as a liaison between Consol and the State of Pennsylvania, including facilitating the approval process. O’Neil Dep. 6.

which states that “[t]he owner hereby [sic] accepts the above listed hoist system as complete, and assumes operational and maintenance responsibilities of the system,” on April 7, 2014. RX-C. Additionally, as of the commissioning ceremony, Frontier-Kemper had not trained Consol’s hoist operators. O’Neil Dep. 13. They were trained on April 3, 2014. Tr. 106; RX-F at 17. The Commissioning Report also states that “[t]he commissioning consisted of successful completion of the included checklists, required periodic tests, and training of 16 Consol hoistmen.” RX-F at 3.

Chris Demidovich, hoistman Brian Henry, and 15 others attended the training on April 3, 2014.⁶ Tr. 105-06; Henry Dep. 12; RX-F at 17. During the training, the Frontier-Kemper representative instructed the miners on the operation of the hoist, all of the fault screens and panels in the hoist building, the brake systems, and how to check the safety features. Tr. 106-07; Henry Dep. 12. There were no discussions about daily examinations at that time. Henry Dep. 12. Demidovich, however, had one of his mechanics record that a weekly examination had been performed, since Frontier-Kemper covered all of the safety devices on the brakeman car and the mechanic was trained. Tr. 109. On April 3rd and April 4th, Consol recorded weekly electrical examinations of the slope car, the slope pump, and the slope rope.⁷ RX-D at 1.

After the training, Brian Henry was sent from the Enlow slope to the Oak Springs slope to watch the belts that ran up the slope with the hoist. Henry Dep. 13. During this time, Henry operated the Oak Springs slope hoist to hoist a fire boss so that he could examine self-contained self-rescuer stations along the slope. *Id.* He was never directed to hoist the fire boss, but the fire boss asked if the hoist was operational, and to Henry’s knowledge, it was, so he pulled up the fire boss. *Id.* Henry could not recall who told him that the hoist was operational. *Id.* at 14. Shane Jobs and Inspector Jason Tungate also testified that another fireboss was pulled out of the mine by another hoist operator.⁸ Tr. 48; Tr. 160.

⁶ Brian J. Henry also gave testimony by deposition subsequent to the hearing. Henry had been employed as a hoistman at Enlow Fork Mine since 2013 and had worked for Consol for 10 years. Henry Dep. 7-8. His past jobs included mine operator, mine side bolter, loader operator, and motorman. Henry Dep. 7. He was a certified hoistman and had been paid on an hourly basis at the time of the written citation and order. Henry Dep. 7-8.

⁷ A slope pump is a pump midway down the shaft that must be examined to make sure it is in permissible condition. Tr. 110.

⁸ Shane Jobs was the outside shop and maintenance foreman at Enlow Fork Mine at the time of the hearing and in April of 2014. Tr. 149. He had worked at Enlow Fork Mine since September 2013, and before that was with engineering and maintenance groups with Consol since 1998. Tr. 147. He started working for Consol at the Bailey Prep plant in 1991, just after he graduated from West Virginia Institute of Technology, where he received a bachelor’s in engineering. Tr. 149. His duties included repairing broken parts in the maintenance shop and sending away broken parts to get repaired. Tr. 149.

(continued...)

Between April 3, 2014, and April 10, 2014, three issues occurred on the Oak Springs slope hoist. The first, an overspeed glitch, occurred between April 3rd and April 8th. Tr. 123. When the hoist was operated at 600 feet per minute, the HSS showed a fault because the brakeman car's overspeed control and the hoist drum's overspeed control were not communicating. *Id.* To fix the issue, Consol turned one of the controls "maybe five feet a minute lower than the HSS [to] kind of give it a little bit of a buffer so those two could try to keep in sync with each other. *Id.* At 600 feet per minute, they could run the hoist for a little while without having a fault, then they could hit the "fault reset and acknowledge button" to run it again, but when they slowed down the hoist to 300 feet per minute, "it worked flawlessly." Tr. 123-24.

The second issue, a kink in the hoist's rope, occurred on April 7th. Tr. 138. Brian Henry, the hoistman, dropped dollies, or flat cars used to haul equipment, into the mine using the Oak Springs slope hoist. Henry Dep. 15. When the dollies reached the bottom of the hoist, Henry surmised at the hearing, the motormen hooking up to the dollies "must have pushed the car up the hill too far and it kinked the rope." Henry Dep. 16. At that same time, Demidovich was with Chris O'Neil and Tom Muser, maintenance managers, at Oak Springs, looking at the conveyor belt system, and O'Neil and Muser wanted to stop by the hoist house to look at the hoist remote building. Tr. 125. When they exited the hoist house, the brakeman car had returned to the top of the rope, and they noticed the kink in the rope. Tr. 125; Henry Dep. 16. Demidovich called Ketchem Construction to reterminate the rope. Tr. 138. They were at the Enlow slope portal that day, however, so Ketchem could not perform the work until April 8th. *Id.* The hoist was taken out of service until Ketchem "reterminated" the rope on April 8th by removing the 25 feet that contained the kink and reconnecting the rope to the brakeman car. O'Neil Dep. 19; Tr. 126.

The third issue occurred on April 8th when the three overtravel devices failed to stop the brakeman car from crashing into the shiv wheel at the top of the hoist. After Ketchem reterminated the rope, they asked Tom Nelms, a hoist operator, to do a full test run of the hoist before they left the area. Tr. 126. When he did so, he failed to drop the brakeman car far enough into the mine to resync the system with the reset switch. *Id.* Because he did not resync the system, the HSS and PLC systems, which set a limit for how far up or down the slope hoist the brakeman car can go, did not register that the rope was now 25 feet shorter than it was prior to the retermination. *Id.* Consequently, when the car reached the top of the hoist, the systems did not register that it had done so. Regardless, a third overtravel device, a "mechanical limit switch," should have stopped the car short of running into the shiv wheel. This switch failed, too. Tr. 52.

⁸ (...continued)

MSHA Inspector Jason Tungate appeared and testified on behalf of the Secretary. Tungate's duties as an inspector included the inspection of hoists and elevators at mines and approving shaft and slope plans. Tr. 21. He had worked for 5 years with MSHA as an electrical specialist and an additional 4 years as a general inspector. Tr. 21-22. Prior to working for MSHA, Tungate had worked as an underground electrician, mine supply contractor, and general laborer. Tr. 24. He possessed an Associate's degree in electrical engineering. Tr. 25. Tungate was familiar with Enlow Fork, having both inspected and worked at the mine. *Id.*

The mechanical limit switch consisted of a spring-loaded, foot-long rod that, when struck by the car, should have caused the car's brakes to engage. Tr. 127. However, the inch-wide plate on the car "barely caught the end of the rod, so when it shoved the rod down . . . and it went past the rod, the rod popped itself back up in a neutral position." *Id.*

On Thursday, April 10, 2014, Inspector Tungate conducted an inspection at the Oak Springs portal. Tr. 28. His supervisor had told him that an inspector at the mine on April 9, 2014, was made aware of issues with the hoist, so Tungate's supervisor sent Tungate to look at the hoist. Tr. 84. The cited conduct and conditions were discovered by Tungate during the April 10th inspection.

Inspector Tungate issued Citation No. 7018138 for a violation of 30 C.F.R. § 50.10(d), which requires that a mine operator contact MSHA within 15 minutes if a hoist sustains damage that endangers an individual or interferes with use of the hoist for more than 30 minutes. *See* GX-5. He marked the cited condition as unlikely to result in a lost workdays or restricted duty injury or illness, not significant and substantial, but resulting from high negligence, with one person affected. *Id.* At the hearing, Tungate stated that he designated the citation as high negligence because the mine knew, because they have other hoisting systems at the mine, that "if there's something that causes the hoist to be down for longer than 30 minutes they have to report it." Tr. 57.

Inspector Tungate issued Citation No. 7018139 for a failure to have automatic stop controls in violation of 30 C.F.R. § 77.1401. *See* GX-3. He designated this violation as unlikely to result in a lost workdays or restricted duty injury or illness, not significant and substantial, and the result of low negligence, with one person affected. *Id.* Tungate designated the negligence as low because the violation occurred during a test run and the failure to reset the sensors, which caused two of the automatic stop controls to fail, was inadvertent. Tr. 54.

Finally, Tungate issued Order No. 7018140 due to Consol's failure to record daily examinations between April 1, 2014, and April 9, 2014. 30 C.F.R. §75.1400-4 requires that daily examinations be recorded after each examination is completed and be retained for one year. *See* GX-1. He designated the violation as reasonably likely to result in a lost workdays or restricted duty injury or illness, significant and substantial, the result of high negligence, affecting one person, and an unwarrantable failure to comply with a mandatory safety standard. *Id.* Tungate stated at the hearing that a high negligence finding was warranted, mainly, because the mine took ownership of the hoist on April 1st, and no exams were recorded in the next nine days, even though the hoist was operated by qualified operators and company officials were around the hoist throughout the time period. Tr. 40. When Tungate arrived at the hoist house, additionally, he saw the empty examination book sitting within five feet of the hoist operator on a table or electrical box, with no other books around. Tr. 44.

II. Findings of Fact and Conclusions of Law

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the

testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

A. Citation No. 7018138 Is Properly Designated as High Negligence

Citation No. 7018138 was issued due to a violation of 30 C.F.R. § 50.10(d), which requires the operator to “immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . [a]ny other accident.” The regulations define accident broadly, but it includes “[d]amage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes.” 30 C.F.R. § 50.2(h)(11).

Inspector Tungate issued the citation because Consol failed to report the kink in the rope and the damage caused when the car was pulled into the shiv wheel following retermination of the rope by Ketchem. GX-5.

i. Negligence Determination

Consol has stipulated to the fact of violation for Citation No. 7018138. JX-1, ¶ 9. Consol has also stipulated that the violation was properly characterized as unlikely, non-S&S, that the reasonably likely injury was lost workdays or restricted duty, and that one person would likely be affected. JX-1, ¶¶ 9-11. The only remaining issues with respect to this violation are whether the inspector properly characterized it as being due to high negligence, and the appropriate penalty to be assessed.

The Secretary defines high negligence as requiring that “management knew or should have known of a violation, and there are no mitigating factors.” 30 C.F.R. § 100.3(d), Table X. Respondent urges use of this definition as well. Resp’t Br. 29. Judges, however, are not bound by the Secretary’s definitions of negligence. *Wade Sand & Gravel*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015). The Commission has a broader definition of high negligence, which requires that such a finding result from “an aggravated lack of care that is more than ordinary negligence.” *E. Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Under this definition, “a Commission Judge may find ‘high negligence’ in spite of mitigating circumstances or may find ‘moderate’ negligence without identifying mitigating circumstances.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015).

The Court agrees that the citation was properly characterized as high negligence. Consol is a seasoned operator, and has another hoist and elevator at Enlow Fork Mine. Not only does it know of the responsibility to report accidents, members of mine management had personal knowledge of the damage that occurred and the time that it took to abate the kinked rope. Without reporting accidents, MSHA cannot investigate causes and cannot work to prevent additional accidents.

Respondent argues that the hoist was not being used for production purposes, that Ketchem was directing the hoistman when the car was pulled into the shiv, that the hoist was not a designated escapeway, and that, although the hoistman had pulled firebosses in the car, he was never directed to do so. Resp't Br. 30-31. However, Respondent identifies no basis in the caselaw or regulations that would exempt it from the reporting requirement of § 50.10(d) for any of these reasons, and the Court does not recognize these as mitigating circumstances.

Respondent also asserts that MSHA's designation of Citation No. 7018139 as "low negligence" is inconsistent with a finding of high negligence for this citation. Resp't Br. 32. This assertion is unpersuasive because the negligent conduct that resulted in each violation is completely different. For this citation, a finding of high negligence is warranted because (1) mine management knew of the damage to the rope and the subsequent damage to the shiv wheel, and (2) mine management knew of the requirement in § 50.10(d) by virtue of the fact that the mine has another operating hoist. The negligence that resulted in Citation No. 7018139 was based on the short length of time the condition existed and the fact that the hoistman should have known that the hoist would need to be resynced following the retermination of the rope. The negligence that caused the automatic stop controls to fail is irrelevant and unrelated to the mine's negligence in failing to report the resulting accident to MSHA.

ii. Penalty Determination

When assessing civil penalties, the Commission considers the factors contained in section 110(i) of the Mine Act. These six 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). The parties stipulated that the penalties as assessed by the Secretary would not affect Respondent's ability to continue in business, and Respondent demonstrated good faith in abating the violations. JX-1, ¶¶ 6-7.

The Court finds that Respondent had no history of violations of this type, the operator was highly negligent, and the gravity, with injury unlikely to occur, was somewhat low. Based on these factors, the Court finds that the Secretary's proposed penalty is appropriate. Accordingly, a civil penalty of \$362.00 is assessed against Respondent for Citation No. 7018138.

B. The Conduct in Citation No. 7018139 Violates 30 C.F.R. § 77.1401, and the Citation Is Properly Designated as Low Negligence

i. The Fact of Violation

The Secretary has carried his burden of proof, establishing that Respondent violated 30 C.F.R. § 77.1401 by a preponderance of the evidence. The standard requires that "[h]oists and

elevators shall be equipped with overspeed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when fully loaded.” 30 C.F.R. § 77.1401.

The undisputed record discloses that the Oak Springs slope hoist was equipped with three stop controls: the PLC system, the HSS system, and the mechanical switch. Tr. 127. All three, however, failed to stop the car, and the car crashed into the shiv wheel. Tr. 52.

The Secretary interprets § 77.1401 as requiring that “the hoist be equipped with automatic stop controls capable of stopping the hoist.” Sec’y Br. 20. Consequently, those that fail to stop the hoist do not satisfy the plain meaning of the regulation. *Id.* It is unclear, however, whether the adjective phrase “capable of stopping the elevator when fully loaded” modifies only the noun “brakes,” or both “brakes” and the series “overspeed, overwind, and automatic stop controls.” Because the regulation is ambiguous, the Secretary’s reasoned interpretation is entitled to deference unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

Regardless of whether the Secretary’s interpretation of the standard is correct, automatic stop controls by their very nature must be able to stop the car in order to comply with the regulation, and the Court finds Respondent’s arguments to the contrary unpersuasive. Respondent argues that the hoist was “equipped” with automatic stop controls, and it therefore met the standard, even though they were not functioning due to operator error. Resp’t Br. 27.⁹ This is a distinction without a difference, because the operator’s actions caused the stop controls to no longer function, and controls that do not automatically stop a brakeman car from running into the shiv wheel at the top of the hoist do not meet the definition of “automatic stop controls” for the purposes of § 77.1401. If non-functioning stop controls met the standard, the standard would be rendered useless since they would not achieve the purpose for which they are intended—actually stopping the car.

To the extent that operator error played a role in the brakeman car’s failure to stop, such a factor may be taken into consideration in determining the degree of negligence but not as to whether a violation of § 77.1401 had taken place. Additionally, the mechanical switch would not have been capable of stopping the car even in the absence of error. Regardless of whether the

⁹ Respondent’s “plain language” argument is reminiscent of that rejected by the Commission in *Watkins Engineers & Constructors*, 24 FMSHRC 669 (July 2002). The operator in that case argued that 30 C.F.R. § 56.15005, which requires that “[s]afety belts and lines shall be worn when persons work where there is danger of falling,” does not require that “such belts and lines be used or ‘tied off.’” 24 FMSHRC at 681. The Commission disagreed with this reading, and instead cited to its statement in a similar case that “[a]lthough a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the [safety enhancing] purposes of the Part 57 regulations and this standard in particular.” *Id.* at 682 (quoting *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981)) (alterations in original). Similarly, stop controls that are non-functioning and unable to serve the purpose for which they are “equipped” do not meet the requirements of 30 C.F.R. § 77.1401.

hoist operator, who had only been trained a few days earlier, *see* RX-H, had failed to resync the system, none of the automatic stop devices, including the mechanical switch, actually stopped the car when they should have.

ii. Negligence Determination

Given the stipulations of the parties, the gravity of the violation of § 77.1401 was properly designated as “unlikely,” the injury that could reasonably be expected was “lost workdays or restricted duty,” and the violation itself was non-S&S with “1 person affected.” *See* JX-1, ¶¶ 12-14. This Court found nothing in the record to contraindicate said designations, leaving only the question of whether the negligence was properly characterized as “low.”

30 C.F.R. § 100.3, Table X, provides that a finding of low negligence is warranted when “the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.”¹⁰

Respondent was aware that Ketchem had reterminated the rope, so Respondent clearly knew or should have known of the violative condition. However, as noted by Inspector Tungate, the condition had existed for only a few hours. Tr. 54; GX-4. Given that Respondent had acted on constructive knowledge that the hoist car would need to be resynced following retermination so that the systems could accurately measure the rope’s length and the stopping distance, Respondent has not advanced any persuasive argument for a finding of no negligence. *See* 30 C.F.R. § 100.3, Table X (“The operator exercised diligence and could not have known of the violative condition or practice.”). Accordingly, the Court finds that Citation No. 7018139 was appropriately designated as arising from low negligence.

iii. Penalty Determination

The Court finds that Respondent had no history of this type of violation, Respondent is a large operator, Respondent showed low negligence in committing the violation, and the gravity was otherwise low. Considering those factors and the factors stipulated to by the parties, the Court finds that the originally assessed penalty, \$100.00, is appropriate for Citation No. 7018139.

C. Order No. 7018140 Is Properly Designated as Reasonably Likely, Significant and Substantial, High Negligence, and Resulting from an Unwarrantable Failure

Order No. 7018140 was issued to Respondent for failing to record the hoist examination for nine days, from April 1, 2014, to April 9, 2014. GX 1. It is undisputed that during his April 10, 2014, inspection, MSHA Inspector Tungate found that the examination book for the Oak Springs slope hoist was blank. Respondent was unable to produce any records of daily exams for

¹⁰ The Commission has stated that ALJs are not bound by the Secretary’s negligence definitions in Part 100, *see, e.g., Wade Sand & Gravel*, 37 FMSHRC at 1878 n.5, but the Court finds the Secretary’s definitions of low and no negligence to be appropriate in this case.

the time period of April 1 through April 9, 2014. Given such, the parties stipulated that 30 C.F.R. § 75.1400-4 was violated and that this violation affected one person.

30 C.F.R. § 75.1400-4, in reference to daily examination of hoists, provides:

At the completion of each daily examination required by § 75.1400, the person making the examination shall certify, by signature and date, that the examination has been made. If any unsafe condition is found during the examinations required by § 75.1400-3, the person conducting the examination shall make a record of the condition and the date. Certifications and records shall be retained for one year.

i. Significant and Substantial and Likelihood

Well-settled Commission precedent sets forth the standard used to determine if a violation is Significant and Substantial (S&S). A violation is S&S “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984). This determination “must be made at the time the citation is issued ‘without any assumptions as to abatement’ and in the context of ‘continued normal mining operations.’” *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

Since Respondent stipulated to the fact of the violation, and 30 C.F.R. § 75.1400-4 is a mandatory safety standard, the first element of *Mathies* has been proven by the Secretary. The second prong of *Mathies* is also clearly satisfied. The failure to record daily examinations clearly contributes to a discrete safety hazard: hoist operators, miners, or MSHA inspectors may be unaware of unsafe conditions with the hoist that would pose a hazard for transporting men or materials. See Tr. 37-38.

The third element of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in an injury—is also supported by the record and applicable case law. The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury.” *Id.* at

1281. Importantly, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.*

The lack of notice of a possible unsafe condition on the hoist due to the lack of a daily examination record clearly creates a reasonable likelihood that the hazard contributed to will result in an injury. Viewed through the perspective of continued mining operations, the Court assumes that Respondent would continue to fail to record daily examinations. Fire bosses at Enlow Fork Mine would continue to be exposed as they utilized the slope hoist while conducting their preshift examinations. *See* Tr. 39. These preshift examinations take place three times per day, once per shift. Miners traveling in a hoist that had unrecorded unsafe conditions could be thrown about if the hoist moved suddenly or had a violent impact due to a collision or an emergency stop. Tr. 39-40.

The Secretary has also established the fourth and final element of *Mathies*: “A reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies*, 6 FMSHRC at 3-4. Being thrown about in a hoist that is malfunctioning, causing it to overspeed or overtravel, or causing sudden movements or violent impacts, creates a reasonable likelihood that injuries will be of a reasonably serious nature.

Respondent argues an injury was not reasonably likely to occur due to the recording violation because of the redundant safety features and “the significant attention paid to and work conducted on the hoist during the relevant time.” Resp’t Br. 14. However, “the Commission and courts have soundly rejected the argument that additional safety measures should preclude a finding of S&S.” *Small Mine Development*, 37 FMSHRC 1892, 1901 (Sept. 2015); *see also Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) (finding that additional safety measures did not preclude a finding that a fire contributed to by coal dust accumulations would be reasonably likely to result in serious injury). This point is especially important because the safety features that Respondent relies on, which include the PLC, HSS, mechanical switch system, and fault screen, all in some way failed within the first nine days during which the hoist was active. The PLC and HSS failed when the hoist operator did not recalibrate the hoist following the kink in the rope. The mechanical switch failed of its own accord—it would have never stopped the car from crashing into the shiv wheel, regardless of operator error. Finally, the fault screen cannot notify the operator of every issue with the hoist, as demonstrated when it did not identify the kink in the rope as a problem. Henry Dep. 23.

Respondent’s argument that there was “no hazardous miscommunication,” Resp’t Br. 18, is only true in the most technical sense. Brian Henry stated that one of the ways that he would be aware of problems with the hoist on prior trips would be through talking to the hoistman from the prior shift. Henry Dep. 20-21. While operating the Oak Springs slope hoist, he did not remember talking to anybody. *Id.* at 21. In fact, even though he was operating the hoist to pull out firebosses and send dollies into the mine, no one told him whether he was allowed to operate the hoist or not. *Id.* Rather than stating that there was “no hazardous miscommunication,” it appears that there was simply “no communication,” even though Respondent asserts that “significant attention was paid to the hoist by both Frontier Kemper and Consol.” Resp’t Br. 15.

Accordingly, the Court finds that the failure to record examinations was significant and substantial and appropriately designated as reasonably likely. The violation contributed to the hazard that miners would use the hoist with unrecorded and uncommunicated defects and hazards, which would be reasonably likely to cause a jarring stop, either from the automatic stop controls or by running into the shiv wheel. This stop would throw them about the car, resulting in reasonably serious lost workday or restricted duty injuries. The known failures of the safety devices and the admitted lack of communication, additionally, served to make an injury reasonably likely to occur.

ii. Respondent's Failure to Record Examinations Constituted an Unwarrantable Failure

The Commission has determined that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Such a failure may be characterized by the following types of conduct: reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

Manalapan Mining Co., 35 FMSHRC at 293. The Court must consider all relevant factors, the facts and circumstances of the case, and whether mitigating circumstances exist. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

1. The Extent of the Violative Condition and the Length of Time that the Violative Condition Existed

Because this is a daily recordkeeping violation, the extent of the violative condition and the length of the time the condition existed are, in this case, one and the same. Accordingly, the Court will consider these two factors together.

In order to determine the length of time that the condition existed, the Court must determine when the Oak Springs slope hoist was commissioned. The Secretary contends that Respondent failed to record exams for nine days, from April 1, 2014, to April 9, 2014. Respondent, however, asserts that it was not required to perform daily examinations until Monday, April 7, 2014, when Chris O'Neil signed the Commission certification document, RX-

C, which was signed, scanned, and emailed to Jeremy Cundiff, Frontier-Kemper Operations Manager. Resp't Br. 21.¹¹

The Court finds that, by the preponderance of the evidence, the Oak Springs slope hoist was commissioned on April 1, 2014. The cover page of the Commissioning Report from Frontier-Kemper states that the hoist was commissioned on April 1, 2014. RX-F at 1. The "Final Commissioning Checklist" states "Date Completed: 4/1/2014." RX-F at 8. Chris Demidovich was present at the commissioning ceremony on April 1, 2014, and confirmed that "[e]verybody seemed to be satisfied that we [were] okay to put this hoist in operation." Tr. 104. Brian Henry, the hoist operator, similarly stated that he understood the hoist to be operational. Henry Dep. 21. Respondent also recorded weekly electrical examinations of the Oak Spring slope hoist that occurred on April 3, 2014, and April 4, 2014. RX-D at 1. Demidovich confirmed that the electrical exams were performed and recorded. Tr. 109.

Respondent states that Frontier-Kemper continued to perform tests at the Oak Springs slope hoists and even serviced the hoist's brake coil on April 5, 2014. Resp't Br. 16-17; RX-E. These facts are stated to provide evidence for the assertion that the commissioning had not yet occurred. While Exhibit E does show that Frontier-Kemper performed work on April 1st through April 4th, it also states, on the first line, "April 1, 2014 – Commission Testing and Operational Turn-over." RX-E. Exhibit E, instead of supporting Respondent's argument that operation of the hoist had not yet been passed to Consol, provides strong evidence that the commissioning was completed on April 1st.

Additionally, Respondent argues that Frontier-Kemper had not trained the hoistmen until April 3, 2014, so Respondent could not have performed the examinations until then because hoistmen are the ones who perform examinations. Resp't Br. 16. The Court is unconvinced by this argument. Respondent would usually have hoistmen perform daily examinations on the midnight shift at the Enlow slope hoist. Tr. 142. Respondent had no midnight shift hoistmen at the Oak Springs slope hoist, but that does not excuse the responsibility to perform daily

¹¹ At O'Neil's deposition, Respondent moved to admit into evidence two different copies of the Commission certification document, designated Exhibits C and C-1. Exhibit C, containing O'Neil's signature, was offered without objection. That exhibit is hereby admitted. The Secretary objected to the admission of Exhibit C-1, which contained the signatures of both O'Neil and Cundiff, on the basis that the Secretary had not been provided with the exhibit until July 23rd, nine days after the hearing in this case and just one day before the deposition. O'Neil Dep. 15-16. The document differs from the one provided in discovery and the one identified in Respondent's prehearing report. O'Neil Dep. 16. Respondent asserted that the document had been provided to him late, and he offered to provide the email sending him the document. O'Neil Dep. 16. The Court's Notice of Hearing, issued February 24, 2015, stated that "a list of exhibits expected to be introduced" must be provided to the other party and to the Court on or before June 12, 2015. Failure to do so, it warned, may result in that exhibit's exclusion at the hearing. Respondent has offered no good reason why the exhibit was not identified in the prehearing statement since it was available over a year prior to the date prehearing statements were due. Accordingly, the Secretary's objection is sustained, and Respondent's Exhibit C-1 is not admitted into evidence.

examinations. Similarly, Respondent's failure to either (a) train the hoistmen to perform daily exams or (b) direct other miners to perform the daily examinations until hoistmen were trained does not obviate the requirement to perform and record daily examinations.

For the preceding reasons, the Court finds that the Oak Springs slope hoist was commissioned on April 1, 2014. To find otherwise would be to ignore the plain statements of the commissioning report, Consol's own witness, Chris Demidovich, the fact that electrical exams were conducted on April 3, 2014, and the fact that the Oak Springs slope was being operated by Consol hoistmen. The violation was therefore extensive and existed for nine days, a substantial period of time.

2. Whether the Violation Posed a High Degree of Danger

The Court finds that the violation posed a high degree of danger. As the Court stated in its S&S analysis, the Oak Springs slope hoist had several problems during this short time period, a period in which it was being used to transport miners. Respondent argues that there was no hazardous miscommunication, which the Court has already addressed; that none of the conditions were S&S; and that hoist operators would not have even relied on the daily examination for the operation of the hoist. Resp't Br. 23. Insofar as Respondent's argument relies on hoist operators' use of the fault screen or communication with other hoist operators, the Court notes that Brian Henry stated that he did not remember checking the fault screen before operating the hoist, that he would not normally check the fault screen, and that there was no communication with other hoist operators. Henry Dep. 20-21. Hoist operators' failure to use tools, such as the daily examination book, to ensure that the hoist is being operated safely does not mitigate a finding that this violation posed a high degree of danger. Failing to record daily exams leads to exams being missed, contributing to the hazard that the hoist will be operated in an unsafe condition, and miners will be thrown about in the hoist car when it stops suddenly, either due to the automatic stop controls or when it overtravels into the top or bottom of the hoist. Given the problems that had already occurred with the hoist and that it was in use by miners, the violation posed a high degree of danger.

3. Whether the Violation was Obvious

The failure to record exams was obvious, and Respondent should have noticed that exams were not being recorded. First, the physical examination book was lying in the open, within reach of the hoist operator, and it was the same book used for the other hoists, both at Enlow Fork and at other Consol mines. Tr. 44-45. Members of mine management were present at the hoist on most of the nine days on which exams were not recorded. Tr. 158-59. While Respondent argues that the condition was not obvious because of the confusion surrounding the newly-commissioned hoist, Tr. 22, this confusion does not make the empty examination book any less obvious. Respondent's lack of "specific knowledge" does not preclude a finding that the violation was obvious.

4. The Operator's Knowledge of the Existence of the Violation

The inspector testified that Respondent did not know that examinations were not being performed, nor did it know that Frontier-Kemper had stopped performing examinations. Tr. 78-79. The Secretary argues not that Respondent knew of the violation, but that it should have known. Sec'y Br. 20. Accordingly, the Court finds that Respondent did not know of the violation.

5. The Operator's Efforts in Abating the Violative Condition

Respondent, having no knowledge of the violation, could not have attempted to abate the violation, and the Court finds that it made no effort to abate the violation.

6. Whether the Operator Had Been Placed on Notice that Greater Efforts Were Necessary for Compliance

Respondent, as a seasoned operator and as the operator of other slope hoists, was on notice that 30 C.F.R. § 75.1400-4 requires daily examinations to be recorded. Respondent states that the Secretary "adduced no evidence of past similar violations, of conversations regarding daily examinations or notice of any type that would serve to put Consol on notice of the need for greater compliance." Resp't Br. 23-24. In fact, Respondent asserts that "[t]he Secretary presented no evidence that Consol ever had any issue with respect to daily hoist examinations." *Id.* at 24. While this may not hold true in all circumstances, under the facts of this case, Respondent's compliance with the standard at other slope hoists itself demonstrates that Respondent *knew* that failing to record daily examinations would result in noncompliance with the standard. The operator had been placed on notice that greater efforts (than no effort at all) were necessary to comply with the standard.

In sum, although Respondent did not know that exams were not being recorded, the violative condition was "extensive," and exams were not recorded for nine days. The violation posed a high degree of danger, the failure to record the exams was obvious, the operator made no efforts to abate the violation, and the operator had been placed on notice that greater efforts were necessary for compliance.

Accordingly, consideration of the seven factors strongly supports a finding that Respondent's failure to record examinations was an unwarrantable failure to comply with a mandatory standard. None of Respondent's arguments highlighting the miscommunication, lack of actual knowledge, and confusion surrounding the commissioning of the hoist are sufficient to mitigate this finding. While Respondent's conduct was not "willful," that is not a requirement for an unwarrantable failure finding. Here, Respondent's actions constituted reckless disregard, indifference, or a serious lack of reasonable care. Miners were transported in the hoist car, multiple problems occurred with the hoist, and mine management was in the area almost every day. It should have been clear that daily examinations were not being recorded.

iii. Respondent Demonstrated a High Degree of Negligence in Violating § 75.1400-4

As stated in the Court's analysis of Citation No. 7018138, high negligence may be found, in spite of mitigating circumstances, where an operator evinces an aggravated lack of care that constitutes more than ordinary negligence. The Court finds that the violation of § 75.1400-4 was due to high negligence. Respondent was aware that there is a daily examination requirement for slope hoists, mine management was, by Respondent's admission, in the area almost daily, and the empty examination book was in plain sight.

Section 75.1400-4 plainly provides that daily examinations be made, certified, signed, and dated. In the instant case, Respondent failed to record all nine of the daily exams that were required between the time of the hoist's commissioning and the inspection. Tr. 46. Multiple members of mine management were in and around the area. Any of the members of mine management should have noticed that the book in the hoist house was blank. Tr. 37. Inspector Tungate testified that the blank record book was lying in the open, and that it was the same book used by Consol to record daily examinations at its other hoists, including the other hoist at Enlow Fork Mine. Tr. 44-45.

While Respondent's Post-Hearing Brief asserts that the high negligence designation is inappropriate, that statement constitutes the entirety of its argument on that point. *See* Resp't Br. 19-24. The entirety of the argument beneath the applicable heading applies to the unwarrantable failure designation, but, applied to the consideration of whether Respondent showed an aggravated lack of care, Respondent's arguments are similarly unavailing. The Court has found that the commissioning was completed on April 1, 2014, and Respondent's statements about the general confusion regarding responsibilities does not diminish the fact that mine management had multiple opportunities to notice and rectify the failure to record exams, yet failed to do so. Accordingly, the violation noted in Order No. 7018140 is accurately described as being precipitated by high negligence.

iv. Penalty Determination

The parties have stipulated that Respondent abated the violation in good faith and that payment of the fine would not impair its ability to continue in business. JX-1. Respondent is large in size, and does not have a history of this type of violation. The gravity and negligence of the violation were both high. Accordingly, the originally proposed penalty for this violation is appropriate. Respondent is assessed a penalty of \$4,000.00 for Order No. 7018140.

III. Conclusion

The Secretary has proven, by the preponderance of the evidence, each of the issues to be addressed at the hearing. For Citation No. 7018138, Respondent is assessed a penalty of \$362.00; for Citation No. 7018139, Respondent is assessed a penalty of \$100.00; and for Order No. 7018140, Respondent is assessed a penalty of \$4,000.00.

IV. Partial Settlement

The Secretary has also filed a Motion for Decision and Order Approving Partial Settlement, which addresses the 13 settled citations contained in Docket No. PENN 2015-41.¹² The terms of the settlement and the rationale for the settlement of each citation are contained in the table in Appendix A. The Court has considered the representations and documentation submitted in this case, finds that the modifications are reasonable as set forth in the motion to approve settlement, and concludes that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of the partial settlement is **GRANTED**.

ORDER

It is hereby **ORDERED** that Citation Nos. 7018138 and 7018139 and Order No. 7018140 are **AFFIRMED**.

It is further **ORDERED** that Citation Nos. 7027932, 7027716, 7027717, 7027878, 7027718, 7030040, 7030041, 7030042, 7028461, 7028463, and 7030049 are **AFFIRMED** as modified in the Secretary's motion to approve partial settlement, and that Citation Nos. 7028205 and 7028207 are **VACATED**.

Respondent is **ORDERED** to pay a total penalty of \$10,500.00 for Docket Nos. PENN 2015-41 and PENN 2015-42 within 30 days of the date of this decision.¹³

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

¹² Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), the Court strikes paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

¹³ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

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APPENDIX A

Settled and Vacated Citations in Docket No. PENN 2015-41

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
7027932	104(a), § 75.503 (failure to maintain electrical equipment in a permissible manner), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 3 Persons Affected, Moderate Negligence.	\$687.00	\$500.00	<i>Negligence modified to Low.</i> <i>Reduction in penalty.</i> Respondent presented evidence tending to show that the condition had developed after the most recent weekly exam, which occurred seven days earlier. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the negligence may have been less than initially assessed.
7027716	104(a), § 75.380(d)(4)(iv) (failure to maintain a walkway with sufficient width to allow disabled persons to quickly exit the mine in an emergency), S&S, Reasonably Likely, Fatal, 1 Person Affected, Moderate Negligence.	\$540.00	\$375.00	<i>Gravity modified to Lost Workdays or Restricted Duty.</i> <i>Reduction in penalty.</i> Respondent presented evidence tending to show that the obstruction in the walkway would slow, but not prevent, a miner's escape in the event of an emergency. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the expected injury may have been less severe than initially assessed.
7027717	104(a), § 75.403 (failure to maintain the proper percentage of incombustible	\$873.00	\$300.00	<i>Likelihood modified to Unlikely/Non-S&S.</i> <i>Persons Affected modified to 1.</i> <i>Reduction in penalty.</i>

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	content), S&S, Reasonably Likely, Permanently Disabling, 2 Persons Affected, Moderate Negligence.			Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury and the number of persons affected may have been less than initially assessed.
7027878	104(a), § 75.503 (failure to maintain electrical equipment in a permissible manner), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 5 Persons Affected, Low Negligence.	\$425.00	\$300.00	<i>Persons Affected modified to 1.</i> <i>Reduction in penalty.</i> Respondent presented evidence tending to show that the miner operator would likely be the only miner affected in the event of an ignition. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the number of persons affected may have been less than initially assessed.
7027718	104(a), § 75.403 (failure to maintain the proper percentage of incombustible content), S&S, Reasonably Likely, Permanently Disabling, 2 Persons Affected, Moderate Negligence.	\$873.00	\$300.00	<i>Likelihood modified to Unlikely/Non-S&S.</i> <i>Persons Affected modified to 1.</i> <i>Negligence modified to Low.</i> <i>Reduction in penalty.</i> Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources. In addition, Respondent

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
				presented evidence tending to show that the condition would not have been obvious during the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury, negligence, and the number of persons affected may have been less than initially assessed.
7030040	104(a), § 75.605 (failure to clamp a trailing cable to the machine), S&S, Reasonably Likely, Fatal, 1 Person Affected, Moderate Negligence.	\$1,795.00	\$400.00	<i>Likelihood modified to Unlikely/Non-S&S. Negligence modified to Low. Reduction in penalty.</i> Respondent presented evidence tending to show that there was no damage to the cable in question, and that the condition did not exist at the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury and negligence may have been less than initially assessed.
7030041	104(a), § 75.403 (failure to maintain the proper percentage of incombustible content), S&S, Reasonably Likely, Permanently Disabling, 4	\$3,996.00	\$2,313.00	<i>Likelihood modified to Unlikely/Non-S&S. Persons Affected modified to 1. Negligence modified to Moderate. Reduction in penalty.</i> Respondent presented evidence tending to show

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	Persons Affected, Moderate Negligence.			that the area in question did not contain methane or ignition sources. In addition, Respondent presented evidence tending to show that the condition would not have been obvious during the time of the most recent exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury, negligence, and the number of persons affected may have been less than initially assessed.
7030042	104(a), § 75.360(b)(3) (failure to conduct an adequate preshift exam on the working sections), S&S, Reasonably Likely, Permanently Disabling, 4 Persons Affected, Moderate Negligence.	\$1,203.00	\$750.00	<i>Likelihood modified to Unlikely/Non-S&S. Persons Affected modified to 1. Reduction in penalty.</i> This citation was related to Citation No. 7030041, which was a 75.403 violation. As explained above, Respondent presented evidence tending to show that the area in question did not contain methane or ignition sources, and that the condition would not have been obvious during the time of the most recent exam. Based on those arguments, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury and the number

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
				of persons affected may have been less than initially assessed.
7028205	104(a), § 75.1403 (failure to follow a safeguard), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	\$108.00	\$0.00	The Secretary has determined that this violation should be vacated in an exercise of his prosecutorial discretion recognized by the Commission in <i>RBK Construction, Inc.</i> , 15 FMSHRC 2099 (Oct. 1993).
7028461	104(a), § 75.321(a)(2) (failure to maintain the proper level of oxygen), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Low Negligence.	\$100.00	\$100.00	<i>Negligence modified to None.</i> Respondent presented evidence tending to show that the results of its most recent oxygen reading were compliant. Accordingly, the Secretary agreed to modify the citation because the negligence may have been less than initially assessed.
7028207	104(a), § 75.360(b)(1) (failure to perform an adequate exam on beltlines), Non-S&S, Unlikely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	\$108.00	\$0.00	The Secretary has determined that this violation should be vacated in an exercise of his prosecutorial discretion recognized by the Commission in <i>RBK Construction, Inc.</i> , 15 FMSHRC 2099 (Oct. 1993).
7028463	104(a), § 75.1725(a) (failure to maintain equipment in safe operating condition), S&S, Reasonably Likely,	\$540.00	\$300.00	<i>Likelihood modified to Unlikely/Non-S&S. Reduction in penalty.</i> Respondent presented evidence tending to show that the machine in question was using

Citation/ Order No.	Type/Standard/ Gravity	Proposed Penalty	Settlement Amount	Settlement and Rationale
	Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.			double-braided hoses, decreasing the likelihood that the condition would cause the hose to burst. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the likelihood of an injury may have been less than initially assessed.
7030049	104(a), § 75.517 (failure to fully protect a power cable), S&S, Reasonably Likely, Lost Workdays or Restricted Duty, 1 Person Affected, Moderate Negligence.	\$540.00	\$400.00	<i>Negligence modified to Low. Reduction in penalty.</i> Respondent presented evidence tending to show that the condition did not exist at the time of the most recent monthly exam. Accordingly, the Secretary agreed to modify the citation and reduce the penalty because the negligence may have been less than initially assessed.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 31, 2016

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

Petitioner,

v.

AMFIRE MINING CO., LLC,

Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2013-374
A.C. No. 36-09033-330197

Mine: Gillhouser Run Mine

DECISION AND ORDER

Appearances: Kenneth Polka & Jessica R. Brown, Esq., U.S. Department of Labor,
Office of the Solicitor, Philadelphia, PA, for the Secretary

Patrick W. Dennison, Esq., Jackson Kelly, Pittsburgh, PA, for the
Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns two citations (Nos. 7041173 and 7041179) issued against Respondent Amfire Mining Co., LLC. A hearing was held in Pittsburgh, Pennsylvania on December 4, 2014, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

JOINT STIPULATIONS¹

The parties have stipulated to the following:

1. The parties agree that jurisdiction for this matter exists because Amfire Mining Company, LLC, (“Respondent” or “Operator”) was an operator of a mine, as defined in Section 3(d) of the Act, 30 U.S.C. §802(d), and the products of the subject mine entered the stream of commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. §803.
2. Amfire Mining Company, LLC, operates the Gillhouser Run Mine where the citations in contest (hereafter “the citations”) were issued.
3. Gillhouser Run Mine (the “Mine”) is an underground coal mine in Indiana County, Pennsylvania.
4. The Mine produced 255,712 tons of coal in 2013.
5. The Mine produces coal using the continuous miner method.
6. Amfire is an “operator” as defined in §3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Act”), 30 U.S.C. §803(d), at the coal mine at which the citation at issue in this proceeding were issued.
7. Operations of Amfire at the coal mine where the citations were issued in the proceeding are subject to the jurisdiction of the Act.
8. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
9. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
10. True copies of the citations at issue in this proceeding were served on Amfire as required by the Act.
11. The R-17 Assessed Violation History Report is an authentic copy reflecting the Mine’s history of violations and may be admitted as a business record of the Mine Safety and Health Administration.
12. The proposed civil penalty will not affect Amfire’s ability to remain in business.
13. Citation No. 7041173 was issued on January 23, 2013, and citation 7041179 was issued on February 5, 2013, by MSHA Inspector Joseph A. Wagner.

¹ The following stipulations are contained in Joint Exhibit No. 1. Joint exhibits will hereinafter be designated JX followed by a number; the Secretary’s exhibits will be designated as GX followed by a number; and Respondent’s exhibits will be designated as RX followed by a letter. Pages of the official hearing transcript are designated “Tr.” followed by the appropriate page reference(s).

14. Inspector Wagner was accompanied by company representative, Troy Lewarchik, on January 23, 2013.
15. Inspector Wagner was accompanied by company representative, Rich Kinter, on February 5, 2013.
16. Citation No. 7041173 was issued with respect to the Ocenco EBA 6.5 Self Contained Self Rescuers.
17. Citation No. 7041179 was issued with respect to the roof control plan previously approved by MSHA on October 13, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Citation No. 7041173 (SCSRs)

On January 23, 2013, MSHA Inspector Joseph Wagner inspected the Gillhouser Run Mine as part of a quarterly inspection.² Tr. 25-26. During the inspection, Wagner traveled along the 9 South alternate escapeway, which is a belt air course, and served as the primary travelway for everybody going inby and outby of the mine using a rubber tire mantrip. Tr. 26, 27.

Wagner issued Citation No. 7041173 to mine superintendent Norman Gardner³ after he found three Ocenco 6.5 self-rescuers (SCSRs) that had lost pressure on the Damascus

² At the time of hearing, Joseph Wagner had worked as an underground coal mine inspector for MSHA for approximately three and a half years. Tr. 24. He had 10 years of mining experience, working in a variety of jobs underground, including outby supply guy and outby foreman. Tr. 24-25. Wagner had Pennsylvania mine foreman and mine examiner papers, as well as certifications in machine runners and gas detection. Tr. 25. Wagner had previously worked for Amfire. Tr. 50.

³ At the time of hearing, Norman Gardner had been the superintendent and mine foreman at the Gillhouser Run Mine for several years. Tr. 153. Prior to starting at the Gillhouser Run Mine in 2006, he worked for DLR Mining. Tr. 153. Prior to that, he worked for over 19 years at Greenwich Colliers. Tr. 153. He had 42 years of total mining experience. Tr. 153. He has all available state certifications, except electrician, has several certifications from the federal government, and is trained as an EMT. Tr. 153-154.

mantrip.⁴ Tr. 27-28; GX-1. The mantrip was a MAC-8, which carried eight persons. Tr. 68. Therefore, according to the regulations contained in 30 C.F.R. §75.1714-4(b) it was required that there be eight SCSRs on the mantrip. Tr. 68. The mantrip had a total of 12 SCSRs, with three that were non-compliant. Tr. 68-69.

The manufacturer's recommended pressure range for the Ocenco 6.5 SCSR was between 2,500-3,000 pounds per square inch (PSI). Tr. 33.⁵ According to the Ocenco 6.5 instruction manual, the gauge pressure readings should at no time be below 2,150 PSI. Tr. 32; GX-14. Therefore, three of the SCSRs met the manufacturer's removal criteria. Tr. 32. In order to terminate the citation, the Respondent removed the three noncompliant SCSRs. Tr. 69.

At hearing, Wagner referred to photographs he took of the non-compliant SCSRs and testified that the pressure gauge of SCSR number 10120485 was at 1,500 PSI; the pressure gauge of number 10120408 was at 1,400 PSI; and the pressure gauge of number 10120557 was at 1,000 PSI. Tr. 33-34; GX-8. Two of the three noncompliant SCSRs were on the outside box of the mantrip, and one was on the box inside. Tr. 41. Wagner testified that because of the limited room between the mantrip box and the mine roof, the noncompliant SCSRs would be more accessible and may have been utilized first in case of an emergency. Tr. 42-43. Any type of emergency, including an explosion, fire, or inundation, could require use of the SCSRs. Tr. 43. Wagner testified that this posed a problem because if there was smoke, the miners would be using the SCSRs on the mantrip to make it to the surface. Tr. 34.

MSHA rates the Ocenco 6.5 SCSRs as lasting one hour, so that a miner can make it to fresh air. Tr. 34. However, according to Ocenco advertisements, the 6.5 unit provides over 90 minutes of oxygen in demand mode—such as in an escape situation—and up to 8 hours in conservation mode. Tr. 115.

The mine had other SCSRs available in addition to those on the mantrip. Tr. 34-35. Based on the coal seam height of 42-48 inches, MSHA has permitted the caches of SCSRs at Gillhouser Mine to be 3,300 feet apart. Tr. 26, 73, 121. It was presumed that miners could travel this distance in approximately half an hour. Tr. 73. The next cache of SCSRs is approximately 3,000 feet away. The Emergency Response Plan (ERP), required that there had to be a cache of 26 SCSRs every 3,300 feet.⁶ Tr. 157-158. Twenty six SCSRs were required per cache because it

⁴ At Gillhouser Mine, two types of SCSRs are used: the belt-worn Ocenco M-20 and the Ocenco 6.5 in the cache. Tr. 114. The M-20 is lighter and more maneuverable than the 6.5, and miners can keep it on them at all times while running the equipment. Tr. 114-115.

⁵ When the SCSR is within the manufacturer's recommended pressure range, it is sometimes referred to being "in the green." Tr. 33.

⁶ The ERP provides instructions and other relevant materials in case of an evacuation. Tr. 156-157.

was determined that 26 would be the most men that would be underground at any given time, including if the men were “hot seating.”⁷ Tr. 158.

In case of emergency, miners were trained to meet in specific places underground, which were determined by the escapeway plan. Tr. 70. Gillhouser Mine safety representative, Richard Kinter testified that he conducts annual electrical and rescuer training every 90 days.⁸ Tr. 70-71, 127. During this training, Kinter teaches miners how to use the belt-worn rescuers, including performing a manual inspection to make sure everything is in order before donning the SCSR. Tr. 128-129. Kinter believed that his men were well-trained enough so that the non-compliant SCSRs would not have been an issue. Tr. 130-132.

Kinter described the procedures miners were trained to follow in case of emergency. At the first sign of an event, a miner would first use the 10-minute SCSR on his belt in order to get to a one-hour SCSR. Tr. 35, 36, 69. The miner would have to travel a distance of approximately 100-300 feet by either crawling or duck-walking. Tr. 37, 39, 51-52. Assuming that miners can travel approximately 150 feet per minute, it would take the miners approximately 10 minutes to travel the distance from the escapeway caches. Tr. 76. During an emergency situation, smoke may lead to little or no visibility.⁹ Tr. 40. Furthermore, a miner cannot talk while donning an SCSR. Tr. 45-46.

Wagner determined that three persons would be affected because that was how many units were noncompliant. Tr. 47. There was no way to determine how long the violation existed. Tr. 47. Amfire had a policy of preoperational checks on the SCSRs, fire extinguishers, and brakes, and Wagner believed that they should have seen the units during that check. Tr. 48.

⁷ “Hot seating” is the industry term used for when section coal crews switch out at the face. Tr. 158.

⁸ Richard Kinter testified at hearing for Respondent. At the time of hearing, Kinter had worked for Amfire for seven years as a safety representative. Tr. 110. He has worked at Gillhouser Mine, Ednola Mine, Barrett Mine, and Dora Mine. Tr. 111. Prior to that he worked for two years at R&P in a variety of positions including general laborer and miner operator. Tr. 111. Prior to R&P, Kinter worked for 21.5 years with Bethlehem as a general laborer, mine examiner, shuttle car operator, miner operator, temporary face washer, and assistant chief mine operator. Tr. 111-112. Kinter has a Pennsylvania State mine electrician certificate, a Pennsylvania State diesel instructor certificate, a Pennsylvania mine examiner certificate, and he is a certified EMT and MSHA approved instructor and mine rescue instructor. Tr. 112. In January and February of 2013, Kinter was employed as the safety representative for Gillhouser Mine. Tr. 112-113. In this capacity, Kinter was responsible for training miners in self-rescue, accompanying inspectors to accident violation investigation, and filling out tracking sheets on all violations. Tr. 113.

⁹ During a training event that Wagner witnessed, miners told him that they could not see the SCSR gauges because the smoke was too thick. Tr. 40-41.

Kinter testified that he performed an examination on the SCSRs on December 12, 2012. Tr. 117; RX-11. He described the process by which he normally examines the SCSRs. Kinter would pull the rescuer out of the case and inspect the expiration date, whether the seal had popped, whether there was any swelling, whether the bands were in place, whether the gauges were in the correct position, whether there were any cracks or obstructions, and whether there was any bulging in the middle. Tr. 118-119. If an SCSR needed attention, Kinter would remove it and replace it. Kinter testified that during the December 12, 2012 examination he did not find any SCSRs on the MAC-8 that needed to be removed from the mine. Tr. 118.

Kinter testified that the SCSRs with a reading of 1,000 PSI, 1,300 PSI, and 1,500 PSI would have provided “plenty enough oxygen” for a miner to get to the next cache. Tr. 125-126. Kinter further testified that contrary to MSHA’s estimates that the M-20 SCSR only provides 10 minutes of oxygen, he has been able to get 30 minutes of oxygen from one, and 20 minutes with a guy running around an outside parking lot. Tr. 126. He estimated that the 6.5 Ocenco at 1,000 PSI would have provided approximately 30 minutes of oxygen. Tr. 126.

Kinter performed an investigation following the issuance of Citation No. 7041173. Tr. 113. He testified that he has tested the SCSRs at issue and at 2,000 pounds of pressure, they lasted 45 minutes to one hour. Tr. 116. However, his testing was not performed in a smoke-filled environment or in one where miners were crawling out of the mine. Tr. 138-139. Kinter conceded that when a person is under stress he will often breathe heavier, and that under such conditions it may not last as long as his tests indicated. Tr. 139.

ANALYSIS

1. Contentions of the Parties

The Secretary argues that the Respondent violated 30 C.F.R. §75.1714-3(a) by not properly maintaining three of the SCSRs on the mantrip. It encourages this Court to employ the definition of “maintain” that the Commission has used in interpreting other regulations, i.e. “to keep in state of repair, efficiency, or validity: preserve from failure or decline.” *See Secretary of Labor, Mine Safety And Health Administration v. Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011); *Secretary of Labor, Mine Safety And Health Administration v. Sedgman & David Gill, Employed by Sedgman*, 28 FMSHRC 322 (June 2006). The Secretary argues that the three SCSRs violate §75.171-3(a)’s maintenance requirement. Furthermore, the Secretary argues that the violation was S&S because in the case of an emergency, the use of an SCSR without sufficient oxygen would lead to serious injury. The Secretary further argues that the violation was a result of moderate negligence because the Respondent was negligent in allowing three SCSRs to become noncompliant, but their negligence was somewhat mitigated by the fact that none of them were found to have been unsafe at the time of the last inspection.

Respondent argues that it did not violate the regulation by having three SCSRs that were not in the green. Specifically, it argues that the regulation is a performance-based standard that covers only the reasonableness of the operator’s efforts to maintain, test, repair, or keep records. The Respondent argues that a mere existence of SCSRs that were not in the green, without a showing of a defect in the procedures, does not constitute a violation. The Respondent further argues that if the violation did exist, it was not properly designated as S&S because even in the

context of an emergency, it was unlikely miners would use the SCSRs not in the green or that those SCSRs would have run out of oxygen. The Respondent further argues that the inspector's designation of moderate negligence was excessive and that no negligence was proven by the Secretary.

2. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1714-3(a)

On January 23, 2013, Inspector Wagner issued Citation No. 7041173 for a violation of 30 C.F.R. §75.1714-3(a). Section 8 of that Citation, Condition or Practice, reads as follows:

Three of the twelve Ocenco EBA 6.5 Self Contained Self Rescuers provided on the company #4 Mac 8 mantrip, located at survey station 3559 along the 9 South Alternate Escapeway, were not being maintained in a safe operable condition. The gauge on Ocenco SCSR serial number 10120557 was reading approximately 1000 PSI, the gauge on serial number 10120485 was reading approximately 1500 PSI, and the gauge on serial number 10120408 was reading approximately 1300 PSI. The "green" operating range on the Ocenco EBA 6.5 is between 2500 PSI and 3000 PSI.

Standard 75.1714-3(a) was cited 1 time in two years at mine 3609033 (1 to the operator, 0 to a contractor).

GX-1. The Citation was terminated that same day by removing the three SCSRs at issue from the mine. *Id.*

In the instant case, the operator was required to have eight functioning SCSRs on the cited mantrip—one for each miner. Tr. 68. The issue is that in addition to the eight functioning SCSRs, they had three that were not “in the green.” Tr. 32-34. The manufacturer's recommended pressure range was between 2,500-3,000 PSI, and the three SCSRs were at 1,000 PSI, 1,300 PSI, and 1,500 PSI. Tr. 32; GX-14. Such readings indicate that the SCSRs did not contain enough breathable air to function for the hour required by MSHA regulations. Tr. 126. Therefore, they were below the manufacturer's minimum of 2,150 PSI, and met the manufacturer's removal criteria. Tr. 32.

The Respondent argued that although the pressure gauges of the SCSRs indicated a lack of pressure, the SCSRs would likely have provided enough oxygen for miners who utilized them. At hearing, Kinter testified that he examined the SCSRs on December 12, 2012, and they appeared to be in good working condition. Tr. 117-119. Furthermore, he stated that the three SCSRs would have provided “plenty enough oxygen” for a miner to get to the next cache of SCSRs. Tr. 125-126. He based this assertion on tests he conducted in the parking lot where the belt-worn M-20 SCSR provided a miner with 20-30 minutes of oxygen, and not the 10 minutes that MSHA estimates. Tr. 126. He testified that the 6.5 Ocenco SCSR, even at 1,000 PSI, would have provided a miner with an additional 30 minutes of oxygen. Tr. 126.

Giving all due regard to Kinter's parking lot experiments, I find that the three SCSRs were not being maintained in a safe condition. The purpose of the pressure gauges is to ensure

that there is sufficient oxygen and pressure in the SCSR to provide the miner air during an emergency. Such gauges and other safety signals serve an important role in notifying users whether the equipment is likely to work. The pressure gauges were well below the manufacturer's suggested range, and met the manufacturer's removal criteria. Tr. 32; GX-14. As such, I find that they were not in working order. I do not find Kinter's testimony persuasive concerning how much the non-compliant SCSRs may have provided because the conditions of a parking lot are quite unlike the conditions of a mine. The mine at issue had a height of 42-48 inches, meaning that the miners would have had to crawl or walk stooped over. If the miners had to utilize the SCSRs in the mine during an emergency, it is likely that there would have been smoke and other conditions that would have made mobility, visibility, and communications difficult. The parking lot, presumably, did not have these same conditions.

The Respondent argues that even if the SCSRs are found to be noncompliant, this does not prove that the regulation was violated. The cited standard, titled "Self-rescue devices; inspection, testing, maintenance, repair, and recordkeeping," provides that "[e]ach operator shall provide for proper inspection, testing, maintenance, and repair of self-rescue devices by a person trained to perform such functions." 30 C.F.R. 75.1714-3(a). The Respondent contends that it fulfilled its duty to maintain the SCSRs as required by the regulations.

"Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)). Only when the meaning of a regulation is ambiguous does the Secretary's interpretation warrant deference from the court. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

In this instance, the meaning of the regulation is clear. Although not interpreted in the context of 75.1714-3(a), "the Commission has consistently construed 'maintain' in relation to other standards to require a continuing functioning condition." *Secretary of Labor, Mine Safety and Health Administration v. Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011). Accordingly, the Commission has defined "maintain" as "to keep in state of repair, efficiency or validity; preserve from failure or decline." *Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res.*, 28 FMSHRC 983, 987-88 (Dec. 2006); *Lopke Quarries*, 23 FMSHRC 705, 707-08 (July 2001); *Jim Walter Res.*, 19 FMSHRC 1761, 1765 (Nov. 1997); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997).

In applying this ordinary meaning of "maintain," the Commission has repeatedly held that standards including such a provision require that the item to be maintained be operating properly. In *Alan Lee Good*, the Commission affirmed the judge's finding that an inoperative parking brake violated the requirement in 30 C.F.R. §56.14101(a)(3) that braking systems "be maintained in functional condition." 23 FMSHRC 995, 996 (Sept. 2001). Similarly, in *Nally & Hamilton Enterprises*, the Commission reversed the judge's ruling and held that where the operator had a truck back-up alarm that was not working it violated the requirement of 30 C.F.R.

§77.410(c) that “warning devices shall be maintained in functional condition.” 33 FMSHRC at 1763-1765. The Commission further explained:

Inclusion of the term “maintain” makes clear that warning devices shall be capable of performing on an uninterrupted basis and at *all* times. Congruent with our holding in *Lopke Quarries*, to “maintain” imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.

Id. at 1763 (emphasis in original).

The Commission has held that where the regulation requires the operator to maintain equipment, knowledge of a defect is not an essential element of violation. Quoting *Peabody Coal*, the Commission in *Nally & Hamilton* held that “what the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.” 33 FMSHRC at 1764 (*quoting Peabody Coal*, 1 FMSHRC 1494, 1495 (Oct. 1979)). The Commission further pointed out that imputing such a knowledge requirement would create “perverse incentives” for the operator to overlook problems during examinations. *Id.* The same is true in the instant case. The maintenance requirements of 30 C.F.R. §75.1714-3(a) mean that the SCSRs must be in proper working order. The three SCSRs that were found with low pressure were not in such working order and therefore constituted a violation of the standard.

It is no defense to argue that because the operator had the required number of compliant SCSRs, the three non-compliant SCSRs did not constitute a violation. Such an argument presumes that no harm occurs from having non-compliant or inoperative safety equipment in the mine. It completely ignores the reliance that miners might place on defective equipment, assuming that it was in working condition. Miners should not be required to roll the dice in an emergency situation and hope that a tank intended to provide air actually provides such life-saving air. If during an emergency, a miner accidentally grabbed an SCSR with insufficient pressure or air, it does him no good to know that there was a better working SCSR behind it. This argument also permits no principled line drawing. If three of twelve SCSRs may be noncompliant, so long as the required eight are compliant, then it would seem to be allowable to have eight of sixteen noncompliant. Or twenty of twenty eight noncompliant. Or one hundred of one hundred and eight noncompliant. It is easy to draw this argument to absurd lengths because the argument is based upon an absurd premise. Miners must be able to rely on all of the safety and emergency equipment available to them. Any other holding would place the entire Mine Act in jeopardy.

3. The Violation Was Reasonably Likely to Result in a Fatal Injury and Was Significant And Substantial In Nature

Inspector Wagner marked the gravity of the cited danger in Citation No. 7041173 as being Reasonably Likely to result in Fatal injuries to three persons, as well as S&S. These determinations are supported by a preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

The Commission has held that determining whether emergency lifeline standards are S&S “necessarily involve[s] consideration of an emergency situation.” *MSHA v. Cumberland Coal Res. LP*, 33 FMSHRC 2357, 2364 (Oct. 5, 2011), *affirmed* 717 F.3d 1020 (D.C. Cir. 2013). It explained that such standards “are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” *Id.* at 2367. The Commission has similarly held that when considering the S&S nature of an escapeway violation, the judge must presume the existence of an emergency. *MSHA v. Spartan Mining Co., Inc.*, 2013 WL 6792689 (Dec. 11, 2013). In the instant case a similar emergency standard is at issue, and therefore the analysis requires the presumption of an emergency situation of the type that the standard is intended to address.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.1714-3(a). Similarly, the second element of *Mathies*, a discrete safety hazard contributed to by the violation – was met. Using an SCSR during an emergency situation that does not have sufficient air or pressure under the manufacturer’s guidelines could contribute to the discrete safety hazard of not having sufficient air during an emergency. In the instant case, if an emergency arose with eight miners in the mantrip, these miners would face a 25%-60% chance of grabbing a non-compliant SCSR.¹⁰

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Id.* at 1281. Importantly, it stated that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established

¹⁰ This back-of-the-envelope calculation assumes that the first miner would have a 3/12 chance of grabbing a non-compliant SCSR. Then, assuming a best-case scenario where the first seven miners grabbed working SCSRs, the final miner would have a 3/5 chance of grabbing a non-compliant SCSR.

precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986). If a miner utilized and relied upon a noncompliant SCSR during an emergency, that miner could suffer smoke inhalation or death. Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). Smoke inhalation and death are injuries that are reasonably serious in nature.

4. The Violation Was the Result of Moderate Negligence

The Secretary defines Moderate negligence as when the “operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d), Table X. The Commission has made it clear that judges, however, are not bound by the Secretary’s “formulaic approach” to negligence, and instead should look to whether the operator has failed to meet the high standard of care established under the Act. *Sec’y of Labor, MSHA v. Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *Wade Sand & Gravel*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015). “In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Brody*, 37 FMSHRC at 1702. The judge is to apply a “totality of the circumstances” analysis that need not focus on mitigating circumstances. *Id.* at 1702-1703.

In the instant case, the operator had a duty to maintain the SCSRs in the mantrip. As has been explained *supra*, the operator fell short of this duty in allowing three of the 12 SCSRs—a full quarter of those available—to become non-compliant. The Respondent had an internal policy that required preoperational checks of all mantrips, including SCSRs and fire extinguishers. Tr. 48. Though there is no evidence that the operator or its agents knew of the deficient SCSRs, it is inconceivable that with all proper checks a full quarter of the SCSRs on the mantrip would be deficient. Therefore, I find that the violation is the result of Moderate negligence.

Citation No. 7041179 (roof control plan)

On February 5, 2013, while conducting the quarterly inspection of the Gillhouser Run Mine, Inspector Wagner issued a citation for a roof control violation. Wagner was traveling the 10 South belt drive with Kinter.¹¹ Tr. 52-53, 134-135. At 10 South, there was 24-47 inches of roof that had been cut for a total roof height of six to eight feet. Tr. 53-55. The width was 20 feet, with 13 feet of rib that wasn’t bolted. Tr. 55. There was approximately 36 inches of clearance between the rib and the structure. Tr. 55.

¹¹ A belt drive is taller than a normal belt structure and requires that rock is cut either from the roof or the bottom. Tr. 53. The transcript incorrectly has the date of inspection as February 15, 2013, but this appears to be a typographical error.

Wagner issued Citation No. 7041179 because there were no bolts or posts in an area where more than two feet of rock was cut.¹² Tr. 56-57. According to the approved roof control plan, posts were supposed to be set on five foot centers, or rib bolts and cribs were supposed to be utilized. Tr. 58, 93; GX-10. Wagner testified that there was no support installed in the cited area. Tr. 58. When more than two feet of rock is cut, it puts more pressure on the coal pillar, and additional supports are necessary. Tr. 56-57.

According to Wagner's notes, the ribs on the clearance side of the belt showed signs of failure and there were large pieces of rock that were either pulled down or had fallen down. Tr. 61-62; GX-4. Wagner cited the area on the tight side of the belt, where miners only travel when they have to clean the belt. Tr. 86. Wagner believed that at minimum the cited area had been mined for approximately a month before the citation was issued, meaning that the condition existed for at least a month. Tr. 64, 67.

According to the roof control plan approved on April 17, 2014, unbolted ribs are permitted for up to one week. Tr. 99; RX-13. The one week delay in putting in the bolts would have been before the belt drive was installed. Tr. 101. Therefore, mine management would have been present during parts of the belt drive installation. Tr. 101. Even if there was a one-week delay when the rib was unbolted, there were at least three weeks when it remained unbolted. Tr. 102. The area that was cited as not adequately supported was near a turn where bolts sometimes get pulled out during mining. Tr. 91. Wagner did not ask anyone whether the area had been bolted because there were no signs of it having ever been bolted. Tr. 91.

Wagner determined that the citation was S&S because roof and rib problems are the leading cause of injuries in mines.¹³ Tr. 64-65. In this instance, the miners had to walk an area that was three feet wide between the belt structure and the rib. Tr. 65. A falling object could cause fatal injuries, or cause someone to fall onto the belt. Tr. 65. Wagner testified that such injuries would be fatal. Tr. 65. Wagner testified that the condition was very obvious because it was painted with dots, and examiners and management would have been well aware of the condition. Tr. 66.

¹² Under Section 8, "Condition or Practice," the Citation reads:

The operator failed to comply with the current approved roof control plan (No. 40239-B8) page 27 which states the Procedures for Rib Control at Boom Hole Locations where 24" or more roof has been removed. There was an area, located at the 10 South belt drive boom hole along the tight side of the 1 South Belt, that measured approximately 13' in length where the roof removed measured from 24" to 47" that had no additional support provided.

Standard 75.220(a)(1) was cited 2 times in two years at mine 3609033 (to the operator, 0 to a contractor).

¹³ This standard is on the Rules to Live By list, meaning that the condition has led to a high level of injuries. Tr. 67.

Kinter testified that he saw red spots on the rib where there were no rib bolts, meaning that they were either not installed or were removed. Tr. 135. It appeared to Kinter that the bolts had been pulled out.¹⁴ Tr. 135. Kinter described the condition of the rib as “okay,” with no movement, sloughage or cracks. Tr. 135. He disagreed with Wagner’s assessment that the roof had been cut as much as 47 inches, and said it was likely 27 inches. Tr. 135-137. Kinter further did not agree that the violation was reasonably likely to cause fatal injuries to one person because the rib condition in the area did not show any visual defects. Tr. 137. Furthermore the roof was slate and there was no breakage on the roof. Tr. 137-138.

ANALYSIS

1. Contentions of the Parties

The Secretary argues that Respondent violated 30 C.F.R. §75.220(a)(1) by not complying with the mine roof control plan and installing additional rib supports in a 13 by 20 foot area in the 10 South Belt Drive Area. The Secretary argues that the violation was S&S because a rib fall caused by unsupported ribs was reasonably likely to lead to a serious injury. The Secretary further argues that the violation was the result of high negligence, rather than moderate (as originally assessed), because the Respondent had marked the areas that needed additional roof support, and these markings were visible for at least a month without any action. As a result of the change in negligence, the Secretary requests that the civil penalty be increased from \$1,412.00, as originally assessed, to \$5,159.00.¹⁵

Respondent concedes the fact of violation, but argues that it was not S&S, and that the gravity, negligence, and assessed penalty should be reduced. The Respondent argues that there was no credible evidence presented that demonstrated a reasonable likelihood of serious injury, or that the cited condition adversely affected the immediate roof or ribs, or that there was any exposure to the condition. For these reasons, the Respondent argues that the Fatal and S&S designations were improper. Further, the Respondent argues that there was no evidence that anyone in management was aware of the condition, or that the condition existed for the length of time presumed by the inspector. For these reasons, the Respondent argues that the level of negligence should be lowered from Moderate, rather than raised, as the Secretary proposed.

¹⁴ If a roof bolt was pulled out, evidence of it would have been visible to an examiner and should have been recorded in the pre-shift examination. Tr. 147.

¹⁵ The original assessed penalty was \$1,569.00, however the Secretary reduced it by 10% to \$1,412.00

2. The Violation Was Reasonably Likely to Result in a Fatal Injury and Was Significant And Substantial In Nature

Regarding the first element of S&S—the underlying violation of a mandatory safety standard—the Respondent has conceded that it violated §75.220(a)(1).¹⁶ Similarly, the second element of *Mathies*, a discrete safety hazard contributed to by the violation, was met. The unsupported rib area was thirteen feet long and the width of the entry was 20 feet. Tr. 55. There were signs of rib failure, such as large pieces of rock that had come down onto the mine floor across from the unsupported rib. Tr. 62. This condition significantly contributed to the safety hazard of a rib fall.

The third and fourth elements of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in a serious injury—was also met. A rib fall is reasonably likely to lead to an injury as serious as death. Tr. 65. MSHA has identified rib falls as one of the categories of accidents most frequently cited by MSHA following a fatal accident. Rules to Live By.¹⁷ A falling rock from a rib or roof has been repeatedly held to meet the third and fourth elements of the *Mathies* test. See *Sec’y of Labor, MSHA v. Maryan Mining LLC*, 37 FMSHRC 1715 (ALJ) (Aug. 2015); *Sec’y of Labor, MSHA v. Consolidation Coal Co.*, 36 FMSHRC 615, 634 (ALJ) (Feb. 2014). I therefore find that the violation met the *Mathies* test and was properly designated as S&S.

Furthermore, the citation was properly designated as “Fatal.” Inspector Wagner credibly testified that when more than two feet of rock is cut, it places additional pressure on the coal pillar, requiring extra supports. Tr. 56-57. Though the unsupported rib was on the tight side of the belt, miners would travel in this area when cleaning the belt. Tr. 86. Such a miner could easily have a large rock fall on him, leading to fatal injuries. Therefore, I find that the Secretary carried his burden by a preponderance of the evidence that the citation should be marked as “Fatal.”

3. The Violation Was the Result of Moderate Negligence

The Secretary argues that the negligence of the citation should be “High,” rather than “Moderate” (as originally assessed) because there were no mitigating circumstances present. However, the Commission has made clear that judges are not bound by the Secretary’s

¹⁶ Section 75.220(a)(1) “Roof Control Plan” states:

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

30 C.F.R. § 75.220(a)(1).

¹⁷ The Rules to Live By are available at available at <http://arlweb.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>.

definitions of negligence, and rather than focusing purely on mitigating circumstances, the judge should consider the totality of the circumstances. *Brody*, 37 FMSHRC at 1701-1702.

In the instant case, Inspector Wagner believed that the condition existed for at least one month, whereas the roof control plan only allowed unbolted ribs for one week. Tr. 64, 67, 99. However, Kinter testified credibly that it appeared to him that the bolts had been pulled out. Tr. 135. Whether the bolts were never installed or pulled out is irrelevant to whether the violation existed, but highly relevant to the negligence determination. Though Wagner's assessment is reasonable, because of the presence of red spots where bolts should have been, there is also a possibility that the bolts had been pulled out. Therefore, I find that the negligence should remain at "Moderate" and not be raised as the Secretary requests.

PENALTIES

The principles governing the authority of the Commission's administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §2700.28. The Act requires that in assessing civil monetary penalties, the Commission and its judges shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i)

The Secretary seeks civil penalties in the amounts of \$1,795.00 for Citation No. 7041173 and \$5,159.00 for Citation No. 7041179.¹⁸ Given all of the evidence and my findings above, I find that the penalty for Citation No. 7041173 is appropriate, but the penalty for Citation No. 7041179 should remain at the originally assessed amount of \$1,412.00.

In assessing a \$3,207.00 total penalty, I have given full consideration to the Section 110(i) criteria. Specifically, I note that Respondent had been cited once in the previous two years for violations of §75.1714-3(a) and two times for §75.220(a). Respondent is a large operator and the Gillhouser Run Mine is a large mine and therefore the penalty is appropriate to the size of the business. The parties stipulated that this penalty amount would not affect Respondent's ability to stay in business. Both citations were properly assessed as S&S and Moderate negligence.

¹⁸ The Secretary originally assessed a penalty of \$1,412.00 for Citation No. 7041179, but sought an increase in its Post-Hearing Brief.

Further, the dangers cited with respect to each violation were highly likely to result in fatal injuries of miners.

ORDER

It is **ORDERED** that Citation No. 7041173 is **AFFIRMED** as written, and Citation No. 7041179 is **AFFIRMED**, with Moderate negligence. It is further **ORDERED** that Amfire Mining Co. LLC, **PAY** the Secretary of Labor the sum of \$3,207.00 within 30 days of the date of this Decision.¹⁹ Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 4, 2016

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,
Respondents,

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM
WE-MD 14-03

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER ON COMPLAINANT'S MOTION TO AMEND

Before: Judge Moran

Complainant Matthew Varady has filed a motion to amend the complaint in this matter, brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), to add Jerritt Canyon Gold, LLC, ("JCG") as an alleged successor. JCG then filed its Special Limited Appearance on Behalf of Jerritt Canyon Gold, LLC to Contest Jurisdiction in Response to Complainant's Motion to Amend ("Response").¹ For the reasons that follow, the Court grants Complainant's Motion to Amend, allowing the addition of JCG as an alleged successor in interest to Veris Gold USA, Inc. ("Veris Gold").

JCG's Special Limited Appearance challenges whether this Court has "jurisdiction over and can attach liability for alleged claims of discrimination by Veris Gold USA, Inc. ('Veris Gold') to [JCG], a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale." JCG Resp. 1. Though it filed its Response, JCG simultaneously asserts that it had not received service of the Motion to Amend but that, *de facto*, it received the filing from counsel for Whitebox Advisors, LLC. Given JCG's Response, in view of its claim of defective service, though overcome because it acknowledges receiving Varady's motion, **JCG, through its Counsel, Attorney Kaster and Attorney Jarvis, is hereby ORDERED to provide the correct service address for JCG to the Court and Mr. Varady.**

The Response begins with serious inaccuracy by characterizing the Mine Act discrimination action brought by Varady as "*alleged* claims of discrimination by Veris Gold USA, Inc." *Id.* (emphasis added). This Court, after a hearing held in Elko, Nevada, from June 8-10, 2015, at which Veris Gold had legal counsel, found in a decision issued on September 2, 2015, that Veris Gold engaged in acts of discrimination against Complainant Varady. *See Varady*

¹ Mr. Varady filed a response to the JCG filing, which was also considered by the Court.

v. Veris Gold USA, Inc., 37 FMSHRC 2037 (Sept. 2015) (ALJ). Therefore, far from mere allegations, this Court made findings of fact and conclusions of law regarding that discrimination claim.

The Response then queries whether JCG, “a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale” can be liable for Veris Gold’s acts of discrimination. JCG Resp. 1. The Response does acknowledge that the issue is whether JCG can be added to the complaint as an “alleged successor in interest to Veris Gold.” *Id.*²

It is JCG’s position that the final orders of the bankruptcy court are not subject to collateral attack, as that court “declared the sale of Veris Gold assets to JCG ‘free and clear’ of claims and encumbrances pursuant to Federal Bankruptcy Code, 11 U.S.C. § 363(f).” JCG Resp. 2. Again characterizing Varady’s Complaint as an allegation of Veris Gold’s discrimination, JCG asserts that “efforts to impose a penalty on JCG [based on Varady’s discrimination complaint] tramples on powerful and persuasive precedent as well as policies that derive from fundamental ‘equitable distribution to creditors’ policy underlying bankruptcy law.” *Id.* at 2. On that basis, the Response contends that this Court has no jurisdiction over JCG and therefore it should deny the Complainant’s Motion to Amend. *Id.*

In the “Background” section, the Response asserts “JCG is a newly formed limited liability company funded by *new investors* [which is] not affiliated *in any way* with the former operations of Veris Gold.”³ *Id.* (emphasis added).

The Response acknowledges that Mr. Varady brought his own “private” discrimination action under section 105(c)(3) of the Mine Act.⁴ The Response then notes that “[o]n June 4,

² The Response references that similar issues are presented in *Lowe v. Veris Gold*, Docket No. WEST 2014-614-DM, another matter in which this Court determined, after a hearing, that Veris Gold discriminated against Daniel Lowe in violation of section 105(c)(3) of the Mine Act. JCG Resp. 1.

³ These claims, that JCG is funded by “new investors” who are “not affiliated in any way” with Veris Gold, have been challenged, and the resolution of such issues would be part of the Court’s determinations regarding whether JCG is a successor.

⁴ Though it acknowledges that Varady brought his own discrimination action under section 105(c)(3) of the Mine Act, the Response cannot help but insert irrelevancies into its argument by noting that MSHA declined to file a discrimination action on Varady’s behalf and that MSHA’s decision was “based upon its investigation, staffing, resources and priorities.” JCG Resp. 3 & n.2. Such references are not merely historical, but, as with the Response’s characterization of the action as “alleged claims of discrimination,” are obvious attempts to indirectly diminish the merits of Varady’s 105(c)(3) action as if it was a stepchild claim. Congress did not impute under the Mine Act that such private claims were of inferior standing. Since JCG has raised the vehicle employed for Varady’s claim, it is fair to note that his action was one of a bevy of discrimination complaints filed against Veris Gold, some brought by the
(continued...)

2015, the U.S. Bankruptcy Court entered an order approving the sale of Veris Gold's assets, including the Jerritt Canyon mine and mill, free and clear of all liens, claims and interests pursuant to Section 363 of the Bankruptcy Code, (11 U.S.C. § 363). Docket No. 318." *Id.* at 3. JCG takes particular note that

the Sale Order specifically provided that the Assets would be sold free and clear of: 'rights or claims on any successor or transferee liability and any enforcement action or enforcement history ...and... all contractual rights and claims and labor, employment and pension claims, in each case, whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or un-matured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of these Chapter 15 Cases...'

JCG Resp. 3-4 (quoting Sale Order at 6-7, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318).

The Response then notes that Varady received notice of the bankruptcy action on June 19, 2015, that Varady filed a motion to stay the bankruptcy court's Sale Order, and that the bankruptcy court denied the motion stating that there was no legal or factual for the relief Varady sought. *Id.* at 4. The denial of the motion occurred *on the same day* Varady filed his motion seeking a stay.⁵

The Response asserts that this Court "lacks jurisdiction to amend the complaint and adjudicate the Section 105(c)(3) complaint against JCG." JCG Resp. 5. Apart from the unusual and temerarious assertion that this Court, as part of the Federal Mine Safety and Health Review Commission ("the Commission"), in a lawful section 105(c)(3) action under the Mine Act, lacks jurisdiction to allow Varady to amend his complaint and to adjudicate such amended complaint against JCG, the Response makes the fundamental error of conflating bankruptcy court decisional authority with that of the Commission. The Commission has the authority to adjudicate section 105(c) complaints of all stripes and such authority includes determinations of

⁴ (...continued)

Secretary of Labor and others, as with Varady, on their own. *See Sec'y of Labor on behalf of Garcia v. Veris Gold USA, Inc.*, 36 FMSHRC 1883 (July 2014) (ALJ); *Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ).

⁵ The Response notes that Varady, a non-attorney, *pro se* complainant, did not attempt to appeal the bankruptcy court's denial of his motion and "thus failed to exhaust his remedies." JCG Resp. 4. This is somewhat disingenuous if meant to suggest that a different outcome was at all possible.

motions to amend such complaints.⁶ As Commissioner Cohen has noted in another section 105(c)(3) complaint against Veris Gold, “the Complainant may file a motion to amend the complaint to add as parties the entities which now have a successor interest in the mine formerly owned by Veris Gold.” *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016) (citing *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990)). Commissioner Cohen continued:

Moreover, the Federal Rules of Civil Procedure may present several potential avenues of relief for the Complainant. *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”). For instance, under Rule 21, a Judge may *sua sponte* grant a post-hearing joinder of a new party. Fed. R. Civ. P. 21 (“the court may at any time, on just terms, add or drop a party”). In addition, Federal Rule of Civil Procedure 15 permits a party, with the court’s leave, to amend a complaint more than 21 days after the pleading is served “when justice so requires.” Fed. R. Civ. P. 15(a)(2).”

Id.

I. Jerriitt Canyon Gold’s Arguments

In support of its claim that this Court does not have jurisdiction to adjudicate a Mine Act section 105(c)(3) discrimination complaint, the Response advances four contentions:

I. The automatic stay provisions of the Bankruptcy Code preclude ancillary proceedings by private individuals and any such proceedings are void. . . . II. The Bankruptcy Court’s adjudication and sale of Veris Gold assets were ‘free and clear’ of liens, claims and interests as provided for under Section 363(f) of the

⁶ *See, e.g., McDonald v. TMK Enterprises*, 37 FMSHRC 2239 (Oct. 2015); *Black Beauty Coal Co.*, 34 FMSHRC 1733 (Aug. 2012); *Wyo. Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992). The Procedural Rules provide that the Commission’s judges shall be guided by the Federal Rules of Civil Procedure “[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act.” 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be “freely given when justice so requires.” Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, “especially when . . . they do not prejudice a party in preparing its defenses.” *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (Sept. 2009) (ALJ); *see also Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981); *Bob Bak Constr.*, No. CENT 2005-139-M et al., 2006 WL 2927263, at *6 (FMSHRC Sept. 11, 2006) (ALJ). Provided adequate notice is given and there is no prejudice to the opposing party, administrative pleadings are to be liberally construed and easily amended. *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ). The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Jim Walter Res.*, No. SE 2010-351, 2013 WL 3865345, at *4 (FMSHRC June 12, 2013) (ALJ) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971)).

Bankruptcy Code. The Bankruptcy Courts' [sic] Adjudication resulted in the buyer of assets of Veris Gold taking title to those assets free from all claims against Veris Gold, including the claims in this private proceeding. . . . III. Complainant is barred under principles of res judicata and collateral estoppel from bringing a claim against Veris Gold and JCG where Complainant made an appearance, sought relief from, and made objections to actions in the Bankruptcy Court's denial of the relief sought by Complainant and the ordering of the sale free and clear to JCG. . . . IV. Any action of the ALJ would violate important policies and the fundamental framework of the Bankruptcy Code which requires equitable treatment of all creditors."

JCG Resp. 5, 7, 9, 11 (footnote omitted).

A. The Contention that the Automatic Stay Provisions of the Bankruptcy Code Preclude Ancillary Proceedings by Private Individuals and Any Such Proceedings Are Void

Noting that Veris Gold sought bankruptcy protection under Chapter 15 of the Bankruptcy Code, JCG asserts that the petition filing brought about an "automatic stay" *the same day* and triggered 11 U.S.C. § 362(a)(1). The Response states that the stay served as an injunction to

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

JCG Resp. 5 (quoting 11 U.S.C. § 362(a)(1)).

The Response acknowledges that, despite the broad language employed, "cases commenced or continued by a 'governmental unit' may be exempt from the automatic stay" provision, per 11 U.S.C. § 362 (b)(4). However, the Response effectively asserts that any action other than one brought by a governmental unit is *void ab initio*. *Id.* (citing *In re Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001)). It then contends that, since the *pro se, non-attorney* Complainant failed to seek relief from the automatic stay, any actions taken by other judicial or administrative authorities are void as infringing upon the bankruptcy court's jurisdiction. *Id.* at 5-6. The concern is that if the bankruptcy court's injunction could be modified, it would strip the court of "its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize [its] financial affairs." *Id.* at 6 (quoting *In re Gruntz*, 202 F.3d 1074, 1083-84 (9th Cir. 2000)).⁷ Thus, the Response maintains that this Court has no jurisdiction because the bankruptcy court's

⁷ In *In re Gruntz*, the Ninth Circuit, in the context of determining whether a bankruptcy court's automatic stay enjoined a state criminal proceeding for failing to pay child support, held that because that proceeding fell within one of the exceptions to an automatic stay, it did not so operate, but that, generally, federal courts are not bound by state court modifications of the automatic stay.

stay enjoined “proceedings brought by *creditors of a debtor* outside of the bankruptcy case.” *Id.* (emphasis added). The response to this contention is addressed *infra*.

B. The Contention that the Bankruptcy Court’s Adjudication and Sale of Veris Gold Assets Were “Free and Clear” of Liens, Claims, and Interests as Provided for Under § 363(f) of the Bankruptcy Code, Resulting in JCG, as the Buyer of the Assets of Veris Gold, Taking Title to Those Assets Free from All Claims Against Veris Gold, Including the Discrimination Action Brought by Varady Under the Mine Safety and Health Act

Noting that § 363(f)⁸ provides that the trustee may sell property free and clear of any interest in such property other than the estate only upon meeting certain conditions, JCG observes that the term “interest” has been broadly interpreted by courts and, citing *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3rd Cir. 2003) (“*TWA*”), that being free and clear of such “interest” insulates a successor from claims of discrimination against the predecessor. *Id.* at 7. JCG also points to *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996), for the proposition that the bankruptcy court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5) and therefore that Court did not need to determine if the purchaser was a successor in interest. JCG contends that, per *TWA*, “interest in property” applies to obligations that are connected to, or arise from, property being sold, and are not limited to *in rem* interests. *Id.* at 8 (citing *TWA*, 322 F.3d at 289-90). JCG adds that as the bankruptcy court’s Sale Order provided that the purchaser will not be liable for claims based on any successor or transferee liability and any enforcement action or enforcement history or employment and pension claims, such order applies to Varady’s claim. *Id.* JCG also maintains that Varady moved to stay the Sale Order, and that his motion was denied and he made no appeal from that order. *Id.*

It is true that, while not in the Ninth Circuit, the applicable circuit for this case, the Third Circuit did hold in *TWA* that the various airline workers’ employment discrimination claims, as well as claims by flight attendants under a travel voucher program that the debtor-airline had established in settlement of sex discrimination actions, both qualified as “interests in property” under the bankruptcy statute provision that provided for sale of assets of estates free and clear of interests in property. However, this Court believes the case is distinguishable.

⁸ 11 U.S.C. § 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

First, it would appear that American Airlines was an arms-length successor to TWA. In addition, the court of appeals concluded that in the § 363(f) sale permitting the sale of property “free and clear” of an “interest in such property,” the claims against TWA were connected to or arose from the assets sold, a determination which this Court has yet to make. An additional and important distinction, the bankruptcy court determined there was no basis for successor liability only after conducting an evidentiary hearing. *TWA*, 322 F.3d at 286.

Apart from the procedural protection of an evidentiary hearing, as noted, part of that determination was the bankruptcy court’s determination that the claims against TWA were interests in property under § 363(f). In construing the term “interest in such property,” the appeals court acknowledged that Congress did not define that phrase and that some courts have limited its application to *in rem* interests in property.¹ The appeals court also referenced the Fourth Circuit’s decision in *Leckie* in which that court concluded “that the *employer-sponsored benefit plans* had interests in the property of the debtors which had been transferred under section 363(f) in the sense that there was a relationship between their right to demand premium payments from the debtors and the use to which the debtors had put their assets.” *TWA*, 322 F.3d at 289 (citing *Leckie*, 99 F.3d at 582). The Third Circuit obviously struggled with its conclusion, so much so that it felt the need to offer a supporting rationale had it concluded that the claims were not interests in property. It noted that one of the discrimination claims went to trial and damages were awarded, while in the other suit no determination of liability had been made at the time of the bankruptcy filing. It then looked to the reasoning in other cases that such claimants should not be allowed “to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate [as that] would ‘subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors.’” *TWA*, 322 F.3d at 292 (quoting *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982)).

However, the Third Circuit also took special note of the importance of discrimination claims, stating it recognized “that the claims of the EEOC and the Knox-Schillinger class of plaintiffs are based on congressional enactments addressing employment discrimination and are, therefore, not to be extinguished *absent a compelling justification*.” *Id.* (emphasis added). Despite that admission, that court continued to adhere to its view that allowing “the claimants to assert successor liability claims against American while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme.” *Id.*

It is clear, at least to this Court, that the Third Circuit’s holding was impacted by the particular facts and that it was not a broad-based pronouncement. Among those facts was the anticipated disastrous outcome if the claimants’ interests were recognized, as it noted:

The Bankruptcy Court found that, in the absence of a sale of TWA’s assets to American, “the EEOC will be relegated to holding an unsecured claim in what will very likely be a piece-meal liquidation of TWA. In that context, such claims are likely to have little if any value.” *In re Trans World Airlines, Inc.*, et al., No. 01-00056, slip op. at 23, 2001 WL 1820326 (Bankr. D. Del. Mar.27, 2001). The same is true for claims asserted pursuant to the Travel Voucher Program, as they would be reduced to a dollar amount and would receive the same treatment as the

unsecured claims of the EEOC. Given the strong likelihood of a liquidation absent the asset sale to American, a fact which appellants do not dispute, we agree with the Bankruptcy Court that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of Knox-Schillinger and the EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits.

TWA, 322 F.3d at 293.

C. The Contention that Complainant Is Barred Under Principles of *Res Judicata* and Collateral Estoppel from Bringing a Claim Against Veris Gold and JCG Where Complainant Made an Appearance, Sought Relief from, and Made Objections to Actions in the Bankruptcy Court and Thereafter Failed to Seek Relief from or Appeal the Bankruptcy Court's Denial of the Relief Sought by Complainant and the Court's Ordering of the Sale Free and Clear to JCG

JCG argues that since the § 363 sale order is an *in rem* proceeding, *res judicata* applies to that sales transfer of property rights and that those property rights are good against the world. JCG Resp. 9. Since the property in the bankruptcy court's Sale Order was sold free and clear of any interests in that property, Complainant cannot make any claims against that property. *Id.* JCG adds that collateral estoppel also applies on the basis that Complainant "had notice and participated in the Bankruptcy Court action, the matter was actually litigated, and Complainant had the incentive to litigate and prevail." JCG Resp. 9-10. Repeating its earlier remarks about this, JCG asserts that Varady had his chance, as he sought to stay the bankruptcy sales order. When the bankruptcy court ruled against his motion, Varady failed to appeal that ruling and now must live with the consequences of that failure. *Id.* at 10.

This contention is an echo of JCG's other arguments and is addressed within this Order.

D. The Contention that Any Action by the ALJ Would Violate Important Policies and the Fundamental Framework of the Bankruptcy Code which Requires Equitable Treatment of all Creditors.

Unabashedly, JCG invokes its concern for the "equitable treatment of creditors" and the Bankruptcy Code's purpose of ensuring "that all substantially similar claims of creditors are treated equitably[, with c]laims [being] classified and paid according to priority as set forth in 11 U.S.C. § 507." JCG Resp. 11. That sounds high-minded, but if the Court correctly interprets JCG's next remark that Veris Gold shifted from a "going concern" restructuring to a liquidation and only secured claims would be paid, in plain English this means that no matter what Varady did in terms of appeals from the bankruptcy court rulings, he could never prevail. Thus, happily for Veris, and by extension for JCG, under the bankruptcy proceeding, both were able to walk away from all unsecured pre-filing claims. Mr. Varady, JCG asserts, should not be entitled to any "preferential" treatment. Rather, he should be entitled to the same equitable treatment dispensed to all the other unsecured creditors. As an example of this "equitable treatment," JCG points to *the settlement agreement* Veris had with Jennifer Morreale, another person alleging

discrimination by Veris, under which, by the Veris bankruptcy action she was paid nothing with her claim being discharged. JCG seeks the same fair and equitable treatment for Varady.

II. Discussion

The Court takes a step back to take note of the basics of the bankruptcy process:

A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial ‘fresh start’ from burdensome debts. The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision: ‘[I]t gives *to the honest but unfortunate debtor...* a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.

Administrative Office of the U.S. Courts, *Process – Bankruptcy Basics*, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited March 3, 2016) (emphasis added). The same source advises that

[n]ot all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for *public policy reasons* (based either on the nature of the debt **or the fact that the debts were incurred due to improper behavior of the debtor**, such as the debtor's drunken driving).

Id. (emphasis added).

Accordingly, it is noted that bankruptcy law is aimed at debts owed creditors, not at relief for wrongdoers, such as those that engage in discrimination in violation of the Mine Act. Depending on the outcome of the determination of JCG’s possible status as a successor and what it knew about the Varady proceeding and the legal representation for Veris Gold in that proceeding, holding JCG responsible may be an appropriate outcome.

Moreover, as noted above, per the Commission’s related opinion in *Lowe v. Veris Gold USA, Inc.*,⁹ No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016), one Commissioner expressed that it was not so clear that the bankruptcy proceeding filed by

⁹ While this Order pertains to Varady’s action, this Court upheld Lowe’s discrimination complaint in a decision issued on October 15, 2015. *See Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 15, 2015) (ALJ). JCG has filed essentially the same response, advancing the same arguments for the Lowe matter, as it has presently filed here in Varady’s discrimination complaint. A separate order will be issued for the Lowe matter.

Veris Gold is effective against Lowe.¹⁰ As such, that Commissioner's expression would apply with equal force in the Varady discrimination complaint. That Commissioner further expressed that

[i]t appears that in filing its bankruptcy petition, Veris Gold may not have given Lowe proper notice of the filing. Indeed, Lowe – together with other former employees of Veris Gold who have discrimination complaints before the Commission under section 105(c) of the Mine Act – filed a motion in the U.S. Bankruptcy Court for the District of Nevada in Case No. 14-51015 gwz in which they made this allegation.

Lowe, 2016 WL 197500, at *2 n.4.

The same Commissioner also stated:

Even if the bankruptcy filing was effective against Lowe, this fact does not necessarily foreclose the Commission from providing relief against the successors in interest of Veris Gold. In *International Technical Products Corp.*, 249 NLRB 1301 (Jun. 1980), the NLRB held that a company which purchased all of the assets of a predecessor company 'free and clear of all liens, claims and encumbrances' pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law. In 2010, the Board reaffirmed the *International Technical Products Corp.* holding in *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010), incorporating by reference 354 NLRB 872 (Oct. 2009), *aff'd sub nom. NLRB v. Leiferman*

¹⁰ The same Commissioner also expressed:

The Mine Act provides a Judge broad remedial powers to address instances of discrimination as may be appropriate. 30 U.S.C. § 815(c)(3) (providing that if a Judge sustains charges of discrimination he may grant "such relief as [he] deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate"). Accordingly, [that Commissioner noted] that the Commission has been granted more discretion in fashioning an appropriate remedy by the Mine Act than [this Court] initially recognized [when it] concluded that reinstatement of a miner to a successor in interest is not possible under the Mine Act. . . . However, the remedy of reinstatement may be imposed on an operator's successor in interest. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom., Terco v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987), cert. denied, 488 U.S. 818 (1988); *Simpson v. Kenta Energy*, 11 FMSHRC 770, 778 (May 1989).

Lowe, 2016 WL 197500, at *2 n.4.

Enterprises, LLC, 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

Id.

As the Commissioner noted, the National Labor Relations Board, in *International Technical Products*, held that a successor was liable for backpay, despite the successor's assertion that the assets were purchased "free and clear of all liens" pursuant to an order and judgment of the United States District Court. The NLRB stated that the sole issue presented was whether "a judicial sale, free and clear of all liens, pursuant to the authority of a bankruptcy court, extinguishes any backpay liability imposed upon a successor-employer for the unfair labor practices committed by its predecessor-employer." *International Technical Products*, 249 NLRB at 1302. The successor asserted that as it purchased the predecessor's assets free and clear of all liens, claims, and encumbrances, this would include the Board's claim for backpay. Citing its decision in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), and the Supreme Court's decision in *Golden State Bottling Company, Inc. v. N.L.R.B.*, 414 U.S. 168 (1973), the Board noted its holding in *Perma Vinyl*

that 'one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.' In *Golden State Bottling Company, Inc.*, the Supreme Court sustained the Board's *Perma Vinyl* doctrine and held that a successor-employer which acquires a business with knowledge of an outstanding Board order requiring its predecessor to reinstate with backpay an unlawfully discharged employee may properly be required to assume the reinstatement obligation and to share jointly and severally with the predecessor the backpay liability.

International Technical Products, 249 NLRB at 1303 (footnote omitted).

The Board did not accept the contention that the successor's liability was extinguished by the bankruptcy court's order allowing the successor to purchase the assets "free and clear of all liens, claims, and encumbrances. Rather, it noted that

while a bankruptcy court may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts. Indeed, the significance of a Board order has long been recognized by the Supreme Court. Thus, in *N.L.R.B. v. J. H. Rutter Rex Manufacturing Co, Inc.*, 396 U.S. 258, 263 (1969), the Supreme Court, citing *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), stated that 'as with the Board's other remedies, the power to order back pay is for the Board to wield, not for the courts.' Moreover, the Court emphasized that 'when the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that

the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’

Id.

The Board concluded that

the bankruptcy court’s order allowing [the successor] to purchase [the] assets free of all liens, claims, and encumbrances cannot affect the Board’s Order . . . requir[ing] . . . the ultimate successor [to] make the discriminate[e] whole for the remaining portion of the backpay due and owing them. To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . to proceed against a successor employer in furtherance of that obligation. Indeed, such a finding would, of necessity, imply that, by merely ordering the judicial sale of a bankrupt employer’s assets to a nonbankrupt successor employer ‘free and clear of all liens, claims, and encumbrances,’ a bankruptcy court can effectively nullify a Board order requiring that the nonbankrupt successor employer remedy the unfair labor practices committed by its predecessor.

Id.

Speaking to the purpose of the Board’s order, it added:

To insure that the adverse effects of a wrongdoer’s unlawful conduct are eliminated and that the public right is vindicated, it is essential that there be full compliance with the Board’s order requiring that the employer comply with the order’s remedial provisions. . . . Thus it cannot be classified or treated simply as a “lien, claim, or encumbrance” within the common usage of those terms and, consequently, any liability arising therefrom cannot be extinguished or modified . . . through the purchase of a bankrupt’s assets “free and clear of all liens, claims and encumbrances” at a judicial sale.

Id.

In *Chicago Truck Drivers, Helpers, and Warehouse Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995), a multi-employer pension fund brought an action against a Chapter 7 debtor’s successor in interest. Although the district court held there could not be successor liability, the appeals court held that the pension fund’s unsuccessful participation in the predecessor employer’s bankruptcy did not preclude it from a successor liability claim. The facts in *Tasemkin* may yet echo those in this matter. *Tasemkin* “went belly-up” allegedly owing some \$300,000 in delinquent pension funds. *Id.* While the Pension Fund attempted to recover those funds in the Chapter 7 bankruptcy, *Tasemkin Furniture* (“Old *Tasemkin*”) made a debt compromise agreement with its secured lender and turned over its interest to a new company, *Tasemkin, Inc.*, (“New *Tasemkin*”) which then foreclosed on the collateral, leaving nothing for anyone else, including the Pension Fund. *Id.* Thereafter, the Pension Fund sued *Tasemkin, Inc.*, on a successor liability theory. *Id.* The Seventh Circuit

provided clarity about successorship *vis-à-vis* bankruptcy and the general rule that a purchaser of assets does not acquire the seller's liabilities:

Most states have adopted exceptions to the general no-liability rule that allow creditors to pursue the successor if the "sale" is merely a merger or some other type of corporate reorganization that leaves real ownership unchanged. . . . Successor liability under federal common law is broader still: in order to protect federal rights or effectuate federal policies, this theory allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was "substantial continuity in the operation of the business before and after the sale." *E.E.O.C. v. G-K-G, Inc.*, 39 F.3d 740, 748 (7th Cir.1994). Successor liability is an equitable doctrine, not an inflexible command, and "in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240, 41 L.Ed.2d 46 (1974); see also *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir.1995).

Tasemkin, 59 F.3d at 49.

Noting that the district court had found that allowing the Pension Fund to proceed against New Tasemkin on a successor liability theory would frustrate the primacy of the Bankruptcy Code, and on that basis dismissed its claim, the Seventh Circuit acknowledged there were cases adopting that approach but it rejected the notion that it is an ironclad or simplistically applied rule. *Id.* at 50. The Seventh Circuit took note of the reasoning in support of protecting successors,

that it is desirable, perhaps even necessary, to shield purchasers of failing businesses from liability incurred by the predecessors . . . as a means of encouraging market growth and the fluidity of corporate capital. Fear of successor liability, this argument runs, would "chill" sales in bankruptcy and as a result harm employees of the failed concern who might have retained jobs with the successor business . . . [and that] companies may have trouble selling their assets for a decent price because "successors will be unwilling to assume a business involved in substantial time-consuming and expensive litigation when the assets themselves lack substantial value"

Id. (quoting *Musikiwamba v. ESSl, Inc.*, 760 F.2d 740, 751 (7th Cir.1985)).

Again, the Seventh Circuit's point, that a blanket rule is insufficiently analytical, is well taken, as it noted that

there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities[, and that] it is neither certain nor clear that the chilling effect need give [that Court] pause [as] purchasers can demand a lower price to account for pending liabilities of which they are aware, and [furthermore] under federal

successorship principles [purchasers] will not be held responsible for liabilities of which they had no notice.

Id. at 50-51.

The Seventh Circuit then quickly dispatched the second argument — that allowing application of “the successorship doctrine [would] frustrate[] the orderly scheme of the Bankruptcy Code by allowing some unsecured creditors to leapfrog over others.” *Id.* at 51. The circuit court observed that “once a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force.” *Id.* Although the circuit court acknowledged that imposing successorship liability “would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed,” it noted that “a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a per se preclusive effect on the creditor’s chances.” *Id.* The circuit court clearly thought a successorship theory should be permitted where the opposite approach, one which had the effect of “frustrating unsecured creditors while resurrecting virtually the identical enterprise,” should not. *Id.*¹¹

¹¹ A number of law review commentators have criticized the view that the power of a bankruptcy court under § 363(f) is without boundaries. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. (2002). The author notes that § 363(f) of the bankruptcy code authorizes sales free of “any interests,” whereas § 1141(c) authorizes post-sale vesting of property free and clear of all “claims and interests,” pointing out that the distinction is important because the latter is a plan process whereas the former is a quick-sale process, which affords little opportunity to object. Despite the narrower statutory language, in applying § 363(f), bankruptcy courts have been affording the debtor or trustee the same power to sell claims and interests. As applied to successors, the author points out that although it has been asserted that “[s]tate and federal decisions holding a bankruptcy purchaser liable as a successor of the debtor are directly at odds with Congressional intent to allow a debtor to sell its assets free and clear of all claims and interests therein,” this view is problematic. *Id.* at 258. This is because “[s]uccessor liability arises out of the actions of the purchaser, not the property itself.” *Id.* at 261. Thus, where

a de facto merger is found, or mere continuation of an enterprise justifies imposing successor liability, it is the purchaser’s postsale conduct (in continuing the business in substantially the same form and manner) that gives rise to liability. The same is true for successor liability founded upon fraudulent transfer and continued manufacture of a product line. All these successor liability doctrines are grounded upon acts or implications from acts of the purchaser, not the property.

Id. Thus, successor liability is *in personam* in nature, not *in rem*.

Other commenters have similarly opined that successor liability claims should be viewed as outside of “interests in property” under § 363(f) of the Bankruptcy Act. Rachel P. Corcoran,
(continued...)

¹¹ (...continued)

Why Successor Liability Claims are not 'Interests in Property' under Section 363(f), 18 Am. Bankr. Inst. L. Rev. 697 (2010). As noted, that section permits the sale of property of the estate outside the ordinary course of business “free and clear of any interest in such property.” The article examines what constitutes an “interest in property” in the context of § 363(f)’s “free and clear” sale provision, noting that its construction is important for successor liability claimants suing those who have purchased under it. While acknowledging that the great majority of courts have interpreted the provision to include successor claims, the author contends that state law should guide “the analysis of whether a particular claim or right constitutes ‘property’ or an ‘interest in property’ in the bankruptcy context, unless some identifiable federal interest requires otherwise,” and that Supreme Court precedent supports her view. *Id.* at 699. The author also observes that if a successor liability claim is an interest in property, then such claimant is entitled to adequate protection per § 363(e). This author also notes that § 363(f) only refers to “interests in property,” and does not include the term “claims.” *Id.* at 705. “Successor liability claims do not fall within any one of the section 507 priorities, and therefore, are general unsecured claims entitled to a pro rata share of whatever remains after secured and priority claims are paid.” *Id.* at 707. The author also cites to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), stating that the Supreme Court

held ‘that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)[,]’ that is, with respect to injunctions and restraining orders resulting from unfair labor practices. The Court reasoned, ‘[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees . . . and protection for the victimized employee-- all important policies subserved by the National Labor Relations Act, are achieved at a relatively minimal cost to the bona fide successor.’ . . . [T]he imposition of successor liability in *Golden State* was not due to the transfer of property alone, but rather, federal policy concerns and the successor’s knowledge at the time of purchase.

Id. at 727 (quoting *Golden State Bottling*, 414 U.S. at 180, 185) (footnotes omitted).

Another commentator reached a similar analytical outcome. See Patrick M. Birney, *Section 363 Sale Orders: May Sales be made Free and Clear of Successor Liability Claims?*, 22 J. Bankr. L. & Prac. 4 Art. 4 (2013). The author asserts that § 363 cannot provide insulation from successor liability claims, and that such claims against a § 363 purchaser under a successor liability theory should be evaluated under state successor liability law. Speaking to the language employed in § 363, that such sales are made “free and clear of any interest in such property,” the author acknowledges that in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), the court suggests that the “any interest” language “refer[s] to obligations that are connected to, or arise from, the property being sold,” and, in a similar vein, that *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003), also points to the proposition that “any interest” should include interests “that could potentially travel with the property being sold.” Birney, *supra*, at 3.

(continued...)

JCG has acknowledged that if MSHA itself brought the discrimination claim under section 105(c)(2) such a claim would be in a different category, but in this Court's estimation there is nothing about a section 105(c)(3) claim which mandates that it should have inferior status. Congress included the provision as a failsafe protection mechanism for those miners alleging discrimination where, as in this case, the agency, though acting in good faith, simply gets it wrong.

The Mine Act is a distinct creation of Congress. It operates independently of the Bankruptcy Act in, among other matters, making determinations of discrimination, appropriate parties to be included in its proceedings, and findings on the issue of successorship. There is nothing in the Mine Act that relegates it to a status as an appendage of bankruptcy law and therefore there is nothing which prohibits this Court, should the facts so warrant, from making the legal determination of whether JCG is a successor entity under the Mine Act. Should the Court find that JCG is a successor to Veris Gold, it also has the authority to award damages against that entity. However, should Varady prevail, the issue of whether JCG will ultimately be held financially liable as a successor for the damages flowing from Mr. Varady's discrimination claim is unpredictable and a distinct matter from this Court's ability to make the determination of

¹¹ (...continued)

However, as with the other commentators cited in this footnote, the author notes that, although courts have read the word "claims" into § 363(f), it is absent. In contrast, the word does appear in § 1141(c) proceedings, an inclusion which makes sense because that section provides claimants with procedural rights that do not exist in § 363 sale. Because "successor liability claimants are general unsecured creditors, who have no specific interest in the property that is being sold . . . there is no nexus between a successor liability claimant and specific debtor property outside of bankruptcy." *Id.* at 4. These are in personam, not in rem, actions, which is significant because a judgment against a successor does not constitute an interest in the debtor's property. *Id.* If in personam claims are included within a § 363 sale order, that would constitute "a nondebtor release of the asset purchaser from the successor liability claim" but such releases are very limited under the Bankruptcy Code. *Id.* at 5. In that regard the author notes that *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995), held that, except for asbestos matters, nondebtor releases are prohibited. Birney, *supra*, at 6. Thus, the author contends that as "third-party releases are permitted (if at all) only in limited circumstances and only in the context of a confirmed plan of reorganization, the Bankruptcy Code, and in particular section 363, simply cannot authorize the insulation of an asset purchaser from successor liability claims." *Id.* Advocating that state law should not be supplanted in the context of bankruptcy, unless Congress expressly so declares such a preemption, the author points out that the "Supreme Court has noted that, absent a "clear and manifest" purpose to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace . . . state law." To that point, § 363 does not contain an express congressional mandate empowering bankruptcy courts to sell debtor assets free and clear of in personam claims, including successor liability claims. Instead, the courts have inserted that broad interpretation. *Id.* at 6-7. Perhaps most importantly, the author observes that successor liability claims are born from the conduct of the asset purchaser, and not the asset. *Id.*

This Court fully appreciates that law journal assessments are not, in any fashion, precedent. However, the persuasiveness of such arguments is noted.

whether JCG is properly designated as a successor and to make findings as to the established, and appropriate, damages.

Other observations need to be made. It is unclear whether, in the high speed route under § 363(f) of the Bankruptcy Act, Mr. Varady received fair treatment. Though beyond this Court's purview, it would seem that he did not, in part because the § 363 procedure avoids the due process hearing found in § 1141(c) proceedings. The Court is under the impression that the bankruptcy court relies heavily upon those moving that procedure along, in particular, the monitor, to ensure that they are treating those who may have claims appropriately, especially where a *pro se*, non-attorney is seeking fair treatment. This Court is also persuaded that, in line with the law review commentators cited above, at least in the type of claim brought by Mr. Varady, the tendency of many courts to read interests *and claims* into 363 actions may work injustice.

In this connection it is noted that while the bankruptcy action was proceeding, Veris was still actively defending the section 105(c)(3) claims brought by Mr. Varady. JCG at least had knowledge of this. It was not until the evidence at that hearing clearly demonstrated Veris' discriminatory behavior against Varady that, at the conclusion of the hearing, Veris then acted to back out. That option, not taken earlier, was available.

Accordingly, Varady's complaint is amended to add JCG as a respondent.¹² The next step in the proceeding will be to determine the appropriateness of designating JCG as a successor. The final stage will then be for the Court to determine the appropriate damages to be awarded, a determination made apart from whether such damages as may be awarded will be enforceable in another federal, or possibly a state, forum.

Within two weeks from the date of this Order, JCG is directed to advise the Court whether it intends to participate in the successorship and damages proceedings and determinations.

So ordered.

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

¹² A separate order will be forthcoming regarding the issue of whether the Whitebox Entities may appropriately be added as a respondent in this proceeding for the purpose of determining successor liability.

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March 4, 2016

SECRETARY OF LABOR, MSHA, on
behalf of **CHERYL GARCIA**,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-905-DM
WE MD 14-16

Jerritt Canyon Mill Mine
Mine ID 26-01621

STAY ORDER

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The listed Respondent, Veris Gold USA, filed for Chapter 15 Bankruptcy on June 9, 2014, several weeks before the Secretary first filed for temporary reinstatement on behalf of Ms. Garcia in this matter.¹ On June 4, 2015, Jerritt Canyon Gold (JCG) purchased the Jerritt Canyon Mill Mine and other Veris Gold assets pursuant to a section 363(f) asset sale approved by the U.S. Bankruptcy Court. As a condition of that sale, JCG obtained a liability waiver that stated the asset sale was “free and clear of all liens, claims, and interests.” Sale Order, Docket No. 14-51015 (Bankr. D. Nev.).

During that same time period, the court twice postponed the scheduled hearing in this matter with assurances that additional time would aid settlement negotiations. On June 11, 2015, the Respondent’s bankruptcy counsel sent the Complainant a letter stating that Veris Gold USA would be liquidated through an asset sale and that no proceeds would be available to satisfy employee claims. On June 16, 2015, Respondent’s previous counsel filed a Notice of Withdrawal stating that Veris Gold USA had instructed counsel to withdraw from this matter pending the Respondent’s corporate dissolution.

Veris Gold then repeatedly failed to participate in mandatory prehearing proceedings, and the court entered a default order in favor of the Complainant on September 21, 2015. At the court’s request, the Secretary submitted a civil monetary penalty and personal damages on behalf of Ms. Garcia on October 9, 2015.

Shortly thereafter, two different actions were filed with the Commission that, in effect, sought to add JCG as a liable successor in interest for separate 105(c) violations originally filed against Veris Gold. *Morreale v Veris*, WEST 2014-793, October 9, 2015 Motion to Reopen;

¹ Ms. Garcia’s last potential cause of action occurred on or about February 27, 2014. As such, Ms. Garcia’s claim is a pre-bankruptcy claim and collection of any monetary award is presumptively governed by federal bankruptcy law.

Lowe v. Veris, 37 FMSHRC 2337 (October 2015)(ALJ Moran). The Commission remanded *Lowe* to the ALJ for further consideration on January 12, 2016 and has not yet addressed the Complainant's Motion to Reopen in *Morreale*.

On February 4, 2016, this court ordered the Secretary, Veris Gold, and JCG to address the following issues for this docket.

- 1.) Is JCG liable as a successor in interest for the discrimination claims contained in this docket.
- 2.) If the Secretary does not move to add JCG as a successor in interest, may the court add JCG *sua sponte* pursuant to Rule 21 of the Federal Rules of Civil Procedure?

The Secretary and JCG timely filed responses with the court on February 29, 2016. Veris Gold did not file a response. On February 16, 2016, JCG also filed a response with the Commission to the Complainant's Motion to Expedite and Amend in *Morreale v Veris*, WEST 2014-793.

Both the Secretary and JCG argue that this court should not add JCG as a liable successor in interest. Both entities state, with extra-Commission support, that a section 363(f) asset sale liability waiver is a complete bar to recovery for claims based upon the preceding owner's liabilities, including employment discrimination claims. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-290 (3rd Cir. 2003); *In re New England Fish Co.*, 19 BR 323, 326-27 (Bankr. W.D. Wash. 1982). However, neither party offered any binding guidance on the relationship between the Commission's traditional successorship test and federal bankruptcy law.^{2 3}

JCG's February 16, 2016 Commission filing in *Morreale v. Veris* WEST 2014-793 is substantially similar to the filing made with this court on February 29, 2016. Therefore, it appears that the Commission is currently considering the same asset sale liability waiver and

² JCG does note that the Bankruptcy Court may extinguish "Coal Act" successor liability pursuant to 11 U.S.C. § 363(f)(5). JCG Br., 7 (citing *Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996)). Upon review the "Coal Act" referenced is the Coal Industry Retiree Health Benefit Act of 1992 that created a combined pension Fund and Plan for UMWA miners and retirees. *Leckie*, 99 F.3d 576-77. Accordingly, while the *Leckie* decision may be illustrative of the proper operation of section 363(f) asset sales in general, it is not pertinent to successorship liability under the subject Federal Mine Safety & Health Act of 1977.

³ Additionally, neither party addressed the explicit statutory requirement that 363(f) sales may proceed, "only if – (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest." 11 U.S.C. 363(f)(1). To be clear, this court cannot and will not review the Bankruptcy Court's approval of the asset sale itself. However, this court is not prepared to conclude that a section 363(f) liability waiver completely supersedes the Commission's longstanding successorship test without further Commission direction. See *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd* in relevant part sub nom. *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983).

successorship issues presented in this case. The Commission's decision in *Morreale* will likely provide clarity for the adjudication of this docket. Thus, a temporary stay is warranted in this matter to ensure administrative efficiency and consistency.⁴

ORDER

Accordingly, Docket No. WEST 2014-905 is **STAYED** pending Commission action in *Morreale v Veris*, WEST 2014-793.

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

Distribution: (U.S. First Class Mail)

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⁴ As noted by the Secretary, Veris Gold USA has been officially dissolved and does not retain any assets against which Ms. Garcia could potentially recover. Therefore, placing this matter in stay will not prejudice or harm the Complainant.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEFFREY S. BREWER,
Complainant,

v.

MONONGALIA COUNTY CO.,
CONSOLIDATION COAL CO.,
MURRAY AMERICAN ENERGY INC.,
and MURRAY ENERGY CORP.,
Respondents

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2016-238-D
MSHA Case No.: MORG-CD 2016-14

Mine: Blacksville No. 2
Mine ID: 46-01968

ORDER GRANTING TEMPORARY REINSTATEMENT OF JEFFREY S. BREWER

Before: Judge Andrews

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on February 19, 2016, filed an Application for Temporary Reinstatement of miner Jeffrey S. Brewer (“Complainant”) to his former position with Murray Energy (“Respondent”) at the Blacksville No. 2 Mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. §2700.45(c). By email, the Respondent’s counsel notified the court that they received the Secretary’s Application on February 22, 2016. The Respondent has not filed a timely Request for Hearing. Since, for the following reasons, the complaint appears to have merit the temporary reinstatement of Jeffrey S. Brewer should be granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1 Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. §2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought, s[he] shall issue immediately a written order of temporary reinstatement. *Id.* In the instant case, the Respondent has not timely filed a request for hearing.

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it appears to have merit. S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress's "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). The plain language of the Act states that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. §815(c)(2). The judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."¹ *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

Evidence

The Discrimination Complaint was filed with the Secretary's Application for Temporary Reinstatement. (see Application for Temporary Reinstatement, Exhibit B). In the Summary of Discriminatory Action, Complainant stated, in pertinent part:

I am a miner who, on October 19, 2015, was suspended pending discharge due to the accusation, by management, that I abused the filing of 103g and reported too many safety concerns.

The Declaration of Special Investigator Jeffrey C. Maxwell was also filed with the Complainant's Application for Temporary Reinstatement (see Exhibit A), and asserts the following:

1. Mr. Brewer was employed and classified as a Shuttle Car Operator, and also performed work as a Roof Bolter and General Inside Laborer, among various other jobs, at Murray's Blacksville No. 2 Mine.

¹ "Substantial evidence" means such relevant evidence as a reliable 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)).

2. Between August 2015 and October 2015, Mr. Brewer filed 103(g) safety complaints with MSHA concerning safety issues at Blacksville No. 2 Mine.
3. Assistant Shift Foreman Chad Martin made statements showing that Mr. Martin believed that Mr. Brewer filed too many 103(g) safety complaints with MSHA.
4. There is evidence showing that Shift Foreman Gary Brookover made statements displaying general animus toward miners who filed 103(g) safety complaints with MSHA.
5. On August 31, 2015, Mr. Brewer filed 105(c) complaint MORG-CD-2015-31, which he subsequently withdrew because Murray did not terminate his employment at that time.
6. On September 1, 2015, Murray issued a letter stating that Mr. Brewer would be suspended with intent to discharge. However, Murray amended this action, and Mr. Brewer was not discharged, but was suspended from August 27, 2015 through September 2, 2015.
7. On October 17, 2015, Mr. Brewer was suspended with intent to discharge for allegedly violating Employee Rules of Conduct Nos. 4 and 9, which provide that

In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including:

...

4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.

9. Absence from work or leaving the workplace without permission from supervisor, except in circumstances, which prevent the giving of such notice.

8. On October 19, 2015, Murray terminated Mr. Brewer's employment.
9. On October 20, 2015, the United Mine Workers of America ("UMWA") Local, which represents miners at Murray's Blacksville No. 2 Mine, filed a grievance to contest Murray's termination of Mr. Brewer's employment.
10. On December 3, 2015, Mr. Brewer filed 105(c) complaint MORG-CD-2016-12, which he subsequently withdrew on December 7, 2015.
11. Representatives from the UMWA advised Mr. Brewer to delay filing his 105(c) complaint with MSHA until after an arbitration decision was issued on Mr. Brewer's grievance regarding his termination.
12. On December 30, 2015, a final Arbitration Opinion and Award was issued, validating and finalizing Murray's termination of Mr. Brewer's employment.
13. Mr. Brewer denies the allegations that he violated Employee Rules of Conduct Nos. 4 and 9. In addition, Mr. Brewer alleges that Employee Rules of Conduct Nos. 4 and 9 are not consistently enforced at the Blacksville No. 2 Mine.

14. On January 14, 2016. Mr. Brewer filed the 105(c) complaint which constitutes the basis of the present 105(c) Temporary Reinstatement Application.

Based upon the information available as the result of the special investigation conducted in these matters, I have concluded that evidence exists that Mr. Brewer was discharged from his employment with Murray because he made 103(g) safety complaints to MSHA. Thus, it is my determination that the discrimination complaint filed by Mr. Brewer was not frivolously brought. Declaration of Jeffrey C. Maxwell, pp. 1-3.

Findings and Conclusion

I find that the evidence developed by the Special Investigator is not insubstantial and presents a reasonable cause to believe the instant Discrimination Complaint was not frivolously brought. Miner Jeffrey S. Brewer is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Jeffrey S. Brewer** be immediately **TEMPORARILY REINSTATED** to his former job at the Blacksville No. 2 mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Murray Energy did not violate Section 105(c) of the Act.

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

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March 9, 2016

AUSTIN POWDER COMPANY,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 2012-116-R
Citation No. 7040091; 01/20/2012

Mine: River Hill Coal Co., Inc.
Mine ID 36-00884 E24

Docket No. KENT 2011-213-R
Citation No. 8257007; 10/22/2010

Mine: S-1 Hunts Branch
Mine ID 15-18280 E24

Docket No. KENT 2011-214-R
Order No. 8257009; 10/22/2010

Mine: S-1 Hunts Branch
Mine ID 15-18280 E24

Docket No. KENT 2011-403-R
Citation No. 8257016; 12/29/2010

Mine: S-4 Netley Branch
Mine ID 15-17799 E24

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

v.

AUSTIN POWDER COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2012-172
A.C. No. 36-00884-281523 E24

Mine: River Hill Coal Co., Inc.

Docket No. PENN 2012-77
A.C. No. 36-09312-273298 E24

Mine: Allegheny Strips

Docket No. CENT 2013-213
A.C. No. 23-02262-309819 E24

Mine: Hume #1

Docket No. KENT 2011-1011
A.C. No. 15-17799-252893 E24

Mine: S-4 Netley Branch

Docket No. KENT 2012-684
A.C. No. 15-18280-281484 E24

Mine: S-1 Hunts Branch

Docket No. KENT 2012-1030
A.C. No. 15-17834-287578 E24

Mine: F-9 Prater Branch

Docket No. KENT 2013-274
A.C. No. 15-19451-307263 E24

Mine: S-9 Findlay Branch

Docket No. KENT 2013-1078
A.C. No. 15-19199-325351 E24

Mine: S-4 Calloway North

Docket No. SE 2012-128
A.C. No. 01-03375-273206 E24

Mine: Johnson Mine

Docket No. VA 2012-542
A.C. No. 44-07133-293119 E24

Mine: No. 26 Strip

Docket No. VA 2014-197
A.C. No. 44-07098-343919 E24

Mine: S-5 Jones Fork

Docket No. WEVA 2014-157
A.C. No. 46-00015-334165 E24

DBA: Greer Lime Company

**ORDER AFFIRMING “UNITARY OPERATOR” STATUS OF
AUSTIN POWDER COMPANY**

Appearances: Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, on behalf of the Secretary of Labor

Christopher D. Pence, Esq., Hardy Pence, PLLC, Charleston, West
Virginia, on behalf of Austin Powder Company

Before: Judge Andrews

This proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). Austin Powder Company (“APC”) is subject to the jurisdiction of The Federal Mine Safety and Health Commission (“FMSHRC”) and the undersigned Administrative Law Judge (“ALJ”) has the authority to hear this case and issue a decision.¹

¹ For clarity throughout this decision, the following abbreviations and terms will be used:

Austin Powder Company, the Ohio Corporation, parent and owner of the subsidiaries will be “APC”;

The Austin Powder Divisional Subsidiary Corporations will be “subsidiary LLC” or “LLC”;

The entire Austin Powder organization, APC and LLCs, will be the “APC organization”; and

The *Berwind* companies will be the “BNRC group”.

Procedural History

The above-captioned dockets were consolidated to provide for the efficient resolution of a threshold issue common to all of the citations for alleged violations of safety standards by Austin Powder divisional subsidiary LLCs. Each of the twenty citations and two orders listed Austin Powder Company as the operator based on a determination by the Secretary of Labor (“Secretary”) that the APC organization constituted a “unitary operator” for the purposes of the Mine Act. Austin Powder Company is the parent company and the owner of the divisional subsidiary LLCs. Respondent has objected to being charged on that basis since the subsidiary LLC - and only that entity – should be held liable for any violations committed by that subsidiary LLC. The secretary has responded that more than one entity in a company may be held liable based on the “unitary operator” theory first announced by the Commission in *Berwind Natural Resources, Corp., et al.*, 21 FMSHRC 1284 (Dec. 1999).

Early in the procedural history of this case, ALJ William Steele approved a partial settlement of the 104(a) citation in docket PENN 2012-172, leaving the issue of assignment of liability to be later adjudicated. Upon Judge Steele’s retirement, the docket was reassigned to another ALJ. The parties moved for Summary Decision, but the ALJ determined there were material facts in dispute and that the unitary operator issue must first be decided. The Secretary then moved for consolidation of all similar APC dockets, so the preliminary issue of the Secretary’s determination that the APC organization is a unitary operator could be resolved in one proceeding.

After reassignment of this docket to the undersigned, Austin Powder dockets with the unitary operator issue were ordered to be consolidated. Of the twelve consolidated dockets, PENN 2012-172 with Contest PENN 2012-116-R were designated the lead dockets.² In December 2014 the parties were ordered to file briefs limited to the unitary operator issue and the test to be applied for any determination of unitary operator status. The briefs were submitted and the matter was set for hearing. Conferences were also held with the parties on May 5, 13, and 21, 2015, in preparation for the hearing. The hearing was held on May 27, 2015, in Pittsburgh, Pennsylvania at which time the parties had the opportunity to present arguments and evidence in support of their respective positions. No witnesses were called; the evidence in this proceeding consists of numerous documents filed prior to the hearing and the exhibits admitted at hearing, all contained in the official file of the lead docket.³ Oral argument replaced the need for post hearing briefs.⁴

² PENN 2012-172 contains copies of all of the complete pleadings and documents filed in this proceeding.

³ Before the hearing, the official file had become expanded to well over one thousand pages, mostly repetitive filings of the parties when seeking summary decision. In an effort to contain the record and limit duplicative submissions and exhibits, the documents already of record were marked for identification and reference as follows:

The 28 exhibits attached to Respondent’s Motion for Summary Decision will be “RSD” with the exhibit number;

(continued...)

At the outset, the Secretary objected to the admission of expert reports obtained by Respondent pertaining to APC and two of the subsidiary LLCs that concluded APC and the LLCs should not be treated as a unitary operator. Counsel for Respondent explained the reports were offered for the limited purpose of understanding the corporate structure and corporate formalities, and not for the facts found or conclusions drawn by the author. The reports were admitted on the basis that there could be information helpful in the determination of the preliminary issue. However, much of the information was also contained in other documents, and I did not find the reports to be particularly relevant in reaching this decision.

The Secretary also objected to a letter dated September 26, 2008. Again, for the limited purpose of any helpful background information in the letter, it was admitted into evidence. However, the information was not needed for a determination in this matter.

Joint Stipulations

The parties submitted Joint Stipulations:

1. The May 6, 2015, *Notice of Hearing, Pre-Hearing Order* addresses the "narrowly limited" scope of the May 27 hearing, stating that the hearing will be restricted to consideration of two discrete issues. The first issue is "Whether Austin Powder Company meets the definition of 'Operator' under Section 3(d) of the Mine Act." For purposes of the consolidated proceeding, the Secretary does not assert that Austin Powder Company (APC), an Ohio corporation and the parent company of various Austin Powder subsidiaries established pursuant to Delaware state law, alone had sufficient contact with mines at which the violations were issued to be an "operator" under Section 3(d) of the Mine Act.

³ (...continued)

The 4 additional documents submitted with the Respondent's renewed motion will be RRMD-3, RRMD-21, RRMD-27 and RRMD-28;

The 50 documents submitted with the Secretary's Motion for Summary Decision will be "SSD" with the document number. The 8 CDs will be "SSCD" with a letter, A through H; and

The 2 documents submitted with the Secretary's renewed motion will be SRMD-1 and SRMD-2.

⁴ At the hearing, additional exhibits were admitted into evidence. The Secretary's exhibits were marked GX-1 through 6, and two diagrams, demonstrative only, were marked GXDE-1 and GXDE-2. Respondent's exhibit (with ten attachments) was marked RX-A. Joint Stipulations have also been submitted and marked JX-1. All of the above documents are contained in six numbered file folders that comprise the official file for the lead docket. Each document and/or the pages cited in the Findings and Conclusions below have been compiled and placed in each of the consolidated dockets. In addition, all of the documents relevant to the preliminary issue are also available in electronic form in each of the consolidated dockets in the Commission's e-CMS system.

2. For purposes of this hearing, APC does not contest that an APC subsidiary (Austin Powder Appalachia, LLC; Austin Powder MidSouth, LLC; Austin Powder Northeast, LLC; or Austin Powder Central States, LLC) was performing services at a mine, and thus met the definition of an "operator," under Section 3(d) of the Mine Act, at the time each of the violations in the consolidated proceeding was issued.
3. Beginning on or about December 21, 2004, Austin Powder Company made the business decision for reasons unrelated to the contractor identification issue to restructure the company and spin-off APC's corporate divisions performing services at mines into separate, legal entities, operating as wholly-owned subsidiaries and organized as limited liability companies pursuant to Delaware state law. The decision was formally adopted through an *Action by Unanimous Written Contract of the Board of Directors*, dated December 15, 2006. The *Action* is entered into evidence as SSD-9 and RRMD-21. This action was accomplished, in part, through the execution of *Limited Liability Company Agreements* for the respective subsidiaries and through the execution of formal certification documentation by Delaware state representatives. Each APC subsidiary executed substantially the same *Limited Liability Company Agreement* and substantially the same Delaware state certification documentation was provided for each APC subsidiary. The documents specific to Austin Powder Northeast LLC are entered into evidence as SSD17, SSD18, and RSD-17.
4. Austin Powder Company and each Austin Powder Company subsidiary are parties to a series of formal, written contracts that specifically establish the duties and responsibilities of each party, including a *Capital Contribution Agreement*; *Employee Leasing Agreement*; *Assignment and Assumption of Contracts and Leases*; *Services Agreement*; *Transportation, Vehicle and Operational Support Services Agreement*; and *Supply Agreement* (collectively, "Contracts"). These Contracts were executed by and between the parties on or about January 1, 2007. The content of each of the Contracts between Austin Powder Company and each Austin Powder Company subsidiary is materially the same. The agreements specific to Austin Powder Northeast LLC are entered into evidence as SSD-10, SSD-11, SSD-12, SSD-13, SSD-14, SSD-16, and RSD-18, RSD-19, RSD-20, RSD-21, RSD-22, and RSD-23.

JX-1.

The Issue

The issue presented is whether APC and its subsidiary LLCs constitute a "unitary operator" under the Commission decision in *Berwind*.

Contentions

The APC organization performs blasting services for mines, and it contends that the purpose of the APC corporate restructuring was not to achieve lower penalties but to obtain ATF licenses for each of the LLCs.⁵ As a result of the restructuring, each LLC has separate officers, managers, and physical office locations; each LLC Management team has full authority and responsibility over the leased APC employees and activities of the LLC and can make decisions on their own without permission from APC. Each LLC can hire, fire and set the pay of an employee. Each LLC shares only one officer, the Secretary and Treasurer, with APC. Further, each LLC operates in a distinct region of the United States, files its own state income tax return, and conducts its own training, corrects safety issues, and enforces health and safety policies to protect miners. Respondent also contends that while there is some interrelationship of operations and some common management, APC is vertically integrated with each LLC, the corporations are formed under state law, the conduct of business is governed by formal, written “arms-length” contracts setting the obligations of each entity, and the LLCs have operational independence.

Respondent further argues that viewing APC as one big company is overly simplistic and ignores corporate law and the facts of the case since the LLCs are separate and distinct legal business entities each with its own existence and identity. Also, APC is too far removed from the blasting activities to be considered a single entity with its LLCs. Further, each LLC can develop its own procedures based on regional geologic differences. Respondent also argues that MSHA has incorrectly cited APC for conditions that existed at a mine when APC does not have substantial involvement with the mine, does not exercise pervasive control over the LLC at the mine, and the Secretary’s “unitary operator” theory is not supported under the law. The ultimate responsibility for implementing and enforcing safety policies and compliance with health and safety laws rests with the LLCs.

The Secretary contends that prior to December 2004, APC worked as a single company with ten regional divisions performing contract services at mines; APC manufactured blasting materials that were transferred to these regional divisions where the products were sold and used. From 2004 through 2007, APC reorganized and incorporated each of the wholly owned regional subsidiaries, but for the purposes of the Mine Act the company continued to operate as a single entity, making, transferring, storing, selling and using the blasting materials and supplies. Further, APC continues to relate to its subsidiaries in materially the same way as before the reorganization and there is significant evidence of stunning interrelationship and interdependence of operations, centralized control over health and safety, and a number of facts showing common management. The training programs are developed and distributed by APC and are required to be presented to and followed by its employees at the LLCs.

The Secretary also contends APC holds itself out as one company, and the wholly owned subsidiary LLCs could not and do not stand and function on their own. The formal agreements are in essence binding statements that dictate the way LLCs will operate. Further, there is no need to examine what work a particular subsidiary is performing at one of the 360 mines serviced by the company. The Secretary argues the facts overwhelmingly weigh in favor of the entities of the APC organization constituting a “unitary operator” under the four factor test, and

⁵ ATF refers to the Bureau of Alcohol, Tobacco, and Firearms.

consistent with the Mine Act MSHA has the authority to charge-issue a citation to-either APC or its subsidiary LLC.

Definitions

For the purposes of the Mine Act:

“operator” means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine....

“person” means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.

30 U.S.C. § 802(d),(f).

The *Berwind* proceedings

The parties are essentially in agreement that the Commission’s decision in *Berwind* controls, and under that precedent they should succeed in their respective positions.

The *Berwind* controversy arose as a result of over two hundred citations and orders issued by MSHA following an explosion at the Elmo No. 5 Mine in November 1993 that resulted in one fatality. *Berwind Natural Resources, Corp.*, 17 FMSHRC 684 (Apr. 1995) (ALJ). There were five companies engaged in mining coal; Berwind Natural resources, Corp., (“BNRC”) a holding company, and its wholly owned subsidiaries: Kentucky Berwind Land Company (“Kentucky Berwind”) owner of coal reserves, Kyber Coal Company (“Kyber”) lessee of the Elmo No. 5 coal reserves, and Jesse Branch Coal Company (“Jesse Branch”) a contractor providing mapping and surveying services at the mine for Kyber. *Id* at 684, 686-689. AA&W Coals, Inc., (“AA&W”) operated the mine under a contract with Kyber. *Id* at 684. The citations and orders were issued to AA&W as operator; however, the Secretary also issued these citations and orders to each of the four BNRC entities in order to establish joint and several liability. *Id* at 684, 686.

Following a hearing the ALJ rejected the Secretary’s “Unitary Entity” theory offered to establish that multifaceted corporate entities are of necessity statutory operators. *Berwind Natural Resources, Corp.*, 18 FMSHRC 202, 233 (Feb. 1996) (ALJ). The Judge found that BNRC, Kentucky Berwind and Jesse Branch were not operators of the mine. Kyber, however, was found to have the authority to participate in decision making with AA&W and did retain such control and supervision of AA&W as to make Kyber an “operator” within the meaning of the Mine Act. *Id* at 233-243.

On review, a majority of the Commission affirmed that, of the four BNRC entities, only Kyber was an “operator” of the Elmo No. 5 Mine. This holding was based on Kyber’s “substantial involvement” in engineering, financial, production, personnel and health and safety matters. *Secretary v. Berwind Natural Resources, Corp., et al.*, 21 FMSHRC 1284, 1325 (Dec. 1999). The judge’s rejection of the Secretary’s “Unitary Entity” theory was vacated and a new test was established by modifying the four-part “Single Employer” doctrine developed under the

National Labor Relations Act (“NLRA”), 29 U.S.C. § 141 *et seq.*, and Title VII of The Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.* to address the primary concern with the protection of health and safety of miners. *Id* at 1308-1317. The majority modified the single employer doctrine and announced the four-factor “Unitary Operator” test. This theory was considered to be a gap-filling measure designed to flesh out the definition of “operator” under the Mine Act. Upon application of the test, only Kyber and Jesse Branch were found to be a “unitary operator” functioning essentially as a single entity. *Id* at 1321, 1322. The combined Kyber/Jesse Branch entity therefore qualified as an “operator” under the Mine Act. *Id* at 1324, 1325.⁶

Berwind has been cited in one Commission decision, *Secretary of Labor (MSHA) v. National Cement Co. of California, Inc., and Tejon Ranchcorp*, 30 FMSHRC 668 (Aug. 2008). In this decision a majority of the Commission found that an entity must have “substantial involvement” with mine related activities, as defined in *Berwind*, to be considered a mine “operator”. *Id* at 682. In a dissenting opinion, Commissioner Jordan questioned the *Berwind* holding in light of the D.C. Circuit decision in *Sec’y of Labor v. Twentymile Coal Co.*, 456 F. 3d 151 (D.C. Cir 2006). *Id* at 689, footnote 13.⁷

Commission Judges have also cited *Berwind* in the application of the four-factor test and in discussing the statutory definition of “operator” status. *Sec’y of Labor OBO Reuben Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 894, 897 (Apr. 2012)(ALJ), 34 FMSHRC 1464, 1475 (Jun. 2012)(ALJ); *Fred Estrada v. Freeport McMoran Tyrone, Inc., and/or Runyan Construction*, 35 FMSHRC 3244, 3246 (Sept. 2013)(ALJ); *Sec’y of Labor (MSHA) v. Black Energy, Inc.*, 35 FMSHRC 2913, 2916 (Aug. 2013)(ALJ). Also, two commonly owned entities sharing the same address and equipment were considered a unitary operator in order to amend Petitions to include both as Respondents. *Sec’y of Labor (MSHA) v. Quality Materials and CDG Materials, Inc.*, 36 FMSHRC 2334-2336 (Aug. 2014). Recently, *Berwind* was discussed in the context of operational involvement at a mine and MSHA jurisdiction. *Sec’y of Labor (MSHA) v. Hammerlund construction, Inc.*, 37 FMSHRC 2611, 2620-22 (Nov. 2015).

Although both questioned and cited by the Commission, *Berwind* has not been modified or overruled.

In order to better understand whether and to what extent *Berwind* relates to the instant case, some pertinent information regarding each company, the APC organization and the BNRC group, is set forth below. It is not intended that these brief summaries be detailed or comprehensive.

⁶ While this combined entity could properly be charged as liable along with AA&W, any citations were found to be invalid on fair notice grounds.

⁷ Commissioner Jordan wrote “In light of the D.C. Circuit’s decision in *Sec’y of Labor v. Twentymile Coal Co.*, 456 F. 3d 151 (D.C. Cir. 2006), one could question the vitality of the *Berwind* holding cited by my colleagues.”

The BNRC group

The BNRC group was engaged in the business of production mining of coal at a single location, the Elmo No. 5 Mine. The holding company BNRC owned Kentucky Berwind, Kyber and Jesse Branch. The function of BNRC was to oversee the operations of its three subsidiaries by reviewing and approving their budgets and allocating funds to meet those budgets. BNRC shared common officers with its subsidiaries, and as sole shareholder had the authority to both approve and replace officers and management officials. Economic performance, coal production and quality were monitored through financial statements and reports received from the subsidiaries. BNRC did not have any direct relationship with contractor AA&W and did not exert control over operations at the mine. *Berwind*, at 1285.

Kentucky Berwind was the owner of coal reserves that were leased to Kyber, Jesse Branch and others. Kentucky Berwind did not fund the mining operations and did not support the mining with any supplies, machinery, equipment or tools. *Id* at 1286. Kentucky Berwind employees examined the mine workings periodically to ensure proper coal recovery and confirm royalties. Kentucky Berwind had no input into mining projections, or roof control or ventilation plans. *Id* at 1287, 1288.

Kyber contracted out preparation of the leased area and actual mining of coal at the Elmo No. 5 Mine. Kyber retained final approval of all aspects of mining projections, and Kyber employees visited the mine to insure that the coal reserves were being fully and properly mined. *Id* at 1287, 1288.

Jesse Branch was paid by Kyber for surveying services, including drafting mine maps and setting spads. Jesse Branch employees were generally at the mine weekly to perform the contract work. *Id* at 1286, 1287. Jesse Branch was a sister company with Kyber, and Jesse Branch's engineering services played a key role in determining the areas to be mined and the direction of mining. *Id* at 1299, 1300. A high degree of interrelationship existed between these sister companies; they shared officers, board members, employees, offices, equipment and machinery. *Id* at 1319-1321. Together, Kyber and Jesse Branch exercised control over the operation of the Elmo No. 5 Mine. *Id* at 1322.

The APC organization

APC is an Ohio corporation wholly owned by Austin Powder Holding Company. A large explosives company, APC provides contract blasting, drilling and related services to mining companies throughout the United States. APC's contract services are provided by twelve wholly owned divisional subsidiary LLCs to more than three hundred mine sites. The LLCs purchase from APC the nitrates, explosives, fuel oil and blasting accessories as well as other needed goods and products. The subsidiary LLCs store, sell and use the APC commercial explosive products. There is no evidence that Austin Powder either owns coal or other mineral reserves or owns or operates any mine. Prior to 2004 the LLCs were divisions under the corporate umbrella of APC. During the period from 2004 through 2007 the relationship between APC and its LLCs was defined by a series of contractual agreements executed pursuant to reorganization. The relationship is also illustrated by materials published by APC, restructuring documents, various

communications, website information, and deposition testimony of record. The relationship is discussed at length below.

The APC organization today and the BNRC group of 1999 are very different business enterprises. The BNRC group was focused on mining coal at one location, the Elmo #5 mine. APC provides contract blasting services and supplies to industries including mining nation-wide, but does not own or operate any mines. Comparisons are difficult to draw and for this reason the wisdom of the *Berwind* four-factor test becomes obvious. Companies can and do differ greatly considering their organizational structure, conduct of their business, and the products and services offered. The four-factor test can be applied to companies that consist of two or more entities, and the relevant examination is the relationship between the entities. The unitary operator theory allowed the Secretary to issue each citation to the mine operator and to each of the BNRC entities; however, in the instant case the theory was used to cite APC for alleged violations of safety standards by the LLCs performing the contract services at mines. The Secretary stipulated that for this proceeding only APC is not an “operator” as defined by the Mine Act, and Respondent stipulated that the LLCs were contractors at mine sites and met the definition of “operator”.

Findings and Conclusions

Congress intended for the definition of “operator” to be as broad as possible. S. Rep. No. 91-411 at 44 (1969), 1 Coal Act Legis. Hist. at 170. However, in 1999 the definition had not been extended to multiple entities within a company engaged in mining or performing work at a mine. It was in this context that the Commission borrowed from and modified the “single employer” doctrine to craft the four-factor “unitary operator” test as a gap-filling measure to allow for joint and several liability of more than one entity of a company as an “operator”. The *Berwind* majority began by upholding as reasonable under *Chevron II* analysis the Secretary’s interpretation of the Mine Act permitting two or more related entities to be designated a single operator. The unitary operator test established these factors:

- (1) Interrelation of operations,
- (2) Common management,
- (3) Centralized control over mine health and safety, and
- (4) Common ownership.

The majority further explained:

To demonstrate unitary operator status, not every factor need be present, and no particular factor is controlling. Instead, we will weigh the totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one. (Citations omitted).

Berwind, at 1317.

The APC organization is currently treated as a unitary operator, providing the Secretary with the discretion to issue citations to the parent, APC, for alleged violations by its subsidiary LLC working at a mine. Therefore, the test must be applied to the APC organization to determine whether the exercise of the Secretary's prosecutorial discretion was proper. The initial task is to analyze the APC organization in each of the test factors. For each factor, the question of substantial involvement must be addressed. Whereas in *Berwind* the question was whether the entities of the group had *ceased* functioning as separate operations, in the instant case the question is whether APC and its subsidiary LLCs have *become* separate entities.

As indicated above, beginning in 2004 APC reorganized its regional subsidiaries as corporations under Delaware state law each as a limited liability company (LLC). The principle place of business for each was the APC corporate address in Cleveland, Ohio. Each LLC was granted an ATF license, and each license also listed the corporate address in Cleveland, Ohio. SSD-29, pp. 54, 55, 240. APC's interest in the LLCs was 100% of "profits, losses, cash distributions, capital accounts and other economic rights". Cash and any property not required by the LLC would flow to APC. A Board of Managers with decision making authority was created to manage and control each LLC. The individuals designated were David M. Gleason, Michael A. Gleason and David P. True. This Board of Managers elected the officers of the LLC. RSD-17.

In December 2006 all of the Members of the APC Board of Directors, David M. Gleason, Michael A. Gleason and David P. True, having already caused the formation of the LLCs, unanimously consented to enter into certain contractual agreements with each LLC. RRMD-21. Two of the agreements provided for the contribution of certain assets to the LLCs in exchange for the 100% ownership interest, and the assumption of certain liabilities by the LLC including listed contracts and leases. RSD-18, 20. The remaining agreements provided for employee, services, transportation and supply arrangements between the entities. RSD-19, 21, 22, 23. The parties stipulated that the content of each of the contracts between APC and each subsidiary LLC was materially the same. JX-1, No.4. Therefore, there is no need to refer to the many duplicative documents in the official file. Respondent argues that the contractual agreements establish an "arms-length" relationship between the entities. However, those same agreements spell out how the business will be conducted and they also set the parameters for the operation of the LLCs.

Interrelation of operations

Many services are furnished by APC to its LLCs: accounting, human resources, invoicing/collection, record keeping, general office services, insurance coverage, and IT for record keeping and financial reporting purposes. RSD-21. These services are centralized at APC with some shared responsibilities performed by the LLCs. The services are characterized by APC as administrative and support necessary to allow the LLC to run its business. *Id.* The agreement covering services does relieve each LLC of needing additional personnel to handle these essential business functions or of contracting for such services locally. While these provisions do support the subsidiary LLC it is also clear that the LLCs are largely *dependent* on APC for the services. Further, the services are not only provided by APC, but *controlled* by APC.

An important support service is in the area of human resources. The Employee Leasing Agreement provides that APC will lease employees to the LLCs. RSD-19. All employees,

whether working at APC headquarters or at a subsidiary LLC in the field, are on the direct payroll of APC. *Id.* It is APC that performs the usual payroll functions of directly paying the leased employee, withholding taxes, and producing wage and tax statements. *Id.* Health and life insurance plans are provided by APC. Respondent contends the LLCs can hire, fire and set the pay of an employee. However, it is APC that has the authority to remove or replace any leased employee. RSD-19. LLC officials can recommend employment actions, but it is APC that conducts screening and approves the actions. SSD-29, pp. 94, 96, 99, 100. Employees are required to review the APC Employee Handbook during training, and they are issued a copy. SSD-41, p. 7. It is clear that all employees are governed by the personnel policies and guidelines published by APC. While the LLC may participate in personnel matters, it is APC that *controls* the policies governing human resources.

Invoicing and collection are accounting services provided by APC. RSD-21. It is APC that maintains the cost accounting allowing the LLCs to “pay” for services and supplies. SSD-29, pp. 126, 127. A single federal tax return is filed for the APC organization, and APC provides the information and documentation for each LLC to file state tax returns. RSD-17, No.9.7, SSD-29, pp. 45-47. This does not show that the LLCs are independent of APC, but the practical reality of regional locations. Further, the mine operators send payments to a national company bank account. SSD-29, p. 127. While the LLCs must participate with billing, record keeping and financial reports regarding its activities in connection with performing contracts, it is clear that the handling of revenues is *controlled* by APC. In addition, insurance policies are negotiated and maintained by APC, with the LLCs named as parties. Employee health and life, workers compensation, liability, vehicle and other needed insurance coverage are all held by APC. RSD-22; SSD-29, p. 86. Credit cards are provided to the LLCs, and APC is ultimately responsible for the charges. SSD-29, pp. 150-152. It is the IT service maintained by APC that relieves the LLC of obtaining and maintaining its own technology for communications, record keeping and financial reporting. SSD-29, pp. 187, 222, 223, 233, 234. The websites⁸ are also maintained by APC, not each of the LLCs. SSD-29, p. 187. The LLCs are *dependent* on APC for accounting, financial, insurance and technology functions.

Vehicles, some specialized, are needed for the LLCs to carry out the blasting work. APC provides the vehicles, carrier services and vehicle support services necessary for the LLCs to do the contract work. APC is also responsible for registration and maintenance of the vehicles, insurance coverage, and related accounting and tax services. The LLCs have the responsibility to comply with all applicable laws and obtaining any needed permits. RSD-22. APC also supplies the LLCs with the products needed for their work. This includes nitrates, explosives, fuel oil and blasting accessories. Under the Supply Agreement the LLC is to purchase all of its needs for products from APC. RSD-23. Respondent contends that the LLCs can also purchase supplies from other vendors; however, about 95 percent of the material used by the LLCs is manufactured and supplied by APC. SSD-29, p. 135. Of course, when using the vehicles and supplies, they are under the control of LLC personnel, who are employees of APC. This does not serve to functionally separate the entities; rather, the LLCs are *dependent* on APC for vehicles, equipment, supplies and related services.

⁸ The websites are www.austinpowder.com and www.austinpowder.net.

The APC organization is not held out to the world as being comprised of separate and distinct corporations that function independently. The websites do not distinguish between APC and the subsidiary LLCs, referring to “Austin Powder”, “Austin Powder Company” or the “Austin team”. SSD-42, pp. 1, 7. The content of the websites shows that promotion, marketing, and technical support are all handled by APC. SSD-42, 43. Potential customers are directed to contact APC world headquarters. SSD-43. Further, the APC corporate organizational structure shows numerous divisions within APC, all connected and none designated as separate or independent.⁹ RSD-4.

Respondent argues that the LLCs can make decisions without permission from APC, apparently denominating this as “operational independence”. The LLCs were given control over the personnel, equipment and supplies provided by APC. In the day-to-day conduct of business, in this instance at many mine sites across the country, decisions “on the ground” would need to be made locally. APC headquarters officials do not need to be and no doubt could not be at the many mine sites. Of necessity, the LLCs are tasked with the responsibility of safely and fully executing the contract work awarded to APC. Not adequately explained, however, is just how this day-to-day conduct of business is different from the time prior to the reorganization when the LLCs were divisions that performed the same work and were considered an integral part of APC. The responsibility placed on the LLCs to perform the work at mines does not vitiate the functional integration of the entities. I find for this factor of the test there is substantial involvement of APC in its LLCs.

Common management

I have found, above, that the relevant inquiry under the *Berwind* four-factor test is the relationship between APC and the LLCs, and not an examination of what work the LLC performs at a particular mine site. BNRC and Kentucky *Berwind* did not have a comprehensive relationship with AA&W, the mining company contracted by Kyber. Only Kyber and sister company Jesse Branch exercised substantial control over operations at the mine. In contrast, the wholly owned LLCs are the entities that perform the blasting work for owner APC and there is a direct relationship between these entities that includes comprehensive management control.

There is common management between APC and the subsidiary LLCs, and ownership control over the LLC managers and supervisors. David M. Gleason, Michael A. Gleason, and David P. True were all of the members of the APC Board of Directors during the time of the reorganization. These same Directors were also designated as a Board of Managers over each of the LLCs. RRMD-21, p. 3; RSD-17, p. 4. The Board of Managers had the authority “to manage, control and make all decisions affecting the business and assets” of the LLC. The Board of Managers also had the authority to both elect officers of the LLC and remove any LLC officer at any time with or without cause. *Id.* Therefore, the top-ranking Directors of the APC organization were designated to control all aspects of LLC operations which would include but not be limited to the areas of personnel, accounting and finances.

With respect to accounting and finances the person elected as Secretary and Treasurer of each LLC, Randal Wicks, was also the Secretary and Treasurer of the APC organization. SSD-

⁹ Not all divisions are wholly owned.

29, pp. 50, 53, 54. As such, he would supervise accounting at both headquarters and the LLCs. SSD-29, pp. 144, 145. While the LLCs produced reports in each of the areas referenced in the paragraph above, these would be required by APC for corporate bookkeeping and management purposes and Mr. Wicks was responsible for making sure the reporting was accurate and up to date. SSD-29, p. 146. Also, he would oversee the LLC payables. SSD-29, p. 145. In *Berwind*, the financial involvement of BNRC with the mining activity was considered too far removed, but here the financial control over the LLCs operating as contractors is direct and interrelated with APC. In addition, although Respondent argues the Secretary and Treasurer is the only shared officer, the APC Board of Directors are also officers and they are not only shared with each LLC as a Board of Managers but have the authority to control all aspects of LLC operations. In this factor of the test I find substantial involvement of APC in its LLCs.

Centralized control over mine health and safety

With respect to health and safety, it is acknowledged that blasting is a dangerous activity, and it is also acknowledged that APC places great emphasis on safety training and safe operations in conducting this work. Respondent contends it is the responsibility of each LLC to conduct training and enforce compliance with APC policies and applicable laws. While this is correct, the Secretary is also correct that APC exercises control over the training presented to APC employees and mandates that the LLCs enforce compliance.

The APC training materials are extensive, and the required orientation and training for new hires covers many topics and takes a full week to complete. The APC leader's training guide directs how the program will be conducted, and sets forth that the program was developed to help standardize training and provide a systematic method that ensures all compliance training requirements are met. SSD-41, pp. 3, 5, 6. DVDs are provided and form the structure of the training, with additional activities performed locally. *Id.* A participant training guide and the APC Employee Handbook are issued to each employee. *Id.*, pp. 6, 7. Multiple topics are presented covering requirements for ATF, OSHA, DOT-HAZMAT and MSHA regulatory compliance. *Id.*, pp. 9, 11-17. The topics include miner's rights, new miner training, hazard recognition, electrical hazards, shot safety, MSHA regulations, fall protection, lock out/tag out, hearing conservation, first aid and more. *Id.* The leader's guide stresses that all of the training activities are required, and upon completion a certification statement must be signed and sent with completion documents to Human Resources. *Id.*, pp. 3, 5, 6.

There are other important materials furnished by APC impacting health and safety. For example, APC provides software that records all blasts conducted by LLCs and maintains the data on a system server. SSD-29, pp. 60, 61, 63. On the server is the post-blast report required by state and federal authorities, *Id.*, p. 63. APC provides pre-blast software to the LLCs for analysis and presentation to customers. *Id.*, pp. 64, 65. Two or three technicians at each LLC have been trained to use this sophisticated pre-blast software. *Id.*, pp. 66, 67. The software has mine planning parameters that can virtually mine on a computer, giving depths, pounds per shot, number of benches, etc. *Id.*, pp. 67, 68. APC has also created and published Blaster Safety Tips and a Blaster's Guide. APC conducts in-depth, 50-hour blaster training for Austin Certified Blasters. SSD-42, pp. 8-10, 14, 15. These materials can be accessed on the APC websites or obtained by contacting an APC representative. *Id.*

APC employees who drive the vehicles provided to the LLCs are another safety concern. APC commercial vehicles cannot be operated until the Driver Candidate Program is completed and written approval is granted by Cleveland Safety and Compliance. Again, there is a leader's guide, DVDs are provided to augment training, and the driver candidate is issued a Driver Handbook which is a fundamental reference document that includes APC processes and practices required of the driver. SSD-38, pp. 3-6.

Research and development is necessary to produce and publish the training documents and software crucial to the safe conduct of blasting services at mines. On this record it appears that APC performs these functions, not its LLCs. In safely satisfying the contracts for blasting at mine sites, there must of necessity be close cooperation between the entities. The LLCs are dependent on APC to provide them with the materials, guidance and requirements for training APC employees and for enforcement of compliance with safety regulations. Although some responsibilities are divided between the geographically separated entities, this actually underscores the need for a high degree of interrelationship to achieve both safety and contract fulfillment goals. While it is understandable that regional geologic differences would be addressed by development of special procedures, this does not change the essential interdependence of the entities. When viewed from the perspective of how the APC organization performs contract blasting, it is clear that APC maintains *centralized control* over health and safety at its LLCs.

Common ownership

This test is met since each subsidiary LLC is wholly owned by APC. RSD-17. In *Berwind*, the majority did not elaborate on this criterion. *Berwind*, at 1321. There is no need to do so here, other than to point out that complete ownership by a company, however organized, of a subsidiary entity, however organized, establishes a controlling relationship flowing from the owner company to the owned entity. In the opinion of the undersigned, it is simply beyond question that a wholly owned entity must operate in a manner that is acceptable to the owner. The owner has a direct and immediate interest in the activities of the subsidiary to ensure and protect the success of the business enterprise. I find this to be substantial involvement.

Despite the restructuring that formed the wholly owned subsidiaries as corporations, the reality is that APC and its LLCs have never ceased functioning as an interrelated, interdependent, functionally integrated single business enterprise. Despite Respondent's argument of "operational independence", local decision making required to fulfill the contractual obligations at a mine site neither functionally separates the LLC from APC nor disturbs the close cooperation between the entities. APC must have field operations to perform the revenue generating work and the LLCs must have APC support, oversight, guidance, and control to efficiently, competently, safely and lawfully satisfy the obligations APC enters into with its client mine operators. Respondent also argues that viewing APC as a large single entity is simplistic and ignores corporate law. The majority in *Berwind* observed that corporate forms must not be ignored, but the form adopted by entities should not be exalted over the substance of interrelated and integrated operations. *Berwind*, at 1313.

After *Berwind*, there is no need to resort to the principles of corporate law to consider “alter ego” theory or the “identity rule” to “pierce the veil” of legally separate entities. We also do not need to determine whether there was an “intent to evade” the statutory obligations of the Mine Act. It does not matter that APC has chosen to create subsidiary corporations and define the relationship between entities with contracts rather than other forms of written or oral agreements. Companies are free to organize in any lawful manner, but if its activities bring it under the jurisdiction of the Mine Act the *form* of the company will be secondary to the *substance* of intra-organization relationships. The unitary operator test fully addresses the question of whether the separate corporate existence of two or more entities may be disregarded when their operations are so interrelated they function as a single entity. *Berwind*, at 1313-1316.

I have found substantial involvement of APC in its subsidiary LLCs under all of the *Berwind* “unitary operator” test factors. The remaining question is whether APC exercises *pervasive* control over the LLCs. Respondent contends that APC does not exercise pervasive control over the LLC at the mine. The Secretary contends that APC and the LLCs operate as a single entity and that the LLCs could not function on their own. For this determination the totality of the circumstances present in the instant case are weighed to ascertain whether APC and its LLCs should be treated as one entity. *Berwind*, at 1317. Here, the participation and involvement of APC in the personnel, financial, equipment, supplies and health and safety activities of the LLCs impacts virtually every important aspect of the conduct of the contract blasting business and is therefore extensive. This is sufficient to support a finding that APC’s control over its LLCs is *pervasive*.

I have determined that the legal reorganization forming the APC subsidiaries as distinct corporations did not functionally separate APC from extensive involvement in its LLCs. I find the Secretary by a preponderance of the evidence has established that the reorganized APC and its wholly owned subsidiary LLCs have not become separate entities, but together meet the four-factor test of *Berwind* and constitute a “unitary operator”. Therefore, I conclude that the Secretary may issue citations to either or both as “operators” as defined by the Mine Act. 30 U.S.C. § 802.

ORDER

The Secretary has correctly determined that Austin Powder Company and each of its wholly owned divisional subsidiary corporations constitute a “Unitary Operator”; therefore, both entities qualify as “Operators” for the purposes of the Mine Act.

This order is preliminary, interlocutory in nature, with issues remaining to be adjudicated. These issues include those raised by Respondent regarding the authority of the Secretary to assign contractor numbers as well as any validity, gravity, negligence and penalty determinations to be adjudicated for each unsettled citation in the dockets.

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

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March 11, 2016

ROSEBUD MINING CO.,
Contestant,

v.

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

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

v.

ROSEBUD MINING CO.,
Respondent.

CONTEST PROCEEDING

Docket No. PENN 2015-268-R
Citation No. 7032005; 07/06/2015

Mine: Brush Valley
Mine ID: 36-09437

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-318
A.C. No. 36-09437-388936

Mine: Brush Valley

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION **ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION** **ORDER TO PAY**

Before: Judge Harner

On September 22, 2015, Rosebud Mining Company ("Contestant" or "RMC") filed with the undersigned a Motion for Summary Decision in contest case PENN 2015-268-R. This docket includes one citation (No. 7032005) for a violation of 30 C.F.R. §75.370(d), which prohibits the implementation of a ventilation plan before it is approved by the District Manager.¹

¹ The full text of the Regulation is as follows: "No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation." 30 C.F.R. § 75.370.

The citation is in the nature of a technical citation intended to bring the matter before a judge, and was assessed as No Likelihood, No Lost Workdays, Non-S&S, No Negligence, 0 Persons Affected, with a civil penalty of \$100.00. The Secretary filed, on October 14, 2015, a motion requesting that summary decision be denied to the Contestant, and instead be ruled in favor of the Secretary. For the following reasons, I deny the Contestant's Motion for Summary Decision and grant the Secretary's Motion for Summary Decision.

Undisputed Facts

Both parties have stipulated that there are no material facts at issue in this case. The Contestant submitted a list of "Proposed Facts," of which the Secretary agreed with all but a few. I find the several facts over which there are disagreements to constitute either conclusions, speculative, or restatements of regulatory requirements. The mutually agreed-upon proposed facts are as follows:

- 1) Rosebud Mining Company's (RMC) Brush Valley Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("The Act").
- 2) The Administrative Law Judge has jurisdiction to hear the contest of the penalties and citations at issue here.
- 3) Citation No. 7032005 was properly served by a duly authorized representative of the Department of Labor upon an agent of Rosebud on the date and place indicated therein.
- 4) Rosebud Mining Company owns and operates the Brush Valley Mine.
- 5) The Brush Valley Mine accesses the Lower Kittanning coal seam via two slope entries.
- 6) The Brush Valley Mine utilizes two continuous miner sections to extract coal using the room and pillar method.
- 7) Approved seals are utilized to seal off (isolate) worked out areas from the active mine workings.
- 8) Seal Plans are developed by the Operator and submitted to MSHA for approval. If approved, the seal plan is incorporated into the mine's ventilation plan.
- 9) RMC prepared a plan dated March 6, 2015, to seal the Bl Butt at Brush Valley Mine (36-0943 7).
- 10) A decision letter from District Manager Thomas E. Light dated April 9, 2015, stated that the proposed plan has been reviewed and cannot be approved because (1) *"The review revealed that the Bl Butt is to be sealed with two sets of seals."* and (2) *"The set of seals identified as "#1, #2 & #3" does not meet the requirements of 30 CFR 75.337(h)."*
- 11) MSHA and RMC held a meeting on April 30, 2015, to discuss the seal plan. The issues with the seal plan were not resolved and RMC asked for a technical citation to be issued so the plan issues could be resolved.

- 12) Citation #7032005 issued on July 6, 2015, and states "The proposed plan did not include provisions for installing a water drainage system in each set of seals."
- 13) Four seals must be constructed to isolate the BI Butt from the remaining active workings of Brush Valley Mine (i.e., create a BI Butt sealed area).
 - a. The BI Butt sealed area comprises a series of entries that are interconnected.
 - b. There is no barrier within the BI Butt sealed area that separates entries behind Seals# 1-3 from entries behind Seal #4.
 - c. Construction of seals # 1-3 alone does not create a sealed area.
 - d. Construction of seal #4 alone does not create a sealed area.
- 14) Maps/drawings submitted with the BI Butt seal plan designate areas on the perimeter of the BI Butt sealed area where mining is prohibited; these mining limits ensure that barriers of sufficient size will be established as mining proceeds adjacent to the sealed area. These minimum barrier sizes are adequate and consistent with those determined using customary engineering design procedures.
 - a. Seals # 1-4 in conjunction with established barrier pillars effectively isolate the BI Butt sealed area from the remaining active workings at Brush Valley Mine.
- 15) Criteria pertaining to drainage systems in mine seals are addressed in 30 CFR §75.337(h) and in MSHA approved seal installation guidelines (developed under §75.335(b)(1)(i)), MSHA Approval Number: 102M-02.1 120 psi ORICA I MAIN LINE TEKSEAL:
 - a. 30 CFR §75.337(h) *Water drainage system. For each set of seals constructed after April 18, 2008, the seal at the lowest elevation shall have a corrosion resistant, non-metallic water drainage system. Seals shall not impound water or slurry. Water or slurry shall not accumulate within the sealed area to any depth that can adversely affect a seal.*
 - b. 30 CFR §75.335(b)(1) *An engineering design application shall - (i) Address gas sampling pipes, water drainage systems, methods to reduce air leakage, pressure-time curve, fire resistance characteristics, flame spread index, entry size, engineering design and analysis, elasticity of design, material properties, construction specifications, quality control, design references, and other information related to seal construction.*
 - c. Page 9 of the Seal Installation Guidelines for the Orica Main Line Tekseal developed per 30 CFR §75.335(b)(1) states that *"A water drainage system must be installed during seal construction in the lowest elevation seal(s) of the set. This seal is not designed to impound water, other than to a minimal, unavoidable depth. The actual size and number of pipes must be determined by a CPE (certifying professional engineer) based on the anticipated maximum flow rate at the seal location. "*
- 16) The proposed water trap is located at the #4 seal which is at the lowest elevation of all of the proposed BI-Butt seals.
- 17) All seals must be examined on a weekly basis.

- 18) All water traps must be examined (weekly) to make sure they are functioning properly.
- 19) MSHA District 2 Manager, Mr. Light was supplied with all information relied on as exhibits.

Contestant's Motion for Summary Decision, 1-3; *Secretary's Motion for Summary Decision*, 4-5.² In addition to the stipulated facts, the parties each submitted affidavits and documentation supporting their positions.

Summary Decision Standard

The Court may grant summary decision where the “entire record...shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. §2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black's Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007)(citation omitted). The court must evaluate the evidence ““in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

Analysis

At issue in this case is the definition of the phrase “set of seals” in 30 C.F.R. §75.337(h), and whether the District Manager abused his discretion when he denied Rosebud’s March 06, 2015 seal plan. In the decision letter, the District Manager explained that §75.337(h) Seals #1-3 and Seal #4 are separate “sets of seals” such that each requires a water trap. The Contestant argues that the phrase, “set of seals,” by definition implies more than one seal such that Seal #4 cannot constitute a “set of seals” that requires a water trap.

² Joint Stipulations will hereinafter be cited as Stip., followed by the stipulation number. The Contestant’s Motion will be cited as CMSD, followed by page number, and the Secretary’s Motion will be cited as SMSD, followed by a page number.

Section 75.337(h) (Water Drainage System) of the Regulations states:

For each set of seals constructed after April 18, 2008, the seal at the lowest elevation shall have a corrosion-resistant, non-metallic water drainage system. Seals shall not impound water or slurry. Water or slurry shall not accumulate within the sealed area to any depth that can adversely affect a seal.

30 C.F.R. § 75.337(h).

The Contestant grounds its argument primarily in the Merriam Webster Dictionary definition of “set,” as “a number of things of the same kind that belong or are used together.” Using that definition, the Respondent argues that the Secretary’s interpretation of the regulation would lead to an absurd result. Furthermore, it offers that if the term “set” is ambiguous, the Secretary’s interpretation should not be granted deference because “it is not logically consistent with the language of the regulation and it serves no permissible regulatory function.” *CMSD* at 7. Accordingly, the Contestant moves this court to find that the District Manager abused his discretion in denying the seal plan.

Alternately, the Secretary argues that though the term “set of seals” is not defined in the Act or Regulations, the plain language is clear when read in context. The Secretary rebuts the Contestant’s appeal to the dictionary by noting that the mathematical and technical definition of “set” may contain a single unit.³ Furthermore, single seals do occur in mines, and the Contestant’s reading of the Regulation would exempt them from the requirements of Section 75.337(h). Beyond dictionary definitions, the Secretary argues that the District Manager fully considered the details of the plan and he followed MSHA’s reasonable interpretation of the Regulation in denying the plan.

Because the issue presented concerns both the agency interpretation of the Regulation and the District Manager’s denial of the Plan, there are two standards of review that must be applied. First, in determining the proper interpretation of “set of seals” in the Regulations, the agency’s interpretation is given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *See Also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). This requires an analysis of whether the Regulation’s plain meaning is clear or ambiguous, and if ambiguous whether the agency’s interpretation is unreasonable. Following this analysis, it must next be determined whether the District Manager abused his discretion in denying the plan. *Prairie State Generating Co. LLC v. Sec’y of Labor, MSHA*, 2013 WL 3947974, *aff’d*, 792 F.3d 82 (D.C. Cir. 2015). An abuse of discretion occurs where the District Manager’s actions are arbitrary or capricious. *Mach Mining, LLC v. Sec’y of Labor, MSHA*, 34 FMSHRC 1784 (Aug. 2012), *aff’d*

³ Indeed, according to the Oxford English Dictionary, which contains a more complete entry for “set” than Merriam Webster, the term may refer to a number of elements, a single element, or no elements. Though not particularly relevant for the instant inquiry, a “set” may have zero elements contained within it. “set, n.2.” *OED Online*. Oxford University Press, December 2015. Web. 8 March 2016. *See Also* A. Shen & N.K. Vershchagin, *Basic Set Theory*, American Mathematical Society (2000), for a full definition, replete with logic formulas, of “sets.”

728 F.3d 643 (7th Cir. 2013), *cert. den.* No. 13-645, 2014 WL 1515720 (Apr. 21, 2014); *Twentymile Coal Co. v. Sec’y of Labor, MSHA*, 30 FMSHRC 736 (Aug. 29, 2008). This standard simply requires the agency to show that the District Manager made “a full appraisal of the relevant and available facts, and is reasonable in drawing conclusions.”⁴ *Prairie State Generating*, 2013 WL at n. 6.

Applying these standards of review, it is clear that the Contestant’s arguments fail for several reasons. First, I find Contestant’s appeal to Merriam Webster to be a damp squib. The Contestant provides one definition of one word in the regulations, and announces that it is “evident” that a set cannot include one element, and any alternate interpretation would “result in an absurd result.”

However, the phrase “set of seals” has no such singular definition. When viewed in the context of the Regulations and the purpose of §76.337(h), it is clear that the Contestant’s reading is unnecessarily and artificially narrow. Such a reading runs counter to the general rule that statutes and regulations intended to protect individuals’ health and safety must be interpreted in a broad manner to effectuate their goals. *See Rag Shoshone Coal Corp. v. Sec’y of Labor, MSHA*, 23 FMSHRC 407, 422 (Apr. 9, 2001) (ALJ) (citing cases for this proposition). Appealing to dictionaries—from Merriam Webster to the Oxford English Dictionary—simply shows that a “set” may contain a number of elements, a single element, or no elements.

Words are written in context, and they must be read in context. *Mach Mining, LLC v. Sec’y of Labor, MSHA*, 728 F.3d 643, 647 (7th Cir. 2013) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). Sections 75.334-75.337 clearly concern the sealing off of areas to isolate any problems that occur in those areas. Section 75.337(h) fits this general plan by preventing water and slurry accumulations. *See Final Rule and Commentary, Sealing of Abandoned Areas*, 73 FR 21182-01 (April 18, 2008). The Contestant’s argument that the required water drainage systems would only be necessary for multiple seals makes little sense in light of the regulation and its context. Water and slurry could accumulate at one seal just as they could accumulate at multiple seals. Therefore, the plain meaning of the Regulation clearly includes a single seal. Such a reading as urged by the Contestant would exempt single seals not only from §75.337(h), but also §75.364(c)(3) (concerning the testing of methane) and §75.336(a)(iii) (concerning the monitoring of atmosphere behind a seal). *Declaration of Stephen G. Sawyer, Jr.*, Sec. Ex-3, ¶ 8. There is no conceivable reason why MSHA would have intended for water and methane to be contained in very specific ways for multiple seals, but not for singular seals. The clear intent of these regulations is to keep miners safe, and an exemption for

⁴ The Commission has explained that “this is an appropriately deferential standard, as judges (as well as Commissioners) are not always best-equipped to decide technical issues regarding ventilation and roof control. They are instead charged with deciding whether the district manager has made a fair and informed suitability determination.” *Prairie State Generating Co. LLC v. Sec’y of Labor, MSHA*, 2013 WL 3947974, at n. 6, *aff’d*, 792 F.3d 82 (D.C. Cir. 2015).

single seals would not serve this purpose. Therefore, I find that the phrase “set of seals” can mean one seal for purposes of the regulation.

Based on the stipulated facts it appears that the District Manager, Thomas E. Light, had a reasonable factual and legal basis to conclude that the Contestant’s plan violated §75.337(h). The District Manager was supplied with all relevant information regarding the seals. Stip. 19. He considered the fact that Seals #1-3 are within 50 feet of each other. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶ 9. Seal #4 is located approximately 2,600 feet from Seals #1-3, and this distance is occupied by an uninterrupted barrier of coal that runs along the B Mains. *Id.* at ¶¶ 9-10. Furthermore, Seal #4 is 123 feet lower than Seals #1-3. Att. F-1. The District Manager was concerned that a roof or rib fall could block water from reaching Seal #4, thereby allowing water to accumulate behind Seals #1-3. *Id.* at ¶ 11.

Furthermore, the District Manager also consulted with staff who were assigned to review the proposed plan in light of the conditions at the mine. *Id.* at ¶ 14. Staff such as Supervisory Specialist Jeremy Williams and Civil Engineer Stephen Sawyer each reviewed the proposed plans and concluded that they did not comply with the regulations. *Declaration of Jeremy S. Williams*, Sec. Ex-2; *Declaration of Stephen G. Sawyer, Jr.*, Sec. Ex-3. Specifically Williams was concerned not only with the possibility of a roof or rib fall, but also with the effect on methane readings under §75.364(c)(3) of not having separate water traps at Seals #1-3 and at #4. *Declaration of Jeremy S. Williams*, Sec. Ex-2, ¶¶ 13-19. Sawyer reiterated these concerns and emphasized that the proposed plan would have an adverse effect on barometric pressure and methane testing. *Declaration of Stephen G. Sawyer, Jr.*, Sec. Ex-3.

The District Manager communicated his concerns to the Contestant. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶ 12. He considered all the information submitted, as well as MSHA guidance regarding seals, and drew factual conclusions based on his knowledge and experience. *Declaration of Thomas E. Light*, Sec. Ex.-1, ¶¶ 25-26. In rejecting the proposed plan, he stated that the information had been reviewed, and “the review revealed that the B1 Butt is to be sealed with two sets of seals. The set of seals identified as ‘#1, #2 & 3’ does not meet the requirements of 30 C.F.R. 75.337(h).” Stip. 10; Resp. Ex-B.

The stipulations and documents show that the District Manager fully considered the relevant and available facts and drew reasonable conclusions based on the regulations, MSHA guidelines, and his experience and knowledge. Therefore, I find that he did not abuse his discretion.

Having found that the District Manager did not abuse his discretion in rejecting the proposed plan on the basis that it did not comply with §75.337(h), I find that Contestant violated §75.370(d) by taking steps to implement the plan. Wherefore, the Secretary's Motion for Summary Decision is **GRANTED**, the Contestant's Motion for Summary Decision is **DENIED**, and Rosebud Mining Co., is hereby **ORDERED** to pay the Secretary of Labor the sum of \$100.00 within 30 days of the date of this Order.⁵

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2016

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM
WE-MD 14-04

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER ON COMPLAINANT'S MOTION TO AMEND

Before: Judge Moran

Complainant Daniel Lowe has filed a motion to amend the complaint in this matter, brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), to add Jerritt Canyon Gold, LLC, (“JCG”) as an alleged successor. JCG then filed its Special Limited Appearance on Behalf of Jerritt Canyon Gold, LLC to Contest Jurisdiction in Response to ALJ’s Order Regarding Secretary’s Motion for Reconsideration and Complainant’s Motion to Amend (“Response”).¹ For the reasons that follow, the Court grants Complainant’s Motion to Amend, allowing the addition of JCG as an alleged successor in interest to Veris Gold USA, Inc. (“Veris Gold”).²

JCG’s Special Limited Appearance challenges whether this Court has “jurisdiction over and can attach liability for alleged claims of discrimination by Veris Gold USA, Inc. (‘Veris Gold’) to [JCG], a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale.” JCG Resp. 1.

The Response begins with serious inaccuracy by characterizing the Mine Act discrimination action brought by Lowe as “*alleged* claims of discrimination by Veris Gold USA, Inc.” *Id.* (emphasis added). This Court, after a hearing held in Elko, Nevada, on June 18, 2015,

¹ Mr. Lowe filed a response to the JCG filing, which was also considered by the Court.

² This Order parallels the March 4, 2016, Order issued by this Court in Matthew Varady’s discrimination complaint against Veris, WEST 2014-307-DM. Lowe and Varady, both non-attorneys, with each presently proceeding *pro se*, have assisted one another in their respective filings. In this instance their motions to amend, seeking to add Jarrett Canyon Gold as a party were nearly identical submissions. Accordingly, except for minor adjustments, this Order tracks the substance of Varady Order.

found in a decision issued on October 15, 2015, that Veris Gold engaged in acts of discrimination against Complainant Lowe. *See Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ). Therefore, far from mere allegations, this Court made findings of fact and conclusions of law regarding that discrimination claim.

The Response then queries whether JCG, “a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale” can be liable for Veris Gold’s acts of discrimination. JCG Resp. 1. The Response does acknowledge that the issue is whether JCG can be added to the complaint as an “alleged successor in interest to Veris Gold.” *Id.*

It is JCG’s position that the final orders of the bankruptcy court are not subject to collateral attack, as that court “declared the sale of Veris Gold assets to JCG ‘free and clear’ of claims and encumbrances pursuant to Federal Bankruptcy Code, 11 U.S.C. § 363(f).” JCG Resp. 2. Again characterizing Lowe’s Complaint as an allegation of Veris Gold’s discrimination, JCG asserts that “efforts to impose a penalty on JCG [based on Lowe’s discrimination complaint] tramples on powerful and persuasive precedent as well as policies that derive from the fundamental ‘equitable distribution to creditors’ policy underlying bankruptcy law.” *Id.* at 2. On that basis, the Response contends that this Court has no jurisdiction over JCG and therefore it should deny the Complainant’s Motion to Amend. *Id.*

In the “Background” section, the Response asserts “JCG is a newly formed limited liability company funded by *new investors* [which is] not affiliated *in any way* with the former operations of Veris Gold.” *Id.* (emphasis added).

The Response acknowledges that Mr. Lowe brought his own “private” discrimination action under section 105(c)(3) of the Mine Act.³ The Response then notes that “[o]n June 4, 2015, the U.S. Bankruptcy Court entered an order approving the sale of Veris Gol[d]’s assets, including the Jerritt Canyon mine and mill, free and clear of all liens, claims and interests

³ Though it acknowledges that Lowe brought his own discrimination action under section 105(c)(3) of the Mine Act, the Response cannot help but insert irrelevancies into its argument by noting that MSHA declined to file a discrimination action on Lowe’s behalf and that MSHA’s decision was “based upon its investigation, staffing, resources and priorities.” JCG Resp. 3 & n.2. Such references are not merely historical, but, as with the Response’s characterization of the action as “alleged claims of discrimination,” are obvious attempts to indirectly diminish the merits of Lowe’s 105(c)(3) action as if it were a stepchild claim. Congress did not impute under the Mine Act that such private claims were of inferior standing. Since JCG has raised the vehicle employed for Lowe’s claim, it is fair to note that his action was one of a bevy of discrimination complaints filed against Veris Gold, some brought by the Secretary of Labor and others, as with Lowe, on their own. *See Sec’y of Labor on behalf of Garcia v. Veris Gold USA, Inc.*, 36 FMSHRC 1883 (July 2014) (ALJ); *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ).

pursuant to Section 363 of the Bankruptcy Code, (11 U.S.C. § 363). Docket No. 318.” *Id.* at 3. JCG takes particular note that

the Sale Order specifically provided that the Assets would be sold free and clear of: ‘rights or claims on any successor or transferee liability and any enforcement action or enforcement history....and... all contractual rights and claims and labor, employment and pension claims, in each case, whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or un-matured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of these Chapter 15 Cases...’

JCG Resp. 3-4 (quoting Sale Order at 6-7, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318).

The Response then notes that Lowe received notice of the bankruptcy action, that on June 19, 2015, Lowe filed a motion to stay the bankruptcy court’s Sale Order, and that the bankruptcy court denied the motion stating that there was no legal or factual basis for the relief Lowe sought. *Id.* at 4. The denial of the motion occurred *on the same day* Lowe filed his motion seeking a stay.⁴

The Response asserts that this Court “lacks jurisdiction to amend the complaint and adjudicate the Section 105(c)(3) complaint against JCG.” JCG Resp. 5. Apart from the unusual and temerarious assertion that this Court, as part of the Federal Mine Safety and Health Review Commission (“the Commission”), in a lawful section 105(c)(3) action under the Mine Act, lacks jurisdiction to allow Lowe to amend his complaint and to adjudicate such amended complaint against JCG, the Response makes the fundamental error of conflating bankruptcy court decisional authority with that of the Commission. The Commission has the authority to adjudicate section 105(c) complaints of all stripes, and such authority includes determinations of motions to amend such complaints.⁵ As Commissioner Cohen has noted in this case, “the

⁴ The Response notes that Lowe, a non-attorney, *pro se* complainant, did not attempt to appeal the bankruptcy court’s denial of his motion and “thus failed to exhaust his remedies.” JCG Resp. 4. This is somewhat disingenuous if meant to suggest that a different outcome was at all possible.

⁵ See, e.g., *McDonald v. TMK Enterprises*, 37 FMSHRC 2239 (Oct. 2015); *Black Beauty Coal Co.*, 34 FMSHRC 1733 (Aug. 2012); *Wyo. Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992). The Procedural Rules provide that the Commission’s judges shall be guided by the Federal Rules of Civil Procedure “[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act.” 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be “freely given when justice so requires.” Fed. R. Civ. P. 15(a); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, “especially when . . . they do not prejudice a party in preparing its defenses.” *Brannon v. Panther Mining, LLC*, 31 (continued...)

Complainant may file a motion to amend the complaint to add as parties the entities which now have a successor interest in the mine formerly owned by Veris Gold.” *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016) (citing *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990)). Commissioner Cohen continued:

Moreover, the Federal Rules of Civil Procedure may present several potential avenues of relief for the Complainant. *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”). For instance, under Rule 21, a Judge may *sua sponte* grant a post-hearing joinder of a new party. Fed. R. Civ. P. 21 (“the court may at any time, on just terms, add or drop a party”). In addition, Federal Rule of Civil Procedure 15 permits a party, with the court’s leave, to amend a complaint more than 21 days after the pleading is served “when justice so requires.” Fed. R. Civ. P. 15(a)(2).”

Id.

I. Jerriitt Canyon Gold’s Arguments

In support of its claim that this Court does not have jurisdiction to adjudicate a Mine Act section 105(c)(3) discrimination complaint, the Response advances four contentions:

I. The automatic stay provisions of the Bankruptcy Code preclude ancillary proceedings by private individuals and any such proceedings are void. . . . II. The Bankruptcy Court’s Adjudication and sale of Veris Gold assets were “free and clear” of liens, claims and interests as provided for under Section 363(f) of the Bankruptcy Code. The Bankruptcy Courts’ [sic] Adjudication resulted in the buyer of assets of Veris Gold taking title to those assets free from all claims against Veris Gold, including the claims in this private proceeding. . . . III. Complainant is barred under principles of res judicata and collateral estoppel from bringing a claim against Veris Gold and JCG where Complainant made an appearance, sought relief from, and made objections to actions in the Bankruptcy Court’s denial of the relief sought by Complainant and the ordering of the sale free and clear to JCG. . . . IV. Any action of the ALJ would violate important

⁵ (...continued)

FMSHRC 1277, 1279 (Sept. 2009) (ALJ); *see also* *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981); *Bob Bak Constr.*, No. CENT 2005-139-M et al., 2006 WL 2927263, at *6 (FMSHRC Sept. 11, 2006) (ALJ). Provided adequate notice is given and there is no prejudice to the opposing party, administrative pleadings are to be liberally construed and easily amended. *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ). The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Jim Walter Res.*, No. SE 2010-351, 2013 WL 3865345, at *4 (FMSHRC June 12, 2013) (ALJ) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971)).

policies and the fundamental framework of the Bankruptcy Code which requires equitable treatment of all creditors.

JCG Resp. 5, 7, 9, 11 (footnote omitted).

A. The Contention that the Automatic Stay Provisions of the Bankruptcy Code Preclude Ancillary Proceedings by Private Individuals and Any Such Proceedings Are Void

Noting that Veris Gold sought bankruptcy protection under Chapter 15 of the Bankruptcy Code, JCG asserts that the petition filing brought about an “automatic stay” *the same day* and triggered 11 U.S.C. § 362(a)(1). The Response states that the stay served as an injunction to

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

JCG Resp. 5 (quoting 11 U.S.C. § 362(a)(1)).

The Response acknowledges that, despite the broad language employed, “cases commenced or continued by a ‘governmental unit’ may be exempt from the automatic stay” provision, per 11 U.S.C. § 362 (b)(4). However, the Response effectively asserts that any action other than one brought by a governmental unit is *void ab initio*. *Id.* at 6 (citing *In re Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001)). It then contends that, since the *pro se, non-attorney* Complainant failed to seek relief from the automatic stay, any actions taken by other judicial or administrative authorities are void as infringing upon the bankruptcy court’s jurisdiction. *Id.* The concern is that if the bankruptcy court’s injunction could be modified, it would strip the court of “its ability to distribute the debtor’s assets equitably, or to allow the debtor to reorganize [its] financial affairs.” *Id.* at 6 (quoting *In re Gruntz*, 202 F.3d 1074, 1083-84 (9th Cir. 2000)).⁶ Thus, the Response maintains that this Court has no jurisdiction because the bankruptcy court’s stay enjoined “proceedings brought by *creditors of a debtor* outside of the bankruptcy case.” *Id.* at 7 (emphasis added). The response to this contention is addressed *infra*.

⁶ In *In re Gruntz*, the Ninth Circuit, in the context of determining whether a bankruptcy court’s automatic stay enjoined a state criminal proceeding for failing to pay child support, held that because that proceeding fell within one of the exceptions to an automatic stay, it did not so operate, but that, generally, federal courts are not bound by state court modifications of the automatic stay.

B. The Contention that the Bankruptcy Court’s Adjudication and Sale of Veris Gold Assets Were “Free and Clear” of Liens, Claims, and Interests as Provided for Under § 363(f) of the Bankruptcy Code, Resulting in JCG, as the Buyer of the Assets of Veris Gold, Taking Title to Those Assets Free from All Claims Against Veris Gold, Including the Discrimination Action Brought by Lowe Under the Mine Safety and Health Act

Noting that § 363(f)⁷ provides that the trustee may sell property free and clear of any interest in such property other than the estate only upon meeting certain conditions, JCG observes that the term “interest” has been broadly interpreted by courts and, citing *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3rd Cir. 2003) (“*TWA*”), that being free and clear of such “interest” insulates a successor from claims of discrimination against the predecessor. JCG Resp. 7. JCG also points to *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996), for the proposition that the bankruptcy court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5) and therefore that Court did not need to determine if the purchaser was a successor in interest. JCG Resp. 7. JCG contends that, per *TWA*, “interest in property” applies to obligations that are connected to, or arise from, property being sold, and are not limited to *in rem* interests. *Id.* at 8 (citing *TWA*, 322 F.3d at 289-90). JCG adds that as the bankruptcy court’s Sale Order provided that the purchaser will not be liable for claims based on any successor or transferee liability and any enforcement action or enforcement history or employment and pension claims, such order applies to Lowe’s claim. *Id.* JCG also maintains that Lowe moved to stay the Sale Order, and that his motion was denied and he made no appeal from that order. *Id.* at 9.

It is true that, while not in the Ninth Circuit, the applicable circuit for this case, the Third Circuit did hold in *TWA* that the various airline workers’ employment discrimination claims, as well as claims by flight attendants under a travel voucher program that the debtor-airline had established in settlement of sex discrimination actions, both qualified as “interests in property” under the bankruptcy statute provision that provided for sale of assets of estates free and clear of interests in property. However, this Court believes the case is distinguishable.

⁷ 11 U.S.C. § 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

First, it would appear that American Airlines was an arms-length successor to TWA. In addition, the court of appeals concluded that in the § 363(f) sale permitting the sale of property “free and clear” of an “interest in such property,” the claims against TWA were connected to or arose from the assets sold, a determination which this Court has yet to make. An additional and important distinction, the bankruptcy court determined there was no basis for successor liability only after conducting an evidentiary hearing. *TWA*, 322 F.3d at 286.

Apart from the procedural protection of an evidentiary hearing, as noted, part of that determination was the bankruptcy court’s determination that the claims against TWA were interests in property under § 363(f). In construing the term “interest in such property,” the appeals court acknowledged that Congress did not define that phrase and that some courts have limited its application to *in rem* interests in property.¹ The appeals court also referenced the Fourth Circuit’s decision in *Leckie* in which that court concluded “that the *employer-sponsored benefit plans* had interests in the property of the debtors which had been transferred under section 363(f) in the sense that there was a relationship between their right to demand premium payments from the debtors and the use to which the debtors had put their assets.” *TWA*, 322 F.3d at 289 (citing *Leckie*, 99 F.3d at 582). The Third Circuit obviously struggled with its conclusion, so much so that it felt the need to offer a supporting rationale had it concluded that the claims were not interests in property. It noted that one of the discrimination claims went to trial and damages were awarded, while in the other suit no determination of liability had been made at the time of the bankruptcy filing. It then looked to the reasoning in other cases that such claimants should not be allowed “to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate [as that] would ‘subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors.’” *TWA*, 322 F.3d at 292 (quoting *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982)).

However, the Third Circuit also took special note of the importance of discrimination claims, stating it recognized “that the claims of the EEOC and the Knox-Schillinger class of plaintiffs are based on congressional enactments addressing employment discrimination and are, therefore, not to be extinguished *absent a compelling justification*.” *Id.* (emphasis added). Despite that admission, that court continued to adhere to its view that allowing “the claimants to assert successor liability claims against American while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme.” *Id.*

It is clear, at least to this Court, that the Third Circuit’s holding was impacted by the particular facts and that it was not a broad-based pronouncement. Among those facts was the anticipated disastrous outcome if the claimants’ interests were recognized, as it noted:

The Bankruptcy Court found that, in the absence of a sale of TWA’s assets to American, “the EEOC will be relegated to holding an unsecured claim in what will very likely be a piece-meal liquidation of TWA. In that context, such claims are likely to have little if any value.” *In re Trans World Airlines, Inc.*, et al., No. 01-00056, slip op. at 23, 2001 WL 1820326 (Bankr. D. Del. Mar.27, 2001). The same is true for claims asserted pursuant to the Travel Voucher Program, as they would be reduced to a dollar amount and would receive the same treatment as the

unsecured claims of the EEOC. Given the strong likelihood of a liquidation absent the asset sale to American, a fact which appellants do not dispute, we agree with the Bankruptcy Court that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of Knox-Schillinger and the EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits.

TWA, 322 F.3d at 293.

C. The Contention that Complainant Is Barred Under Principles of *Res Judicata* and Collateral Estoppel from Bringing a Claim Against Veris Gold and JCG Where Complainant Made an Appearance, Sought Relief from, and Made Objections to Actions in the Bankruptcy Court and Thereafter Failed to Seek Relief from or Appeal the Bankruptcy Court's Denial of the Relief Sought by Complainant and the Court's Ordering of the Sale Free and Clear to JCG

JCG argues that since the § 363 sale order is an *in rem* proceeding, *res judicata* applies to that sales transfer of property rights and that those property rights are good against the world. JCG Resp. 9. Since the property in the bankruptcy court's Sale Order was sold free and clear of any interests in that property, Complainant cannot make any claims against that property. *Id.* JCG adds that collateral estoppel also applies on the basis that Complainant "had notice and participated in the Bankruptcy Court action, the matter was actually litigated, and Complainant had the incentive to litigate and prevail." JCG Resp. 10. Repeating its earlier remarks about this, JCG asserts that Lowe had his chance, as he sought to stay the bankruptcy sales order. When the bankruptcy court ruled against his motion, Lowe failed to appeal that ruling and now must live with the consequences of that failure. *Id.* at 10.

This contention is an echo of JCG's other arguments and is addressed within this Order.

D. The Contention that Any Action by the ALJ Would Violate Important Policies and the Fundamental Framework of the Bankruptcy Code which Requires Equitable Treatment of all Creditors.

Unabashedly, JCG invokes its concern for the "equitable treatment of creditors" and the Bankruptcy Code's purpose of ensuring "that all substantially similar claims of creditors are treated equitably[, with c]laims [being] classified and paid according to priority as set forth in 11 U.S.C. § 507." JCG Resp. 11. That sounds high-minded, but if the Court correctly interprets JCG's next remark that Veris Gold shifted from a "going concern" restructuring to a liquidation and only secured claims would be paid, in plain English this means that no matter what Lowe did in terms of appeals from the bankruptcy court rulings, he could never prevail. Thus, happily for Veris, and by extension for JCG, under the bankruptcy proceeding, both were able to walk away from all unsecured pre-filing claims. Mr. Lowe, JCG asserts, should not be entitled to any "preferential" treatment. Rather, he should be entitled to the same equitable treatment dispensed to all the other unsecured creditors. As an example of this "equitable treatment," JCG points to *the settlement agreement* Veris had with Jennifer Morreale, another person alleging

discrimination by Veris, under which, by the Veris bankruptcy action she was paid nothing with her claim being discharged. JCG seeks the same fair and equitable treatment for Lowe.

II. Discussion

The Court takes a step back to take note of the basics of the bankruptcy process:

A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial ‘fresh start’ from burdensome debts. The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision: ‘[I]t gives *to the honest but unfortunate debtor...* a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.

Administrative Office of the U.S. Courts, *Process – Bankruptcy Basics*, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited March 3, 2016) (emphasis added). The same source advises that

[n]ot all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for *public policy reasons* (based either on the nature of the debt ***or the fact that the debts were incurred due to improper behavior of the debtor***, such as the debtor's drunken driving).

Id. (emphasis added).

Accordingly, it is noted that bankruptcy law is aimed at debts owed creditors, not at relief for wrongdoers, such as those that engage in discrimination in violation of the Mine Act. Depending on the outcome of the determination of JCG’s possible status as a successor and what it knew about the Lowe proceeding, holding JCG responsible may be an appropriate outcome.

Moreover, as noted above, per the Commission’s prior opinion in this case, one Commissioner expressed that it was not so clear that the bankruptcy proceeding filed by Veris

Gold is effective against Lowe.⁸ See *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016). That Commissioner further expressed that

[i]t appears that in filing its bankruptcy petition, Veris Gold may not have given Lowe proper notice of the filing. Indeed, Lowe – together with other former employees of Veris Gold who have discrimination complaints before the Commission under section 105(c) of the Mine Act – filed a motion in the U.S. Bankruptcy Court for the District of Nevada in Case No. 14-51015 gwz in which they made this allegation.

Lowe, 2016 WL 197500, at *2 n.4.

The same Commissioner also stated:

Even if the bankruptcy filing was effective against Lowe, this fact does not necessarily foreclose the Commission from providing relief against the successors in interest of Veris Gold. In *International Technical Products Corp.*, 249 NLRB 1301 (Jun. 1980), the NLRB held that a company which purchased all of the assets of a predecessor company ‘free and clear of all liens, claims and encumbrances’ pursuant to an order of a bankruptcy court could be held responsible for the predecessor’s backpay liability under federal labor law. In 2010, the Board reaffirmed the *International Technical Products Corp.* holding in *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010), incorporating by reference 354 NLRB 872 (Oct. 2009), *aff’d sub nom. NLRB v. Leiferman*

⁸ The same Commissioner also expressed:

The Mine Act provides a Judge broad remedial powers to address instances of discrimination as may be appropriate. 30 U.S.C. § 815(c)(3) (providing that if a Judge sustains charges of discrimination he may grant “such relief as [he] deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate”). Accordingly, [that Commissioner noted] that the Commission has been granted more discretion in fashioning an appropriate remedy by the Mine Act than [this Court] initially recognized [when it] concluded that reinstatement of a miner to a successor in interest is not possible under the Mine Act. . . . However, the remedy of reinstatement may be imposed on an operator’s successor in interest. *Sec’y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff’d sub nom., Terco v. Fed. Coal Mine Safety & Health Review Comm’n*, 839 F.2d 236 (6th Cir. 1987), cert. denied, 488 U.S. 818 (1988); *Simpson v. Kenta Energy*, 11 FMSHRC 770, 778 (May 1989).

Lowe, 2016 WL 197500, at *2 n.4.

Enterprises, LLC, 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

Id.

As the Commissioner noted, the National Labor Relations Board, in *International Technical Products*, held that a successor was liable for backpay, despite the successor's assertion that the assets were purchased "free and clear of all liens" pursuant to an order and judgment of the United States District Court. The NLRB stated that the sole issue presented was whether "a judicial sale, free and clear of all liens, pursuant to the authority of a bankruptcy court, extinguishes any backpay liability imposed upon a successor-employer for the unfair labor practices committed by its predecessor-employer." *International Technical Products*, 249 NLRB at 1302. The successor asserted that as it purchased the predecessor's assets free and clear of all liens, claims, and encumbrances, this would include the Board's claim for backpay. Citing its decision in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), and the Supreme Court's decision in *Golden State Bottling Company, Inc. v. N.L.R.B.*, 414 U.S. 168 (1973), the Board noted its holding in *Perma Vinyl*

that 'one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.' In *Golden State Bottling Company, Inc.*, the Supreme Court sustained the Board's *Perma Vinyl* doctrine and held that a successor-employer which acquires a business with knowledge of an outstanding Board order requiring its predecessor to reinstate with backpay an unlawfully discharged employee may properly be required to assume the reinstatement obligation and to share jointly and severally with the predecessor the backpay liability.

International Technical Products, 249 NLRB at 1303 (footnote omitted).

The Board did not accept the contention that the successor's liability was extinguished by the bankruptcy court's order allowing the successor to purchase the assets "free and clear of all liens, claims, and encumbrances. Rather, it noted that

while a bankruptcy court may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts. Indeed, the significance of a Board order has long been recognized by the Supreme Court. Thus, in *N.L.R.B. v. J. H. Rutter Rex Manufacturing Co, Inc.*, 396 U.S. 258, 263 (1969), the Supreme Court, citing *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), stated that 'as with the Board's other remedies, the power to order back pay is for the Board to wield, not for the courts.' Moreover, the Court emphasized that 'when the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that

the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’

Id.

The Board concluded that

the bankruptcy court’s order allowing [the successor] to purchase [the] assets free of all liens, claims, and encumbrances cannot affect the Board’s Order . . . requir[ing] . . . the ultimate successor [to] make the discriminate[e] whole for the remaining portion of the backpay due and owing them. To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . to proceed against a successor employer in furtherance of that obligation. Indeed, such a finding would, of necessity, imply that, by merely ordering the judicial sale of a bankrupt employer’s assets to a nonbankrupt successor employer ‘free and clear of all liens, claims, and encumbrances,’ a bankruptcy court can effectively nullify a Board order requiring that the nonbankrupt successor employer remedy the unfair labor practices committed by its predecessor.

Id.

Speaking to the purpose of the Board’s order, it added:

To insure that the adverse effects of a wrongdoer’s unlawful conduct are eliminated and that the public right is vindicated, it is essential that there be full compliance with the Board’s order requiring that the employer comply with the order’s remedial provisions. . . . Thus it cannot be classified or treated simply as a “lien, claim, or encumbrance” within the common usage of those terms and, consequently, any liability arising therefrom cannot be extinguished or modified . . . through the purchase of a bankrupt’s assets “free and clear of all liens, claims and encumbrances” at a judicial sale.

Id.

In *Chicago Truck Drivers, Helpers, and Warehouse Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995), a multi-employer pension fund brought an action against a Chapter 7 debtor’s successor in interest. Although the district court held there could not be successor liability, the appeals court held that the pension fund’s unsuccessful participation in the predecessor employer’s bankruptcy did not preclude it from a successor liability claim. The facts in *Tasemkin* may yet echo those in this matter. *Tasemkin* “went belly-up” allegedly owing some \$300,000 in delinquent pension funds. *Id.* While the Pension Fund attempted to recover those funds in the Chapter 7 bankruptcy, *Tasemkin Furniture* (“Old *Tasemkin*”) made a debt compromise agreement with its secured lender and turned over its interest to a new company, *Tasemkin, Inc.*, (“New *Tasemkin*”) which then foreclosed on the collateral, leaving nothing for anyone else, including the Pension Fund. *Id.* Thereafter, the Pension Fund sued *Tasemkin, Inc.*, on a successor liability theory. *Id.* The Seventh Circuit

provided clarity about successorship *vis-à-vis* bankruptcy and the general rule that a purchaser of assets does not acquire the seller's liabilities:

Most states have adopted exceptions to the general no-liability rule that allow creditors to pursue the successor if the "sale" is merely a merger or some other type of corporate reorganization that leaves real ownership unchanged. . . . Successor liability under federal common law is broader still: in order to protect federal rights or effectuate federal policies, this theory allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was "substantial continuity in the operation of the business before and after the sale." *E.E.O.C. v. G-K-G, Inc.*, 39 F.3d 740, 748 (7th Cir.1994). Successor liability is an equitable doctrine, not an inflexible command, and "in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240, 41 L.Ed.2d 46 (1974); see also *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir.1995).

Tasemkin, 59 F.3d at 49.

Noting that the district court had found that allowing the Pension Fund to proceed against New Tasemkin on a successor liability theory would frustrate the primacy of the Bankruptcy Code, and on that basis dismissed its claim, the Seventh Circuit acknowledged there were cases adopting that approach but it rejected the notion that it is an ironclad or simplistically applied rule. *Id.* at 50. The Seventh Circuit took note of the reasoning in support of protecting successors,

that it is desirable, perhaps even necessary, to shield purchasers of failing businesses from liability incurred by the predecessors . . . as a means of encouraging market growth and the fluidity of corporate capital. Fear of successor liability, this argument runs, would "chill" sales in bankruptcy and as a result harm employees of the failed concern who might have retained jobs with the successor business . . . [and that] companies may have trouble selling their assets for a decent price because "successors will be unwilling to assume a business involved in substantial time-consuming and expensive litigation when the assets themselves lack substantial value"

Id. (quoting *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 751 (7th Cir.1985)).

Again, the Seventh Circuit's point, that a blanket rule is insufficiently analytical, is well taken, as it noted that

there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities[, and that] it is neither certain nor clear that the chilling effect need give [that Court] pause [as] purchasers can demand a lower price to account for pending liabilities of which they are aware, and [furthermore] under federal

successorship principles [purchasers] will not be held responsible for liabilities of which they had no notice.

Id. at 50-51.

The Seventh Circuit then quickly dispatched the second argument — that allowing application of “the successorship doctrine [would] frustrate[] the orderly scheme of the Bankruptcy Code by allowing some unsecured creditors to leapfrog over others.” *Id.* at 51. The circuit court observed that “once a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force.” *Id.* Although the circuit court acknowledged that imposing successorship liability “would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed,” it noted that “a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a per se preclusive effect on the creditor’s chances.” *Id.* The circuit court clearly thought a successorship theory should be permitted where the opposite approach, one which had the effect of “frustrating unsecured creditors while resurrecting virtually the identical enterprise,” should not. *Id.*⁹

⁹ A number of law review commentators have criticized the view that the power of a bankruptcy court under § 363(f) is without boundaries. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. (2002). The author notes that § 363(f) of the bankruptcy code authorizes sales free of “any interests,” whereas § 1141(c) authorizes post-sale vesting of property free and clear of all “claims and interests,” pointing out that the distinction is important because the latter is a plan process whereas the former is a quick-sale process, which affords little opportunity to object. Despite the narrower statutory language, in applying § 363(f), bankruptcy courts have been affording the debtor or trustee the same power to sell claims and interests. As applied to successors, the author points out that although it has been asserted that “[s]tate and federal decisions holding a bankruptcy purchaser liable as a successor of the debtor are directly at odds with Congressional intent to allow a debtor to sell its assets free and clear of all claims and interests therein,” this view is problematic. *Id.* at 258. This is because “[s]uccessor liability arises out of the actions of the purchaser, not the property itself.” *Id.* at 261. Thus, where

a de facto merger is found, or mere continuation of an enterprise justifies imposing successor liability, it is the purchaser’s postsale conduct (in continuing the business in substantially the same form and manner) that gives rise to liability. The same is true for successor liability founded upon fraudulent transfer and continued manufacture of a product line. All these successor liability doctrines are grounded upon acts or implications from acts of the purchaser, not the property.

Id. Thus, successor liability is *in personam* in nature, not *in rem*.

Other commenters have similarly opined that successor liability claims should be viewed as outside of “interests in property” under § 363(f) of the Bankruptcy Act. Rachel P. Corcoran,
(continued...)

⁹ (...continued)

Why Successor Liability Claims are not ‘Interests in Property’ under Section 363(f), 18 Am. Bankr. Inst. L. Rev. 697 (2010). As noted, that section permits the sale of property of the estate outside the ordinary course of business “free and clear of any interest in such property.” The article examines what constitutes an “interest in property” in the context of § 363(f)’s “free and clear” sale provision, noting that its construction is important for successor liability claimants suing those who have purchased under it. While acknowledging that the great majority of courts have interpreted the provision to include successor claims, the author contends that state law should guide “the analysis of whether a particular claim or right constitutes ‘property’ or an ‘interest in property’ in the bankruptcy context, unless some identifiable federal interest requires otherwise,” and that Supreme Court precedent supports her view. *Id.* at 699. The author also observes that if a successor liability claim is an interest in property, then such claimant is entitled to adequate protection per § 363(e). This author also notes that § 363(f) only refers to “interests in property,” and does not include the term “claims.” *Id.* at 705. “Successor liability claims do not fall within any one of the section 507 priorities, and therefore, are general unsecured claims entitled to a pro rata share of whatever remains after secured and priority claims are paid.” *Id.* at 707. The author also cites to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), stating that the Supreme Court

held ‘that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)[,]’ that is, with respect to injunctions and restraining orders resulting from unfair labor practices. The Court reasoned, ‘[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees . . . and protection for the victimized employee-- all important policies subserved by the National Labor Relations Act, are achieved at a relatively minimal cost to the bona fide successor.’ . . . [T]he imposition of successor liability in *Golden State* was not due to the transfer of property alone, but rather, federal policy concerns and the successor’s knowledge at the time of purchase.

Id. at 727 (quoting *Golden State Bottling*, 414 U.S. at 180, 185) (footnotes omitted).

Another commentator reached a similar analytical outcome. See Patrick M. Birney, *Section 363 Sale Orders: May Sales be made Free and Clear of Successor Liability Claims?*, 22 J. Bankr. L. & Prac. 4 Art. 4 (2013). The author asserts that § 363 cannot provide insulation from successor liability claims, and that such claims against a § 363 purchaser under a successor liability theory should be evaluated under state successor liability law. Speaking to the language employed in § 363, that such sales are made “free and clear of any interest in such property,” the author acknowledges that in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), the court suggests that the “any interest” language “refer[s] to obligations that are connected to, or arise from, the property being sold,” and, in a similar vein, that *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003), also points to the proposition that “any interest” should include interests “that could potentially travel with the property being sold.” Birney, *supra*, at 3.

(continued...)

JCG has acknowledged that if MSHA itself brought the discrimination claim under section 105(c)(2) such a claim would be in a different category, but in this Court's estimation there is nothing about a section 105(c)(3) claim which mandates that it should have inferior status. Congress included the provision as a failsafe protection mechanism for those miners alleging discrimination where, as in this case, the agency, though acting in good faith, simply gets it wrong.

The Mine Act is a distinct creation of Congress. It operates independently of the Bankruptcy Act in, among other matters, making determinations of discrimination, appropriate parties to be included in its proceedings, and findings on the issue of successorship. There is nothing in the Mine Act that relegates it to a status as an appendage of bankruptcy law and therefore there is nothing which prohibits this Court, should the facts so warrant, from making the legal determination of whether JCG is a successor entity under the Mine Act. Should the Court find that JCG is a successor to Veris Gold, it also has the authority to award damages against that entity. However, should Lowe prevail, the issue of whether JCG will ultimately be held financially liable as a successor for the damages flowing from Mr. Lowe's discrimination claim is unpredictable and a distinct matter from this Court's ability to make the determination of

⁹ (...continued)

However, as with the other commentators cited in this footnote, the author notes that, although courts have read the word "claims" into § 363(f), it is absent. In contrast, the word does appear in § 1141(c) proceedings, an inclusion which makes sense because that section provides claimants with procedural rights that do not exist in § 363 sale. Because "successor liability claimants are general unsecured creditors, who have no specific interest in the property that is being sold . . . there is no nexus between a successor liability claimant and specific debtor property outside of bankruptcy." *Id.* at 4. These are in personam, not in rem, actions, which is significant because a judgment against a successor does not constitute an interest in the debtor's property. *Id.* If in personam claims are included within a § 363 sale order, that would constitute "a nondebtor release of the asset purchaser from the successor liability claim" but such releases are very limited under the Bankruptcy Code. *Id.* at 5. In that regard the author notes that *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995), held that, except for asbestos matters, nondebtor releases are prohibited. Birney, *supra*, at 6. Thus, the author contends that as "third-party releases are permitted (if at all) only in limited circumstances and only in the context of a confirmed plan of reorganization, the Bankruptcy Code, and in particular section 363, simply cannot authorize the insulation of an asset purchaser from successor liability claims." *Id.* Advocating that state law should not be supplanted in the context of bankruptcy, unless Congress expressly so declares such a preemption, the author points out that the "Supreme Court has noted that, absent a "clear and manifest" purpose to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace . . . state law." To that point, § 363 does not contain an express congressional mandate empowering bankruptcy courts to sell debtor assets free and clear of in personam claims, including successor liability claims. Instead, the courts have inserted that broad interpretation. *Id.* at 6-7. Perhaps most importantly, the author observes that successor liability claims are born from the conduct of the asset purchaser, and not the asset. *Id.*

This Court fully appreciates that law journal assessments are not, in any fashion, precedent. However, the persuasiveness of such arguments is noted.

whether JCG is properly designated as a successor and to make findings as to the established, and appropriate, damages.

Other observations need to be made. It is unclear whether, in the high speed route under § 363(f) of the Bankruptcy Act, Mr. Lowe received fair treatment. Though beyond this Court's purview, it would seem that he did not, in part because the § 363 procedure avoids the due process hearing found in § 1141(c) proceedings. The Court is under the impression that the bankruptcy court relies heavily upon those moving that procedure along, in particular, the monitor, to ensure that they are treating those who may have claims appropriately, especially where a *pro se*, non-attorney is seeking fair treatment. This Court is also persuaded that, in line with the law review commentators cited above, at least in the type of claim brought by Mr. Lowe, the tendency of many courts to read interests *and claims* into 363 actions may work injustice.

In this connection it is noted that while the bankruptcy action was proceeding, Veris was still actively defending the section 105(c)(3) claims brought by Mr. Lowe. JCG at least had knowledge of this. It was not until the evidence at that hearing clearly demonstrated Veris' discriminatory behavior against Lowe that, at the conclusion of the hearing, Veris then acted to back out. That option, not taken earlier, was available.

Accordingly, Lowe's complaint is amended to add JCG as a respondent.¹⁰ The next step in the proceeding will be to determine the appropriateness of designating JCG as a successor. The final stage will then be for the Court to determine the appropriate damages to be awarded, a determination made apart from whether such damages as may be awarded will be enforceable in another federal, or possibly a state, forum.

Within two weeks from the date of this Order, JCG is directed to advise the Court whether it intends to participate in the successorship and damages proceedings and determinations.

So ordered.

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

¹⁰ A separate order will be forthcoming regarding the issue of whether the Whitebox Entities may appropriately be added as a respondent in this proceeding for the purpose of determining successor liability.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20004

March 18, 2016

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

v.

NORTH AMERICAN QUARRY AND
CONSTRUCTION SERVICES, LLC,
Respondent.

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

v.

MARTY HARRINGTON, formerly
employed by NORTH AMERICAN
QUARRY AND CONSTRUCTION
SERVICES, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2013-212-M
A.C. No. 30-00287-330292 (2KX)

Mine: Mt. Marion Pit and Mill

CIVIL PENALTY PROCEEDING

Docket No. YORK 2015-134-M
A.C. No. 30-00287-387349A

Mine: Mt. Marion Pit and Mill

ORDER GRANTING THE SECRETARY'S MOTION TO COMPEL

These cases are before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §§ 815, 820(c).¹ I consolidated Docket Nos. YORK 2013-212-M and YORK 2015-134-M on December 8, 2015, and ordered the parties to comply with my Prehearing Order by no later than April 20, 2016.

On February 25, 2016, the Secretary filed a motion to compel North American Quarry and Construction Services, LLC ("NAQCS"), to produce requested discovery and to appear at a

¹ On January 2, 2014, Chief Administrative Law Judge Robert J. Lesnick assigned me Docket No. YORK 2013-212-M. On April 14, 2014, I stayed this docket, yet allowed discovery to proceed, pending completion of the Secretary's related section 110(c) investigation. On September 25, 2015, the Secretary filed a petition in Docket No. YORK 2015-134-M, seeking penalties against Marty Harrington ("Harrington") under section 110(c). Chief Judge Lesnick assigned me Docket No. YORK 2015-134-M on December 2, 2015, attaching a copy of my Prehearing Order directing the parties to settle the case or position it for hearing within 140 days.

Rule 30(b)(6) deposition focusing on the business relationship between NAQCS and its parent company, Austin Powder Company (“Austin Powder”). *See* Fed. R. Civ. P. 30(b)(6). NAQCS timely filed a response on March 7, 2016. On March 15, 2016, the Secretary filed a motion requesting permission to file a reply to NAQCS’s response, which I hereby **DENY**.

I. Background and Issues

On August 19, 2015, the Secretary sent NAQCS a set of interrogatories and document requests. (Mot. at 6.) NAQCS objected to one interrogatory and eight document requests, which sought information about NAQCS’s relationship with Austin Powder. (Mot. at 6–9.) NAQCS’s objections stated that the information sought was irrelevant, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and protected by the attorney-client privilege and work-product doctrine. (*Id.*) NAQCS provided no additional explanation in its initial objections. (*Id.*)

On October 21, 2015, the Secretary again requested this information, asserting its relevance to the Secretary’s penalty assessment. (Mot. at Ex. K.) On November 10, 2015, NAQCS again refused to comply but indicated it would stipulate (1) to the operator’s size alleged in the Secretary’s Petition for the Assessment of Civil Penalty, and (2) that the Secretary’s proposed penalty would not adversely affect the operator’s ability to continue in business. (Mot. at Ex. L.) On January 13, 2016, the Secretary sent a final letter demanding the information and averring that NAQCS’s proposed stipulations did not resolve the penalty issue. (Mot. at Ex. M.) On February 16, 2016, the Secretary served NAQCS with notice of its Rule 30(b)(6) deposition concerning these same topics. (Mot. at 2, Ex. A.) According to the Secretary, NAQCS will not comply with the notice. (Mot. at 2.)

In his motion, the Secretary argues he is entitled to conduct discovery on the relationship between Austin Powder and its subsidiary, NAQCS, to demonstrate that the two entities should be treated as a “unitary operator.” (Mot. at 9–10.) The Secretary relies on the Commission’s holding in *Berwind Natural Resources Corporation*, 21 FMSHRC 1284 (Dec. 1999), and claims Austin Powder may be held liable for both the violation and penalty in this matter under the unitary operator theory.² (*Id.* at 9–11.) The Secretary thus believes his discovery requests are necessary to determine the full extent of Austin Powder’s control over NAQCS. (*Id.* at 11–12.)

In response, NAQCS argues that the Secretary’s discovery requests are duplicative, are wasteful, and seek irrelevant information. (Resp. to Mot. at 2–5.) NAQCS asserts that the Secretary has already completed voluminous discovery on the unitary operator issue in separate proceedings before another Commission Judge involving Austin Powder and other subsidiaries

² In *Berwind*, the Commission held that a corporation and its subsidiary may be considered a single operator under the Mine Act for purposes of establishing joint and several liability and assessing civil penalties. *See Berwind Natural Res. Corp.*, 21 FMSHRC at 1316.

(not NAQCS).³ (*Id.* at 3.) NAQCS claims its relationship with Austin Powder has already been examined in those separate proceedings. (*Id.*) Furthermore, NAQCS argues that the requested information is irrelevant due to NAQCS's proposed stipulations, as well as Austin Powder's limited involvement in the events leading to the issuance of the citations here. (*Id.* at 4–5.)

Based on the parties' arguments, the following issues are before me — (1) whether information regarding NAQCS business relationship with its parent company, Austin Powder, is within the scope of discovery; and (2) whether providing the requested documents and an answer to the interrogatory and allowing the Federal Rule 30(b)(6) deposition would be duplicative and impose an undue burden on NAQCS.

II. Principles of Law

A. Scope of Discovery

Under Commission Procedural Rule 56, parties may use depositions, written interrogatories, requests for admissions, and requests for documents or objects to “obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. § 2700.56(a)–(b). A party served with a request for production must respond within 25 days of service and state the basis for any objections in its answer. 29 C.F.R. § 2700.58(c).

Commission Judges may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Under Federal Rule 26(b)(1), a party may discover “any non[-]privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). The scope of discovery under the Federal Rules is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Parties may depose company officials under Federal Rule 30(b)(6). Fed. R. Civ. P. 30(b)(6).

B. Limitations on Discovery: Undue Burden or Expense

Under Commission Procedural Rule 56(c), a Commission Judge may “limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense” for “good cause shown.” 29 C.F.R. § 2700.56(c). This provision grants the Judge considerable discretion to regulate the course of discovery. *See also* 29 C.F.R. § 2700.55 (empowering

³ On March 27, 2015, Administrative Law Judge Kenneth R. Andrews consolidated sixteen dockets to determine preliminarily whether Austin Powder and a number of its subsidiaries constitute a unitary operator. *Austin Powder Co.*, FMSHRC Docket No. KENT 2013-1078 (Mar. 27, 2015) (ALJ) (order). On March 9, 2016, Judge Andrews issued an order affirming the entities' “unitary operator” status. *Austin Powder Co.*, FMSHRC Docket No. PENN 2012-172 (Mar. 9, 2016) (ALJ) (order). However, NAQCS admits it was not a subsidiary involved in the consolidated proceedings before Judge Andrews. (Resp. to Mot. at 3.)

Commission Judges to regulate the course of hearings, order depositions, and dispose of procedural requests).

Although the Commission has not defined “good cause” or “undue burden,” Commission Judges have relied on Commission Rule 56(c) to limit needless, speculative, overly broad, or duplicative discovery. *See Marfork Coal Co.*, 28 FMSHRC 742, 743 (Aug. 2006) (ALJ) (postponing “needless discovery” where contest cases had been stayed pending the proposal of civil penalties); *Eagle Energy, Inc.*, 21 FMSHRC 109, 113 (Jan. 1999) (ALJ) (denying motion to compel *in camera* review of documents where requesting party failed to make a “threshold showing identifying the nature of information to be discovered”); *Newmont Gold Co.*, 18 FMSHRC 1709, 1713–14 (Sept. 1996) (ALJ) (limiting deposition questions to prevent “broad, complicated, or lengthy hypothetical questions . . . that do not relate to the facts at issue”); *Scott McGlothlin v. Dominion Coal Corp.*, 36 FMSHRC 3049, 3051 (Nov. 2014) (ALJ) (granting motion to quash subpoena because information sought had already been obtained through other documentation and would not necessarily lead to relevant evidence).

A party objecting to a discovery request on the basis of undue burden or expense must demonstrate such a burden or expense. *See Greyeagle Coal Co.*, 35 FMSHRC 3321, 3327–29 (ALJ) (refusing to limit discovery because party failed to detail the burden or expense involved in responding to discovery request); *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Jan. 1998) (ALJ) (denying motion for protective order because party failed to show the requested deposition would cause undue burden); *Newmont Gold Co.*, 18 FMSHRC 1304, 1306–08 (July 1996) (ALJ) (denying, in part, motion for protective order as depositions would not be overly burdensome).

III. Analysis and Conclusions of Law

A. Scope of Discovery – Relevancy

The Secretary seeks information to determine Austin Powder and NAQCS’s unitary operator status. (Mot. at 11.) NAQCS argues the unitary operator issue was the focus of discovery with regard to Austin Powder’s other subsidiaries, and the Secretary should not be permitted to delve into it again with NAQCS. (Resp. to Mot. at 2–4.)

Here, the interrogatory, eight document requests, and notice of deposition ask NAQCS to produce information pertaining to its corporate relationship with Austin Powder: contractual agreements between the two entities; NAQCS’s placement within Austin Powder’s organizational structure; NAQCS’s leasing of employees; NAQCS’s worker and unemployment compensation policies; any goods, products, or services Austin Powder provides to NAQCS; and Austin Powder’s role in this litigation. (Mot. at 6–9, Ex. A.) Under *Berwind*, the Commission considers four factors to determine whether multiple entities will be treated as a unitary operator — (1) interrelation of operations; (2) common management; (3) centralized control over mine health and safety; and (4) common ownership. *Berwind*, 21 FMSHRC at 1317. The Secretary’s discovery requests relate to each of the four *Berwind* factors and would allow the Secretary to identify whether Austin Powder could be jointly liable with NAQCS for both the violation and payment of the civil penalty. Thus, the information the Secretary seeks is quite relevant to the unitary operator theory, especially given that no legal determination by a Commission Judge has

been made that NAQCS and Austin Powder are a unitary operator. Of course, a stipulation to the unitary operator issue and an unopposed motion adding Austin Powder as a party would obviate the need for any such discovery.

NAQCS next argues its offered stipulations about the Secretary's proposed penalty eliminate the relevance of NAQCS's relationship with Austin Powder. (Resp. to Mot. at 4.) Commission Judges, however, are not bound by the Secretary's proposed penalty assessment. *See, e.g., Sellersburg Stone Co.*, 5 FMSHRC 287, 290–93 (Mar. 1983), *aff'd*, 737 F.2d 1147, 1151–52 (7th Cir. 1984) (“[I]t is clear that under the [Mine] Act the Secretary of Labor's and the Commission's role regarding the assessment of penalties are separate and independent”). Consequently, information about the relationship between NAQCS and Austin Powder remains relevant to the Commission's own determination of the civil penalty in this matter. NAQCS's suggested stipulations, therefore, would not fully resolve the issue regarding the appropriate civil penalty.

Additionally, NAQCS argues that the information sought is not relevant to the actual violations at issue. (Resp. to Mot. at 4–5.) NAQCS claims the Secretary has no evidence that Austin Powder provided either the training or equipment that led to the violations. (*Id.*) Yet contrary to NAQCS's claim, the Secretary has provided evidence that NAQCS's employees drive vehicles carrying Austin Powder's logo and are subject to the Austin Powder Company Employee Handbook, which contains the company's safety policy. (Mot. at 10, Exs. J, C.) This evidence signals that a further inquiry into the extent of Austin Powder's involvement in NAQCS's operations is warranted.⁴ The Secretary's discovery requests would lead him to the very information NAQCS claims the Secretary does not have. NAQCS's circular reasoning why this information is not relevant therefore lacks merit.

Accordingly, I determine that the information the Secretary seeks in his discovery requests is relevant or appears likely to lead to the discovery of admissible evidence under Commission Rule 56, and is thus within the scope of discovery in this matter.

B. Undue Burden or Expense

NAQCS argues that the Secretary's discovery requests are duplicative and wasteful. (Resp. to Mot. at 2.) In support of this argument, NAQCS asserts that the Secretary has already completed voluminous discovery on the unitary operator issue in a separate Commission proceeding involving Austin Powder and a number of its other subsidiaries. (*Id.*)

NAQCS, however, was not a party in any of the dockets contained in the separate action. (Resp. to Mot. at 3.) Non-parties who are not privy to a legal action generally cannot be bound

⁴ A Commission Judge's decisions are not binding upon the Commission. 29 C.F.R. § 2700.69(d). Nevertheless, Judge Andrew's order affirming Austin Powder's unitary operator status with a number of its other subsidiaries strongly suggests that Austin Powder's control over its subsidiary NAQCS is a lot more pervasive than NAQCS seems to present. *Austin Powder Co.*, FMSHRC Docket No. PENN 2012-172 (Mar. 9, 2016) (ALJ) (order).

by the adjudication of issues in that action. *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996) (“A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.” (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989))). Furthermore, although another Commission Judge ruled on the unitary operator issue for other Austin Powder subsidiaries, decisions by a Commission Judge are not binding legal precedent. 29 C.F.R. § 2700.69(d). Thus, whether Austin Powder and NAQCS may be considered a unitary operator remains at issue in the matter before me. Accordingly, I determine that discovery by the Secretary on the issue would not be duplicative or wasteful.

Finally, NAQCS provided no information about the burden or expense of complying with the discovery. Based on the information before me, the discovery sought by the Secretary does not appear to be needless, speculative, overly broad, or duplicative. Rather, the discovery appears relevant and sufficiently tailored to the unitary operator issue. Lacking any additional details regarding the burden or expense of producing the requested information, I therefore determine that NAQCS has not demonstrated any undue burden or expense. Absent good cause, I conclude there is no basis to limit the Secretary’s pending discovery requests.

IV. Order

Based on the above reasoning, the Secretary’s motion to compel is **GRANTED**. It is hereby **ORDERED** that NAQCS shall (1) identify and produce the documents in the Secretary’s eight document requests, unless otherwise privileged; (2) provide an answer to the Secretary’s interrogatory; and (3) designate a person or persons to appear at the Secretary’s properly noticed Rule 30(b)(6) deposition.⁵

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

⁵ Under the Commission’s rules a party that fails to comply with an order compelling discovery may be subject to an order, as is just and appropriate, in favor of the party seeking discovery, including deeming as established the matters sought to be discovered or dismissing the proceedings altogether. 29 C.F.R. § 2700.59.

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March 21, 2016

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,
Respondents,

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM
WE-MD 14-03

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER ON COMPLAINANT'S MOTION TO AMEND TO ADD VARIOUS WHITEBOX ENTITIES AS PARTIES

Before: Judge Moran

Complainant Matthew Varady has filed a motion to amend his original complaint “so as to join ‘Whitebox Entities’ to include Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Jerritt Canyon Gold, LLC,¹ Sprott Mining Inc., and Eric Sprott as successors in interest to Veris Gold USA Inc.” Mot. to Deny Special Limited Appearances at 2; *see also* Mot. to Amend and Mot. for Expedited Consideration at 1.

Following that motion, on February 12, 2016, counsel on behalf of the Whitebox Entities (“Whitebox Counsel”) filed a Special Limited Appearance to contest this Court’s jurisdiction and to challenge whether the Court can attach liability against the parties Varady wishes to join for the acts of discrimination against Varady committed by Veris Gold USA, Inc. (“Veris Gold”). Thereafter, on February 25, 2016, Whitebox Counsel also filed a sur-reply. Varady then filed a response to the sur-reply.

For the reasons which follow, the Court holds that it has jurisdiction to determine if other entities may be added as successors in interest, but that there is insufficient information in the record to make such a determination and that discovery may be had in furtherance of resolving those issues.

¹ Varady’s Motion to Amend asserts that Jerritt Canyon Gold, LLC, Whitebox Asset Management, Whitebox Advisors LLC, Wbox 2014-1 Ltd., Sprott Mining Inc. and Eric Sprott are the purchasers of Veris Gold Inc. and the successors in interest to Veris and that the three principals of Jerritt Canyon Gold LLC are Gregory Gibson, Jacob Mercer, and Erik Sprott, as its managers. Mot. to Amend 2.

Successorship Basics

The Commission has recognized that, in certain cases, the imposition of liability on a successor is appropriate. *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463 (1980), *aff'd in part, rev'd in part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983); *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom. Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987).

In *Secretary of Labor on behalf of Keene v. S&M Coal Company, Inc.*, 10 FMSHRC 1145 (Sept. 1988), the Commission noted that in

the cases in which the Commission and the courts have found successorship liability there has been some type of transaction (a “transactional element”) with respect to the business between the predecessor and the entity against which liability is being asserted and/or there has been a continuation of activity at the predecessor’s site. In *Munsey, supra*, for example, the company that was held liable as a successor had acquired leases and mining equipment from the former employer, substantially replacing the predecessor’s operation. Similarly, in *Terco, supra*, successorship liability attached because there was substantial continuity of business interests at the same site.

Id. at 1152.

The Commission then observed that

[a]ssumption of the predecessor’s position by the successor underlies the successorship cases. For example, in *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), successorship was found where the predecessor company was merged into the acquiring company, a process that also involved the wholesale transfer of the predecessor’s employees to the successor. The Court observed that for an employer to be considered a successor, there must be a substantial continuity in the identity of the business enterprise before and after a change. *Wiley, supra*, 376 U.S. at 551. Another example of the acquisition element underlying these cases can be found in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, (1973) which involved a bona fide purchase of a company that had committed an unfair labor practice. Issuance of a reinstatement and back-pay order was upheld against the acquiring company, which occupied the site where the unfair practice had occurred.

Id.

Clearly, the “transactional element,” at least as to Jerriitt Canyon Gold, LLC, (“JCG”) has been conceded. This led to the Court’s determination adding that entity as a Respondent in its March 4, 2016, Order. *See Order on Compl’t’s Mot. to Amend*, Mar. 4, 2016. Whether other entities may be shown to have such transactional elements, and therefore be added as successors, is a subject of this Order, though, as explained below, conclusions about the status of those entities are not presently possible.

Apart from determining if a company occupies the position of a successor is the separate issue of determining whether such a successor should be liable to remedy the unlawful discrimination of its predecessor. For that determination, the Commission has followed the courts and has approved consideration of nine specific factors:

(1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

Keene, 10 FMSHRC at 1153 (quoting *Munsey*, 2 FMSHRC at 3465-66).

The Commission has further noted that

the key factor for determining successorship liability is whether there is a substantial continuity of business operations. This question is fact intensive and must be resolved on a case-by-case basis. *Howard Johnson, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256 (1974). In *Sugartree*, 9 FMSHRC at 398, the Commission emphasized that factors (3) through (9) provide the framework for analyzing whether there is a continuity of business operations and work force between the successor and its predecessor.

Id. (citing *Munsey*, 2 FMSHRC at 3467; *Sugartree*, 9 FMSHRC at 398).

Similarly, in *Secretary of Labor on behalf of Zambonino v. Colonial Mining Materials, LLC*, 36 FMSHRC 1239 (May 2014) (ALJ), an administrative law judge determined a mine operator was a successor and liable for the complainant's termination. That judge noted that in *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court determined that

the successor company acquired the predecessor *with notice of unfair labor practice litigation*, and continued the business without substantial interruption or change in operations, employee or supervisory personnel, [and then] upheld the Board's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award.

Zambonino, 36 FMSHRC at 1259 (emphasis added).

The judge took note that the Supreme Court also expressed that

[t]o further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business

of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

'In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'

Id. at 1260 (quoting *Golden State Bottling*, 414 U.S. at 171 n.2 (quoting *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967) (footnotes omitted), *enforced sub nom.*, *U.S. Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968))).

The Motion and Responses

Varady's Motion to Amend² states that Veris Gold began its bankruptcy proceeding in June 2014, which was after Varady had filed his discrimination complaint in November 2013. Mot. to Amend 2. Varady asserts that

Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott had knowledge of the Complainant's discrimination action before the Commission because Jerritt Canyon Gold LLC was represented by the same law

² Complainant Varady's motion also requests expedited consideration. As this case is one of many dockets before the Court and as the Court has already issued many rulings regarding Varady's Complaint, the request to expedite is DENIED.

firm as Veris Gold USA Inc., Goicoechea, Di Grazia, Coyle and Stanton, Ltd., and in particular both were represented by Attorney David M. Stanton.

Id. at 3. Varady adds that “[a] business filing with the State of Nevada – Secretary of State’s Office filed on June 9, 2015 states that the age of the company, Jerritt Canyon Gold LLC., was 4 months old,” and Varady therefore contends that “Jerritt Canyon Gold LLC., had been [in] operation since March of 2015 and that the Registered Agent was the law firm of Goicoechea, Di Grazia, Coyle and Stanton, Ltd.” Mot. to Amend 3.

The motion asserts that

[t]here has been a 100 % continuity of business operations between Veris Gold USA Inc. and Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. The same surface mill has operated without any hiatus by Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott. Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott are engaged in all of the exact same operations (gold ore extraction, stock piling, primary crushing, secondary crushing, tertiary crushing, ball milling, roasting, off gas handling, carbon in leaching, stripping of carbon, tailings storage, and refining Dore gold) as Jerritt Canyon Gold LLC, Whitebox Advisors LLC, Sprott Mining Inc., and Eric Sprott use the exact same equipment.

Id.

As to this assertion, the Court would observe that Complainant is making *allegations* in support of his claim that the parties he wishes to add are successors. The Court notes that with its previous order, issued March 4, 2016, Jerritt Canyon Gold, as the acknowledged new owner of the Jerritt Canyon Mill, has been added as a party. However, as to the other entities and individuals Complainant seeks to add, Complainant apparently does not realize that his assertions about their involvement with Jerritt Canyon Gold, and previously with Veris Gold, are not evidence of such claims. Instead, evidence to support Varady’s claims about the relationship of those other entities and individuals with Veris Gold and JCG must be established. Discovery is the initial means to learn about the nature of the relationship of those other entities and individuals with Veris Gold and JCG. Discovery vehicles include official records, requests for admissions, interrogatories, stipulations, and depositions.

Complainant also asserts that

[t]he vast majority of Jerritt Canyon Gold LLC’s employees are all former Veris Gold USA Inc.’s employees and are engaged in the same types of job classifications as they were when they worked for Veris Gold USA Inc. The transfer from one company to the other is likened to flipping a light switch at the time of the sale date. At the stroke of midnight all to the Veris Gold USA Inc.’s employees became Jerritt Canyon Gold LLC’s employees with a very minor exception of less than a few employees. According to a local newspaper article

the number of employees effected [sic] in the transfer of ownership was approximately 400 employees.

Mot. to Amend 4. This assertion is also not evidence.

The same deficiencies exist with regard to items 6 through 9 of Complainant's Motion; they are assertions of the claims made in those items, not evidence thereof.³ *See Id.*

The Court has urged Complainant, following the determination that he was discriminated against by Veris Gold, to make efforts to find legal counsel in support of his efforts to establish that these various entities should be determined to be successors and to present a well-founded claim for his submission of damages. It again urges Complainant to make efforts to secure legal counsel. While retaining counsel would not assure a successful outcome, it can be stated with some confidence that continuing to proceed without such counsel, in these complex legal matters, presents a disadvantage. The Court will not, and cannot, act as if it were Complainant's attorney in fact, as the Court cannot operate in such dual, and conflicting, roles. Discovery and how to conduct it effectively are Complainant's burdens.

Further, it is difficult for the Court to appreciate why such efforts to obtain legal counsel have apparently not been made, as Complainant has a judgment of discrimination in hand and attorney's fees would be recoverable for the efforts to hold a successor liable, if such attorney is successful in that effort. Such attorney's fees would not diminish the recovery of the respondent's damages at all, as they are a separate line item for a respondent's damages in discrimination claims. However, the Court is *not* suggesting that Complainant retain an attorney on a fee basis, as the cost would be prohibitive and the final outcome remains uncertain. Another arrangement would be on a contingency basis under which the attorney would be able to file for such attorney's fees plus be entitled to a share of any damages. These are matters for Complainant and an attorney to work out, not the Court. The benefit for Complainant would be having the expertise and skill provided by legal counsel.

The Court will now address the responses from "the Whitebox Entities," as provided through the limited appearance of its counsel, the law firm of Fennemore Craig, P.C.

The "Whitebox Entities," which are defined in counsel's response as Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, and any other Whitebox entity or individual including Jacob Mercer and Jeff Sterling, assert that the Whitebox Entities did not purchase any of assets of Veris Gold, and do not operate the Jerritt Canyon Gold mine or mill. Special Limited Appearance on Behalf of the Whitebox Entities to Contest Jurisdiction in Resp. to Compl't's Mot. to Amend at 1 ("Whitebox Response").

The Response maintains that the Whitebox Entities had no involvement with Debtor Veris Gold entities⁴ prior to filing of bankruptcy proceedings on June 9, 2014; were not creditors

³ The motion concludes with Complainant's citation to case law, which he maintains support his claim that these entities should be deemed successors. Such legal conclusions cannot come about until the facts supporting such a claim have been adduced.

or equity holders of Veris Gold entities; and were not officers, directors, or control persons of Veris Gold entities. *Id.* at 2. Jerriitt Canyon Gold, LLC, was the purchaser of Veris Gold's assets. *Id.* However, the Response relates that "WBox 2014-1 Ltd." loaned \$12 million to Veris Gold for "their post-petition operations." Whitebox Resp. 2.

The Response then identifies Deutsche Bank as the "first position secured creditor" of the debtors, and informs that the bank declined to advance funds to keep the debtors in business, post-petition.⁵ *Id.* The Response then asserts that post-petition financing was approved by bankruptcy courts around October 6, 2014, with WBox 2014-1 Ltd. loaning \$12 million to the debtors, then increasing that loan to \$15 million in May 2015, secured by a "first position priming lien" on all of debtors' assets. *Id.* The recounting of events by the Response then informs that the sale process was approved in November 2014, but no buyer was found. *Id.* Following that, the Response advises that WBVG LLC, *an affiliate of WBox 2014-1 Ltd.*, made an offer to purchase Veris Gold assets and *after notice and hearing*, that sale was approved. *Id.* at 2-3. Thereafter, WBVG LLC changed its name to Jerriitt Canyon Gold LLC. *Id.* at 3.

The Response further asserts that Complainant had notice of Veris Gold's bankruptcy, both actual and constructive. *Id.* The Response states written notice was given in the Sale Motion and hearing and also in the notice of entry of sale order in June 2015. *Id.* As to the written notice given in the Sale Motion and hearing, the Response, pointing to Paragraph G of the Sale Order, advises that the order found that "the Secretary of Labor, Inspector of Mines, EEOC, MSHA and OSHA and any known claimants that have asserted Claims against the Debtors were given actual notice of the Sale Motion and hearing." Whitebox Resp. 3. It is not clear that Complainant was one of those known claimants given actual notice.⁶

The Response then points to the Sale Order and its statement that

[t]he transactions contemplated under the Agreement do not amount to a consolidation, merger or de facto merger of the Purchaser and the Debtors and/or the Debtors' estates, there is not substantial continuity between the Purchaser and

⁴ The bankruptcy proceedings concerned not only Veris Gold USA, Inc., but also Veris Gold Corp., Queenstake Resources, Ltd., and Ketza River Holdings, Ltd. (collectively, "Veris Gold entities"). *See* Whitebox Resp. Ex. A, at 1.

⁵ The Response also asserts that Deutsche Bank, with \$80 million in secured claims, and Small Mine Development, with an asserted \$40 million of secured claims, and various unidentified "environmental creditors," asserting \$20 million in penalties, all received no funds for the payment of their claims from the sale of the assets. Whitebox Resp. 3. This seems unimaginable, if the Response is suggesting that two significant creditors, with \$120 million in secured claims, walked away from the bankruptcy proceeding with nothing. **Whitebox Counsel is directed by the Court to address this issue.**

⁶ It does appear to be admitted that the Complainant filed a Motion to stay the Sale on June 15, 2015, that the motion was denied and that Complainant did not appeal the Sale order. Whitebox Resp. 3-4.

the Debtors, there is no common identity between the debtors and the Purchaser, there is no continuity of enterprise between the Debtors and the Purchaser, the Purchaser is not a mere continuation of the Debtors or their estates, and the Purchaser does not constitute a successor to the Debtors or their estates.

Whitebox Resp. 4 (quoting Sale Order at 9, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318 [hereinafter “Sale Order”]).

Thus, the Purchaser and Debtors happily agreed that none of the factors which would point toward a successorship were present. This Court would be surprised to learn that the bankruptcy courts engaged in any detailed review of those claims. Rather, they more likely accepted in good faith that those representations were made to them in good faith and grounded in fact, as opposed to being mere assertions. As mentioned in its Order of March 4, 2016, it is this Court’s understanding that bankruptcy courts of necessity rely upon the representations of the parties and the monitor. Depending upon what is learned about the relationships between Veris Gold, Jarrett Canyon Gold, the Whitebox Entities, and the various individuals who may have commonality among those enterprises, the bankruptcy courts may have been misled.⁷

⁷ In the Court’s estimation, some aspects of the bankruptcy proceeding involving at least the monitor, Veris Gold, and Jerritt Canyon Gold are disconcerting. The Court’s concerns, which are not yet conclusions or findings, stem in part from yet another discrimination action against Veris in which there was a settlement agreement between Veris and discrimination complainant Jennifer Morreale. A Commission Order involving that case informs there was a settlement agreement in February 2015 with Morreale within which agreement “Veris Gold represented that it had received *approval from a bankruptcy monitor* to make the [settlement] payment, as the operator had previously filed U.S. Chapter 15 bankruptcy proceedings concurrent with Canadian bankruptcy filings and was subject to the financial oversight of a bankruptcy monitor.” *Sec’y of Labor on behalf of Morreale v. Veris Gold USA, Inc.*, 38 FMSHRC ___, slip op. at 2, No. WEST 2014-793-DM (Mar. 8, 2016) (emphasis added). However, Morreale was never paid, the settlement agreement never lived up to, and in June 2015, the presiding judge in that case learned “that the bankruptcy monitor overseeing the bankruptcy proceedings had withheld payment to both the Secretary [of Labor] and Ms. Morreale pending the resolution of an asset sale of the mine by the operator to a separate entity, Jerritt Canyon Gold, LLC.” *Id.* Given the above-mentioned dates, it can be stated with some confidence that the bankruptcy monitor must have been fully aware of Varady’s discrimination complaint, been aware of, and likely approved, Veris’ employing legal counsel to defend that complaint during the June 8 through 10, 2015, hearing held before this Court in Elko, Nevada. Similarly the monitor was likely fully aware of the separate discrimination complaint brought by Daniel Lowe in Docket No. WEST 2014-614-DM against Veris, which was also heard by this Court on June 18, 2015, and that the monitor approved the legal defense fees associated with that matter as well, until it became clear that Veris would not prevail in either matter. Thus, it seems reasonable to conclude that money was flowing freely for the legal defense of Veris in both the Varady and Lowe matters, but stopped once it became clear that Veris would be held accountable for its discrimination against those miners. The Court doubts that the bankruptcy courts were fully apprised of these doings.

Further, a case such as this lays bare the problems identified by the law review commentaries when 11 U.S.C. § 363(f) proceedings supplant those brought under § 1141(c), despite the former's narrower language and the absence of the procedural protections which are available under the latter, all as cited in the Court's previous Order on Complainant's Motion to Amend, issued March 4, 2016. For example, if through discovery, it is shown that there are individuals who had financial or management interests in Veris, Jarrett Canyon Gold and/or the Whitebox Entities, such linkage could be troublesome and point to the appropriateness of holding others accountable as successors.

As if the foregoing proclamations advanced by the Response were not enough, the Response then lards:

Furthermore, Paragraph 38 of the Sale Order *concludes* that there is no "successor" liability as to the Purchaser. The sale was free and clear of any successor liability. [The Sale Order] expressly *rules*: . . . The Purchaser is not a 'successor' to the Debtors or their estates by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume, or in any way be responsible for any liability or obligation of any of the Debtors and/or their estates including, but not limited to, any bulk sales law, successor liability, transferee liability, derivative liability, vicarious liability or any other liability or responsibility of any kind or character for any Liens, Claims, or Interests against the Debtors or against an insider of the Debtors, or similar liability except as otherwise expressly provided in the Agreement, whether known or unknown as of the Closing, now existing or hereafter arising, fixed or contingent, asserted or unasserted, or liquidated or unliquidated.

Whitebox Resp. 4-5 (emphasis added) (footnote omitted) (quoting Sale Order at 21).

Though the above language crafted by the purchaser and debtor would seem to have created an insurmountable barrier to successorship claims, that is, if one accepts the lawyering employed and disregards due process concerns and the issues concerning the propriety of using § 363, instead of § 1141(c), additional barriers were nevertheless employed. Paragraphs N and Q of the Sale Order provide that the term "claims" captures successor or transferee liability and that the parties would not have entered into their agreement if the purchaser acquired the property with such claims. *Id.* at 5.

Even with that, more efforts to protect against such claims were layered onto those already described, as the Response then points to Paragraph 39 of the Sale Order. That paragraph lists, in the fashion employed by the other provisions, just discussed, any other

conceivable soul⁸ as being “forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests . . . against the Purchaser or any affiliate, successor or assign thereof, or the Assets.” *Id.* at 5-6 (quoting Sale Order at 21).

The Response concludes with the assertion that *only* the U.S. Bankruptcy Court can address the issues raised by the Complainant and that this Court has no jurisdiction over the Whitebox Entities. Yet, while asserting that this Court has no jurisdiction, Whitebox simultaneously requests attorneys’ fees and costs for having to file its response. *Id.* at 6. The request for attorneys’ fees is DENIED.

Subsequent to its Response, the Whitebox Entities then filed a Special Limited Appearance on Behalf of Whitebox Entities for Sur Reply to Complainant’s Motion to Amend (“Whitebox Sur-reply”). For the most part, the Sur-reply reasserts its previous arguments or those made by Jarrett Canyon Gold in its responses. These include the claim that this Court has no jurisdiction over successorship vis-à-vis findings of Mine Act discrimination. Whitebox Sur-reply 1. Again, the Sur-reply from the Whitebox Entities points to the Order Approving the Sale. However, regarding that Order Approving Sale, through the process of discovery, as conducted by Complainant, not the Court, it is necessary to learn who drafted the Order approving the sale, the date that order was presented to the court(s), the circumstances of that presentation, including the party or parties who presented the Order to such bankruptcy court(s), the parties present at that presentation, the record, including any transcripts, of any inquiry between the bankruptcy court(s) and those presenting the Order for the courts’ approval, whether this occurred only by written submissions or through a hearing, if any hearing in fact occurred, and the date the Order was approved.

⁸ Displaying lawyering that frequently causes public revulsion, in stating that “to make sure the Purchaser [is] protected from further actions,” the Whitebox Entities Response points to this passage from Paragraph 39 of the Sale Order which provides:

Except to the extent expressly included in the Assumed Liabilities or to enforce the Agreement or Permitted Encumbrances, pursuant to Bankruptcy Code Sections 105 and 363, all persons and entities, including but not limited to, the Debtors, the Monitor, all debt security holders, equity security holders, the Debtors’ employees or former employees, governmental, tax and regulatory authorities, lenders, parties to or beneficiaries under any benefit plan, trade and other creditors asserting or holding Liens, Claims, or Interests of any kind or nature whatsoever against, in or with respect to any of the Debtors or the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way related to the Debtors’ business prior to the Closing Date or the transfer of the Assets to the Purchaser, shall be forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Liens, Claims, or Interests whether by payment, setoff, or otherwise, directly or indirectly, against the Purchaser or any affiliate, successor or assign thereof, or the Assets.

Whitebox Resp. 5-6 (quoting Sale Order at 21-22).

The Whitebox Entities repeat that they are not “an owner of a mine, miners, operators, or employers that fall within the definitions and jurisdiction of FMSHA.” Whitebox Sur-reply 2. Then, contradicting that assertion, they admit that “[a]t most, one of the Whitebox Entities, WBox 2014-1 Ltd., is a 20% holder of a membership interest [which the Sur-reply characterizes as analogous to 20% shareholder of a corporation] in the Delaware limited liability company that owns and operates the mine.”⁹ Whitebox Sur-reply 2. In this regard, the Sur-reply contends that

the Whitebox Entities did not purchase, do not have title to and do not own any of the assets previously owned by Veris Gold, do not operate the mine or mill previously operated by Veris Gold and do not employ any employees previously employed by Veris Gold at the mine or mill [and that] . . . **[t]here are no facts or law that could be used to find or conclude that any of the Whitebox Entities are the successor of Veris Gold.**

Id. at 3 (emphasis added). The Court agrees with the last quoted statement but adds the important qualifier, “at least for now.” This is because, until discovery occurs, a definitive statement about that claim cannot be made.

The Sur-reply then speaks to the role of Jacob Mercer, described as a manager of Jerriitt Canyon Gold, LLC, and states that being a manager or a member of a limited liability company does not make such a person liable for the debts or obligations of such a company. *Id.* at 3-4. The balance of the Sur Reply repeats previous contentions and concludes with the assertion that Nevada common law is to be applied to determine successor liability and that such state law does not speak to the issue of whether a member or manager of a purchaser would be subject to such liability as a successor.¹⁰ *Id.* at 4-5.

Varady filed a short response to the Whitebox Sur-reply, asserting that the Mine Safety and Health Review Commission has the final jurisdictional authority in this matter, not the United States Bankruptcy Court. Varady’s response denies that he was ever served with any document regarding Veris Gold USA, Inc.’s bankruptcy but that, through information from other sources, he admits that he did file a motion to stay the sale, that the bankruptcy court denied that motion to stay, that he did not appeal that adverse ruling and that, in any event, the sale occurred before such appeal period ended. Complainant’s Motion To Deny Counsels’ Special Limited Appearance on behalf of the “Whitebox Entities” Sur Reply to Complainant’s Motion to Amend (“Varady Response to Sur-reply”).

⁹ The Sur Reply adds that it is not correct that “one of the Whitebox Entities purchased purchased a 20% interest in the assets and that Jerriitt Canyon Gold LLC purchased an 80% interest.” Whitebox Sur-reply 3. Instead, it is stated that WBox 2014-1 Ltd. owns 20% of the *membership interest* in Jerriitt Canyon Gold LLC, which it characterizes as akin to 20% of the stock of a corporation. *Id.*

¹⁰ As with its Response, the Whitebox Entities’ Counsel seeks attorney’s fees and costs for filing its Sur-reply. Consistent with the Court’s ruling in the Whitebox Entities’ Counsel seeking such fees for its Response, this request is similarly DENIED.

Discussion

In order to determine the appropriate parties potentially to be added as successor entities and to determine if liability as successors is warranted, it is necessary to pull back the covers, so to speak, in order to fully understand the relationship(s), if any, between Jarrett Canyon Gold, the “Whitebox Entities,” Veris Gold, and the owners of those entities, in order to determine if they share common identities. This is a purpose of discovery, which the complainant is entitled to utilize.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence *or appears likely to lead to the discovery of admissible evidence.*” 29 C.F.R. § 2700.56(b) (“emphasis added”). That provision allows parties to use depositions, written interrogatories, requests for admissions, and requests for documents or objects to obtain such information. A party served with interrogatories and requests for production must answer within 25 days of service and must state the basis for any objections in its answer. 29 C.F.R. §§ 2700.58(a), (c).

In addition, it has also been observed that:

[f]or procedural questions not regulated by the [Mine] Act, [the Commission’s] Procedural Rules, or the Administrative Procedure Act,” the Federal Rules of Civil Procedure guide Commission Judges as “far as practicable.” 29 C.F.R. § 2700.1(b). Guidance, though, does not require strict adherence. See *Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989) (observing “[Commission] Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be ‘guided’ by a particular Federal Rule of Civil Procedure.”)

Like the Commission's rules, the Federal Rules of Civil Procedure establish a broad discovery regime. See *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (“We enter upon determination of this construction with the basic premise ‘that the deposition-discovery rules are to be accorded a broad and liberal treatment’ to effectuate their purpose that ‘civil trials in federal courts no longer need to be carried on in the dark.’”) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). Notwithstanding recent changes intended to involve courts’ fine tuning of overabundant discovery, Federal Rule 26(b)(1) continues to authorize parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). Like the Commission’s rules, the Federal Rules’ regime also specifies that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence.”

Greyeagle Coal Co., 35 FMSHRC 3321, 3324 (Oct. 2013) (ALJ).

The Way Forward

The information provided by both sides on the issue of determining which entities, (beyond Jarrett Canyon Gold, which was added as a party pursuant to the Court's March 4, 2016, Order),¹¹ may be considered as successors, has largely consisted of assertions. Complainant, it would seem, has two options. One is to pursue only Jarrett Canyon Gold to establish that entity as a successor to Veris Gold. The other would be to learn more about the various other entities Complainant believes should also be deemed as successors. Under both approaches, discovery needs to occur, beginning with the basics by Complainant seeking information from those entities, to include the identification all the owners of Veris Gold, its officers, the management individuals running that mine, and stockholders, and then seeking the same identifying information from each of the Whitebox Entities, including WBVG LLC, an affiliate of WBox 2014-1 Ltd, which later changed its name to Jerritt Canyon Gold LLC. There needs to be a full understanding of the various entities, including the individuals which embody and comprise them, all with the purpose of ascertaining if there are threads of commonality between some or all of those entities as, for example, if names associated with Veris Gold reappear with Jarrett Canyon Gold and the Whitebox Entities. If such commonalities appear, this would tend to show that the sale of Veris was not an arms-length transaction. If present, given that Veris was trying to avoid being saddled with a pattern of violations designation by MSHA not long before opting for bankruptcy and was also facing multiple discrimination claims, *see Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037, 2050 (Sept. 2015) (ALJ), such relationships could be considered in evaluating successorship claims.

Based upon the Court's comments to the Response, *supra*, one would anticipate that Complainant would also want to discover a host of details such as the dates of bankruptcy court hearings, the participants in such hearings, the parties given notice of such hearings, and the transcripts of such proceedings before any bankruptcy court involved with this matter and the

¹¹ Complainant Varady has provided business records from MSHA showing Jerritt Canyon Gold LLC as beginning operations at the Jerritt Canyon Mill on the day following the cessation of Veris Gold USA, Inc.'s operation at that Mill, with Veris Gold's operation at that Mill ending on June 23, 2015, and Jerritt Canyon Gold LLC's operation starting on June 24, 2015. Current Mine Information, Mine Safety and Health Administration, <http://arlweb.msha.gov/drs/drshome.htm#MID> (input "2601621" in the MSHA Mine ID searchbox). The same MSHA records list "WBOX 2014-1 LTD; Eric Sprott" as the "Current Controller." *Id.* Although Varady also listed other sources as associated with Whitebox entities, naming <http://www.corporationwiki.com>, which lists Jacob Mercer as the "Senior Portfolio Manager at Whitebox Advisors LLC, along with Greg Gibson and Eric Sprott, as managers for Jerritt Canyon Gold LLC," and <http://www.bloomberg.com>, which lists other information about executives for Whitebox Advisors, LLC, these sources and others of that ilk (e.g., Bizapedia, <http://www.foxrothschild.com>) are insufficient to establish the information contained in them for purposes of this proceeding.

aforementioned relationships, if any, between Veris Gold, and the Whitebox entities, including Jarrett Canyon Gold LLC, formerly known as WBVG LLC.¹²

To that end, the Court **ORDERS and DIRECTS** Fennemore Craig, P.C., Whitebox Counsel, as the representative for the Whitebox Entities, including Whitebox Asset Management, Whitebox Advisors LLC, WBox 2014-1 Ltd, to provide the service address for those entities to the Court and Complainant within 10 days of the date of this Order to enable Complainant to pursue discovery of Jarrett Canyon Gold, the Whitebox Entities, and such individuals related to those entities.

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

¹² Failure to respond to discovery requests may have consequences. The Commission's rules require that discovery requests be responded to fully and in writing within 25 days of service unless the party initiating discovery agreed to a longer time. 29 C.F.R. § 2700.58. While that procedural rule does not itself deem unanswered requests as admitted, an order to compel discovery may follow and Federal Rule of Civil Procedure 36(a) provides additional guidance on this issue. *See, e.g., Gray v. North Fork Coal Corp.*, No. KENT 2010-430-D, 2013 WL 4648492 (FMSHRC Aug. 22, 2013); *Sw. Quarry & Materials*, 26 FMSHRC 116 (Feb. 2004) (ALJ); *Hamilton v. Stone Mountain Trucking Co.*, 6 FMSHRC 2300 (Sept. 1984) (ALJ).

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