

May 2016

TABLE OF CONTENTS

COMMISSION DECISIONS

05-17-16	WARRIOR COAL, LLC	KENT 2011-1259-R	Page 913
05-17-16	UNITED MINE WORKERS OF AMERICA O/B/O MARK A. FRANKS v. EMERALD COAL RESOURCES, LP	PENN 2012-250-D	Page 935

COMMISSION ORDERS

05-19-16	ACI TYGART VALLEY	WEVA 2014-685	Page 939
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ADMINISTRATIVE LAW JUDGE DECISIONS

05-02-16	SEC. OF LABOR O/B/O ERIC GREATHOUSE v. MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	WEVA 2015-904-D	Page 941
05-03-16	OAK GROVE RESOURCES, LLC	SE 2013-301	Page 957
05-03-16	OIL DRI PRODUCTION COMPANY	SE 2013-0507 M	Page 990
05-03-16	SIMS CRANE	SE 2015-315	Page 1008
05-03-16	ORIGINAL SIXTEEN TO ONE MINE, INC.	WEST 2014-527-M	Page 1019

05-03-16	D. HOLCOMB & COMPANY, LLC	WEST 2015-382-M	Page 1074
05-11-16	PRODUCTOS DE AGREGADOS DE GURABO	EAJA 2016-0003	Page 1077
05-11-16	THE OHIO VALLEY COAL COMPANY	LAKE 2015-251	Page 1084
05-16-16	BLUE DIAMOND COAL COMPANY	KENT 2014-0620	Page 1098
05-16-16	TRIAD UNDERGROUND MINING, LLC	LAKE 2014-0610	Page 1101
05-16-16	EAGLE CREEK MINING, LLC	WEVA 2013-1149	Page 1104
05-18-16	MICHAEL WILSON v. JIM BROWNING	KENT 2016-0095-D	Page 1161
05-25-16	MACH MINING, INC.	LAKE 2014-77	Page 1168
05-31-16	KENTUCKY FUEL CORPORATION	KENT 2015-575	Page 1222

ADMINISTRATIVE LAW JUDGE ORDERS

05-02-16	SEC. OF LABOR O/B/O JEREMY COOTS v. YELLOW ROSE COAL CO., LLC	KENT 2016-320-D	Page 1247
05-09-16	WEST ALABAMA SAND & GRAVEL, INC.	SE 2009-870-M	Page 1250
05-10-16	SEC. OF LABOR O/B/O GEORGE M. SCOLES v. HARRISON COUNTY COAL CO.	WEVA 2016-274-D	Page 1253
05-11-16	DOMINION COAL CORPORATION	VA 2015-285	Page 1256
05-16-16	SEC. OF LABOR O/B/O MICHAEL MURRAY v. MACH MINING, LLC	LAKE 2016-186-D	Page 1258

05-24-16	SANDRA G. MCDONALD v. GEORGE KING, MARK TOLER, GUARDCO SECURITY, LLC, and NEW TRINITY COAL, INC., as successor-in-interest to FRASURE CREEK MINING, LLC	WEVA 2014-387-D	Page 1261
05-25-16	SEC. OF LABOR O/B/O JENNIFER MORREALE v. VERIS GOLD USA, INC., JERRITT CANYON GOLD, LLC, WHITEBOX MANAGEMENT, & ERIC SPOTT	WEST 2014-793-DM	Page 1267
05-26-16	SEC. OF LABOR O/B/O KELLY RAWLEY v. J.L. SHERMAN EXCAVATION	WEST 2016-467-DM	Page 1269

Review was granted in the following cases during the month of May 2016:

United Mine Workers of America obo Mark A. Franks, et al. v. Emerald Coal Resources, LP, Docket No. PENN 2012-250-D, et al. (Judge Miller, April 11, 2016)

Oak Grove Resources, LLC v. Secretary of Labor and Secretary of Labor v. Oak Grove Resources, LLC, Docket No. SE 2009-261-R, et al. (Judge Moran, April 6, 2016)

Review was denied in the following cases during the month of May 2016:

Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2015-41, et al. (Judge Lewis, March 24, 2016)

Mark L. Lujan v. Signal Peak Energy, LLC, Docket No. WEST 2015-252-D (Judge Barbour, January 15, 2016)

Secretary of Labor v. Stone Plus, Inc., Docket No. WEST 2013-263-M, et al. (Judge Gill, April 5, 2016)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 2016

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

v.

Docket Nos. KENT 2011-1259-R
KENT 2011-1260-R
KENT 2012-705

WARRIOR COAL, LLC

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

DECISION

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

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), involve a citation and an order issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) to Warrior Coal, LLC (“Warrior”) following its failure to comply with a request for information made by MSHA investigators. The investigation was initiated after an inspector observed miners working in close contact to multiple hazardous roof and rib conditions. MSHA’s request for information about the position, shifts worked, and contact information for each mine employee was made pursuant to section 103(h) of the Mine Act.¹

Warrior contested the citation and the order before the Commission. After considering motions for summary decision, a Commission Administrative Law Judge affirmed both the citation and the order, assessed a penalty, and ordered that Warrior provide the requested information. 35 FMSHRC 2968, 2976 (Sept. 2013) (ALJ).

Warrior petitioned the Commission for review of the Judge’s order. We granted review, and for the reasons that follow, we affirm the order of the Judge.

¹ Section 103(h) of the Mine Act requires mine operators to “provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act.” 30 U.S.C. § 813(h).

I.

Factual and Procedural Background

On May 10, 2011, an MSHA inspector visited the underground Cardinal Mine in Kentucky owned by Warrior. During an inspection of the mine's No. 2 unit, he observed multiple hazardous roof and rib conditions in a place where miners were actively working. The inspector immediately issued an order to withdraw the miners pursuant to section 107(a) of the Mine Act.² In addition, the inspector issued Warrior a citation and an order pursuant to section 104(d), 30 U.S.C. § 814(d). The citation alleged a violation of 30 C.F.R. § 75.202(a)³ for a failure to protect miners from the hazards related to roof and rib falls. The order alleged that the hazardous conditions were not listed in the pre-shift examination book, in violation of the safety standard at 30 C.F.R. § 75.360(a)(1).⁴

Thereafter, MSHA began a special investigation into the hazardous roof and rib conditions pursuant to section 110(c) of the Act, which addresses liability for corporate directors, officers, or agents.⁵ The investigators suspected that the hazards may have existed for multiple shifts and sought to interview Warrior's employees. On June 21, 2011, the MSHA District Manager sent Warrior a letter stating:

MSHA is conducting a preliminary investigation of a possible willful/knowing violation. The Federal Mine Safety and Health Administration (MSHA) is requesting the names, addresses, positions, shift worked and telephone numbers of the employees at the Cardinal Mine.

S. Ex. G; W. Ex. 1.

² Section 107(a) states that “[i]f, upon any inspection . . . an authorized representative of the Secretary finds that an imminent danger exists, such representative shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from . . . such area.” 30 U.S.C. § 817(a).

³ Section 75.202(a) states that “[t]he roof, face and rib’s of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.”

⁴ Section 75.360(a)(1) provides that “a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is schedule to work or travel underground.”

⁵ Section 110(c) states that “[w]henver a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to . . . civil penalties, fines, and imprisonment” 30 U.S.C. § 820(c).

In response, Warrior sent the District Manager a letter which raised concerns that the demand for information was “overly broad, unduly burdensome, an unwarranted invasion of confidential and proprietary information of Warrior, and an unwarranted invasion of the privacy of Warrior’s employees” S. Ex. H; W. Ex. 2. Warrior also represented that it would cooperate with MSHA provided that MSHA first obtained the permission of the employees involved. *Id.*

An exchange of several letters followed; in each of the letters, Warrior stated that it disagreed with the scope of the request, and, in turn, the District Manager demanded that Warrior provide his investigators with the list. Warrior continuously represented that it would not provide employee contact information without first receiving prior approval from the individual employees involved.

On July 14, 2011, MSHA issued Citation No. 8503376 to Warrior, alleging that Warrior failed to provide requested information during an investigation in violation of section 103 of the Act.⁶ After receipt of the citation, Warrior continued to refuse to supply the contact information. Accordingly, MSHA issued an order to Warrior pursuant to section 104(b) of the Mine Act for its failure to abate the violation.⁷

Warrior filed notices of contest with the Commission, and the proceedings were assigned to an Administrative Law Judge. The Judge scheduled the case for a hearing. Thereafter, the parties filed cross motions for summary decision and responses pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67.

The Judge granted the Secretary’s motion for summary decision, denied Warrior’s motion, and ordered that Warrior provide the requested information to the Secretary. 35 FMSHRC at 2973-76. The Judge concluded that MSHA’s specific request to Warrior was “reasonable and for a legitimate government purpose.” *Id.* at 2974. Accordingly, he affirmed the citation and the order and assessed a civil penalty of \$555. *Id.* at 2976.

On review before the Commission, Warrior asserts that section 103 of the Act does not grant the Secretary the authority to compel an operator to produce the contact information of its employees to MSHA investigators. Warrior also maintains that the Judge’s ruling conflicts with an MSHA policy document that states that miner participation in interviews is “voluntary.”

⁶ Section 103(a) provides that “[a]uthorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year” 30 U.S.C. § 813(a). Section 103(h) states that “[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall . . . provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act.” 30 U.S.C. § 813(h).

⁷ Section 104(b) authorizes an inspector to issue an order to an operator if, upon any follow-up inspection of the mine, he determines that a violation was not abated in the time specified. 30 U.S.C. § 814(b).

Finally, Warrior contends that the Judge erred in affirming the section 104(b) order because the violation of section 103(h) did not affect a physical location at the mine.

II.

Disposition

A. Section 103(h) of the Mine Act authorizes the Secretary to make reasonable requests for information from a mine operator as part of an investigation.

As noted above, section 103(h) of the Mine Act states that “[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall . . . provide such information, as the Secretary . . . may *reasonably require* from time to time to enable him to perform his functions under this Act.” 30 U.S.C. § 813(h) (emphasis added).

The Commission had occasion to consider the reasonableness of the Secretary’s request for records under section 103(h) in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *aff’d*, 715 F.3d 631 (7th Cir. 2013), a case which involved citations issued during an audit of accident, injury, and illness reports. In *Big Ridge* we made clear that the Secretary has broad authority to request information from mine operators. As part of the audit, the Secretary requested access to medical reports and payroll information, and issued citations alleging violations of 30 C.F.R. § 50.41 to the mine operators who refused to provide the requested information.⁸ On review, the Commission concluded that the Secretary’s requests were within the broad scope of authority provided by section 103(h) of the Mine Act. It stated that section 103(h) provides “clear instructions that ‘information’ that is not specifically required to be maintained by the Act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is *reasonable*.” *Id.* at 1012-13 (emphasis added and omitted).

In affirming the Commission’s decision, the Seventh Circuit emphasized that section 103 “unambiguously requires mines to provide MSHA with records, reports and information beyond what mines are otherwise required to maintain.” 715 F.3d at 641. It further stated that the text of section 103(h) “permits MSHA to make information demands for a wide range of purposes – any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act.” *Id.*

Warrior incorrectly asserts that the court’s ruling in *Big Ridge* was premised on its finding that the records at issue there were “relevant and necessary” for MSHA to verify whether operators complied with Part 50 reporting requirements. W. Br. at 5. Although the posture of

⁸ 30 C.F.R. § 50.41 states that “[u]pon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.”

the case in *Big Ridge* concerned MSHA's records request pursuant to Part 50, the court did not restrict its holding to the "relevant and necessary" language of that standard. It emphasized that:

[The text of section 103(h)] permits MSHA to make information demands for a wide range of purposes – any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act.

715 F.3d at 641. The court then stated that "[s]ection 50.41 and the document demands here are well within those bounds." *Id.* at 642. It held that MSHA may reasonably require operators to turn over records, even records they are not required to maintain, when that information would enable MSHA to perform any of its functions under the Act. *Id.* at 641. In other words, MSHA's statutory authority is not limited to "relevant and necessary" information.⁹

B. The Secretary's request was reasonable.

In determining the reasonableness of the Secretary's document request, we will consider, as the *Big Ridge* court did, whether the request is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 715 F.3d at 646 (quotation omitted); *see also id.* at 642, 646-48.

Applying that framework here, we conclude that the request was clearly reasonable. First, the request was relevant to MSHA's purpose, which was to investigate if any agent of the operator "knowingly authorized, ordered, or carried out" a violation of a mandatory safety standard. 30 U.S.C. § 820(c). The investigation concerned serious failings with regard to roof and rib control requirements. MSHA suspected that the roof and rib hazards had existed for multiple shifts. Failures in these areas have a potential for the most serious safety consequences, and the employees of the operator are the only potential witnesses who may have relevant information.

While the scope of the request was broad, we conclude that the broad scope was justified by the circumstances of the investigation. In connection with an investigation into a potential systemic compliance failure, MSHA obviously must have access to a broad number of potential employee witnesses, and must have the ability to follow the investigation where it leads without unnecessary encumbrance. By having the names of all employees, MSHA can pursue the investigation without the need to have further conversations with the operator, thereby maintaining the important aspect of confidentiality during the progress of the investigation. MSHA could have attempted to frame the request more narrowly by specifying types of job duties at the mine. However, such an effort might have inadvertently omitted the identities of persons not directly working on the section who nonetheless would have relevant information. The Secretary correctly observes that employees might have information by dint of their duties in

⁹ Even if it could be said that MSHA must establish that the information it seeks from Warrior is "necessary" for its investigation, MSHA has met this burden in this case. As noted, *infra*, miners other than those who worked in the immediate area of the violations may have relevant information, and MSHA must be able to follow the investigation where it leads.

office administration or relationships with other employees rather than by virtue of their particular duties at the operation.

We also conclude that the request was sufficiently limited in both time and manner. MSHA requested only the names of the employees who were employed at the mine at the time of the request. Furthermore, the manner is limited to obtaining a list of employees, with their shifts and contact information. It does not include searching through Warrior's offices for additional documents.

In the *Big Ridge* decision, the Seventh Circuit recognized that while the Mine Act does not empower MSHA to serve administrative subpoenas during an investigation, the power to request information pursuant to section 103(h) "amounts to an administrative subpoena in substance." 715 F.3d at 646.¹⁰ Our determination here that the Secretary's request is reasonable is fully consistent with the broad authority the federal courts have accorded agencies' enforcement of administrative subpoenas.

For example, the Supreme Court has held that an administrative subpoena issued by the Secretary of Labor pursuant to the Walsh-Healey Act should be enforced if the "evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); see also *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 818 (8th Cir. 2012) ("a subpoena 'should be enforced when the evidence sought by the subpoena is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties.'") (citation omitted).

We also find the opinion of the Fourth Circuit in *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012) instructive. In that case, the EEOC filed an application to enforce an administrative subpoena against an employment agency. The subpoena requested employment information from 13 offices in Maryland over a five-year period. The EEOC was investigating allegations of disability discrimination based on an alleged literacy policy of the employer. The Fourth Circuit rejected the employer's claim that the geographic and temporal scope of the subpoena went too far. Although the

¹⁰ Our dissenting colleague is deeply critical of the Seventh Circuit's analogizing of MSHA's authority to request information pursuant to section 103(h) to the issuance of administrative subpoenas, and suggests that the court may have been unaware of MSHA's lack of general subpoena power. Slip op. at 15-16 n.1. It is certainly true that the Mine Act does not provide MSHA with the express power to issue subpoenas except in connection with summoning witnesses to appear and documents to be produced for investigatory public hearings. 30 U.S.C. § 813(b). However, as discussed *supra*, the Mine Act, in section 103(h), clearly requires "every operator of a coal or other mine [to] establish and maintain such records, make such reports, and provide such information, as the Secretary . . . may reasonably require from time to time . . ." 30 U.S.C. § 813(h) (emphasis added). Hence, although Congress did not give MSHA the power to subpoena individuals to testify except in connection with investigatory public hearings, it did give MSHA the power to reasonably require the production of records and other information from operators. This power is properly analogized to the power to issue administrative subpoenas for such records and information.

employer argued that the subpoena should have been limited to the position assignments made only by the complainant's office during the years he was temporarily employed there, the court disagreed, stating that it and the district court “must defer to the EEOC's appraisal of what is relevant so long as it is not obviously wrong. We conclude the thirteen-office, five year scope of the subpoena was not an unreasonable exercise of the EEOC's discretion in deciding how to investigate whether [the employer's] literacy policy was discriminatory.” *Id.* at 451 (citation omitted).¹¹

The Supreme Court has also held that the burden of showing that the request pursuant to a subpoena is unreasonable, and therefore should not be enforced, is on the subpoenaed party. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 218 (1946) (holding that “[n]o sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make ‘appropriate defense.’”); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (“The burden of showing that the request is unreasonable is on the subpoenaed party.”). If an operator has an objection to the scope of a request made by the Secretary pursuant to section 103(h), it appropriately bears the burden of identifying the basis for its objection that the request is not reasonable.

Warrior did not carry that burden. Warrior's submissions included a letter to the District Manager stating that the scope of the Secretary's request was too broad because it included employees who were not underground miners. W. Ex. 6. Warrior failed, however, to provide the Judge with specific objections stating why a certain category of employee would lack relevant knowledge. Instead, Warrior requested that the Judge decide the case on the arguments it presented in its motion for summary judgment. *See* 35 FMSHRC at 2973. In that motion, Warrior argued that, as a general matter, section 103(h) does not provide the Secretary the right to the disclosure of private contact information of miners, that the Secretary's position was in conflict with an MSHA handbook, that *Big Ridge* was distinguishable, and that the Secretary was disregarding a miner's right not to provide his contact information to MSHA. W. Mot. for Sum.

¹¹ Commissioner Young's reliance on *United States v. Johnson*, 628 F.2d 187, 193 (D.C. Cir. 1980), slip op. at 17, is misplaced. *Johnson* involved a discharged employee's request that a government agency issue subpoenas for witnesses on his behalf. Our opinion rests not on MSHA's power to issue subpoenas, but on Congress's explicit grant of authority to MSHA pursuant to section 103(h) of the Act.

Commissioner Young relies on *Donovan v. Dewey*, 452 U.S. 594 (1981) for the Fourth Amendment proposition that MSHA's reasonable search must be both authorized by law and necessary. Slip op. at 19. However, as the Seventh Circuit made clear in *Big Ridge*, the protections available to mine operators under the Fourth Amendment when faced with a documents request are best analogized to the protections available to a regulated entity which has received a request for documents in the form of an administrative subpoena. Accordingly, it distinguished the document request in *Big Ridge* from MSHA's ability to conduct warrantless physical searches of mine property considered in *Donovan*. Because *Big Ridge*, like this case, did not involve a physical search of a mine, the Seventh Circuit concluded that “the Fourth Amendment issues are better understood in terms of the law applicable to administrative subpoenas.” 715 F.3d at 645.

Dec. at 6-11. As to MSHA's request being overly broad, Warrior's argument for summary decision was limited to the following general assertion: "The request was unreasonably broad because it clearly sought information from people who MSHA knew would have no information to provide." *Id.* at 11.

Therefore, Warrior did not provide to the Judge any significant context or factual support for its cursory contention that the Secretary's request was "overly broad and not relevant." PDR at 6. The mere statement of the breadth of the request does nothing to explain why such breadth makes the request unreasonable. Warrior needed to assert with particularity why inclusion of non-underground miners resulted in overbreadth, created a burden, or otherwise was unreasonable. It failed to do so.

MSHA's information request placed virtually no "burden" upon the operator. Obviously the operator could easily produce a list of its employees, and Warrior made no effort to demonstrate any burden in doing so. As the Judge found, "[s]imply supplying the contact information for its employees placed almost no burden on Warrior." 35 FMSHRC at 2974.

Further, such disclosure did not impose any obligation upon any employee. Each employee could choose whether to cooperate with any MSHA investigator who might contact the employee. The information sought by the Secretary only enabled his representatives to contact relevant witnesses away from the mine site, a measure that ensures that the identity of potential witnesses remains confidential during the course of an investigation. *See* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 ("A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.").

MSHA had an understandable preference to speak with potential witnesses in true privacy rather than in a closed room at the workplace of the entity under investigation. MSHA must be able to conduct an effective investigation. Therefore, an objection that MSHA could satisfy its need to speak with potential witnesses by interviewing employees at the mine carries no weight whatsoever.¹²

The Commission is mindful and protective of individuals' right to privacy. However, every individual working at a mine understands the dangers faced by miners. Therefore, in undertaking such employment, individuals also understand that the Secretary has the important task of assuring compliance with laws and regulations protecting the health and safety of miners. Although employees may refuse to participate in an investigation by MSHA, it does not overreach by obtaining their names and addresses in the course of conducting an ongoing investigation into a serious safety situation at a mine.

¹² Warrior suggests that the investigators could have visited the mine and asked miners to join them at an off-site location for interviews. We reject this argument. The Mine Act does not require such an ungainly process and, as stated above, MSHA is authorized to make reasonable requests for information during an investigation.

Accordingly, we hold that Warrior failed to demonstrate that any portion of the Secretary's information request was unreasonable.

C. The Secretary's special investigation handbook does not authorize Warrior's refusal to comply with the information request, and MSHA's request did not deprive Warrior of fair notice of its obligations under the Mine Act.

Warrior argues that the Secretary's request for miner contact information impermissibly forces it and its miners to participate in the Secretary's investigation, which conflicts with MSHA's policy that states that participation in an investigation is voluntary. W. Br. at 6-9. Warrior's assertion is based on the statement "all information is voluntary and may be refused" found in MSHA's *Special Investigations Procedures Handbook* at page 5-9. W. Ex. 12.

We disagree. As to Warrior itself, the argument would give any operator carte blanche to refuse to participate in an MSHA special investigation, which would eviscerate MSHA's ability to conduct a meaningful inquiry.

As to individual miners, there is no conflict between the MSHA Special Investigations policy and the Secretary's request to Warrior. Any miner contacted by the Secretary during the course of the investigation can voluntarily choose whether to participate in a subsequent interview and to what extent. Under the Secretary's proposed investigation method, miners retain their individual ability to make a decision for themselves, and inform the investigators of their decision. The *Handbook* in no way sanctions Warrior's refusal to comply with the Secretary's request.

Further, because there is no conflict between an employee's right to choose whether to participate in an investigation and the right of the Secretary to obtain material reasonably related to its investigation, Warrior was not deprived of fair notice.

Finally, we note that it is well established that policy manuals are not officially promulgated and do not prescribe rules of law that are binding on the Commission or its Judges. *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1420 (June 1981) (citing *Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (Oct. 1980)).

D. The Secretary's interpretation of section 104(b) of the Mine Act is reasonable.

The Judge concluded that an inspector can issue an order alleging a failure to abate a violation pursuant to section 104(b), even if the inspector determines that no discrete physical location in the mine is affected by the violation. 35 FMSHRC at 2975.

Warrior argues that the Judge erred, in that the language of the standard makes the inspector's ability to issue a section 104(b) order conditional on his determination that a specific area has been affected. We disagree.

Section 104(b) of the Mine Act states:

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 . . . and (2) that the period of time for 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 or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, *such area* until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b) (emphases added).

Section 104(b) provides two conditions for the issuance of an abatement order: (1) a violation has not been totally abated within the time period fixed and (2) the inspector determines that the period for abatement should not be further extended. If those two conditions are satisfied, the inspector must then “determine the extent of the area affected by the violation” and issue the order which requires the withdrawal of miners from that area. It is this second set of requirements that arguably injects ambiguity into the standard. The Mine Act provides no specific direction for how an inspector is to proceed if he determines that a violation has not been abated within the time fixed, the period should not be extended, but “the extent of the area affected” language is not applicable.

When the Mine Act is silent on an issue, the Secretary’s interpretation which reasonably effectuates the health and safety goals of the Act is controlling. *Sec’y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

We conclude that the Secretary’s interpretation of the statute, permitting the issuance of a section 104(b) order which states that the inspector determined that no area of the mine in particular was affected by the violation, is a reasonable interpretation.

It is significant that nothing in the language of section 104(b) prohibits the Secretary from issuing a “no area affected” order. The language indicates that, if the two conditions above are met, the MSHA inspector “shall determine the extent of the area affected by the violation” and order the appropriate withdrawal of miners from “such area” until it is determined that the violation has been abated. Thus, if no specific area of the mine is affected by the violation, it is reasonable to read the statute as providing that the inspector is to state that determination and issue a corresponding section 104(b) order.

The Secretary's interpretation is also consistent with the remedial nature of the Act. *See Pattison Sand Co., v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012) ("The Act is remedial in nature and its terms should therefore be construed broadly."). Furthermore, it is consistent with the Mine Act's structure and progressive enforcement scheme of increasingly severe sanctions being applied when an operator incurs repeated violations. *See* 30 U.S.C. § 814(d) and (e).

A "no area affected" order provides an important deterrent to operators who fail to abate violations in a timely fashion. Moreover, issuing such orders has been an ongoing and accepted practice for many years. *See Thunder Basin Coal Co.*, 16 FMSHRC 671 (Apr. 1994) (acknowledging the Secretary's practice of issuing "no area affected" section 104(b) orders). The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act.

While the immediate result of miner withdrawal is not applicable if no physical space in the mine is affected by the violation, the withdrawal of miners is not the only consequence associated with the issuance of a section 104(b) order. Pursuant to section 105(b)(1)(A) of the Act, 30 U.S.C. § 815(b)(1)(a), the Secretary is authorized to seek a separate civil penalty if an operator has not corrected a violation in a timely manner, i.e., if the issuance of a section 104(b) order for failure to abate the violation was warranted. Moreover, section 110(b)(1) of the Act, 30 U.S.C. § 820(b)(1), authorizes the assessment of a civil penalty on a daily basis if an operator fails to abate a violation. Finally, a Judge can assess an elevated civil penalty as a result of an operator's failure to abate a violation. *See* 30 U.S.C. § 820(i) ("In assessing civil monetary penalties, the Commission shall consider . . . [factors that include] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."). In these instances, the issuance of a "no area affected" section 104(b) order documents the operator's failure to comply, and the prospect of a higher penalty acts as a deterrent.

Our dissenting colleague suggests that the operator was not afforded due process protection because "[r]ather than an opportunity to seek judicial review concerning the scope and nature of the agency's request . . . the operator was exposed to the threat of immediate and coercive penalties simply for defending its fundamental rights." Slip op. at 20. The Seventh Circuit in *Big Ridge* categorically rejected a similar claim (that the mine operators' due process rights were violated because MSHA was allowed to impose daily penalties on mines not complying with record demands before any opportunity for judicial review). After analyzing the legislative history of the Mine Act, the Court found that the procedures for imposing penalties were constitutional. 715 F.3d at 652-53. It also noted that the Secretary had granted the operators' request not to assess any failure-to-abate penalties until after the disposition of the hearing before the Judge, and that the Commission granted the mine operators' request to expedite its review. *Id.* at 654. The Court concluded that "the penalties do not violate the mine operators' right to due process because the statutory scheme offered opportunities both for review and to mitigate the penalties." *Id.*

Moreover, although our colleague implies that Warrior was forced to pay penalties for its failure to turn over the records without recourse to Commission review of MSHA's request, this was not the case. Pursuant to the scheme set forth by Congress in the Mine Act, the Secretary proposed a penalty for Warrior's failure to turn over the records, the operator contested the

citation and the penalty, and was only ordered to pay a \$550 penalty *after* the opportunity for a hearing before a judge. In addition, there is no record of any proposed penalty for the failure to abate order.¹³

For the aforementioned reasons, we conclude that the Secretary's interpretation of section 104(b) of the Mine Act as authorizing MSHA inspectors to issue "no area affected" orders is reasonable and should be given deference.

III.

Conclusion

We affirm the Judge's decision to grant the Secretary's motion for summary decision. Accordingly, the citation and the order are both affirmed. Warrior is ordered to pay the assessed civil penalty and to provide the requested information to MSHA within 30 days of the date of this decision if it has not already done so.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

¹³ We also note that Warrior could have requested an expedited hearing before the Judge. See Commission Procedural Rule 52, 29 C.F.R. § 2700.52.

Commissioner Althen, concurring.

I concur with the majority decision. Commission precedent establishes that, although MSHA does not have authority to issue administrative subpoenas except in very limited circumstances, sections 103(a) and (h) of the Mine Act authorize MSHA to demand documents beyond those required by the Act. Here, MSHA was pursuing an important investigation; the document demand imposed virtually no burden on the operator, and implicated minimal, if any, privacy rights. I think the request was “reasonable.”

However, I share many of the important concerns expressed in Commissioner Young’s dissent. In particular, a document demand under section 103(h) is not an administrative subpoena. There are important differences. A fundamental difference is the absence of a hearing before assessment of a proposed civil penalty arising from the failure to comply with a document demand.¹⁴ The right to a fair hearing at a meaningful time and in a meaningful manner is a fundamental requirement of the due process clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631 (7th Cir. 2013), the Seventh Circuit offered three reasons that a penalty assessment before a hearing in a document demand case did not create constitutional difficulties: (1) mine operators could ask MSHA to delay imposing the penalty; (2) penalties are not automatic; and (3) mine operators can contest a penalty assessment before it becomes final. *Id.* at 653-54. The first two points rest upon a speculative, secular faith in the goodwill of government.¹⁵ Only, the third point is substantive.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court did not find a constitutional defect in a pre-hearing assessment of a civil penalty. However, the Court was careful to state that it was the record in that case that did not support finding a constitutional defect. *Id.* at 216-18. That case focused upon the jurisdiction of federal district courts and upon the circumstances associated with inspections – that is, the type of MSHA actions that formed

¹⁴ There are other differences. For example, it appears that the operator never provided the demanded information at issue in this case. Unless MSHA has kept a section 110(c) investigation open for more than four years awaiting the names and addresses of all employees, it completed its investigation without the operator’s compliance with the demand. Assuming that is the case, if this proceeding was analogous to an administrative subpoena proceeding, then, when the agency closed the investigation, a motion to compel compliance with a subpoena would be moot. Here, apparently, the Secretary collects a monetary penalty even though MSHA has foregone receipt of the documents in completing its investigation.

¹⁵ This unusual case provides only a modicum of justification for the *Big Ridge* court’s initial propositions. Here, MSHA did not seek a daily fine for the failure to abate order, and followed normal processes in assessing a fine for the section 104(a) citation. Indeed, the records obviously were not of real interest to MSHA as it allowed the contest to continue for over four years and, apparently, closed the investigation without obtaining the information. This provides no comfort that in other cases, when MSHA actually wants the information, it will not propose daily fines to coerce compliance before a hearing.

the gravamen of the Court's acceptance of warrantless inspections in *Donovan v. Dewey*, 452 U.S. 594 (1981). Such urgency does not attach to document demands and, thus, does not offer the set of facts or intellectual underpinning upon which the Court rested its *Thunder Basis* decision.

I do not find due process concerns sufficiently raised and articulated in this case to warrant definitive analysis. However, I am uncomfortable with the notion that MSHA may impose significant daily fines upon respondents to coerce compliance with a demand for records before a fair hearing. A future case in which MSHA does not meet either of the first two hypotheses of *Big Ridge* would present an opportunity to review the constitutionality of MSHA's imposition of severe, pre-hearing fines to coerce disclosure in the context of a specific investigation or discrimination case.

In this regard, MSHA recently alleviated constitutional concerns over the right to immediate review of a notice of safeguard by instituting a procedure for a technical citation followed by a hearing. See Program Policy Letter ("PPL") No. P14-V-02 (issued Sept. 24, 2014); *Contest of Mine Approval Actions*, MSHA's Program Policy Manual, V.G-4. Such a procedure for document demands, if coupled with an expedited hearing, would go far toward vindicating the Seventh Circuit's otherwise naïve assumptions about MSHA and toward assuring the constitutionality of enforcement procedures for document demands under section 103(h).

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

Commissioner Young, dissenting:

I joined our opinion approving the Secretary's information request in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), despite some misgivings, because the Mine Safety and Health Administration's (MSHA) request was narrowly crafted and the information sought was necessary to proper, specific and publicly-noticed auditing functions. Further, the rulemaking in *Big Ridge* gave notice that the Secretary intended to seek precisely the types of information at issue. Finally, and most critically, the information request at issue in *Big Ridge* was authorized and directed by the Secretary's own designated Administrator, whom Congress intended to exercise the discretionary powers under the Act.

The current information request is not similarly graced, and the majority seeks to follow an appeals court's invitation¹⁶ – on an issue we pointedly did not address in our decision in *Big Ridge* – to engage in an alarming and unconstitutional expansion of the law, and to permit the sort of low-level policy freelancing the Supreme Court has expressly disapproved on Fourth Amendment grounds. I dissent.

At the heart of the majority's opinion lies the mistaken assumption that MSHA has the authority to issue administrative subpoenas in connection with routine mine inspections.¹⁷ The

¹⁶ The Seventh Circuit's reference to administrative subpoenas provides no support for its recognition of a general subpoena power in the Mine Act. Like the majority (*see n.2, infra*), the Court of Appeals simply assumes that the subpoena power exists, stating that it is "not persuaded" otherwise. *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 642 (7th Cir. 2013). This is a bare conclusion that cites no law governing the issuance of subpoenas under the Act or as a general matter of administrative law. Somewhat ironically, the court states, "we conclude that the record demands are best understood, in constitutional terms, as administrative subpoenas." *Id.* at 644. Of course, "in constitutional terms," MSHA has no power whatsoever, except that which has been bestowed by Congress. It may be understandable that the Court of Appeals would assume that the Mine Act authorizes the issuance of administrative subpoenas – a prerequisite to their use and enforcement under the Administrative Procedure Act. *See* 5 U.S.C. § 555(d) (requirement that agency subpoenas be "authorized by law"). It is relatively rare for an agency *not* to have Congressional authorization to issue administrative subpoenas, which suggests strongly that such power must be express, and not implied. *See* Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 93 n.19 (1971) ("Those few remaining agencies which do not possess the subpoena power must obtain it from Congress.")

¹⁷ In seeking to rationalize the Seventh Circuit's position on administrative subpoenas, the majority falls into the same trap as the appeals court but lacks the legally-valid fallback position afforded by the distinguishable facts in *Big Ridge*. The appellate court could properly have noted that Congress did, in fact, confer significant powers on the Secretary, along with the appropriate rulemaking he had undertaken in direct support of the records request, and affirmed our holding on that basis. Instead, it sought to overcome the significant impediments the Supreme Court has imposed on agency searches and seizures by assuming, as the majority now has in turn, that MSHA has a power Congress withheld from it. Thus, the majority's

(continued...)

problem with this rationale is that Congress not only failed to confer general administrative subpoena power on MSHA, it designed the Mine Act to preclude any inferences in favor of that power.

As we very recently held in *Pocahontas Coal Company*:

The precise list of jurisdictional triggers in section 105(d) strongly indicates a Congressional intent to exclude other types of actions. See *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that “a power which has been withheld or denied by Congress cannot be found to exist as an ‘incidental’ and ‘necessary’ power” when Congress has specifically delineated other powers).

38 FMSHRC 157, 160-61 (Feb. 2012).

Despite our fresh recognition of this fundamental principle of statutory construction, the majority finds a general subpoena power where none was given. Indeed, the Mine Act authorizes subpoenas in only two circumstances: 1) to compel the attendance of witnesses when the agency holds public hearings to assist its investigation following an accident or other occurrence (section 103(b)); and 2) to authorize the *Commission* to compel the appearance of witnesses and production of evidence for hearings (section 113(e)). 30 U.S.C. §§ 813(b), 823(e).

Not only is the express authority for subpoenas severely limited under the Act, the power is extended to the Commission, and not the Secretary, except when summoning witnesses to public hearings. This is important.¹⁸ “The Supreme Court has characterized as ‘treacherous

¹⁷ (...continued)

fundamental error is its endorsement of the Seventh Circuit’s assumption that the authority exists and then analogizing the case at bar to cases where the issue was the scope of an authorized administrative subpoena. These cases have no relevance because MSHA does not possess subpoena power, and the alternative justifications offered have been expressly refuted by the Supreme Court. See pp. 18-19, *infra*.

¹⁸ In addition to the case law cited in this opinion, it’s worth noting that, in a Report to Congress directed by Public Law 106-544, Section 7, the Department of Justice *expressly* noted the limited scope of the Secretary’s subpoena power under the Act. Citing section 103(b) of the Act, the report states that this conferral is the Act’s sole administrative subpoena authority:

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production or [sic] relevant papers, books, and documents, and administer oaths.” *Federal courts have long recognized that the subpoena power of the Secretary under this and the predecessor Federal Coal Mine Health and Safety Act of*

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business' such imputations of power from one agency to an entirely different agency.” *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988) (citing *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 353 (1941)).

Peters is directly on point, and confronts the extension of subpoena power where none was conferred by Congress. The Immigration and Naturalization Service (INS) assumed it had the power to issue subpoenas because the Internal Revenue Service had been granted similar power to issue summonses in an analogous situation. *Id.* at 698. In reversing the District Court’s “expansive” reading of the authorizing statute, the Court of Appeals contrasted the inferred power with the “specific legislative direction [given to the IRS] in an area heavily explored by both Congress and the courts.” *Id.* at 698-99.

Here, the structure of that Act clearly evinces Congressional intent to limit the Secretary’s subpoena power, by specifying this power may be wielded by the Secretary in only one situation not at all like or related to the circumstances presented by this case. Further, the legislative history and the structure and operation of the Act make clear that Congress intended independent adjudication by the Commission, and placed significant restraints on the Secretary’s ability to enforce the Act and to adjudicate issues unilaterally. Thus, except when MSHA convenes a public hearing authorized by the Act, only the Commission has the authority to issue subpoenas, as a necessary extension of its power to conduct hearings.

This necessity, too, has been examined in a Court of Appeals, which similarly found unavailing the government’s arguments in favor of an inferred power to issue subpoenas. See *Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980) (“Subpoena power is not an intrinsic feature of the administrative process, and courts cannot engraft subpoena authority onto an agency’s charter from Congress.”) (citation omitted). In *Johnson*, a discharged federal employee claimed that his due process rights were violated by the Civil Service Commission’s failure to issue subpoenas for witnesses on his behalf. *Id.* The Court of Appeals held that there was no authority for the subpoenas sought by the employee. *Id.* Citing precedent, the Court reiterated that ““(t)he Commission cannot confer upon itself the power of subpoena in the

¹⁸ (...continued)

1969 (P. L. 91-173) is limited to public hearing settings, *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 519 (6th Cir. 1981); *UMWA v. Martin*, 785 F. Supp. 1025, 1027 [n].1 (D.D.C. 1992). Thus, it is clear both from the wording of the statute and the court interpretations that the subpoena power of the Mine Act is limited to investigatory public hearings being conducted by the Secretary.

U.S. Department of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, Appendix A-1 (emphasis added). Of course, pursuant to Section 112 of the Mine Act, all litigation by the Solicitor before the Commission is subject to the direction and control of the Attorney General, and the Justice Department’s frank appraisal in a statutorily-mandated report should thus be accepted as authoritative.

absence of a statute requiring it to hold hearings of the type involving subpoenas.” *Id.* (citing *Deviny v. Campbell*, 194 F.2d 876, 880 (D.C. Cir.), *cert. denied*, 344 U.S. 826 (1952)).¹⁹

One cannot overlook, in this context, the significance of Congress’ choice to establish an independent Commission. Not only does the Labor Department lack the authority to conduct hearings, but Congress assigned that function to another, distinct entity: the Commission. Indeed, the Commission has express subpoena power as an extension of its authority to conduct hearings under the Act. Where Congress has clearly delineated, and limited, the subpoena power under the Mine Act, it is improper for the Commission – or the courts – to infer additional power clearly withheld.²⁰

Noting the Secretary’s own awareness that it lacks subpoena authority beyond that expressed in the Act seems almost beside the point, in light of the overwhelming authority weighing against a more expansive view. But the Secretary’s representatives did in fact seek greater subpoena powers, and the sponsors of the bill acknowledged the Secretary’s absence of authority to issue such subpoenas. *See Big Ridge*, 715 F.3d at 642 (citing Committee on Education and the Workforce Democrats, H.R. 1373: The Robert C. Byrd Mine Safety Protection Act of 2013, 113th Cong., 1st Sess. (Mar. 21, 2013) (citation omitted)). While the Seventh Circuit dismissed this, *id.*, the Secretary’s clear understanding of its administrative boundaries is nothing less than an acknowledgment of the governing law here.

Even if one were to somehow find the request permissible under another theory, in this context the request must be recognized on principle as facially overbroad and unreasonable under *Donovan v. Dewey*, 452 U.S. 594 (1981). From conditions in one section of a mine, MSHA has concocted theories justifying an unbounded inquisition into the operator’s affairs and the authority, not only to question anyone whom it wishes on any subject, but to compel the operator’s cooperation in what appears to be the classic – and forbidden – “fishing expedition.”

The agency presents no evidence of a mine-wide problem, but appears confident that it would find one, but for the operator’s intransigence. *See* S. Br. at 20 (“At the beginning of its

¹⁹ The majority attempts to distinguish *Johnson* on its facts, but the fundamental legal principles upon which the decision rests are express, forceful and controlling here and do not depend on the peculiar circumstances of that case for their vitality.

²⁰ Where some courts have inferred a subpoena power from a statute, the inference arose from a statutory grant that implied the power by necessity. *See U.S. v. Florida Azalea Specialists*, 19 F.3d 620, 622-23 (11th Cir. 1994) (court, citing *Peters*, affirmed issuance of subpoena as within the scope of the subpoena authority conferred by Congress, even though the specific circumstance was not expressed in the statute authorizing investigations by the Office of Special Counsel); *U.S. ex rel Richards v. De Leon Guerrero*, 4 F.3d 749, 753 (9th Cir. 1993) (subpoena power is inferred from the grant of audit power to the Department of Interior under Insular Areas Act, which was expressly made “in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978.”) (citation omitted). Both cases followed *Peters* and specifically quoted its holding that “[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute.” *Florida Azalea*, 19 F.3d at 623; *De Leon Guerrero*, 4 F.3d at 753.

section 110 investigation, *MSHA could not have known* how long the [subject] violations had existed, *which agents knew or had reason to know* of their existence, and *whether the violations occurred because of broader practices occurring elsewhere in the mine . . .*”) (emphasis added). This is essentially an acknowledgment that MSHA, despite the broad – and *Donovan*-approved – authority to enter the mine as part of the regular inspection process and to examine all documentation in the mine, must nonetheless also be given general authority to demand documentation that a low-level field agent (contra the Supreme Court’s proscription in *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978)) believes he may need to build a case *without any reason to believe, at the outset, that the case exists*.

The agency’s argument is seductive. The logistical difficulty and inconvenience of complying with the Secretary’s request in this case is, indeed, trivial. In light of the protracted litigation that has ensued, it may in fact have been easier and less costly for the operator to provide access to all of the contact information for everyone who works at the mine, just as it may be more convenient to simply consent to an officer’s request to rifle through one’s possessions on the street rather than insisting on a warrant. However, the Seventh Circuit’s opinion in *Big Ridge* rests squarely on *Donovan*, which draws its force in turn from the Fourth Amendment.

We might do well to remember, then, that *Donovan* explains conformance to constitutional protections – it does not do away with them. Contrary to the majority’s assumption, *Donovan* requires that a reasonable search be *both* authorized by law *and* necessary. See *Donovan*, 452 U.S. at 599 (“Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests.”). Thus, the majority’s confidence in the breadth of the Seventh Circuit’s opinion – which dismisses with hardly a concern the operator’s argument against the supposed “subpoena” power – is sorely misplaced. Asserting that Congress “authorized” agency personnel below the Secretary to seek any “relevant” information from operators, with the bounds of that inquiry left solely to those subordinate agents, disregards *Donovan* and its constitutional underpinnings, as well as the Act’s provision of a forum for ensuring the agency does not have the very sort of unfettered discretion it claims before us in this case.

Donovan, in fact, speaks directly to just that problem:

“Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.” *Colonnade Corp. v. United States*, *supra*, 397 U.S., at 77, 90 S.Ct., at 777. In such cases, a warrant may be necessary to protect the owner from the “unbridled discretion [of] executive and administrative officers,” *Marshall v. Barlow’s, Inc.*, *supra*, 436 U.S. at 323, 98 S.Ct., at 1826, by assuring him that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular

[establishment].” *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

Id. Furthermore, the very concerns which led the same Supreme Court to disapprove of warrantless searches under the Occupational Safety and Health Act in *Marshall v. Barlow’s, Inc.* are present in this case. As the *Donovan* Court explained, in contrasting the regularity of inspection spelled out in the Mine Act with the asserted authority to inspect the panoply of businesses regulated under the OSHA:

In assessing this regulatory scheme [under the Occupational Safety and Health Act], this Court found that the provision authorizing administrative searches “devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.”

452 U.S. at 601 (emphasis added). This, then, represents the proper perspective for analyzing the request at issue in this case: is there any limit or regularity inherent in the exercise of the Secretary’s discretion under section 103(h), when employed by an inspector?

There is precious little. The request in *Big Ridge* involved an initiative developed by or at the direction of the Assistant Secretary, published in advance, and subject to public review and comment. The nexus between the information sought and the audit function for which it was needed was, as we held and the Seventh Circuit affirmed, tightly focused.

Contrast those facts with the current request, initiated by the type of low-level field agent whose discretion the Supreme Court found so troubling in *Donovan* and *Barlow’s, Inc.* Not only does the agency assert *de facto* subpoena power has somehow been conferred (silently) all the way from Congress to a mine inspector, it does so without even the modest due process protections an actual subpoena might provide to its recipient. Rather than an opportunity to seek judicial review concerning the scope and nature of the agency’s request here, as it would have with a proper subpoena, the operator was exposed to the threat of immediate and coercive penalties simply for defending its fundamental rights.²¹

²¹ This really is a matter of fundamental rights. As the Court of Appeals for the Sixth Circuit has noted, and as the Secretary once conceded, the diminished expectation of privacy the Supreme Court has applied to businesses, even those that are “pervasively regulated,” has not abrogated the protections of the Fourth Amendment. *McLaughlin v. Kings Island, Div. of Taft Broadcasting Co.*, 849 F.2d 990, 993-94 (6th Cir. 1988), (citing *New York v. Burger*, 482 U.S. 691, 699 (1987)). Indeed, the Supreme Court established clear standards in *Burger* for balancing
(continued...)

Those rights are the elephant in a relatively small room. Having been granted the power to conduct unnoticed inspections, and access without a warrant to various documents and information, the agency nonetheless asserts it must *also* have the power to require the operator to produce documents beyond those needed to investigate a known violation, in order to determine whether there might be other violations elsewhere in the mine, without providing any foundational facts to gird its suspicions.

Speaking of facts, we should also recall that this case came to us on summary decision. Thus, the majority today affirms the judge's finding that the government was entitled to the information it sought *as a matter of law* and that no plausible factual scenario – a rogue inspector, government overreach on the particulars – might give pause on the way to affirmance. This is a loose and dangerous game, with principles that protect the rights of a free people

²¹ (... continued)

the government's interests against the Fourth Amendment rights of pervasively regulated businesses:

[B]efore any such warrantless inspection or search is constitutionally acceptable:

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."

...

Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. at 994 (citing *Burger*, 482 US at 702-03) (ellipsis in original). The majority fails to even consider that the Supreme Court has established benchmarks which control our evaluation of such matters, let alone attempt to analyze the case before us against those benchmarks. There is no administrative subpoena or any other "constitutionally adequate substitute for a warrant" here, and as this opinion has noted, there are no real limits on the discretion exercised by the Secretary's delegates at the district level. The request is therefore invalid even if the Secretary could establish that the first two *Burger* requirements have been met.

arguably at stake. In the end, the fact that Ernest Miranda was probably guilty²² didn't prevent the Supreme Court from honoring the promises made by the Constitution, *see Miranda v. Arizona*, 384 U.S. 436 (1966), and the fact that this petitioner operates a mine which failed to fulfill its duties under the Mine Act – as almost all do, from time to time – should not preclude a proper constitutional analysis in this case.

The Mine Act represents a negotiated settlement of contentious safety and health issues among labor, industry and government interests. It was produced through compromise, and has inured to the benefit of both the nation's miners and the mining industry. As with all federal laws, it must be read in harmony with the Constitution's protection of fundamental rights. The Commission must respect the Constitution's limits on the exercise of federal power, and is also bound to respect the terms of the Act as they were negotiated, including the significant procedural limits imposed on the Labor Department and the requirement for independent adjudication by the Commission. Extending to the agency powers that Congress withheld in drafting the Act represents legal error and a breach of trust. Accordingly, I dissent.

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

²² After his confession was suppressed, Miranda was retried without it and convicted of the kidnapping and rape of which he had been accused. *See Arizona v. Miranda*, 450 P.2d 364 (Ariz. 1969).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

May 17, 2016

UNITED MINE WORKERS OF AMERICA
(UMWA), on behalf of MARK A. FRANKS

v.

PENN 2012-250-D

EMERALD COAL RESOURCES, LP

UNITED MINE WORKERS OF AMERICA
(UMWA), on behalf of RONALD M. HOY

v.

PENN 2012-251-D

EMERALD COAL RESOURCES, LP

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

PENN 2013-305
PENN 2013-306

EMERALD COAL RESOURCES, LP

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

DECISION APPROVING SETTLEMENT

BY: THE COMMISSION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). They involve complaints of discrimination and interference filed by the United Mine Workers of America (“UMWA”) on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). After a hearing on the merits, an Administrative Law Judge concluded that Franks and Hoy demonstrated that they had

been discriminated against as a result of their participation in activities protected by the Mine Act and in violation of section 105(c). 35 FMSHRC 1696 (June 2013) (ALJ).¹

Emerald then petitioned the Commission for review of the Judge's decision, which the Commission granted. On review, a majority of the Commission affirmed the Judge's decision in result. 36 FMSHRC 2088 (Aug. 2014). Emerald then appealed the decision to the United States Court of Appeals for the Third Circuit. For the reasons articulated below, the Third Circuit vacated the Commission's decision and remanded the cases to the Commission for further analysis.²

The Commission's decision to affirm the Judge's decision, in result, was a split decision. Commissioners Young and Cohen voted to affirm on the grounds that substantial evidence supported the Judge's conclusion that Emerald *discriminated* against Franks and Hoy in violation of section 105(c) of the Mine Act. *Id.* at 2089-2103. Chairman Jordan and Commissioner Nakamura voted to affirm the Judge's decision in result after concluding that Emerald *interfered* with the protected statutory rights of the miners in violation of section 105(c). *Id.* at 2104-2119. Commissioner Althen voted to vacate the decision of the Judge. *Id.* at 2120-2144.

The Third Circuit concluded that the two opinions affirming the Judge's decision presented "conflicting rationales" to support the finding that Emerald violated section 105(c) of the Mine Act, and therefore, the Commission failed to provide a majority rationale that was "amenable to review." *Emerald Coal Res. LP, v. Hoy*, 620 Fed. Appx. 127, 129, 132 (3rd Cir. 2015) (citation omitted). However, the Court further concluded that because "four of five [Commissioners] agreed that the Mine Act was violated and relief was appropriate, [it] believe[d] the agency should have a chance to explain its reasoning." *Id.* at 133. Therefore, the Court vacated and remanded the Commission's decision, noting that it was not expressing an "opinion as to how the Commission may decide the discrimination or interference issues or

¹ The Judge ordered Emerald to take the following remedial actions: (1) provide backpay to Franks in the amount of \$1,168.68 plus interest and backpay to Hoy in the amount of \$1,963.93 plus interest; (2) post the decision at the mine site and provide notice to miners of their rights under section 105(c); (3) remove all reference to the reprimand from the personnel files of Franks and Hoy. 35 FMSHRC at 1707.

² As a result of the Commission's decision that Emerald violated the Mine Act, the Secretary of Labor subsequently filed petitions for assessment of civil penalty pursuant to sections 105 and 110 of the Mine Act. The proposed penalties were \$20,000 each, for a total penalty of \$40,000. The parties filed joint stipulations addressing the penalty criteria, and the Judge assessed the total penalty of \$40,000. Unpublished Order (October 29, 2014) (Docket No. PENN 2013-305 et al.).

Emerald petitioned the Commission for review of the Judge's civil penalty decision. However, no two Commissioners voted to grant the petition. Emerald then appealed the Judge's decision to the Third Circuit. The Third Circuit consolidated the civil penalty cases with the other captioned matters.

whether it should remand the case to the [Judge] to conduct the interference analysis in the first instance” *Id.*

On remand to the Commission, a majority of the Commissioners voted to remand the proceedings to the Judge “to conduct the interference analysis in the first instance” consistent with the decision of the Third Circuit. 38 FMSHRC 226, 228 (Feb. 2016).

On April 11, 2016, the Judge issued her decision on remand. She concluded that Emerald unlawfully interfered with the complainants’ rights under the Mine Act and assessed a total civil penalty of \$40,000. She also reiterated the provisions of her previous order described in footnote 1, *supra*. 38 FMSHRC ___, slip op. at 11-13, No. PENN 2013-305 et al (Apr. 11, 2016).

On April 29, 2016, the parties filed a joint petition for discretionary review. The parties also announced that they had reached a settlement, and requested approval of their settlement agreement. The Commission has granted the petition for discretionary review in a separate Direction for Review, and now disposes of the cases.

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

The parties represent that Emerald’s mine has ceased production of coal and is now closed. The parties further represent that Emerald and its parent company, Alpha Natural Resources, Inc., have filed for bankruptcy. Additionally, the parties represent that Emerald previously performed all the remedial actions ordered by the Judge: Emerald has provided backpay to the miners, posted the decision and notice at the mine, and removed the reprimands from the complainants’ personnel records. The parties now propose that Emerald pay a reduced civil penalty in the amount of \$20,000 in satisfaction of the violations of the Mine Act. The parties represent that Emerald has assured the Secretary that the penalty agreed upon in settlement will be paid in the ordinary course of business, pursuant to an Order of the Bankruptcy Court.

The Secretary represents that he has determined that a total penalty of \$20,000, rather than the \$40,000 ordered by the Judge, is appropriate in light of the facts that the Emerald Mine is now closed, that Emerald and its parent company are now in bankruptcy, and that all other remedies directed by the Judge, including backpay, have been fully performed.

The parties' joint request for approval of settlement is granted. We determine that the parties have justified that a reduction of the penalty is appropriate given the change in the size of the operator's business. *See* 30 U.S.C. § 820(i) ("In assessing civil monetary penalties, the Commission shall consider . . . the appropriateness of such penalty to the size of the business charged. . . ."). Emerald Coal is ordered to pay the civil penalty of \$20,000 within 30 days of the issuance of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 19, 2016

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

v.

ACI TYGART VALLEY

Docket No. WEVA 2014-685
Mine ID: 46-09192

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. (2006) (“Mine Act”). On March 18, 2014, the Commission received from ACI Tygart Valley (“ACI”) a motion seeking to reopen an imminent danger order that had become a final order pursuant to section 107(e) of the Mine Act, 30 U.S.C. § 817(e).

Under section 107(e) of the Mine Act, an operator who wishes to contest the issuance of an imminent danger order under section 107(a) must notify the Secretary of Labor no later than 30 days after being notified of such order.

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the imminent danger order was delivered on January 13, 2014, and became a final order on February 12, 2014. ACI asserted that on February 24, 2014, it received the results of the bottle samples which were taken by MSHA to substantiate the 107(a) imminent danger order, and that based upon the results, it concluded that no imminent danger existed. Since the period for contesting the violation had already expired by the time ACI received the results of the bottle samples, ACI requested that the Commission reopen these proceedings. The Secretary opposed the request to reopen. The Secretary noted that the reasonableness of the imminent danger order did not depend on the results of the bottle samples, but on the information available to the inspector when the order was issued. Therefore, the Secretary contended that the operator did not have to wait until it received the results to contest the order.

We note that the motion to reopen was filed only 34 days after the order became final, and that the 104(a) citation issued in conjunction with the imminent danger order, Citation No. 8050878, was timely contested by the operator. Furthermore, we note that as the record has yet to be developed in this matter, it would be prudent to reopen and remand this proceeding to an Administrative Law Judge, so he or she may consider the Secretary's argument in light of the record.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 2, 2016

SECRETARY OF LABOR, MSHA
on behalf of **ERIC GREATHOUSE**,
Complainant,

v.

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

SECRETARY OF LABOR, MSHA,
on behalf of **RICKY BAKER**,
Complainant,

v.

OHIO COUNTY COAL CO.,
CONSOLIDATION COAL CO.,
MURRAY AMERICAN ENERGY, INC., and
MURRAY ENERGY CORPORATION,
Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of **LEVI ALLEN**,
Complainant,

v.

THE MARSHALL COUNTY COAL, CO.,
MCELROY COAL COMPANY,
MURRAY AMERICAN ENERGY INC., and
MURRAY ENERGY CORPORATION,
Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of **MICHAEL PAYTON**,
Complainant,

v.

INTERFERENCE PROCEEDING

Docket No. WEVA 2015-904-D
MORG-CD-2015-07

Monongalia County Mine
Mine ID: 46-01968

INTERFERENCE PROCEEDING

Docket No. WEVA 2015-905-D
MORG-CD-2015-08

Ohio County Mine
Mine ID: 46-01436

INTERFERENCE PROCEEDING

Docket No. WEVA 2015-906-D
MORG-CD-2015-09

Marshall County Mine
Mine ID: 46-01437

INTERFERENCE PROCEEDING

Docket No. WEVA 2015-907-D
MORG-CD-2015-10

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

Marion County Mine
Mine ID: 46-01433

SECRETARY OF LABOR, MSHA,
on behalf of **ANN MARTIN**,
Complainant,

INTERFERENCE PROCEEDING

Docket No. WEVA 2015-908-D
MORG-CD-2015-11

v.

HARRISON COUNTY COAL CO.,
CONSOLIDATION COAL CO.,
MURRAY AMERICAN ENERGY INC., and
MURRAY ENERGY CORPORATION,
Respondents.

Harrison County Mine
Mine ID:46-01318

SECRETARY OF LABOR, MSHA,
on behalf of **MARK RICHEY**,
Complainant,

INTERFERENCE PROCEEDING

Docket No. LAKE 2015-616-D
MORG-CD-2015-12

v.

THE OHIO VALLEY COAL CO., and
MURRAY ENERGY CORPORATION,
Respondents.

Powhatan No. 6 Mine
Mine ID: 33-01159

DECISION AND ORDER

Before: Judge Miller

These cases are before me upon a complaint of interference filed by the Secretary of Labor (“the Secretary”) on behalf of six miner representatives pursuant to the interference provisions of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c). On January 20, 2015, Complainants filed complaints with the Mine Safety and Health Administration (MSHA) alleging that bonus plans implemented at Respondents’ mines violated Section 105(c) of the Mine Act. On July 31, 2015, the Secretary filed this action on behalf of Complainants. The parties presented testimony and documentary evidence at a hearing on March 2, 2016, in Pittsburgh, Pennsylvania. For the reasons that follow, I conclude that Respondents interfered with the rights of Complainants under the Mine Act in violation of Section 105(c).

At hearing, the parties presented a number of stipulations, as well as a number of stipulated exhibits. The stipulations are a part of the record as Exhibit A, and the stipulated exhibits are entered into the record as numbered. Based upon the stipulations, there is no issue as to the jurisdiction of MSHA at the six mines named, and no issues of jurisdiction as to the

Commission. Jt. Stips. ¶ 1. Complainants were all employed at the mines or serving as representatives of miners at the time the matters arose. Jt. Stips. ¶¶ 15-26. Because the bonus plans at issue at the six mines and the complaints regarding them are nearly identical, I have addressed them together. The Secretary has proposed a civil penalty of \$20,000 as to each of the six mines.

I. FINDINGS OF FACT

This case involves six mines located in West Virginia and Ohio: the Monongalia County Mine (previously known as Blacksville No. 2 Mine), the Ohio County Mine (previously known as Shoemaker Mine), the Marshall County Mine (previously known as McElroy Mine), the Marion County Mine (previously known as Loveridge Mine), the Harrison County Mine (previously known as Robinson Run No. 95 Mine), and the Powhatan No. 6 Mine. Jt. Stips. ¶¶ 5, 6, 8-13. The mines are owned and operated by wholly-owned subsidiaries of Murray Energy Corporation (“Murray Energy”). Jt. Stips. ¶¶ 2-13. The subsidiaries as well as Murray Energy are named as respondents. The six complainants are members of the UMWA and representatives of miners at the mines who work or have worked as miners at the named mines. Jt. Stips. ¶¶ 15-26.

In January 2015, Respondents implemented the “Safety and Production Bonus Plans” at issue at six underground coal mines under their control. Jt. Stips. ¶¶ 36, 39, 43, 46, 50, 54. Hourly employees were notified of the bonus plans in letters distributed in November 2014 and January 2015. Jt. Stips. ¶¶ 28, 30. The plans offer miners money bonuses if their assigned section produces a certain amount of coal during their shift. Jt. Exs. 20-25. The bonus amounts range from \$50 to \$250 per shift depending on how much coal is produced. *Id.* Miners who do not work in a coal production area (“outby employees”) are eligible for bonuses at a lower rate—ten percent of the bonuses earned by the production crews on their shift. *Id.*

The bonus plans also provide that certain circumstances disqualify miners from receiving a bonus, notwithstanding sufficient coal production. First, to be eligible for a bonus, a section crew member must be “physically present the entire shift, including time spent switching at the face, during the shift the bonus share is earned.” Jt. Exs. 20-25. Employees who are not on production crews must also be present for the entire shift to share in the bonus. *Id.* Second, if a “lost time accident” occurs that incapacitates a crew member, the entire crew is disqualified from receiving the bonus for that shift. *Id.* Finally, a crew working on a section may be disqualified if an MSHA inspector issues a certain type of citation or order to that section. If an MSHA inspector issues a citation designated as significant and substantial (“S&S”), all crews that worked on the cited section are disqualified from earning a bonus for that day. *Id.* If a withdrawal order under Section 104(d) or 104(b) of the Mine Act is issued and is attributable to the crews working on the section, all the crews on that section are disqualified from receiving the bonus for seven consecutive days. *Id.*

The bonus and safety plans at issue were designed by Senior Vice President of Murray Energy Corporation John Forelli. Jt. Stips. ¶ 31; Tr. at 265. Forelli based the plans in part on plans that were already in place for supervisors at the mine. Jt. Stips. ¶ 33; Tr. at 307-08, 310. Forelli testified that the company’s motivation in implementing the plans was to improve production and safety at the mines. Tr. at 265-66. The bonus amounts were intended to be high

enough to motivate workers but not so high that miners would risk their safety. Tr. at 277-79; 315. Forelli also believed that awarding the bonus on a per-shift basis would minimize the chance of miners taking safety risks: a miner faced with addressing an unsafe condition would know that even if he lost the bonus that day, he would have an opportunity to earn it the next day. Tr. at 277-78.

Before the plans were implemented, Forelli and other managers held meetings with members of the mine committee of the local union at each mine. Tr. at 147-50, 287. A number of alterations were made to the original plans as a result of these meetings. For example, in response to complaints from the union that the lost-time injury disqualification would discourage reporting of injuries, Forelli added the phrase “that incapacitates the crew member during the shift” to clarify that the disqualification would depend on when the injury was incurred rather than when it was reported. Tr. at 271, 288-89. To the provision disqualifying miners for 104(d) and 104(b) orders, Forelli added the phrase “attributable to the crews working on that section” so that crews would not be disqualified for violations that were beyond their control. Tr. at 270; Jt. Exs. 20-25. A term providing for an additional inspection by the union safety committee each month was added to the plans at the Ohio County and Powhatan No. 6 mines. Tr. at 268-69; Jt. Exs. 21, 25.

Forelli testified that once the plans were implemented, he reviewed production data from the mines to see whether production had improved, but he did not reach a definite conclusion. Tr. at 297-301. Forelli also reviewed daily and quarterly safety reports from the mines and did not see a discernible difference in safety after the plans were implemented. Tr. at 293-96.

The Secretary presented witnesses from the mines who testified about the effects the bonus plans had on conditions at the mines.¹ Several witnesses testified that they observed that miners were less willing to serve as walk-around representatives after the bonus plans were implemented. Tr. at 46-47, 117-18, 152. The witnesses agreed that a person who served as a walk-around representative on a shift would be counted as an outby employee for purposes of the bonus and so would earn ten percent of the bonuses earned by the production crews on his shift.

¹ Respondents argue that the Secretary failed to present any witness testimony regarding the effects of the plans at three of the mines. Resp. Br. at 28-29. At hearing, I did not allow the Secretary to put on several witnesses whose testimony I believed would be cumulative. I find that, in view of the similarity of the plans, the testimony of the witnesses at hearing was probative as to the effects of the plans at all of the mines, and the testimony of additional witnesses was not necessary. This manner of accepting testimony of a representative number of employees has been approved for many years in other employment related actions. Courts overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. *See, e.g., Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir.2014), *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir.1997) (“[I]t is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA.”); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994) (“Courts commonly allow representative employees to prove violations with respect to all employees.”); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir.1988)

Tr. at 46, 178, 243, 283. Ann Martin, chairman of the Safety Committee at the Harrison County Mine, testified that a young miner who had frequently volunteered to be a walk-around representative declined after the bonus plan was implemented because he did not want to miss out on earning the bonus. Tr. at 152. Martin observed that miners became more willing to walk with inspectors when the bonus plan was discontinued at her mine. Tr. at 156, 166. Timothy McCoy, a member of a production crew at the Marshall County Coal Mine, testified that his coworkers discouraged him from serving as a walk-around representative because a less experienced person would be sent to replace him, affecting the crew's ability to achieve a bonus. Tr. at 113-14.

Witnesses for the Secretary also testified about the plan's impact on miners' willingness to report injuries. The miners understood the plans to disqualify everyone on the crew from receiving a bonus for the day if anyone on the crew was involved in a "lost time accident" during the shift. Tr. at 53, 159-60; Jt. Exs. 20-25. Several witnesses had observed or heard about instances of miners deciding not to report injuries they sustained on the job because they did not want to disqualify themselves and their coworkers from receiving the bonus. Tr. at 54-55, 112. Levi Allen, UMW local president at the Marshall County Coal Mine, described an incident in which a miner sustained a shoulder injury during his shift but decided not to report it because he "didn't want to take money off of everybody." Tr. at 226. Allen testified that after the bonus plan was implemented at his mine, he got three times as many calls about miners leaving the mine without reporting an accident. Tr. at 229. At the Ohio County and Powhatan No. 6 mines, the plan included a term providing that the Mine Safety Committee and Mine Safety Director would jointly review any accident to ensure that it was correctly documented. Jt. Exs. 21, 25. However, the chairman of the safety committee at Powhatan No. 6 testified that he had never been asked to review any accident reports. Tr. at 327-28. Thus, I find that the extra provision did not lessen the effect of the bonus plans on injury reporting at those two mines.

The witnesses also testified that they believed miners were less willing to report dangerous conditions in the mine while the bonus plans were in effect. Tr. at 48, 50, 112, 158, 213. They attributed this in part to the provisions of the plan disqualifying miners from the bonus for citations and orders received in by the tailpiece. Tr. at 48, 112, 162. The witnesses explained that even if MSHA did not issue a disqualifying citation, reporting a dangerous condition to management or requesting an inspection took time away from production and so would lessen the crew's chance of earning a bonus that day. Tr. at 50, 251. McCoy described an incident in which a miner expressed that he was unwilling to report a safety hazard because MSHA would come and the crew would lose the bonus the next day. Tr. at 141-42. Martin testified that in her capacity as chairman of the local union safety committee, she received fewer reports from miners about safety hazards while the plans were in effect. Tr. at 158, 166. As with the injury disqualification provision, the witnesses believed that peer pressure exacerbated the effect of the plans on safety reporting. Tr. at 50-51, 114, 163. Martin emphasized the importance the miners placed on earning a good income, which meant that the bonuses had a substantial effect on them. Tr. at 163.

At all of the mines except for Harrison County, the bonus plan contained a provision stating that all "production and safety standards, including roof control, ventilation, and rock dusting, shall be maintained on all shifts where the bonus thresholds are reached. Any major

deviation will disqualify a crew from receiving the bonus award.” Jt. Exs. 20-23, 25. Presumably, this provision was meant to encourage compliance with safety standards even where MSHA was not involved. Allen described an incident at the Marshall County Coal Mine in which a crew had failed to rock dust as required but had attained the level of production to qualify for a bonus. Tr. at 217-18. The next crew reported the rock dusting problem to management, and the first crew lost their bonus under the “standard deviation” provision. *Id.* However, the second crew also ended up not achieving a bonus because of the time it took them to report the problem to management and correct the problem. Tr. at 219-20. Allen thus explained that in most cases, a crew would not bother to report the deviation and so the provision would have little effect. Tr. at 220.

Finally, the witnesses for the Secretary testified that the plans had resulted in miners taking shortcuts related to safety, particularly in the areas of rock dusting, roof bolting, equipment checks, and ventilation. Tr. at 51-52, 105-07, 153, 223. They explained that safety-related maintenance tasks and fixing hazards slowed down production and so could prevent the crew from receiving the biggest bonus. Tr. at 49, 107-08, 159, 218. Not only the bonus itself but also peer pressure motivated miners to move quickly and skip safety steps. Tr. at 50, 106-07.

The local union membership at the Powhatan No. 6 and Harrison County mines voted against adopting the bonus plans, and as a result, the plans are no longer in effect at those mines. Jt. Stips. ¶¶ 52, 53, 56, 57. The plan was discontinued as a result of arbitration at the Marion County Mine. Jt. Stips. ¶¶ 48, 49. The plans remain in effect at the Monongalia, Ohio County, and Marshall County mines. Jt. Stips. ¶¶ 38, 42, 45.

II. ANALYSIS

The prohibition against interference is established in Section 105(c)(1) of the Mine Act, which provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or *otherwise interfere with the exercise of the statutory rights* of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits a miner or his representative to file a discrimination complaint with the Secretary if he believes “that he has been discharged,

interfered with, or otherwise discriminated against” in violation of the Mine Act. 30 U.S.C. § 815(c)(2).

A majority of the Commission has recognized that “the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework.” *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young & Cohen, Comm’rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Jordan & Nakamura, Comm’rs). To make out a claim of discrimination under the *Pasula-Robinette* framework, an employee must prove that he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec’y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, in interference cases, the Commission has accepted claims where the complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than a classic adverse employment action. *See Sec’y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission has focused not on the employer’s motive, but rather on whether the conduct would “chill the exercise of protected rights,” either by the directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

Although the Commission as a whole has not outlined a framework for analyzing interference claims, two Commissioners recently proposed a framework that has since been adopted by several of the Commission’s Administrative Law Judges. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm’rs); *see Sec’y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). Under the *Franks* test, an interference violation occurs if:

- (1) a person’s action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
- (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108. This approach is consistent with Commission precedent addressing interference with employee rights, in which the Commission has focused on the effect of the employer’s conduct on employees’ exercise of protected rights rather than on the motive behind the employer’s conduct. *See Gray*, 27 FMSHRC at 9 (analyzing whether employer’s statements were coercive based on reasonable inferences of the miner); *Moses*, 4 FMSHRC at

1479 (holding that actions constituted interference because they “could logically result in a fear of reprisal and a reluctance to exercise the right in the future”).

The framework proposed in *Franks* is similar to that used by the National Labor Relations Board (NLRB) in cases involving the interference provision of the National Labor Relations Act (NLRA). Section 8(a)(1) of the NLRA provides that “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in Section 7 of the Act. 29 U.S.C. § 158(a)(1). In evaluating Section 8(a)(1) claims, “the Board first examines whether the employer’s conduct reasonably tended to interfere with Section 7 rights. If so, the burden is on the employer to demonstrate a legitimate and substantial business justification for its conduct.” *Cal. Newspapers P’ship*, 343 N.L.R.B. 564, 565 (2004). The analysis “does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *Am. Freightways Co., Inc.*, 124 N.L.R.B. 146, 147 (1959); *see also Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998). Rather, the question is “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].” *American Freightways*, 124 N.L.R.B. at 147. If the employer produces a “legitimate and substantial business justification” for its action, the Board must then “strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the [NLRA] and its policy.” *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967); *Cal. Newspapers P’ship*, 343 N.L.R.B. at 565.

Respondents urge the Court to instead apply the test for interference used in a 2001 ALJ decision, *Secretary of Labor on behalf of Feagins v. Decker Coal Co.*, 23 FMSHRC 47 (Jan. 2001) (ALJ). Resp. Br. at 9. Under the *Decker* test, the complainant must prove either that “the challenged action was taken with the intent to damage or deny rights assured under the Act” or that there is a causal relationship—that is, “exercise of a protected right[] is the acknowledged *cause* of damage to the person attempting to exercise the protected right.” 23 FMSHRC at 50. This test is rooted in the statutory language of Section 105(c), which prohibits “interfere[nce] with the exercise of the statutory rights of any miner ... *because of* the exercise by such miner ... of any statutory right afforded by” the Act. 30 U.S.C. § 815(c)(1) (emphasis added). However, the Commission in *Gray* rejected a “literal interpretation” of Section 105(c)(1), which “might require the actual or attempted exercise of a right before the protection of [that section] comes into play.” 4 FMSHRC at 1480. Instead, the Commission has focused on the likely effect of an operator’s actions on the future exercise of rights by miners. *See Gray*, 27 FMSHRC at 9; *Moses*, 4 FMSHRC at 1478-79. Additionally, the Commission suggested in *Gray* that intent is not a necessary element of an interference claim, finding that the judge erred by focusing primarily on the intent behind a supervisor’s statements to a miner. 27 FMSHRC at 10.

The Commission’s approach is consistent with NLRB cases involving interference, which do not require proof that the employee actually attempted to exercise a protected right. *See, e.g., Medeco*, 142 F.3d at 745 (“An employer’s coercive action affects protected rights whenever it can have a deterrent effect on protected activity. This is true even if an employee has yet to exercise a right protected by the Act.”); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (holding work rule invalid under Section 8(a)(1) because of its “tendency to inhibit” protected activity without deciding whether protected activity in fact occurred). Further, it is well established under NLRA case law that unlawful motive is not a necessary element of an

interference claim. See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22-23 (1964); *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959). I find that the test used in *Decker Coal* does not accurately reflect the Commission's current approach to interference, and thus reject the Respondent's argument to apply it here.

a. Interference with Protected Rights

The Commission has recognized conduct as tending to interfere with the exercise of protected rights on a number of occasions. In *Moses v. Whitley Development Corp.*, the Commission found that coercive interrogation and harassment of a miner after an accident report was made at the mine constituted interference because it could chill the exercise of protected rights by miners. 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Two Commissioners came to a similar conclusion in *Franks*, where two miners were interrogated and suspended after a safety complaint was made at the mine. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2104 (Aug. 2014) (Jordan & Nakamura, Comm'rs) (finding that the actions could have a chilling effect on miners' willingness to make complaints in the future), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). Finally, in *Gray*, the Commission determined that potentially threatening comments made by a supervisor about an employee's participation in a grand jury proceeding could constitute interference if the judge found that the comments were coercive in light of the totality of circumstances. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 10-11 (Jan. 2005).

A number of ALJ decisions have also addressed the issue of interference. These cases have primarily involved threatening or harassing behaviors towards miners in relation to safety complaints. See e.g. *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (finding that interference occurred when coworker verbally and physically harassed miners' representative while he exercised his walk-around rights); *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352 (Aug. 2014) (ALJ) (finding that interference occurred where supervisor told miner it was futile to make safety complaints and encouraged other employees to build a record against the miner after he made a complaint); *Sec'y of Labor on behalf of Clapp v. Cordero Mining, LLC*, 33 FMSHRC 2977 (Dec. 2011) (ALJ), *aff'd*, 699 F.3d 1232 (10th Cir. 2012) (noting that threatening comments made to an employee after she made a safety complaint were interference, but resolving case under discrimination provision because she was actually discharged). The issue of a work rule or policy that interferes with employee rights was addressed in *Secretary of Labor on behalf of McGary v. Marshall County Coal Co.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ). In that case, the ALJ found that a mine operator interfered with employee rights to make complaints to MSHA when the operator required employees to report all safety complaints to mine management and announced the policy in a speech by the CEO threatening closure of the mine. *Id.* at 2606-07.

In addition to these cases, the Commission has recognized that "case law interpreting the National Labor Relations Act, upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues." *Sec'y of Labor on behalf of Johnson v. Jim Walter Res.*, 18 FMSHRC 552, 558 n.11 (1996); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990); see also *Gray*, 27 FMSHRC at 9-10 (reviewing NLRB precedent in discussion of interference provision). Courts interpreting the NLRA have

determined that conferral of a benefit on employees can constitute interference under Section 8(a)(1) if the benefit is withheld from employees who exercise a protected right. For instance, in *NLRB v. Rubatex Corp.*, the Fourth Circuit determined that a company interfered with employees' right to strike when it paid a \$100 bonus to employees who worked through a strike. 601 F.2d 147, 150 (4th Cir. 1979). Similarly, in *Lynn-Edwards Corp.*, the NLRB held that interference occurred when a company included a provision in its retirement plan suggesting that coverage would be withdrawn if employees unionized. 290 N.L.R.B. 202, 205 (1988); *see also Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 907 (6th Cir. 1997) (holding that solicitation of grievances during union campaign violates Section 8(a)(1) if employer suggests that grievances will only be resolved if employees reject union representation).

Respondents' bonus plans promise bonuses ranging from \$50 to \$250 per shift (or less for outby employees) based on the amount of coal produced. Jt. Exs. 20-25. Testimony at hearing indicated that the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety. Because the bonus is based on the amount of coal produced by the crew as a whole, each worker feels pressure to work as fast as possible so as not to take away from potential bonuses for the other workers. The result is that miners take shortcuts that affect safety and result in a denial of the plan benefits to miners who exercise their rights under the Mine Act. Several witnesses described seeing areas that were not adequately rock dusted because miners were in a hurry, or where additional roof bolts should have been installed but were not. Tr. at 51-52, 105-06, 153, 217-18. These safety-related tasks take additional time, and miners are therefore reluctant to do them under the bonus plans because they are less likely to achieve the production goals. Tr. at 119.

In addition to creating a climate adverse to safety, the bonus plans affect miners' willingness to exercise specific rights under the Act. The Commission has observed that in framing the Mine Act, Congress believed that the "participation [of miners] in the enforcement of the Act is essential to the achievement of safe and healthful mines." *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2790 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). Thus, the Act gives miners the right to notify MSHA officials or the operator of unsafe conditions or practices in the mine that require attention. *See id.*; 30 U.S.C. §§ 813(g)(1), 815(c)(1). The Commission has determined that miners also have the right to refuse to work in conditions that threaten their health or safety as well as to report injuries and accidents to the operator. *Pasula*, 2 FMSHRC at 2790-93; *Swift v. Consol. Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994). Yet, under the bonus plan, a miner who refuses to work, along with everyone else on his crew, will not receive the benefit of a bonus. Finally, the Act provides that when MSHA conducts an inspection of the mine, a representative of the miners at the mine "shall be given an opportunity to accompany the Secretary or his authorized representative . . ." 30 U.S.C. § 813(f). If the representative of miners is an employee of the operator, the Act guarantees that he "shall suffer no loss of pay during the period of his participation in the inspection . . ." *Id.* The right to accompany an inspector is frequently referred to as the "walk-around right." The Secretary alleges that the bonus plans at issue here interfere with all of these rights. First Amended Comp. at 16-19.

The Secretary's witnesses at hearing explained that miners are reluctant to report safety issues to management or MSHA under the bonus plans because making the report and

undergoing an inspection take away from production time.² Tr. at 50, 251. Further, the bonus plans disqualify a crew working on a section from receiving the bonus if an MSHA inspector issues an S&S citation during any shift on that section that day. Jt. Exs. 20-25. If a withdrawal order under Section 104(d) or 104(b) is issued to a section and is attributable to the crews working on that section, all the crews on that section are disqualified from receiving the bonus for seven consecutive days. *Id.* The effect of these provisions is to penalize miners who make safety complaints to MSHA, since a complaint to MSHA that results in a violation will prevent the miner from receiving the bonus. The provisions also create peer pressure against making complaints, since the entire crew loses the bonus if a violation is found. The witnesses described instances of miners being unwilling to report violations because of a desire to keep the bonus. Tr. at 112, 114, 141, 158. Representatives from the safety committees at the mines reported that miners were reporting fewer violations and were less likely to bring up safety concerns when asked. Tr. at 158, 166.

Respondents argue that under the bonus plans, “there is no correlation between reporting rights under the Mine Act and the disqualification provisions.” Resp. Br. at 15. They contend that “there is absolutely no correlation between the act of reporting and the issuance of a citation or order resulting from a hazard in the mine.” *Id.* But in fact there is an obvious correlation: when a miner reports a hazard to MSHA, the hazard is substantially more likely to be discovered by an MSHA inspector and thus result in a citation than if the miner were to ignore the hazard and wait for someone else to address it. Thus, the miner who reports the violation, along with his co-workers, are more likely to be disqualified from the bonus that day. The provision disqualifying miners from bonuses for S&S violations is analogous to the situation in the NLRB case *Rubatex Corp.*, in which a bonus was offered to employees who worked through a strike. 601 F.2d at 150. Employees who exercise their statutory right are less likely to receive the bonus, and therefore are discouraged from exercising the right. This is interference with a protected right under Section 105(c).

² Respondents argue that much of the Secretary’s evidence about the impact of the bonus plans on miners was in the form of inadmissible hearsay testimony. Resp. Br. at 18-20. Respondents also argue that they did not have the opportunity to cross-examine witnesses when information was provided through hearsay. *Id.* at 19. I reject these arguments for several reasons. First, pursuant to the Commission’s Rules of Procedure, hearsay testimony is admissible when relevant. 30 C.F.R. § 2700.63. Here, the testimony was based on first-hand conversations and observations, and with few exceptions was not only reliable but relevant. Next, much of the hearsay testimony to which Respondents objected went to the state of mind of miners with regard to the plan, which would in most cases be admissible even under the Federal Rules of Evidence. Fed. R. Evid. 803(3); *see, e.g.*, Tr. at 141, 152. Finally, counsel for the respondents put on no evidence to refute the hearsay testimony, nor did they put forth a witness who was not adversely affected by the bonus plans. The Secretary argues persuasively that admitting hearsay testimony serves the Mine Act’s goal of protecting miner informants, which is necessary in an interference case where miners may feel intimidated. Sec’y Br. at 28 (citing *Revelation Energy, LLC*, 36 FMSHRC 1581, 1599 (June 2014) (ALJ)). I do not find that the Secretary’s use of hearsay evidence was problematic here.

The bonus plans provide for different levels of bonuses for miners working on production crews at the face and those working outby. Employees working outby receive only ten percent of what the production sections on their shift earned. *Jt. Exs. 20-25*. The miner witnesses testified that this provision has affected miners' willingness to serve as walk-around representatives during inspections of the mine. *See 30 U.S.C. § 813(f)*. The witnesses explained that under the bonus plan, miners who serve as walk-around representatives are treated as outby employees. *Tr. at 46, 178, 243, 283*. Union representatives from the mines testified that they had difficulty finding miners to walk with inspectors after the plans were implemented because the miners did not want to miss out on the larger bonus. *Tr. at 46-47, 152*. Although a miner who typically works outby would earn the same bonus if he walked with an inspector, a miner who typically works in the production area could see a substantial difference in pay. Section 103(f) specifically guarantees that a miner serving as a walk-around representative "shall suffer no loss of pay during the period of his participation in the inspection." *30 U.S.C. § 813(f)*. Respondents argue that there would be no loss of pay if a production crew member served as a representative, since there is no guarantee that production crew members will earn a bonus every shift. *Resp. Br. at 16*. In some circumstances, the bonus earned by a miner on walk-around could even be higher than what he would have earned working on the production crew. *Id.* But I find that this would make little if any difference to a miner considering whether or not to act as a walk-around representative. There is no question that some miners are discouraged from serving as walk-around representatives because they would miss out on the chance to get a larger bonus.

Finally, the bonus plans provide that if a "lost time accident" occurs that incapacitates a crew member, the entire crew is disqualified from receiving the bonus for that shift. *Jt. Exs. 20-25*. Several witnesses had observed or heard about miners deciding not to report injuries they sustained on the job that they otherwise would have reported, instead choosing to "rough it out" so they and their coworkers would not lose the bonus for the shift. *Tr. at 54-55, 112*. A miner's right to report injuries to the operator is essential to the "free flow of information" about the conditions at a mine, and the bonus plans have undermined that arrangement at these mines. *See Swift, 16 FMSHRC at 205*. A miner who incurs a "lost time" injury must choose between exercising his right to report the injury and getting a bonus. This is an impermissible burden on his right to report.

Respondents place much emphasis in their brief on the Commission's decision in *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (1994). In that case, the Secretary argued that a program that penalized miners who sustained injuries on the job interfered with miners' rights to report injuries. *Id.* at 202-03. The Commission found that the program did not on its face violate Section 105(c). *Id.* at 208. However, the Commission noted that the case did not involve any evidence of actual negative effects on miners' exercise of their rights. *Id.* at 207 n.6. In this case, by contrast, the Secretary has presented ample evidence of actual interference. Additionally, *Swift* was decided as a 105(c) discrimination case rather than an interference case, and thus is distinguishable from the case at hand. *See id.* at 205-06.

The evidence presented at hearing demonstrates that the bonus plans discourage miners from exercising their rights to make safety complaints, report injuries, and serve as walk-around representatives. However, Respondents argue that a miner who decides not to report an injury or safety violation or who otherwise disregards safety is not acting "reasonably," and therefore any

effect the plans have on miners' exercise of their rights should not be considered interference. Resp. Br. at 21-23. Rather, Respondents argue that the "reasonable miners" relevant to the case are the Secretary's witnesses at hearing, who testified that they were not affected by the financial incentives in the bonus plans or by peer pressure to disregard their safety rights. *Id.* at 23. I do not find merit to this argument. First, the miners who testified gave a number of examples of how the plan interfered with miners, and even if some of those who testified were not swayed by the bonus, they observed and talked to others who were. The appropriate inquiry under the *Franks* test is whether the actions of the operator in instituting the plan could reasonably be viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the rights of the miners. The Secretary presented sufficient evidence to demonstrate that a reasonable miner would in fact be swayed by the promise of additional income to sidestep some safety precautions. The Commission has clearly expressed that "reasonable miners" can be dissuaded from exercising their rights in some instances of extreme pressure. *See Gray*, 27 FMSHRC at 9-10; *Moses*, 4 FMSHRC at 1478-79 ("Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights.").

While the Secretary has the burden of proof in this case, the Respondents had the opportunity to present evidence on any issue raised by the Secretary, including the effect the plan had on miners. Respondents raise issues about how reasonable miners reacted to the plan, yet Respondents called no witnesses and provided no other evidence to the contrary. The Secretary, on the other hand, has demonstrated the strong effect of the bonus plans on miners' behavior. While the bonus amounts are not extraordinarily large, the amounts for production crewmembers are large enough to matter to most miners. Tr. at 163. The witnesses at hearing also emphasized the intensity of the peer pressure fostered by the plans. The bonus plans make it so that a miner must decide whether it is worth taking money out of his own pocket and those of his entire section every time he considers reporting an unsafe condition or an injury. This impact on a miner's decision to exercise his rights constitutes a coercive pressure analogous to the interrogation and harassment discussed by the Commission in *Moses* and *Gray*. A reasonable miner would be dissuaded from exercising his rights in this situation. Therefore, the bonus plans interfere with the protected rights of miners.

b. Legitimate and Substantial Reason

Under the *Franks* framework, if it is determined that a mine operator's conduct interfered with the protected rights of miners, the inquiry proceeds to whether the operator had a "legitimate and substantial reason" for the action "whose importance outweighs the harm caused to the exercise of protected rights." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). *Franks* involved the coercive interrogation and ultimate suspension of two miners after a safety complaint was made at the mine. *Id.* at 2113-16. The operator justified its actions by arguing that it had a responsibility to investigate safety complaints at the mine. *Id.* at 2116. While the Commissioners agreed that this was an "important interest," they noted that the operator could have obtained the information it sought through other means, particularly through speaking with the union safety committeeman. *Id.* at 2117. The operator's interest therefore did

not outweigh the potentially long-term negative consequence of discouraging miners from making safety complaints. *Id.* at 2117.

In NLRB cases, courts typically take a similar approach of requiring that the employer's conduct be calibrated so as to minimize the effect on employee rights. *See, e.g., Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) (blanket confidentiality rule on all matters under investigation by employer was overbroad); *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 353-54 (4th Cir. 2001) (investigation of employees for harassment after they discussed union with coworkers not justified by interest in maintaining harmonious workplace because effect on rights too great); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998) (confidentiality term in contract with employee that interfered with his right to discuss conditions of employment with coworkers not justified by interest in preventing misinformation among employees, since providing accurate information would have served the same purpose); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (rule prohibiting discussion of wages not justified by desire to keep employees working during work hours, since it applied all the time). Courts are more likely to find an employer's substantial business justification to be persuasive when the employer's interest is important and the impact on employee rights is minimal. *See, e.g., Desert Palace, Inc.*, 336 N.L.R.B. 271, 272 (2011) (confidentiality policy regarding an investigation of drug activity at workplace justified as means of protecting witnesses and preserving evidence); *Cal. Newspapers P'ship*, 343 N.L.R.B. 564, 565-66 (2004) (editors who informally reprimanded reporter for speaking to city council about union had legitimate interest in protecting newspaper from appearance of conflict of interest, which outweighed impact on employee). Tenuous or speculative benefits are insufficient to justify interference. *See, e.g., Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271-72 (D.C. Cir. 1998) (employer's videotape surveillance not justified where it provided minimal additional security and employer had little reason to suspect misconduct would occur); *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1100 (9th Cir. 1998) (anticipation of violence did not justify surveillance where employer showed no basis for its concern).

Respondents argue that their reason for implementing the bonus plans was to improve production and safety at the mines. Resp. Br. at 24; Tr. at 266. Senior Vice President John Forelli testified that he gathered data on production at the mines after the plans were implemented to see if it had improved. Tr. at 297. He was unable to reach a definite conclusion as to whether the plans were effective, in part because he did not have data from before the plans were implemented. Tr. at 297-301. Murray also had a system for reviewing safety data that pre-dated the bonus plans. Tr. at 306. Forelli personally compared safety data from before and after the bonus plans were implemented to see if the plans had affected safety, but did not observe any clear patterns. Tr. at 294-95.

A mine operator certainly has a right to implement programs to assure that miners are producing at the best rate possible. However, because I have found that the plans at issue interfere with safety and the rights of miners, they must be reviewed with a more careful eye. Respondents credibly assert that their motivation in implementing the plans was to increase production. Respondents also claim that the bonus plans were tailored so as not to interfere with any rights under the Mine Act. Resp. Br. at 23. The bonuses are of a moderate size and are renewed each shift, which Forelli believed would ensure that miners were not tempted to bypass safety measures. Forelli met with union representatives before implementing the bonus plans and

attempted to address some of their concerns about safety. Respondents also argue that the provisions disqualifying miners from earning the bonus for safety violations and injuries were intended to encourage safety. Resp. Br. at 26. However, the company is unable to show that the plans have actually been effective at improving or maintaining safety at the mines. Even more significantly, the company has been unable to establish that the plans actually resulted in increased production at any of the mines. In contrast, the harm to miners' rights is evident. Miners at these mines are discouraged through peer pressure and personal financial incentives from making safety complaints, reporting injuries, and serving as walk-around representatives. These rights are essential to safety at the mines. For the Mine Act to function as Congress intended, miners must be able to freely participate in its enforcement scheme. *See* S. Rep. No. 95-181, at 30 (1977). The uncertain benefits that Respondents put forth do not outweigh these harms. Accordingly, I find that the bonus plans violate Section 105(c) of the Mine Act.

III. PENALTY AND REMEDIES

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). The Secretary asks the Court to order the mines to rescind the bonus plans, post a notice at the mines for six months reflecting the court-ordered rescission, and mail such notice to the homes of all miners and all representatives of miners at the mines. In addition, the Secretary asks the Court to assess a civil penalty of \$20,000 for each of the six violations.

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In this case, Murray is considered a large operator for penalty purposes. The gravity of the matters is serious, as the bonus plans could reasonably threaten safety for all employees at the mines. The mines have received numerous discrimination complaints in the past, including a recent interference complaint in which they were fined \$30,000 per mine. The operator was moderately negligent in instituting the bonus plans. At three of the mines, the plan is no longer in effect as a result of arbitration initiated by the UMWA. Considering all of the factors, I find that a \$25,000 penalty per mine is appropriate.

IV. ORDER

Based on my conclusion that the bonus plans interfered with the protected rights of miners under the Act, Respondents are **ORDERED** to rescind the bonus plans that remain in effect and cease and desist from implementing any other similar plans. Respondents are further **ORDERED** to post a notice at each of the six mines for a period of six months. The Notice shall be no smaller than 10" by 13", on white paper with clear lettering in a font over 12-point, and shall indicate that miners have a right to file any claim of interference without fear of harassment or retaliation, that the bonus plans are rescinded effective immediately, that the mine has interfered with the rights of miners in putting the plans in place, and that all bonuses earned up until that date will be paid as promised. The notice shall be posted, within 30 days, in a conspicuous place in at least two locations at each mine where it is available to all miners on all shifts.

Finally, within 40 days of the date of this decision, Respondents are **ORDERED** to pay a civil penalty of \$150,000 to the Secretary of Labor.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

May 3, 2016

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

v.

OAK GROVE RESOURCES, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-301
A.C. No. 01-00851-315187-01

Docket No. SE 2013-352
A.C. No. 01-00851-317727-01

Docket No. SE 2013-368
A.C. No. 01-00851-319550

Docket No. SE 2013-399
A.C. No. 01-00851-320606-01

Mine: Oak Grove

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), 30 U.S.C. § 815(d), against the Respondent, Oak Grove Resources, LLC (“Oak Grove”). A hearing was held on September 1 and September 2, 2015, in Birmingham, Alabama.

I. Settled Violations

These consolidated dockets concern a total of 24 citations and orders. Prior to the hearing, the parties advised that 17 of the 18 citations at issue in Docket No. SE 2013-352, and two of the three 104(d)(2) orders at issue in Docket No. SE 2013-301, had settled. The record at the hearing was left open for the parties to submit their written settlement terms, which were filed on February 19, 2016.

a. Docket No. SE 2013-352

Regarding the 17 settled citations in Docket No. SE 2013-352, the parties' settlement terms include reducing the total civil penalty from \$23,559.00 to \$15,713.00. Specifically, the settlement terms provide for reducing the degrees of negligence attributable to the cited violative conditions in Citation Nos. 8524989 and 8524999 to "low" and "moderate," respectively, with corresponding penalty reductions. Regarding Citation No. 8526401, the parties agree to modify the number of people affected from eight to one, with a corresponding penalty reduction. Additionally, the parties agree to reduce the total civil penalty in Citation Nos. 8524490, 8524979, 8524982, 8524987, 8524991, 8524993, 8524994, 8524995, 8524996, 7684600, 8524499, and 8524500, from \$17,108.00 to \$11,019.00 based on the vagaries of litigation, and pay the Secretary's proposed penalties in full for Citation Nos. 8524983 and 8524491. One citation, Citation No. 8520665, remains at issue in Docket No. SE 2013-352.

b. Docket No. SE 2013-301

Regarding the two settled 104(d)(2) orders in Docket No. SE 2013-301, Order Nos. 8524255 and 8524258, the parties' settlement terms maintain the unwarrantable failure designations, but reduce the total civil penalty from \$51,300.00 to \$38,475.00. Order No. 8520666 in Docket No. SE 2013-301 remains at issue in this proceeding.

Consequently, the parties' settlement agreement reducing the total civil penalty for the settled 19 citations and orders in Docket Nos. SE 2013-352 and SE 2013-301 from \$74,859.00 to \$54,188.00 shall be approved as consistent with the penalty provisions of section 110(i) of the Mine Act.

II. Disposition of Violations at Issue

a. Summary of Violations at Issue

In addition to the two violations remaining at issue in Docket Nos. SE 2013-352 and SE 2013-301, the two orders at issue in Docket No. SE 2013-399 and the single order at issue in Docket No. SE 2013-368 have also been adjudicated in this proceeding. Of these five contested citations and orders, two orders concern allegedly impermissible coal dust accumulations along each of two conveyor belt lines, and two orders concern associated allegedly insufficient pre-shift examinations. These alleged accumulations and pre-shift examination violations have been attributable to unwarrantable failures. The remaining citation concerns an allegedly hazardous conveyor belt that was reportedly observed rubbing against the mine roof at the site of an overcast.

The Secretary initially proposed a total civil penalty of \$259,848.00 in satisfaction of these four contested orders and one contested citation. The Secretary's initial total proposed civil penalty included a proposed penalty of \$146,400.00 for the alleged accumulations violation in Order No. 8520664 in Docket No. SE 2013-368 that was designated as a repeated flagrant violation. As discussed below, the flagrant designation was deleted prior to the hearing. *See* Order Deleting Flagrant Designation, 37 FMSHRC 1311 (June 2015) (ALJ). Consequently, the

Secretary reduced the proposed penalty for Order No. 8520664 to \$70,000.00 — the maximum penalty provided for unwarrantable failure violations under 30 U.S.C § 820(a)(1). As a result, at the time of the hearing, the Secretary was proposing a total civil penalty of \$183,448.00 in satisfaction of these four contested orders and one contested citation. The parties' briefs have been considered in the disposition of this matter.

b. Order No. 8520664 in Docket No. SE 2013-368 (Main North 3 Belt Accumulations)

i. Pre-Hearing Deletion of Flagrant Designation

Order No. 8520664, issued on October 3, 2012, alleges a violation of section 30 C.F.R. § 75.400.¹ Order No. 8520664 states:

Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. The hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor).² This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 5. As previously noted, the accumulation condition cited in Order No. 8520664 was initially designated by the Secretary as a “repeated flagrant” under section 110(b)(2) of the Mine Act, for which the Secretary sought a proposed enhanced civil penalty of \$146,400.00. The flagrant designation was deleted by an interlocutory order on June 1, 2015. Order Deleting Flagrant Designation, 37 FMSHRC 1311 (June 2015) (ALJ). The interlocutory order is incorporated by reference.

¹ 30 C.F.R. § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

² This notation of 92 section 75.400 violations in the two year period prior to the issuance Order No. 8520664 cannot be reconciled with the Assessed Violation History Report that reflects 34 section 75.400 violations during the relevant time period. *See* Gov. Ex. 1

As the criteria for a repeated flagrant violation essentially remains a matter of first impression, it is helpful to summarize the rationale for deleting the repeated flagrant designation in this matter. It is axiomatic that the Mine Act provides for the application of “increasingly severe sanctions for increasingly serious violations or [increasingly inexcusable] operator behavior.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 828 (1981). Consistent with this statutory scheme, section 110(b)(2) of the Mine Act, which increases the maximum civil penalty for extremely hazardous violations deemed “flagrant,” was promulgated by Congress in 2006 following the Sago and Darby Mine disasters. Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or *repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added). Thus, section 110(b)(2) applies only to the most hazardous and egregious violations.

Section 75.400, the mandatory standard prohibiting coal dust accumulations cited in Order No. 8520664, is the most frequently cited mandatory standard in underground coal mines. For example, section 75.400 violations constituted eleven percent of all citations issued at underground coal mines in 2015. MSHA, Most Frequently Cited Standards, <http://arlweb.msha.gov/stats/top20viols/top20viols.asp> (last visited April 25, 2016).

While the condition cited in Order No. 8520664 appeared to be a routine accumulations violation, in that it lacked the presence of an identifiable ignition source, the Secretary relied on a “predicate violation history” to support his designation of a repeated flagrant violation. However, if violative coal dust accumulations in proximity to a properly-functioning conveyor system can be elevated to a flagrant violation based on a “predicate history of violations,” the vast majority of section 75.400 violations can be deemed flagrant.

Consequently, in an effort to narrow the issues, on March 14, 2014, the parties were ordered to address whether a section 75.400 violation can be elevated to a repeated flagrant violation based solely on a history of violations, if the cited condition can only contribute to a reasonably serious injury, rather than proximately cause serious bodily injury or death. 36 FMSHRC 815 (Mar. 2014) (ALJ).

In response, the Secretary conceded that “[b]oth reckless and repeated flagrant designations require violations that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” *Sec’y Resp. to Order Scheduling Briefing*, at 6 (Apr. 22, 2014). In other words, the Secretary conceded that a violative condition that cannot reasonably be expected to be the proximate cause of serious injury or death cannot be elevated to a flagrant violation based simply on a history of violations. In this regard, at an oral

argument held on March 4, 2015, for the purpose of addressing the criteria for a repeated flagrant violation, the Secretary's counsel stated:

We absolutely agree that history alone cannot elevate a violation to a flagrant violation. There is no dispute about that from the Secretary's perspective.

And I think as [the Court] read yourself from the Secretary's response to your briefing order, the Secretary has noted that both reckless and repeated flagrant designations require violations that substantially and proximately caused or reasonably could have been expected to cause, death or serious bodily injury.

Order Deleting Flagrant Designation, 37 FMSHRC at 1313 (citing Oral Arg. Tr. 29-30).

Following consideration of the Secretary's April 22, 2014, response, the Secretary was ordered to file a prehearing brief addressing whether the cited violative condition in Order No. 8520664 satisfies the requisite criteria for establishing a repeated flagrant violation under section 110(b)(2) of the Mine Act. Specifically, the requisite criteria were identified as follows:

1. A repeated flagrant violation is a flagrant violation that is demonstrated by either:
 - a. A repeated failure to eliminate the violation properly designated as flagrant, or
 - b. A relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.³
2. A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.
3. A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.
 - a. A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.
 - b. A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.
 - c. Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

36 FMSHRC 1777, 1789-90 (June 2014) (ALJ).

³ This criterion that predicate violations must also meet the requirements for a flagrant violation was included at the suggestion of the Secretary. 36 FMSHRC at 1789 n.13. However, I believe a history of relevant violations can provide a basis for a "repeated" designation, for a violation otherwise properly designated as flagrant, regardless of whether the previous violations satisfy the statutory definition of flagrant.

In response to the above criteria, the Secretary asserted that:

In the present case, hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. Given these ignition sources, it is reasonably expected that, *as normal operations continued*, serious and/or deadly injures from burns and smoke inhalation would result from a fire or explosion. These injuries would be the proximate and direct result of the fire or explosion because the accumulations would be the necessary fuel source that, when combined with oxygen and an ignition source, would cause the fire or explosion.

Sec'y Pre-Hearing Statement, at 2 (Aug. 7, 2014) (emphasis added). The Secretary's response relied upon a traditional significant and substantial ("S&S") analysis. Specifically, the Secretary conflated the contribution of a condition to an event resulting in injury of a reasonably serious nature, based on the potential for future ignition sources that may arise during the course of continued mining operations, with the actual presence of ignition sources that have caused, or can be reasonably expected to proximately cause, death or serious bodily injury.

Reduced to its core, while all flagrant violations are S&S, it is only the most hazardous of S&S violations that can properly be designated as flagrant. By way of illustration, an S&S violation is one that, in the context of continuing mining operations, is reasonably likely to contribute to a hazard that will result in an injury of a reasonably serious nature. In contrast, a flagrant violation is a violation that, itself, presents a present hazard that either has caused, or can be reasonably expected to proximately cause, death or serious bodily injury.

On June 1, 2015, I issued an interlocutory order deleting the flagrant designation in Order No. 8520664, which stated, in pertinent part:

While the cited accumulations may have been exposed to future ignition sources based on conveyor belt defects that may occur during the course of continued mining operations, the undisputed material facts demonstrate that the cited accumulations *were not* in proximity to any identifiable ignition source, such as a misaligned belt or defective roller on October 3, 2012, the date Order No. 8520664 was issued. In this regard, the Secretary[']s counsel] forthrightly conceded during oral argument [in this matter]:

COURT: Was there any evidence of any heat? . . .

COUNSEL: And the simple answer I'd like to give you . . . is at the time the violation was issued, *there is no evidence of heat sufficient to ignite coal at the time the violation was issued.*

[Oral Arg.] Tr. 129-130 (emphasis added).

Moreover, the cited accumulations were remotely located where they could not be exposed to ignition sources at the mine face. In this regard, at oral argument, the

parties stipulated that the location of the cited accumulations was approximately .58 miles from the zero-gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active long wall mining face. [Oral Arg.] Tr. 139-40; Oral Arg. Jt. Ex. 1. Rather, the Secretary repeatedly relies on speculation that there will be future sources of heat that will arise during the course continued mining operations, as a basis for asserting that the cited accumulations could reasonably be expected to cause death or serious bodily injury. *Sec'y Resp.*, at 6-10. In his brief, the Secretary also repeatedly proposes that the “the rationale for presuming ‘continued mining operations’ applies equally to ‘flagrant’ and [S&S] determinations.” *Id.* at 18-22. Consistent with this proposition, at oral argument the Secretary[’s counsel] stated:

COUNSEL: If the Court doesn’t agree that the concept of continued normal mining operations applies in a flagrant violation, then the Court should rule that way, we would lose this case.

[Oral Arg.] Tr. 151-52. Precisely.

Fundamentally, the Secretary must not be permitted to use interchangeably the term “actual (present) ignition source” with the term “potential ignition source” that may occur as a consequence of a future defect in the conveyor belt system during continued mining operations. In the present case, in the absence of ignition sources, the cited accumulations themselves are not capable of combustion and, as such, cannot be the proximate cause of serious bodily injury or death, as contemplated by section 75.400. Consideration of potential exposure to a future ignition source based on continued mining operations in the context of a traditional S&S analysis goes beyond scope a flagrant analysis.

Rather, whether the facts surrounding a violation support a flagrant designation is determined by the facts as they existed at the time the citation was issued. Coal dust accumulations *not in the presence of ignition sources* can be a *contributing cause* of injury if they propagate an explosion. However, such accumulations cannot be the *proximate cause* of injury.⁴ To conclude otherwise, would be to render the vast majority of prohibited accumulations under section 75.400 flagrant violations. . . . Simply put — if everything is flagrant, nothing is flagrant. Nor does the Secretary have the prosecutorial discretion to arbitrarily and capriciously label violations as flagrant.

Order Deleting Flagrant Designation, 37 FMSHRC at 1318-19.

⁴ There may be exceptional cases where the depth of prohibited coal dust accumulations and their contact with multiple turning rollers causes demonstrable suspension of coal dust that could be construed as reasonably expected to be the proximate cause of propagation and resultant serious bodily injury or death, thus satisfying the statutory definition of flagrant.

In the final analysis, it cannot be ignored that Congress elected not to provide for the imposition of flagrant designations based on a timeline when it promulgated section 110(b)(2) of the Mine Act, as it did for withdrawal orders under section 104(d)(1). Rather, Congress provided a definition that requires that a violation deemed flagrant must have proximately caused death or serious bodily injury, *or could be reasonably expected to do so*.⁵ The Mine Safety and Health Administration’s (“MSHA”) persistent attempts to elevate a violation to a repeated flagrant status under section 110(b)(2) primarily based on a history of violations, despite the statutory definition of a flagrant violation provided by Congress, is simply not supportable.⁶ *See* Order Deleting Flagrant Designation, 37 FMSHRC at 1321.

The Secretary did not request interlocutory review of the June 1, 2015, Order Deleting the Flagrant Designation in Order No. 8520664. Consequently, the Secretary was ordered to file an amended petition for civil penalty. In response, on August 21, 2015, the Secretary filed an Amended Petition for the Assessment of Civil Penalty in Docket No. SE 2013-368, replacing the enhanced \$146,400.00 penalty sought for Order No. 8520664, with a proposed penalty of \$70,000.00—the statutory maximum penalty for a violation attributable to an unwarrantable failure. While not necessarily binding, it is noteworthy that, at the hearing, counsel for the Secretary represented that the Secretary is no longer pursuing the repeated flagrant designation for the accumulation violation cited in Order No. 8520664. Tr. 16-17.

ii. Post-Hearing Findings of Fact

The Oak Grove Mine is an underground coal mine in Jefferson County, Alabama. During the course of MSHA Inspector Alveriado Getter’s October 3, 2012, inspection, he traveled the Main North 3 belt entry, where he reportedly observed the accumulation conditions described in Order No. 8520664. Tr. 33-34. As previously noted, the area where the cited accumulations were located was approximately .58 miles from the Zero Gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active longwall mining face. Order Deleting Flagrant Designation, 37 FMSHRC at 1318 (citing Oral Arg. Tr. 139-40 and Oral Arg. Jt. Ex. 1).

⁵ It is clear that the term “proximately” must be read into the statutory phrase “reasonably expected to cause” that refers to situations where serious death or bodily injury has not yet occurred. I recognize that the Secretary has been persistently vague on this point. To conclude otherwise — that violations that can reasonably be expected to contribute to, or are a secondary cause of, serious bodily injury or death, could be properly designated as flagrant — would blur the distinction between flagrant and routine S&S violations.

⁶ I am cognizant that the Commission has held that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013). Of course, a history of violations may be an aggravating factor that is *always* relevant in determining the amount of the enhanced civil penalty that should be assessed pursuant to section 110(b)(2). *See also* 30 U.S.C. § 820(i). However, the Commission has not determined that a history of violations can serve as a basis for elevating a violation, not otherwise flagrant, to a repeated flagrant status. *See* Order Deleting Flagrant Designation, 37 FMSHRC at 1313 n.4.

As stated in Order No. 8520664, Getter testified that he observed accumulations of float coal dust, coal fines, and hard packed coal beginning at the feeder and extending 2,100 feet outby along the beltline.⁷ Tr. 44. However, Getter further testified that, while the identified accumulations were “not continuous” along the cited 2,100 feet of belt line, the accumulations were not so sporadic to justify breaking up the condition into multiple violations. Tr. 44. Order No. 8520664 states that “hard packed coal fines were in contact with moving rollers on the belt line in *multiple locations* along the belt entry.” Gov. Ex. 5 (emphasis added). When asked at the hearing to quantify “multiple locations,” Getter stated that there were “more than twenty” locations where hard packed coal fines were in contact with moving rollers. Tr. 70. However, Getter conceded that neither the order, nor his contemporaneous inspector notes, provide details regarding the depth and extensiveness of the cited accumulations, or their proximity to rollers. *See* Tr. 70; Gov Ex. 3. Consequently, Getter cannot rely on any past recollection recorded to refresh his memory with respect to the depth and extent of the accumulations he observed three years earlier.

Getter believed that the cited accumulations were properly designated as S&S given the extensiveness he reportedly observed. Tr. 54-56. As relevant ignition sources, Getter relied on the purported frictional heat caused by the contact of accumulations with turning rollers, without alleging that any of the rollers were defective. Tr. 55-56. Getter conceded, however, that he did not take any heat readings, or see any signs of heat, i.e. smoke, or observe any defective rollers, to support his belief that the accumulations were in proximity to an ignition source. Tr. 56. Moreover, Getter did not express a concern that the cited accumulations could “propagate” an explosion occurring elsewhere in the mine. Tr. 59-60. Getter asserted that the cited accumulations could not have occurred during the present shift, but rather opined that the accumulations had been present over nine shifts (three days), during which time at least five examiners should have examined the belt entry. Tr. 46-48.

As a result of his observations, Getter issued Order No. 8520664 for a violation of section 75.400, characterizing the cited accumulations as S&S in nature, because of their potential to cause a fire that will result in smoke inhalation and burn-related injuries to 35 miners working the 14 East entry, the Zero Gate entry, and the longwall, “because the air on the [cited] belt line is utilized to ventilate [these inby] sections.” Tr. 56-59. Getter attributed the cited accumulations to a “high” degree of negligence, given his belief that it existed for at least nine shifts. Tr. 60-61. Thus, Getter characterized the cited accumulations as attributable to an unwarrantable failure.

Oak Grove’s witnesses disputed the nature and extent of the accumulations characterized by Getter, arguing that the accumulations were minimal. Tr. 131, 144-45, 147, 168. For example, consistent with Getter’s testimony that the cited accumulations were “not continuous,” Oak Grove Safety Inspector Larry Taft, who accompanied Getter during his inspection, testified that

⁷ Order No. 8520664 also refers to nondescript float coal dust “on the roof, ribs, footwall, and belt structure.” The Secretary did not provide any testimony at the hearing regarding the nature and extent of accumulations on the roof, ribs, and footwall.

the accumulations along the Main North 3 belt were intermittent, characterizing the accumulations as barely notable relative to the visible rock dust. Taft testified:

Counsel: And Main North 3 belt that day, how would you describe the float coal dust?

Taft: Light gray.

Counsel. Okay. Was it continuous?

Taft: No, sir. You'd come to a crosscut that may be, like I said, might be light gray, you needed to sweep it. And then the next two or three crosscuts would be white, then a little light gray area, and a little darker gray area and then white again. It was not dark gray or heavy gray or black the entire length of the belt. No, sir.

Tr. 131. Although neither Getter's testimony, his citation, nor his contemporaneous notes quantified the depth of the cited accumulations, Taft further testified:

Judge: The areas that it was dark gray almost black, would you say it was three inches, six inches, less than three inches; how would you quantify [the amount of accumulations]?

Taft: Oh, probably 16th to an 8th inch. So less than three inches.

Judge: 16th to an 8th inch. So less than three inches?

Taft: Oh, gosh, yes.

Tr. 144-45; *see also* Tr. 173 (testimony of Oak Grove foreman Keith Miller that the accumulations present along the Main North 3 belt line were "about a quarter of an inch"). Given Getter's failure to quantify the extent of the cited accumulations, it is noteworthy that the Secretary did not make an effort at the hearing to rebut the testimony of Taft and Miller that the cited accumulations were significantly less than alleged by the Secretary.

Oak Grove's witnesses do, however, admit that there were accumulations in proximity to the mini-washer, a filtering device used to separate coal and rock from water being pumped through the mine to prevent coal and rock deposits from clogging the water lines. Tr. 134-36. At the mini-washer, located a few feet outby from the intersection of the Main North 3 belt and the Zero Gate belt, coal and rock are filtered from the water lines and dumped onto the Main North 3 belt. Tr. 131-32. Oak Grove's witnesses acknowledged that accumulations are common where the mini-washer dumps the coal and rock extracted from the water lines onto the belt, as they were a normal byproduct of mini-washer operations. Tr. 134, 140, 219-20. On this point, Taft conceded that the accumulations at the mini-washer were significant enough to result in contact with a single belt roller located near the mini-washer site. Tr. 135. Taft quantified these accumulations as approximately four to six inches in depth, amounting to "about six shovels

full.” Tr. 139. However, Oak Grove’s witnesses also asserted that accumulations at the mini-washer are extremely wet by nature. Tr. 135-36; 170-71. Taft described the the cited accumulations at the mini-washer as so saturated that water would run out of them when squeezed. Tr. 136.

Contrary to Getter’s testimony, Taft did not recall any locations where belt rollers were turning in accumulations of coal dust, other than at the mini-washer. Tr. 136. Taft believed that the “hard packed coal fines . . . in contact with moving rollers . . . in multiple locations,” described by Getter in the order, may have referred to clumps of caked mud that had stuck to the belt frame, rather than hard packed coal fines. Tr. 148-49.

Oak Grove foreman Keith Miller testified that abatement of Order No. 8520664 began immediately. Tr. 178. Miller testified that the wet accumulations near the mini-washer were shoveled and that the belt entry was bulk rock dusted to take advantage of the de-energized belt. Tr. 178. Order No. 8520664 was officially abated at 3:05 p.m. on October 3, 2012, about five hours after its issuance. Tr. 51; Gov. Ex. 5.

iii. Fact of the Violation

Section 75.400 requires that coal dust “shall be cleaned up and not be permitted to accumulate” where miners are usually required to work or travel. 30 C.F.R. § 75.400. Thus, consideration of whether a 75.400 violation has occurred requires an analysis of both the quantity and the duration of the cited conditions. Although Oak Grove disputes that there were sufficient coal fines in the belt entry to constitute a violation of section 75.400, Oak Grove concedes that the accumulations near the mini-washer were sufficient, alone, to support the cited violation. Resp. Br., at 9. With respect to the accumulations in the belt entry, although Getter neither documented, nor testified, regarding the depth or nature and extent of the cited accumulations, the Secretary will be afforded the benefit of the doubt that the accumulations along the belt line, although intermittent, were also sufficient to constitute a violation of section 75.400.

iv. S&S

Turning to whether the cited accumulations were properly characterized as S&S, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is [S&S] under *National Gypsum*, the Secretary of Labor must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; *see also Austin Powder Inc. v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

As a general proposition, the Secretary has the burden of proving each element of a citation or order by the preponderance of the evidence, based on direct evidence or adequate circumstantial evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989) (citations omitted). The Commission has noted that the burden of showing something by a preponderance of the evidence standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *Rag Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

Here, the Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited accumulations constituted a violation that posed a discrete safety hazard, i.e. a fire or explosion, that was capable of causing injury of a reasonably serious nature. However, as a general matter, accumulations prohibited by section 75.400 are not S&S *per se*. Rather, when reduced to its core, satisfying the remaining third element in *Mathies* requires the Secretary to bear the burden of demonstrating that it is reasonably likely that the hazard contributed to by the cited accumulations will result in a fire or explosion, causing serious, if not fatal, burn-related or smoke inhalation injuries. *See Bellefonte*, 20 FMSHRC at 1254-55.

With respect to evaluating the likelihood of a fire, the Commission has noted that, in order for ignitions or explosions to occur, there must be a confluence of requisite factors. *Texasgulf*, 10 FMSHRC 498, 501 (Apr. 1988). Namely, these factors are the presence of oxygen and fuel in proximity to ignition sources. With respect to the question of whether violative accumulations are properly characterized as S&S, as oxygen is ever-present, the focus shifts to the extent of the accumulations and whether the cited accumulations are in proximity to potential ignition sources. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997) (citing *Utah Power &*

Light Co., 2 FMSHRC 965, 970-71 (May 1990)); *Texasgulf*, 10 FMSHRC at 500-03. With regard to the necessity of the Secretary to identify potential ignition sources to justify an S&S designation, the Commission has stated:

It was within the province of the Judge to require evidence of a heat source close enough to sufficient quantities of dust as a prerequisite to concluding that there was a likelihood of a fire from the accumulations.

Twentymile Coal Co., 36 FMSHRC 1533, 1545 (June 2014).

Giving the Secretary the benefit of the doubt that the cited accumulations were not properly rock dusted and thus constituted a combustible fuel source, the Secretary has failed to adequately demonstrate that the cited accumulations were in proximity to any identifiable ignition source. As an initial matter, the cited accumulations were far removed from any potential acute ignition source at the face, such as sudden friction-related sparking. Getter's attempts to identify any local ignition sources in proximity to the cited accumulations were unpersuasive. Significantly, Getter failed to identify any potential beltline-related ignition sources, such as defective rollers or rubbing belts.

Rather, Getter relied on contact between dry accumulations and the resultant frictional heat from the moving parts of a properly-functioning beltline to support his S&S designation. Getter opined:

Judge: So your position is that any dry accumulations in the vicinity of a conveyor belt would constitute an S&S violation and a fire hazard.

Getter: Yes, sir. Yes, Your Honor.

Judge: Even if the belt is normally operating, if there are no defects in the belt; is that correct?

Getter: If it's operating, yes, Your Honor.

Judge: That is dry accumulations in the vicinity of the belt.

Getter: Yes, sir. In contact with the belt, Your Honor, or the moving parts of the belt.

Judge: So do I understand you to say that that's an ever-present fire hazard?

Getter: Yes, Your Honor.

Judge: If the belt is operating normally without any hiccups?

Getter: Yes, Your Honor.

Tr. 68-69; 108-09.

Getter's approach to the S&S analysis would impermissibly render the vast majority of section 75.400 violations *per se* S&S. It is noteworthy that in the two year period preceding the issuance of Order No. 8520664, Oak Grove was cited 34 times for violating section 75.400. Gov. Ex. 1. Of these violations, only eleven of the 34 were designated as S&S. *Id.* Consequently, the majority of the remaining violations were characterized as not reasonably likely to contribute to a serious injury.

In noting Getter's failure to identify the presence of ignition sources, I am cognizant that determining the likelihood of injury posed by the hazard, i.e. fire or explosion, caused by the violation must be viewed in the context of continued mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC at 1130. Thus, the probability of a future beltline defect is a proper consideration. However, even considering continued mining operations, the Secretary must demonstrate sufficient quantities of coal dust accumulations in contact with moving beltline parts to support an S&S finding.

Here, Getter quantified the accumulations as "extensive" and in contact with "more than twenty" turning belt rollers, and "dry hard packed coal fines [that] were allowed to accumulate on the roof, ribs, footwall, and belt structure." Gov. Ex. 5; Tr. 70. However, Getter was unable to articulate the extensiveness or depth of any of these accumulations that were allegedly touching rollers. It is noteworthy that Getter's contemporaneous inspection notes also do not quantify the extent of the cited accumulations. *See* Gov. Ex. 3. Moreover, Getter's testimony was devoid of any references to the float coal dust allegedly on the roof, ribs, and belt structure, cited in the order. As such, Getter's testimony, given the Secretary's burden of proof, can only be characterized as vague and unconvincing. Rather, I credit the testimony of Oak Grove witnesses Taft and Miller that the hard packed accumulations were no more than a quarter inch in depth, sporadic, and, at least, partially rock dusted.⁸

Furthermore, with respect to the cited accumulations at the mini-washer, Oak Grove conceded that the wet accumulations were in contact with a turning roller. Given the water-logged nature of these accumulations, their contact with a moving roller is not reasonably likely to result in a fire or explosion. Thus, the soupy accumulations at the mini-washer do not, alone, rise to the level of an S&S violation.

⁸ The lack of detail in Getter's testimony regarding the accumulations he cited in Order No. 8520664 is in stark contrast to the detailed description provided by Inspector Womack regarding the accumulations he cited in Order No. 4694424, discussed hereinafter.

With regard to the likelihood of a propagation hazard, the Commission has noted that “[i]t has long been recognized that a large expanse of float coal dust accumulations . . . can lead to the dust being put into suspension from normal mining operations.” *Twentymile*, 36 FMSHRC at 1543. As an initial matter, the subject order characterizes a substantial, if not a majority of the cited accumulations, as “dry hard packed coal fines . . . on the roof, ribs, footwall, and belt structure.” Gov. Ex. 5. Such hard packed accumulations are not readily capable of propagation. Moreover, Getter’s testimony, given its lack of specificity, failed to demonstrate that the cited accumulations constituted a large expanse of coal dust capable of propagation. Finally, even Getter was admittedly not concerned that the cited accumulations had the potential to propagate an explosion caused by an ignition elsewhere in the mine, such as at the various working faces. Tr. 59-60. Rather, Getter testified that his primary concern was a fire caused by the local ignition of the cited accumulations in the belt entry. Tr. 59-60.

In the final analysis, the Secretary has failed to meet his burden of proof to demonstrate that the cited accumulations in Order No. 8520664 were reasonably likely to result in a fire or contribute to an explosion. Consequently, **the S&S designation in Order No. 8520664 is deleted.**

v. *Unwarrantable Failure*

As a general proposition, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). An unwarrantable failure 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 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of an 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. *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 a miner operator’s conduct is aggravated or if mitigating circumstances exist. *Id.*

The Secretary contends that the cited accumulations conditions in Order No. 8520664 were attributable to a “high” degree of negligence sufficient enough to constitute an unwarrantable failure. In support of the unwarrantable failure designation, Inspector Getter submits that the reported extensiveness of the cited accumulations, as well as his belief that the accumulations existed for at least nine shifts, provide an adequate basis for an unwarrantable failure designation. Tr. 60-61.

However, the evidence does not support Getter's assertion that the cited accumulations were extensive. Rather, the evidence reflects that there were wet accumulations near the mini-washer and sporadic accumulations of less than a quarter of an inch along the cited 2,100 feet of belt line. The accumulations near the mini-washer did not pose a high degree of danger given their extremely wet consistency. Getter's claim that other accumulations were in contact with numerous rollers cannot be substantiated, given the lack of specificity of Getter's testimony regarding the depth and extensiveness of the accumulations.

Furthermore, as discussed below, the fact that the examination reports reflect that the Main North 3 belt line had been cleaned twice in the three days preceding the issuance of Order No. 8520664 undermines Getter's belief that the cited accumulations went unaddressed over a period of nine shifts. In sum, there is insufficient evidence of aggravating factors, such as length of time, extensiveness and obviousness, and degree of danger. While the history of section 75.400 violations is sufficient to have placed Oak Grove on notice that greater efforts were necessary in eliminating accumulation violations, given the non-S&S nature of the subject accumulations and Oak Grove's efforts at good faith abatement, the history of violations, alone, is inadequate to support an unwarrantable failure designation.

Consequently, the record, when viewed in its entirety, supports that the cited accumulations are attributable a "moderate" degree of negligence. Accordingly, **Order No. 8520664 shall be modified from a section 104(d)(2) order to a section 104(a) citation, to reflect that the cited accumulations were not attributable to an unwarrantable failure.**

vi. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the

demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that the *de novo* consideration of the appropriate civil penalties to be assessed does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

Oak Grove is a large mine operator and it has neither been contended nor shown that the proposed penalty for this violation is disproportionate to the size of the business or that it would impede its ability to remain in business. The cited accumulations were abated in a timely manner. While the Secretary now proposes a penalty of \$70,000.00—the maximum penalty for an unwarrantable non-flagrant violation—as discussed herein, the gravity of the subject violation and the degree of negligence attributable to Oak Grove is no more than moderate. However, the history of Oak Grove’s violations of section 75.400 is an aggravating factor.

Given the deletion of the S&S and unwarrantable failure designations, **a civil penalty of \$5,200.00 shall be imposed for Citation No. 8520664.**

c. Order No. 8520666 in Docket No. SE 2013-301 (Main North 3 Belt Examinations)

i. Findings of Fact

Inspector Getter believed that the cited accumulations in Citation No. 8520664 along the Main North 3 belt line should have been observed by five examiners over nine shifts prior to the issuance of the violation. Gov. Ex. 2; Tr. 60-61. After observing the accumulation conditions that gave rise to the issuance of Order No. 8520664, Getter returned to the surface of the Oak Grove Mine to inspect the mine’s pre-shift examination books for the operative nine preceding shifts from September 30 to October 3, 2012. Tr. 50-51. Getter testified that inspection of the books for that period confirmed his belief that accumulations in the Main North 3 belt had not been cleaned for nine shifts. Tr. 50-51.

After reviewing the pre-shift examination books, Getter issued 104(d)(2) Order No. 8520666, which alleges an inadequate pre-shift examination in violation of 30 C.F.R. § 75.360(a)(1).⁹ Order No. 8520666 provides:

The operator failed to make an adequate examination of the Main North 3 belt entry. Accumulations of float coal dust and hard packed coal was allowed to exist for an approximate distance of 2100 feet from the tail piece outby to Crosscut 27. This belt line is examined 3 times each day. 5 different examiners have traveled this belt line in the past 9 shifts. Due to the extensive amount of accumulations in the cited area it is obvious to the casual observer this condition has existed for an extended period of time. Due to 5 examiners traveling through the cited area and the extent of the accumulations this constitutes more than ordinary negligence and is a failure to comply with a mandatory health and safety standard. Standard 75.360(a)(1) was cited 1 time in two years at mine 0100851 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 2. Getter characterized the cited violation as S&S and attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$52,500.00 penalty for Order No. 8520666. Order No. 8520666 was timely abated on October 4, 2012. It is noteworthy that the Secretary did not proffer a copy of the relevant pre-shift examination notations in support of Order No. 8520666.

Oak Grove management personnel Taft and Miller both opined that the extent of the accumulations in the Main North 3 belt entry, as they existed during Getter’s October 3 inspection, could have been noted as remarks by pre-shift examiners, but they did not warrant notations as hazards. Tr. 142, 189-90, 208. Nevertheless, they testified that the mine’s pre-shift examination logs demonstrate that accumulations in the Main North 3 belt line had, in fact, been cleaned twice during the operative nine shifts from September 30 to October 3, 2012. Tr. 213-14.

ii. Fact of Violation

Section 75.360(a)(1) requires a certified person to conduct a pre-shift examination, for the purpose of identifying any hazardous conditions, in the three hours preceding the start of a shift in areas where persons are scheduled to work or travel. *See Cumberland Coal Res., LP*, 32

⁹ Section 75.360(a)(1) states:

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

FMSHRC 442, 446 (May 2010); *RAG Cumberland Res., LP*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork Mining Co.*, 19 FMSHRC at 14. In determining whether a violation of section 75.360(a)(1) has occurred, the proper inquiry is whether the subject pre-shift examination was adequately performed, as evidenced by appropriate notations and actions documented in the mine's examination book. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC at 647 (holding that although mandatory standards may not explicitly require adequate or effective measures by mine operators, such a requirement is implicit in the standard's underlying purpose), *aff'd* 171 Fed. Appx. 852 (D.C. Cir. 2005). It is noteworthy that the Secretary did not proffer the relevant examination book notations to support his assertion that inadequate pre-shift examinations had occurred.

Obviously, pre-shift and on-shift examinations must be adequate, rather than perfunctory. However, not every violation detected during an MSHA mine inspection gives rise to a companion violation of section 75.360(a)(1) simply because the cited violation was not noted in a pre-shift examination book. In resolving the adequacy of examinations, it is helpful to apply the Commission's reasonably prudent person test: namely, whether "a reasonably prudent person, familiar with the mining industry and the protective purposes of [section 75.360(a)(1)]" would have a reasonable basis to believe that the subject pre-shift examinations were sufficiently thorough. *See Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

Unlike the Secretary, Oak Grove proffered the relevant examination book notations. Turning to the relevant entries in the examination book, despite Getter's testimony and belief that there were no relevant notations, there is documentation of several efforts to clean accumulations in the Main North 3 belt entry during the shifts proceeding Getter's inspection. Specifically, the mine's examination books demonstrate that accumulations along the Main North 3 belt line were flagged as hazards during the September 30 evening shift, the October 1 day shift, and the October 2 evening shift. Resp. Ex. 1. These three identified accumulations hazards were noted in Oak Grove's examination book as cleaned during the shifts following their notation. *Id.*

As previously noted, the Secretary has the burden of proof with respect to the alleged pre-shift examination violation. Despite Getter's testimony to the contrary, the above entries demonstrate that accumulations in the Main North 3 belt entry were not ignored in the shifts preceding the issuance of Order No. 8520664.

Given the relevant examination notations, as well as Getter's inability to specifically describe the nature and extent of the cited accumulations claimed to be overlooked by examiners, the record evidence fails to demonstrate that the subject pre-shift examinations were perfunctory or otherwise inadequate. Consequently, **Order No. 8520666 shall be vacated.**

d. Citation No. 8520665 in Docket No. SE 2013-352 (Main North 3 Belt Maintenance)

i. Findings of Fact

An overcast is an enclosed airway structure that separates intake air from return air in the same entry, permitting intake and return air currents to pass by one another. As a general matter, overcasts in belt entries require belt lines to be elevated to pass over the overcast structure. During the course of Inspector Getter's October 3, 2012, inspection of the Main North 3 belt line, he observed evidence of the elevated portion of the belt line rubbing the roof as it passed over the overcast.

Although it was unclear whether the belt was rubbing the roof at the time of the inspection, Getter testified that the fact that the belt was rubbing the roof was evidenced by a "smooth finish" and a "sheen" on the metal roof channel straps, Decatur plates, and roof bolt heads, as if they were being polished by the belt. Tr. 77. Despite the rubbing, Getter did not observe any damage to the belt itself. Tr. 88; *see* Tr. 126. Getter explained that the contact between the belt line and the roof was intermittent. Specifically, Getter testified:

The belt was contacting the roof sporadically as it was loaded or unloaded, so to speak So whenever the belt was loaded, it was not contacting the roof. But after the whatever was loaded into the belt line went through and the belt was clear, it would physically raise up and contact the roof.

Tr. 72.

Below where the belt was rubbing, Getter testified that the word "drop" had been written on the belt structure, along with an arrow pointing upward to the area of contact between the belt and the roof. Tr. 87. While Getter could not determine when this notation had been written, he concluded that someone had detected the need for a belt adjustment, but failed to ensure that the adjustment was made. Tr. 87, 91.

As a result of his observations, Getter issued 104(a) Citation No. 8520665, which alleges a violation of 30 C.F.R. § 75.1725(a).¹⁰ Citation No. 8520665 states:

The operator failed to maintain the Main North 3 belt line in safe operating condition. Approximately 50 feet outby the first over cast outby the tail piece the elevated belt was contacting the roof, roof bolt heads, decatur plates and roof channels. The belt had been contacting the roof for an extended period of time. This was evident due to the roof being worn and the roof bolt heads, decatur plates, and roof channels being worn and having a polished appearance. Standard

¹⁰ 30 C.F.R. § 75.1725(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

75.1725(a) was cited 17 times in two years at mine 0100851 (17 to the operator, 0 to a contractor).

Gov. Ex. 4.

Getter testified that the rubbing belt, as well as the metal splices in the belt, created the potential for frictional heat and sparks when contacting the metal roof channel straps, Decatur plates, and roof bolt heads. Tr. 76-77. Getter opined that float coal dust on the floor, ribs, and belt structure could be ignited by the heat and potential sparks caused by this rubbing. Tr. 76-77. However, there was a significant separation between any frictional heat and sparks caused by the rubbing belt and the accumulations that concerned Getter. In this regard, the coal accumulations on the mine floor and any coal fines on the belt structure were located approximately 15 feet below, and two to three feet below, the area of rubbing, respectively.¹¹ Tr. 82-83. Although Getter conceded at hearing that the belt was made of flame resistant materials, and that there was no float coal dust located on the roof itself, Getter believed that the heat and sparks caused by contact between the belt and the roof could ignite the accumulations on the floor and belt structure. Tr. 76-78, 88, 90. In such an event, a fire or explosion could result, causing “permanently disabling” injuries to the 35 miners working at the 14 East entry, the Zero Gate entry, and the longwall. Tr. 88-90. Consequently, Getter designated Citation No. 8520665 as S&S in nature.

In view of the fact that the condition had not been corrected despite the “drop” notation at the site of the contact, Getter attributed the violative condition to “high” negligence. Tr. 87. Citation No. 8520665 was abated about five hours after its issuance, after the belt structure was lowered and a patch of non-abrasive fire retardant Teflon material was affixed to the roof. Gov. Ex. 4; Tr. 102. The Secretary has proposed a \$12,248.00 civil penalty for Citation No. 8520665.

Although Oak Grove Safety Director Taft, who accompanied Getter during the inspection, and foreman Miller testified that they did not observe the belt rubbing the roof at the time of the inspection, both Taft and Miller conceded that there was evidence of frictional contact between the belt and the roof. Tr. 127, 177. Despite its apparent relevance, Taft disputed the significance of the “drop” notation, asserting rather that notations, such as “lower,” were written elsewhere on the belt structure for various reasons. Tr. 129. With respect to the likelihood of ignition, Miller testified that he does not believe that methane accumulations in roof pockets presented a source of fuel for ignition. Tr. 176-77.

¹¹ It is noteworthy that I do not consider, nor has the Secretary argued, that the belt maintenance defect at issue in Citation No. 8520665 was a local ignition source for the purposes of the accumulations cited in Order No. 8520664. As discussed hereinafter, the hazard contributed to by this belt maintenance defect condition was not related to float coal dust accumulations, but rather methane pockets that may have accumulated near the roof.

ii. Fact of the Violation

Section 75.1725(a) requires that belt line systems must be maintained in safe operating condition. The Commission has held that the standard for determining whether machinery or equipment is in an unsafe operating condition is “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-30 (Dec. 1982). With respect to frictional heat, the Commission has held that a belt rubbing or cutting into the belt structure, along with combustible accumulations and possible ignition sources, constituted a hazard in violation of section 75.1725(a). *Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (Dec. 1993); *Jim Walter Resources*, 18 FMSHRC 804, 817 (May 1996); *Alabama By-Products*, 4 FMSHRC at 2130-31.

Consequently, it is well-settled that a source of ignition caused by frictional heat and sparking in the presence of oxygen and sources of fuel in an underground mine poses a significant hazard. Unlike at the mine face where there is also potential frictional heat and sparking, along belt lines there are no methane monitors to guard against pockets of methane that may accumulate in the irregularities of a mine roof. As such, a reasonably prudent person must conclude that a belt generating frictional heat and sparking at the mine roof, in proximity to potential pockets of methane, constitutes an impermissible unsafe operating condition. In view of the undisputed evidence of frictional contact between the belt and roof, the Secretary has demonstrated the fact of the violation of section 75.1725(a).

iii. S&S

The Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited unsafe condition posed a discrete safety hazard, i.e. a fire or explosion, that was capable of causing injury of a reasonably serious nature. The focus of the S&S analysis now shifts to the third element of *Mathies*, which requires the Secretary to demonstrate that it is reasonably likely that the hazard contributed to by the cited belt malfunction will result in a fire or explosion, causing serious or fatal burn-related or smoke inhalation injuries. *See Bellefonte*, 20 FMSHRC at 1254-55. Resolution of whether a violation of a mandatory standard is S&S in nature must be made assuming the cited condition remains unabated during the course of continued normal mining operations. *U.S. Steel Mining Co.*, 1 FMSHRC at 1130.

As an initial matter, I do not find the potential for frictional heat and sparking as a source of ignition reasonably likely to result in combustion of the cited coal fines and float coal dust accumulations that are located from two to 15 feet from the source of the friction. However, it is reasonably likely, given continued mining operations, that the subject frictional heat and sparking caused by the cited condition will ignite pockets of methane in the mine roof, resulting in reasonably serious fire or smoke-related injuries. Consequently, **the S&S designation in Citation No. 8520665 shall be affirmed.**

iv. Civil Penalty

As previously noted, the Secretary has proposed a \$12,248.00 civil penalty for Citation No. 8520665. It is not contended that this penalty is disproportionate to the size of the business, or that it would impede its ability to remain in business. While the cited condition was abated in a timely manner, the evidence supports the Secretary's contention that the condition was attributable to a "high" degree of negligence. The "high" negligence designation is justified by the location of the notation "drop" directly under the area where the belt was contacting the roof. This notation demonstrates that Oak Grove allowed the condition to exist despite its recognition of the ignition hazard. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

The dearth of mitigating factors does not warrant reducing the civil penalty proposed by the Secretary. Consequently, **a civil penalty of \$12,248.00 shall be imposed for Citation No. 8520665.**

e. Order No. 4694424 in Docket No. SE 2013-399 (Slope Belt Accumulations)

i. Findings of Fact

On September 25, 2012, while conducting a quarterly inspection of the Oak Grove Mine, MSHA Inspector Steve Womack inspected the mine's slope belt, while accompanied by MSHA supervisor Brandon Russell and Oak Grove company representative William Wilson. Tr. 260-61. The slope belt is the last belt carrying coal out of the Oak Grove Mine. Tr. 263. It is located in a sloped 16 foot diameter tunnel that connects the surface to the underground coal seam. Tr. 263. The slope belt is suspended above the tunnel floor, as high as five or six feet off the ground, by roof chains. Tr. 399. The slope belt runs from the head drive unit on the surface to the tailpiece at the tunnel's deepest point, 3,500 feet below. Tr. 263. The tunnel is angled at approximately 12-16 degrees. Tr. 263. At the 3,500 foot mark there is an exit crossover that allows miners on the slope to cross over into an adjacent entry. Tr. 368-69.

At the base of the slope belt is the dump bunker, a pit that collects all of the coal arriving on belts throughout the mine. Tr. 357-58. The miner assigned to work at the dump bunker controls vibrating feeders at the bottom of the pit that periodically releases quantities of coal into a chute that ultimately deposits the coal onto the slope belt to be carried to the mine surface. Tr. 356-58. Personnel at the dump bunker can speed up or slow down the dumping process to regulate the amount of coal being deposited onto the slope belt. Tr. 357-58. The slope belt is the exclusive method of moving coal to the surface of the Oak Grove Mine. Tr. 263.

Womack, Russell, and Wilson began their inspection at the surface, descending down the slope tunnel on a walkway that runs along the right side of the slope belt when traveling in an inby direction. Tr. 264, 267. Womack testified that the first 200 feet of the belt line were unremarkable. Tr. 269. Beginning at the 200 foot mark, however, Womack testified to periodic

“deep” and “massive spillage” on the tunnel floor, and seven inches of “dried” and “anthill-type” accumulations on the metal belt structure. Tr. 270-73. Along this stretch, Womack observed “a couple feet of accumulation” on the tunnel floor beneath the belt. Tr. 272-73. These accumulations were spilling out from under the belt, causing accumulations of approximately nine inches of coal deposits alongside the adjacent walkway. Tr. 272-73.

Wilson disputes Womack’s reported observation of accumulations of “a couple feet” located beneath the belt beginning at the 200 foot mark. Although Womack believed the accumulations were significant, Wilson characterized the accumulations beginning at the 200 foot mark as “small accumulations.” Tr. 359. Wilson quantified these accumulations as varying from eight to 24 inches deep. Resp. Ex. 5. Wilson characterized the accumulations as “[not] continuous” and “staggered.” Tr. 385. Having disputed the depth of these accumulations reportedly observed by Womack, Wilson testified that none of these accumulations were in contact with turning rollers. Tr. 360-61.

Sensitive to Womack’s concerns about the accumulations beginning at the 200 foot mark, Wilson used his radio to call for men to be assigned to the slope belt to start the cleanup process. Tr. 351, 377. Typically, the slope belt is initially cleaned by removing any accumulations in proximity to the dump bunker. Tr. 354. After accumulations are removed from the dump bunker, the accumulations along and under the slope belt are removed by washing the slope belt tunnel with a powerful water hose located at the surface. Tr. 355. Accumulations that are washed from the surface down to the 3,500 foot mark accumulate in a wash hole where they are collected to be re-deposited onto the belt. Tr. 367-68.

As Womack, Russell, and Wilson descended the slope tunnel, at the 2,340 foot mark, Womack reportedly observed that the bottom belt was running in the accumulations and a bottom roller was turning in the coal fines. Tr. 290. At this location, there were two bottom rollers missing, causing the belt to sag and run in the accumulations below. Gov. Ex. 6; Tr. 290.

Wilson’s testimony supports Womack’s contention that there were excessive accumulations around the 2,340 foot mark. However, Wilson opined that these accumulations were caused by a broken belt line support chain, which caused the belt line to sag. Tr. 359-60. Wilson asserts that it is possible that these accumulations built up instantaneously when the chain broke. Tr. 363. Wilson testified that he did not believe that Womack observed the broken chain during the course of the inspection, although it is difficult to comprehend how Wilson knew what Womack did or did not see. Tr. 380-81. Nevertheless, it is significant that on cross-examination Oak Grove did not seek an acknowledgment from Womack as to whether the belt line support chain was, in fact, broken.

Wilson also testified that at the 2,340 foot mark there was a pipe lodged beneath the belt line, causing otherwise normal spillage to accumulate more quickly. Tr. 360-61. Wilson conceded that, here, one roller was turning in accumulations. Tr. 359; Resp. Ex. 5. While it is unclear when use of powerful hoses at the surface to clean the slope belt began, Wilson opined that the accumulations at the 2,340 foot mark were likely exacerbated by the washing process that he called for earlier in the inspection. Tr. 363. However, Wilson’s opinion is belied by his testimony that he saw no evidence of coal and water running down the slope until he was at the

2,600 foot mark. Tr. 366, 379. Thus, the evidence reflects that the accumulations at the 2,340 foot mark were not the result of, or exacerbated by, the cleaning process. Wilson opined that the accumulations at the site of the alleged broken belt line support chain were quite extensive, estimating that they totaled approximately 20 tons. Tr. 370.

Inby from the 3,200 foot mark to the 3,500 foot mark, Womack also observed accumulations as much as 24 inches in depth, and “up to 47 inches” near the tailpiece. Gov. Ex. 6. Womack estimated that the extent of the cited accumulations along the entire slope belt line totaled approximately 4,200 tons. Tr. 280.

From the 3,200 foot mark to the 3,500 foot mark, Wilson acknowledged that “7 inches to 12 inches, even perhaps some places [as much as] 24 inches,” of accumulations were present. Tr. 398-99. Wilson, however, asserts that the accumulations near the tailpiece were clearly the result of the washing process that was initiated during the inspection. Tr. 371-72.

Furthermore, from the buildup at the 2,340 foot mark to the 3,400 foot mark, Wilson testified that he observed no accumulations in contact with rollers. Tr. 367. Thus, although the accumulations under the belt may have been as deep as 47 inches in places along the entirety of the belt line, both Womack and Wilson agree that, with the exception of the extensive accumulations at the 2,340 foot mark, there were no other accumulations touching rollers. Obviously, accumulations of 24 inches would ordinarily contact rollers. However, here, the cited accumulations were separated from the slope belt, which was suspended as high as five or six feet off the ground by roof chains. Tr. 399.

As a result of his observations, Womack issued 104(d)(2) Order No. 4694424. Order No. 4694424 alleges a violation of 30 C.F.R. § 75.400. Order No. 4694424 states:

From the 200 ft. marker of the Slope Belt continuing to the 3000 ft. marker, and again from 3200 to the 3500 ft. marker, run of mine spillage has been allowed to accumulate beneath the bottom belt from the walkway to the offside rib. The depth ranges up to 24 inches and near the tailpiece up to 47 inches. The spillage is dry to damp with sporadic areas which are wet. Dried coal spillage averaging 7 inches in height is present on nearly all top idlers metal framework. From 2340 to 2440 the bottom belt is running in the spillage and a bottom roller is turning in the coal fines. 2 bottom rollers are missing at this location. This is an unwarrantable failure to comply with a mandatory health & safety standard constituting more than ordinary negligence.

Gov. Ex. 6. Womack designated the cited conditions as S&S, asserting that they could “reasonably likely” result in a “lost workdays or restricted duty” injury to four miners. Womack attributed the conditions to a “high” degree of negligence and an unwarrantable failure to comply with section 75.400 of the Secretary’s mandatory standards. The Secretary has proposed a \$32,800.00 civil penalty in satisfaction of Order No. 4694424.

Order No. 4694424, which was issued on September 24, 2012, was abated at 4:00 a.m. on September 27 after Oak Grove contacted MSHA to advise that it had finished cleaning the slope belt. Tr. 296. Womack opined that Oak Grove was working on cleaning these accumulations during the entire two day abatement period, as the order shutting down the slope belt effectively shut down the entire Oak Grove Mine. As Womack explained, “[t]he slope belt shuts down, nothing moves. You can’t mine coal on any of the sections because you have no way of transporting it.” Tr. 296-97. The abatement states:

The combustible accumulations of loose coal have been removed from the slope belt. The loose coal has been washed to the sump at the bottom of the slope, loaded on the belt, and removed from the mine.

Gov. Ex. 6.

With respect to the S&S designation, Womack testified that the roller turning in accumulations, as well as the belt dragging in accumulations, caused frictional heat that created a potential ignition source for accumulations of coal fines and float coal dust. Tr. 282-85. The potential for smoke caused by smoldering or ignited coal in the slope tunnel is of particular concern because there are only two avenues of escape for personnel in proximity to the slope belt—traveling the slope tunnel to the surface or using a crossover located at the 3,500 foot mark. Tr. 285-86. In addition, the accumulations presented tripping hazards inherent in using the steep slope walkway as an escapeway. Tr. 285-86.

Womack asserted that the subject smoke inhalation and tripping hazards will result in at least “lost workdays or restricted duty” injuries when viewed in the context of continued mining operations. Tr. 289. Womack further asserted that the cited hazard would “reasonably likely” affect four miners—the four miners he encountered working the slope during his inspection. Tr. 293. Although Womack was concerned that the cited accumulations constituted a fire hazard, Womack believed that the accumulations along the slope belt did not present a propagation hazard as they are “a couple of miles” from any working faces. Tr. 300-01.

Womack attributed the cited conditions to a “high” degree of negligence evidencing an unwarrantable failure. Womack’s findings predominantly are based on the extensiveness of the accumulations and the protracted length of time the coal dust and coal fines were permitted to accumulate. Tr. 294-95. Womack believed that the cited accumulations existed for a considerable period of time, estimating that the dried anthill-type coal fines that accumulated on the belt structure existed for three days. Tr. 294. Womack testified that this type of coal fine accumulation can only occur over a period of time. Tr. 323-24. During that time, Womack believes that between 9 and 12 examinations had taken place. Tr. 325. Womack elaborated:

The examiner[s] no way could not have seen the extensive amount of material. Even absent what was under the belt, the dried material on top, I mean, on every roller. You just don’t miss that. It’s just even an untrained miner is going to, you

know, going to question that. You know, how long it had been there, management, I mean, certainly they—they have to have knowledge of this. . . .

Tr. 295.

ii. Fact of the Violation

As previously noted, section 75.400 requires that coal dust “shall be cleaned up and not be permitted to accumulate” where miners are usually required to work or travel. Thus, consideration of whether a 75.400 violation has occurred requires an analysis of both the quantity and the duration of the cited conditions. As a threshold matter, it is noteworthy that Oak Grove does not contest the fact of the violation in Order No. 4694424 in its post hearing brief. Order No. 4694424 addresses two types of accumulations: the extensive accumulations at the 2,340 foot mark that were in contact with the suspended belt line and its turning roller, characterized by Oak Grove witness Wilson as totaling as much as 20 tons of coal material; and extensive coal dust and coal fine accumulations on or under the slope belt throughout a significant portion of the 3,500 foot tunnel floor, which were not in contact with moving belt components.

I am mindful that the use of a high-pressure hose to clean the slope entry from the surface, which began during Womack’s inspection, may have concentrated greater accumulations at the lower portions of the slope belt and at the tailpiece. However, notwithstanding Oak Grove’s apparent admission of the fact of the violation, it cannot be reasonably argued that the cited accumulations, either the 20 tons of accumulations at the 2,340 foot mark alone, or along the entire belt slope in amounts totaling 4,200 tons, do not constitute impermissible accumulations of combustible material in violation of section 75.400.

iii. S&S

In evaluating the propriety of an S&S designation, the Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited accumulations constituted a violation that posed a discrete safety hazard, i.e. a fire and resultant smoke, that was capable of causing injury of a reasonably serious nature. In this regard, I credit the Secretary’s assertion that smoke presents a significant hazard when present in the slope tunnel, as miners working in the vicinity of the slope may rely on the slope belt tunnel as a means of escape to the surface.

Thus, the S&S analysis shifts to the third dispositive element of *Mathies* that requires consideration of whether it is reasonably likely that the hazard contributed to by the cited accumulations will result in a fire or explosion, causing serious or fatal burn-related or smoke inhalation injuries. *Bellefonte*, 20 FMSHRC at 1254-55. The likelihood of such injury must be viewed in the context of continued exposure to the hazard posed by the violation assuming the violation continued unabated in the face of normal mining operations. *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991); *Halfway, Inc.*, 8 FMSHRC at 12; *U.S. Steel Mining Co.*, 1 FMSHRC at 1130.

While it is true that a substantial portion of the cited accumulations were located on the tunnel floor, far removed from any source of frictional heat caused by the suspended turning belt or its rollers, the uncontroverted evidence reflects that the accumulations at the 2,340 foot mark were in contact with the moving suspended conveyor belt and a turning roller. It is clear that it is reasonably likely that combustible coal accumulations in contact with the potential frictional heat caused by this condition, if left unabated, will contribute to a fire that will result in injuries of a reasonably serious nature. Consequently, **the Secretary has demonstrated, by a preponderance of the evidence, that the cited accumulations were properly designated as S&S.**

iv. Unwarrantable Failure

The cited accumulations in Order No. 4694424 were attributed to a “high” degree of negligence that evidences an unwarrantable failure to comply with section 75.400. As previously noted, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC at 2001. The Commission has identified the indicia of an unwarrantable failure: 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 IO Coal Co.*, 31 FMSHRC at 1350-51.

The evidence reflects that the accumulations at the 2,340 foot mark, which were several feet in depth and encompassing the suspended belt and a turning roller, were extensive, obvious, and hazardous given the accumulation’s proximity to potential frictional heat. To counter its apparent failure to address these extensive accumulations, Oak Grove relies on its assertion that the significant accumulations at the 2,340 foot mark in the slope tunnel occurred immediately prior to Inspector Womack’s inspection, as a consequence of a recently-broken belt support chain and a pipe that had become lodged below the belt. Although Womack did not testify that he observed either the alleged broken chain or lodged pipe, Oak Grove shall be given the benefit of the doubt that the chain was in fact broken, and that the pipe was indeed lodged below the belt line.

Not surprisingly, however, this is not the first time where I have encountered a mine operator’s claim that the subject violation occurred only moments before the inspector arrived at the working place. Of course, such unsubstantiated, self-serving claims should be given little weight. In fact, the defects relied upon by Oak Grove as justification for the accumulations at the 2,340 foot mark are implicating, rather than exonerating, factors. The Commission has long recognized that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.” *McCoy Elkhorn Coal Corp.* 36 FMSHRC 1987, 1999 (Aug. 2014) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Here, the inference sought by Oak Grove—namely, that the extensive accumulations were caused by a broken chain and lodged pipe that occurred immediately prior to Womack’s arrival at the slope tunnel — is speculative and self-serving, and cannot be drawn from any indirect evidence. Rather, the reasonable inference is that the cited conditions at the 2,340 foot mark existed for a significant

period of time during which coal accumulated in the slope tunnel despite the slope belt being manned by Oak Grove personnel.

With respect to the totality of the accumulations cited in Order No. 4694424, the extensiveness of the accumulations provides the inescapable conclusion that they were allowed to accumulate over a significant period of time. In this regard, Wilson conceded that the accumulations removed from the 2,340 foot mark totaled approximately 20 tons. Additionally, Womack testified that a total of 4,200 tons of materials had accumulated along the length of the 3,500 feet of slope belt tunnel.

The extensiveness of the total cited accumulations is further evidenced by the fact that it took Oak Grove two days to abate the order. In this regard, the two-day abatement is significant in that shutting down the slope belt meant halting production across the entire Oak Grove Mine. Thus, the record amply supports that the accumulations existed for a significant period of time and that they were obvious due to their extensive nature.

Oak Grove was also on notice that greater efforts were necessary for controlling coal accumulations at its Oak Grove Mine facility. In this regard, MSHA's records reflect that Oak Grove was cited 34 times for violating section 75.400 during the two years preceding the issuance of Order No. 4694424. Gov. Ex. 1. Finally, as discussed above, the cited accumulations were hazardous in that they could contribute to serious burn or smoke inhalation-related injuries to personnel working in proximity to the slope belt.

In sum, the Secretary has demonstrated that the subject accumulations were extensive, obvious, hazardous in nature, and existed for a significant period of time. Thus, **the Secretary has demonstrated the necessary criteria to support the alleged high degree of negligence necessary for the unwarrantable failure designation in Order No. 4694424.**

v. Civil Penalty

The Secretary has proposed a penalty of \$32,800.00 for Order No. 4694424. As previously noted, it has not been contended that the Secretary's proposed penalty will adversely affect Oak Grove's ability to remain in business. The subject accumulations are attributable to a high degree of negligence. The hazard contributed to by the violation is serious in gravity. Finally, Oak Grove's history of section 75.400 is an aggravating, rather than mitigating, factor.

Consequently, a civil penalty of \$32,800.00, as proposed by the Secretary, shall be imposed for the cited coal accumulations in Order No. 4694424.

f. Order No. 4694426 in Docket No. SE 2013-399 (Slope Belt Examination)

i. Findings of Fact

After observing the conditions cited in Order No. 4694424, Inspector Womack returned to the surface to inspect Oak Grove's examination books. The relevant examination records, which were proffered by Oak Grove rather than the Secretary, reflect that notations of

accumulations along the slope belt were made during the three shifts preceding Womack's inspection. For example, the pre-shift examination for the September 24, 2012, evening shift includes a "remark" that the slope belt should be cleaned from the 2,360 foot mark to the wash hole. Resp. Ex. 6. Additionally, the pre-shift examination for the September 25, owl shift, the shift immediately preceding Womack's inspection, notes two accumulation hazards along the slope: namely, from the 100 foot mark to the 400 foot mark; and from the 2,280 foot mark to the 2,520 foot mark. Resp. Ex. 6. The former notation was acknowledged by Womack in Order No. 4694426. However, Womack testified that he "missed" the latter notation when inspecting the examination book. Tr. 328.

As a result of his review of the examination book, Womack issued 104(d)(1) Order No. 4694426, alleging a violation of 30 C.F.R. § 75.363(b).¹² Order No. 4694426 provides:

Adequate examinations are not being conducted and recorded on the Slope Belt at this mine. Inspections of the Slope Belt revealed missing & defective rollers, plus coal spillage from 200 ft to the tailpiece, approx 3300 ft up to 47 inches in depth and dried accumulations of coal fines on belt structure averaging 7 inches in height throughout the 3300 feet of area. Pre-shift record for 09/24/2012 and owl shift and evening shift do not list these hazards. Day shift on 09/25/2012 only lists spillage from 100 ft to 400 ft mark. These conditions are obvious to even the most casual observer. This is an unwarrantable failure to comply with a mandatory health and safety standard, constituting more than ordinary negligence.

Gov. Ex. 7 (emphasis added). Womack characterized the cited violation as S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a \$15,900.00 penalty for Order No. 4694426. Order No. 4694426 was timely abated on September 25, 2012.

ii. Fact of the Violation

As a threshold matter, there is a substantive distinction between the cited mandatory section in 75.363(b), which requires that examination books shall be maintained for the purpose of recording hazardous conditions found by mine examiners, and the mandatory standard requiring adequate pre-shift examinations in section 75.360(a)(1). *See supra*, n.9. It is irrefutable

¹² 30 C.F.R. § 75.363(b) states:

A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include the nature and location of the hazardous condition or violation and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found.

that Oak Grove maintained a pre-shift examination record book, given the examination book entries noted above. Consequently, at the hearing, I expressed my concern that the Secretary was alleging a violation of section 75.363(b) that requires that pre-shift examination records be kept, rather than section 75.360(a)(1) that requires that pre-shift examinations be adequately performed. Specifically:

- Judge: Why did you issue this 75.363(b) versus 75.360(a)[(1)]?
- Womack: Well, [363(b)] is the record of that examination. I feel very strongly that, you know, a mine examiner is the first—it's the utmost defense that the miners have before they go into the mine. That examiner looks at an area where people are going to work and travel. If he doesn't do his job, then you've got miners that are going into this area unaware. So if he failed to put that record down and notify the people that we have a problem here, then he's—he's not only failed at his job, he's putting people in a hazardous situation.
- Judge: No, I understand, but I don't know that it makes any difference, but wouldn't it have been more appropriate based on this citation for you to believe that he—that you could have cited an inadequate pre-shift?
- Womack: Yes, I think I could have.
- Judge: Is there a substantive distinction between this, the failure to record under section 75.363(b), versus an inadequate pre-shift examination under 75.360(a)(1)?
- Womack: No, sir. I—
- Judge: Basically the same thing?
- Womack: I could have went actually either way.
- Judge: They're basically the same thing; there's no reason why you chose one over the other, is what I'm saying.
- Womack: No, sir, not other than, you know, just this 363(b) mentions the records.
- Judge: Okay.

Womack: To me, the record is the important thing here. Getting those hazards listed in the record so that action can be taken.

Tr. 302-03.

Womack asserts, in essence, that the mandatory standards in sections 75.360(a)(1) and 75.363(b) are duplicative and indistinguishable. However, these mandatory standards are not duplicative in that they impose distinctly different duties on mine operators. *Sumpter v. Sec’y of Labor*, 763 F.3d 1292, 1301 (11th Cir. 2014) (holding that “citations and orders are not duplicative as long as the standards impose separate and distinct duties”). Contrary to Womack’s opinion, which addresses a question of law, these mandatory standards impose different obligations—to maintain an examination record book, and to perform adequate examinations, as evidenced by notations in the examination record book. In this regard, the failure to effectively note a hazardous condition in an existing pre-shift examination book after an examination occurs is a reflection on the adequacy of the examination, not whether the examination record book is, in fact, being maintained.

Despite my expression of concern that section 75.360(a)(1), rather than section 75.363(b), is the appropriate mandatory standard in question, to date, the Secretary has not, at trial or in his post-hearing brief, sought to modify or otherwise argue in the alternative that a violation of section 75.360(a)(1) is in issue. Make no mistake, I would have unhesitatingly granted the Secretary’s motion to amend Order No. 4694426 to include an alleged violation of section 75.360(a)(1), as undoubtedly Oak Grove would not have been prejudiced thereby. However, it is not the role of a Commission judge to be an eraser on the Secretary’s pencil. Consequently, **having failed to assert a violation of the relevant mandatory standard in section 75.360(a)(1), Order No. 4694426 must be vacated.**

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 8520665 and Order No. 4694424 **ARE AFFIRMED**. Accordingly, **IT IS ORDERED** that Oak Grove Resources, LLC shall pay a penalty of \$12,248.00 in satisfaction of Citation No. 8520665 and \$32,800.00 in satisfaction of Order No. 4694424.

IT IS FURTHER ORDERED that Order No. 8520664 **IS MODIFIED** from a section 104(d)(2) order to a section 104(a) citation, thus deleting the unwarrantable failure designation. **IT IS FURTHER ORDERED** that the 104(a) Citation No. 8520664 **IS MODIFIED** from an S&S to a non-S&S citation. Accordingly, **IT IS ORDERED** that Oak Grove Resources, LLC shall pay a civil penalty of \$5,200.00 in satisfaction of Citation No. 8520664.

IT IS FURTHER ORDERED that Order Nos. 8520666 and 4694426 **ARE VACATED**.

IT IS FURTHER ORDERED that consistent with the parties’ settlement terms, Oak Grove Resources, LLC **SHALL PAY** a total civil penalty of \$54,188.00 in satisfaction of Citation Nos. 8524989, 8524999, 8524490, 8524979, 8524982, 8524987, 8524991, 8524993,

8524994, 8524995, 8524996, 7684600, 8524499, 8524500, 8526401, 8524983 and 8524491 in Docket No. SE 2013-352, and Order Nos. 8524255 and 8524258 in Docket No. SE 2013-301.

In view of the above, **IT IS ORDERED** that Oak Grove Resources, LLC pay, within 40 days of the date of this Decision, **a total civil penalty of \$104,436.00**, consisting of a total civil penalty of \$50,248.00 for the five citations and orders adjudicated in this proceeding, in addition to \$54,188.00 for the 19 settled citations and orders.¹³

IT IS FURTHER ORDERED that upon timely receipt of the total \$104,436.00 payment, the civil penalty proceedings in Docket Nos. SE 2013-301, SE 2013-352, SE 2013-368, and SE 2013-399 **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/acp

¹³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 3, 2016

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

v.

OIL DRI PRODUCTION COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-0507 M
A.C. No. 22-00035-325870

Docket No. SE 2013-0558 M
A.C. No. 22-00035-328667

Docket No. SE 2014-0104 M
A.C. No. 22-00035-337763

Mine: Ripley Mine and Mill

DECISION AND ORDER

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

Douglas Graham, Esq., Oil-Dri Corporation of America, Chicago, IL, for
the Respondent.

Before: Judge L. Zane Gill

This proceeding, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involves five section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oil Dri Production Company at its Ripley Mine and Mill. The Secretary and the Respondent settled seven citations prior to trial: 8731992, 8731994, 8731995, 8731999, 8730316, 8730317, and 8730318. The parties presented testimony regarding the remaining five citations in Nashville, Tennessee. In summary, I find that:

- For Citation No. 8731981, the Secretary failed to prove by a preponderance of the evidence that the accumulated waste material created a fire hazard. I vacate the citation;
- For Citation No. 8731989, Oil Dri violated Section 56.20003(a), there was moderate negligence, and I assess a penalty of \$100.00;
- For, Citation No. 8731997, Oil Dri violated Section 56.14201(b), there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of \$4,300.00;

- For Citation No. 8731998, Oil Dri violated Section 56.17001, there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of \$4,800.00;
- For Citation No. 8636886, Oil Dri violated Section 56.14132(b)(1), there was high negligence, the significant and substantial designation was warranted, and I assess a penalty of \$6,000.00.

Basic Legal Principles

Significant and Substantial

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

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

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

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

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.*, the Commission provided additional guidance: “[T]he third element of the *Mathies* formula ‘requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.’” 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834,

1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).¹

Negligence

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

recognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). “Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly ‘mitigating’ circumstances. Instead, the Judge may consider the totality of the circumstances holistically.” *Brody Mining, LLC*, 37 FMSHRC at 1702.

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

¹ It must be noted that the Fourth and the Seventh 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 Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). This Respondent, however, is not located in either of those Circuits, and thus, my analysis uses the traditional *Mathies* test.

Commission.”), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary’s part 100 regulations are not binding on the Commission, the Secretary’s definitions of negligence in those provisions are illustrative.

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

Gravity

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

Penalty

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

Under section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties ... we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”); *see American Coal Co.*, 35 FMSHRC 1774, 1819 (June 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). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Stipulations

1. Oil Dri was at all times relevant to these proceedings engaged in mining activities at the Ripley Mine and Mill in or near Ripley, Mississippi;
2. Oil Dri's mining operations affect interstate commerce;
3. Oil Dri is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.;
4. Oil Dri is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Ripley Mine and Mill (Federal Mine I.D. No. 22-00035) where the contested citations in these proceedings were issued;
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act;
6. On or about May 20, 2013 through May 28, 2013, MSHA Supervisor Inspector Billy Randolph was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citations from dockets SE 2013-507-M, 2013-558-M, and 2014-104-M at issue in these proceedings;
7. The citations at issue in these proceedings were properly served upon Oil Dri as required by the Act, and were properly contested by Oil Dri;
8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties;
9. Oil Dri demonstrated good faith in abating the violations;
10. Without Oil Dri admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of Oil Dri to continue in business.

Joint Prehearing Report, pg. 1-2.

Citation No. 8731981

Inspector Randolph² issued Citation No. 8731981, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine May 20, 2013, alleging a violation of 30 C.F.R. § 56.4104(a). (Ex. S-3) Section 56.4104(a), a mandatory safety standard, states that “[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard.” 30 C.F.R. § 56.4104(a). The citation alleges:

Oil and other combustible material had accumulated around the new Ag hot kiln. 55 gallon drums and gallon buckets of lubricant were stored on the working platform. Miner[s] are exposed to this hazard daily during routine maintenance. Injuries to miners would result in smoke inhalation, burns, and other disabling injuries.

(Ex. S-3)

The citation alleged that an injury was unlikely but could be reasonably expected to be permanently disabling, one person could be affected, and the violation was a result of moderate negligence. *Id.* The Secretary argued that the accumulation of waste materials (excess oil from a kiln stored in open buckets) could create a fire hazard if exposed to heat because of its inherent combustibility. (Sec’y Br. at 6) The Respondent argued that there was no risk of ignition because the oil’s flashpoint exceeded the temperature in the area. (Resp. Br. at 7) The Respondent also argued a lack of fair notice because MSHA inspectors had never cited Oil Dri for this or identified it as a violation in the past. (Resp. Br. at 8)

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”). Here, the Secretary must prove by a preponderance of evidence that waste material accumulated, and that the accumulation “create[d] a fire hazard.” 30 C.F.R. § 57.4104(a).

The regulation, however, is silent on the quantity of waste that is allowed to accumulate before a waste pile is considered to be a fire hazard. Therefore, the appropriate analysis is whether a “reasonably prudent person familiar with the mining industry and

² At the time of the hearing, Randolph had been working for MSHA for approximately 15 years, and had been a field office supervisor since 2005. (Tr. 21:5-22) He had approximately 40 years’ experience in the mining industry before coming to MSHA. (Tr. 24:15-16) A trainee, Bill Hyde, was present during the inspections, shadowed Randolph, wrote the field notes, and assisted in drafting the citations. However, at the time of the inspection he was not an authorized representative, and did not sign his name on the citations. None of this decision is based on Hyde’s field notes.

the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *Walker Stone Co. v. Secretary of Labor*, 170 F.3d 1080, 1083-1084 (10th Cir. 1998). This test is an “objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.” *Canon Coal Co.*, 9 FMSHRC at 668. In *Essroc Cement Corp.*, 33 [F]MSHRC 459 (Feb. 2011) (ALJ Manning), Administrative Law Judge Manning vacated a citation that alleged a violation of § 56.4104(a) and found that: “[T]he Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid [...] Without a realistic possibility of a fire hazard, there is no violation.” 33 FMSHRC at 465.

Hecla Ltd., 36 FMSHRC 2600, 2604 (Sept. 2014) (ALJ Gill) (footnotes omitted).

A trunnion is used to rotate the kiln at Oil Dri’s mine. High flashpoint oil is used to prevent steel-on-steel contact where the kiln drum contacts the trunnion. The oil must be changed frequently. (Tr. 238:25 – 239:17) The waste oil at issue here came from the trunnion’s oil-changes. *Id.*

There is no dispute that high flashpoint waste oil was stored in buckets on a walkway near the kiln.³ (Tr. 35:25 – 36:6; Tr. 40:18-23; Tr. 41:13-21; Tr. 241:25 – 242:3; Tr. 275:5-11) The Secretary argued that if the oil got hot enough, it would ignite. (Tr. 41:25 – 42:2) However, Inspector Randolph could not remember what the oil was called or what the label on the buckets said. (Tr. 119:1-11) He believed that the trunnion oil was a mixture of two oils, one with a flashpoint of 250 degrees Fahrenheit, and the other 700 degrees. (Tr. 44:11-17) Randolph did not say where he got this information. Respondent’s witness, Steve Gibens,⁴ testified that Oil Dri uses 460 oil, which has a flashpoint of 338 degrees Fahrenheit. (Tr. 243:9 – 243:16; Ex. R-7) I credit Gibens’ testimony regarding the type of oil, its flashpoint, and its use.

³ There is a dispute whether there were rags in the area as well. However, the only testimony from Randolph about rags in the area were “yes” answers to two leading questions from Secretary’s counsel. Rags were not mentioned in the citation. There is no testimony about how many rags there were, where the rags were located, or whether they were saturated with oil. There is also no evidence in the record to show whether or how the rags could ignite. I therefore disregard all testimony about the presence of rags in the area. It must be noted, however, that even if I found that there were rags in the area, there was no ignition source, and therefore, no fire hazard.

⁴ At the time of the hearing, Gibens was the plant superintendent. (Tr. 236:9-13)

Despite the fact that Randolph testified that it was hot in the area where the oil was kept (Tr. 40:25 – 41:6), he did not measure the temperature. (Tr. 118:19-21) Gibens, however, testified that at the cap of the trunnion, where the oil is applied, the temperature is approximately 200 degrees Fahrenheit. (Tr. 245:2-4) Additionally, the temperature of the handrails and the catwalk in the area was approximately 150 degrees Fahrenheit. (Tr. 245:5-6) These temperatures are not high enough to ignite the oil. Randolph also testified that there were no open flames in the area and no other ignition source. (Tr. 32:23 – 33:3; Tr. 42:9-12; Tr. 122:1-4) There was no realistic fire hazard here. The Secretary failed to prove by a preponderance of the evidence that the accumulated waste material created a fire hazard. The citation is vacated.

Citation No. 8731989

Randolph issued Citation No. 8731989, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 20, 2013, alleging a violation of 30 C.F.R. § 56.20003(a). (Ex. S-4) Section 56.20003(a), a mandatory safety standard, states that “[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.” 30 C.F.R. § 56.20003(a). The citation alleges that:

The work walk way adjacent to the RVBM dryer had spillage running over the toe boards extending down approximately 8 feet in length[,] and also on the tail end of the walkway [there] was spillage on the steps extending up [the] belt line another 8 foot [sic] approximately. A slip and fall hazard existed.

(Ex. S-4)

Violation

The citation alleged that an injury was unlikely, that an injury could reasonably be expected to be permanently disabling, one person could be affected, and the violation was a result of the Respondent’s moderate negligence. *Id.* The regulation has two elements: 1) the area cited must be a “workplace,” “passageway,” “storeroom,” or “service room”; and 2) the area shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The Respondent did not dispute that an accumulation existed, but it argued the area was not a “workplace” or a “passageway.” (Resp. Br. at 9)

“Workplace” and “passageway” are not defined in the Mine Act or in the Part 56 definitions section. The Commission “looks to the commonly understood definition of the term.” *Taft Prod. Co.*, 36 FMSHRC 522, 526 (Feb. 2014) (ALJ Gilbert) (citing *Nat’l Cement Co.*, 27 FMSHRC 721, 726 (Nov. 2005); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006); *Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (stating that “[i]n general, absent express definitions, statutory terms should be defined according to their commonly understood definitions.”)). However, the ordinary meaning of the words used in a statute cannot be applied to produce absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC at 987; *Nat’l Cement*, 27 FMSHRC at 728. In *Taft*, the ALJ defined workplace as “a place where work is done”; defined passageway as “a way that allows passage”; and defined passage as a “way of exit or entrance: a

road, path, channel, or course by which something passes.” *Taft Prod. Co.*, 36 FMSHRC at 526 (citing *Merriam Webster’s Online Dictionary*). When applied to the facts before me, these definitions do not produce absurd results.

Randolph believed the area in question was a travelway, or passageway, because there were handrails, toe boards, and a ladder going up to a platform. (Tr. 47:2-8) Additionally, miners worked in the area. Miners did various types of maintenance on the machinery in the area, e.g., changing out motors, equipment, belt sheathing, or simply greasing or servicing equipment. (Tr. 47:12-23) No one was working in the area at the time the citation was written, and there were no footprints in the spillage. (Tr. 128:15-22) The Respondent admitted that miners would access the area from time to time to clean or perform maintenance. (Tr. 251:18-22)

A reasonably prudent person familiar with the mining industry would recognize that the area in question was a workplace and a passageway. Accumulation of Oil Dri’s clay product in this area was thus prohibited under the standard. *See U.S. Silica Co.*, 32 FMSHRC 1699, 1706-08 (Nov. 2010) (ALJ Miller); *USS, a Div. of USX Corp.*, 13 FMSHRC 145, 153 (Jan. 1991) (ALJ Broderick); *Brubaker-Mann, Inc.*, 8 FMSHRC 1482, 1483 (Sept. 1986) (ALJ Morris). I conclude that Oil Dri violated Section 56.20003(a).

Gravity and Negligence

The spillage in question was approximately four inches deep and eight feet long. (Tr. 49:11 – 50:5) Randolph testified that a miner could not access the middle of the belt line without going through the spillage. (Tr. 131:12-14) Randolph envisioned slip, trip, and fall hazards, which could result in restricted duty injuries or worse. (Tr. 49:15 – 50:20) Randolph believed an injury was unlikely because miners were not in the area on a regular basis. Management would have to send a miner to the area for a specific reason. (Tr. 53:6-16) Randolph did not expect more than one person to fall at a time. (Tr. 51:14-20) I agree.

Randolph characterized the negligence as moderate because Oil Dri did not have a history of the committing violation, and it cleaned the area daily. (Tr. 52:9-14) A reasonably prudent person familiar with the mining industry would not have allowed clay spillage to accumulate as it did in this area. The violative condition should have been found during a workplace examination. I agree that this violation arose from moderate negligence.

Penalty

The operator does not have a history of violating this standard. The mine operates 128,832 mine hours per year. The operator was moderately negligent. An injury here could result in lost work days or restricted duty. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in abating the violation. For these reasons, I assess a penalty of \$100.00.

Citation No. 8731997

Randolph issued Citation No. 8731997, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 21, 2013, alleging a violation of 30 C.F.R. § 56.14201(b). (Ex. S-5) Section 56.14201(b), a mandatory safety standard, states: “[w]hen the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.” 30 C.F.R. § 56.14201(b). The citation alleges that:

Five open conveyors were noted as not having an audible or start up warning system installed. A system to alert person who could be exposed of [sic] the hazard of the equipment starting was not provided. Other exposed belt conveyors were also not provided with a warning system. Crushing fatal injuries are likely to result if normal mining operation continues to exist with this hazard.

(Ex. S-5)

Violation

The citation alleged that an injury was reasonably likely, could reasonably be expected to be fatal, the violation was significant and substantial, there was moderate negligence, and one person could be affected. (Ex. S-5) There is no dispute that the entire length of the conveyor was not visible from the start switch. (Tr. 58:8-13; Tr. 234:2-8) There were approximately five conveyors of different lengths located throughout the mine. (Tr. 58:18-24) The Respondent put on evidence that a manual start-up alarm⁵ was in place and all operators were trained to use it.⁶ (Sec’y Br. at 15; Resp. Br. at 10) Respondent argued that the citation should be vacated. (Resp. Br. at 10)

It was very noisy in the area where the conveyors were located. (Tr. 59:3-5) Inspector Randolph felt that a permanently installed start-up alarm of some sort was needed to warn miners working near conveyors to stand clear when the conveyors were about to start. (Tr. 61:15-23; Tr.139:19-23) During the inspection, Randolph asked the plant operator and the miners’ representative if there was a start-up alarm for the conveyor belts. Both admitted that there was none. (Tr. 55:23 – 56:18; Tr. 61:1-6; Tr. 136:14-20) Both also admitted that start-up alarm systems had existed in the past, but none was in place at the time of the inspection. (Tr. 136:14-20)

The day after the inspection, the Respondent claimed that a manual alarm system was, in fact, in place. (Tr. 64:14-20; Tr. 228:25 – 229:14; Tr. 256:8-11) The Respondent’s witnesses testified that miners were trained to activate the alarm before the conveyor belt was turned on.

⁵ This case did not deal with whether a visible warning device was in place.

⁶ There had been no training for a start-up alarm system since August 2011. (Ex. R-6)

But, the miners present during the inspection, including the plant operator, did not know an alarm system existed. (Tr. 228:18-21; Tr. 279:4-7)

Respondent's post-hearing argument focused on the language of the regulation. Respondent argued that all the regulation required was that a start-up alarm system, which could be a manual alarm, be *installed*. (Resp. Reply Br. 18-19) It is true that having a manual alarm installed can satisfy the standard. See *Tilcon Conn., Inc.*, 18 FMSHRC 90, 95-96 (Jan. 1996) (ALJ Hodgdon); MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Vol. IV, Part 56/57, at 54 (Feb. 2003: Release IV-21) (stating the standard "has been uniformly interpreted by MSHA, and its predecessor organizations, to include both automatic and manual conveyor alarm systems"). However, merely installing a manual alarm defeats the fundamental purpose of the Mine Act, which is to protect the health and safety of miners. To satisfy the standard, an alarm must be installed *and actually used before the conveyor starts*. Anything else "would thwart the underlying purpose of the standard and must be avoided." *RAG Cumberland Res.*, 26 FMSHRC 639, 648 (Aug. 2004) (citing *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)). Indeed, the purpose of the Part 56 regulations is "the protection of life, the promotion of health and safety, and the prevention of accidents." 30 C.F.R. § 56.1. The mere installation of a start-up alarm does not satisfy the purpose of the standard. I conclude that Oil Dri violated Section 56.14201(b).

Negligence

Randolph testified that there was an alarm mechanism for shut-down, but not for start-up. To him, this proved that the Respondent had to know that there was no start-up alarm. (Tr. 66:16-19) Randolph justified the moderate negligence determination because the violating condition had existed for years, which he felt constituted a form of mitigation based on "fair notice." (Tr. 67:21 – 68:2) It is unclear from the record what Randolph's reference to "fair notice" meant or how it related to mitigation. In general, fair notice is not considered a mitigating circumstance. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. Nonetheless, Oil Dri was not performing required workplace exams, which, if it had, would have alerted miners to the existence or lack of a start-up alarm. (Tr. 62:22 – 63:2; Tr. 64:5-13; Tr. 135:20-24)

I find that the mine had not used a start-up alarm system for years, had not been performing workplace examinations, and the miners, including the plant operator, did not know anything about a start-up alarm. It is clear that the Respondent failed to train its employees properly and failed to perform adequate workplace examinations. A reasonably prudent person familiar with the mining industry would have known of the need for and lack of a start-up alarm system, would have installed such a system, and would have trained miners to use the start-up alarm before starting the conveyor. I conclude that this violation arose from high negligence.

Gravity

Randolph believed this violation was reasonably likely to cause a fatal injury because he was aware of fatalities resulting from this type of violation in the past. (Tr. 62:4-12) He testified

to the danger inherent in a conveyor starting up when miners are not aware of it. (Tr. 62:4-12) Randolph believed that only one miner would be involved if the conveyor started without an alarm. (Tr. 65:17-21) I agree with the inspector's assessment.

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been satisfied. Respondent's failure to have and use a start-up alarm created a discrete safety hazard which could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

Randolph designated the gravity as reasonably likely to occur because there were multiple conveyors in the plant, and because the workspace next to the conveyors was confined. (Tr. 62:13-21) A miner could be seriously injured by a conveyor starting up without his knowing about it. (Tr. 73:16-20) It is reasonably likely that an unsuspecting miner working on a belt could get pulled into the conveyors.

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

Penalty

The operator does not have a history of violations for this standard. The mine operates 128,832 mine hours annually. The operator was highly negligent, and the violation was S&S. A fatal injury could have resulted. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in the abatement of the violative condition. I assess a penalty of \$4,300.00.

Citation No. 8731998

Randolph issued Citation No. 8731998, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 21, 2013, alleging a violation of 30 C.F.R. § 56.17001. (Ex. S-6) Section 56.17001, a mandatory safety standard, states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." 30 C.F.R. § 56.17001. The citation alleges that:

The truck warehouse loading dock employee is stated [sic] to average 4 to 6 trucks at night being loaded. The illumination where the trucks back up into the locking system was not adequate. The light directly above the loading surface perimeter would not come on. Also four other lights surrounding the dock area was [sic] not working. Miners climb down the dock and manually

chock the truck wheels at times. A hazard to one of these miners exist [sic] of being crushed by a truck due to poor illumination.

(Ex. S-6)

Violation

The citation alleged that an injury was reasonably likely, could reasonably be expected to be fatal, the violation was significant and substantial, there was a high degree of negligence, and one person could be affected. (Ex. S-6) The parties disputed whether there was sufficient illumination at the loading dock.

The Commission has found that the judge must make a factual determination based on the working conditions in the cited area and the nature of the illumination provided to determine whether there was “illumination sufficient to provide safe working conditions.” *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff’d*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision). Randolph admitted that MSHA’s standards do not speak of a minimum number of lights. It is up to the inspector to determine whether there was sufficient illumination. (Tr. 148:21 – 149:15)

Randolph testified that when he inspected the loading dock it was dark. Five out of the seven lights installed at the loading dock were not working. (Tr. 75:15-19; Tr. 78:20 – 79:1; Tr. 145:9-17; Ex. S-6) He asked workers at the dock if the lights could be turned on. The lights were burnt out, not turned off. (Tr. 79:4-11) Respondent admitted that at least one of the loading dock’s main lights was not functioning on the day of the inspection. (Tr. 255:25 – 266:15)

Randolph testified that when a truck backed into the loading dock, there was an area approximately 150 feet in back of it with no light at all. (Tr. 145:9-17) He did not think there was sufficient lighting at the loading dock, particularly in the area where the trucks maneuvered to back into the dock. He believed the lack of illumination violated the intent of the standard, which is to prevent a truck driver from running over a miner while backing up. (Tr. 156:20-23)

Respondent argued that the lights in the loading dock area were sufficient to illuminate the dock itself and several feet beyond it. (Tr. 196:18 – 197:7; Tr. 219:14-20; Tr. 222:24 – 223:2; Tr. 226:16-18)

Respondent’s photo exhibits R-12 and R-13 were not taken the day of the inspection. They were taken at a later date and showed more working lights than existed at the time of the inspection. The photos show a shed with lights which had not been built at the time of the inspection. All four lights on the loading dock are on in the photos, even though the Respondent admitted at least one of them was out at the time of the inspection. (Tr. 180:15-18; Tr. 284:16-23; Tr. 285:10-16; Ex. R-11)

Based on Randolph’s testimony and the photo exhibits R-11, R-12, and R-13, I find that the illumination at the loading dock was insufficient. Respondent violated Section 56.17001.

Negligence

Randolph chose to classify this violation as involving high negligence because there had been a fatality at a sister plant under similar circumstances, and the miners present during this inspection knew about it. (Tr. 81:15-17; Tr. 83:2-9; Tr. 92:3-10; Ex. S-10) Additionally, Randolph testified that to ameliorate the lack of lighting, the Respondent should have used a spotter to help drivers back their trucks into the loading dock. (Tr. 91:11-16) Respondent used a spotter at another dock at the same mine site. (Tr. 80:22 – 81:6) Randolph asked the miners present during the inspection if the Respondent performed workplace exams, to which they responded that they did not. (Tr. 75:20-23) This was an aggravating circumstance for Randolph.

A reasonably prudent person familiar with the mining industry would have made sure that the loading dock was adequately illuminated at night, especially when trucks back into the dock. Further, if the Respondent had been performing workplace exams, the poor illumination issue would have been corrected. I concur with Inspector Randolph that this violation involved high negligence.

Gravity

It was reasonably likely that a pedestrian walking in the poorly lit loading dock parking area could be hit and possibly killed by a truck. (Tr. 81:10-12; Tr. 90:20-22) If this were to occur, it is likely that only one person would be injured. (Tr. 90:24-25)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been satisfied. The lack of adequate illumination created a discrete safety hazard which could have resulted in serious injury. The remaining issue is whether there was a reasonable likelihood that the hazard would occur.

Miners loaded five to seven trucks at this dock every night. (Tr. 81:22-23) Randolph observed truck drivers getting out of their trucks and walking around the loading area. (Tr. 89:2-13) There was poor visibility due to insufficient illumination. The truck Randolph saw backing into the dock area had no back-up alarm (discussed below), and pedestrians were in the area. (Tr. 92:11-20) It was reasonably likely that this situation could result in serious injury to a miner. The Secretary proved by a preponderance of evidence that the significant and substantial designation was warranted.

Penalty

The operator had no history of violating this standard. The mine operated 128,832 mine hours per year. The operator was highly negligent and the violation was S&S. It was reasonably likely that a fatality could result from this violation. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in abating the violation. A penalty of \$4,800.00 is justified and reasonable.

Citation No. 8636886

Randolph issued Citation No. 8636886, pursuant to Section 104(a) of the Mine Act, to Oil Dri at its Ripley mine on May 28, 2013, alleging a violation of 30 C.F.R. § 56.14132(b)(1). (Ex. S-7) Section 56.14132(b)(1), a mandatory safety standard, states that:

[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have -- (i) An automatic reverse-activated signal alarm; (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; (iii) A discriminating backup alarm that covers the area of obstructed view; or (iv) An observer to signal when it is safe to back up.

30 C.F.R. § 56.14132(b)(1) (emphasis added). The citation alleges that:

The 18 wheel over the road customer truck Freightliner #104 vin# 211J44788 had backed into the loading dock without an automatic alarm. The fork lift operator stated he was in the area on the ground at this time [and] stated that he had spotted the truck. The driver had no idea of a spotter program and [the] plant supervisor stated they [did not have] a spotter program. Crushing fatal accident had occurred at another Oil Dry [sic] plant on Oct. 20th 2010[.] [T]he company has exhibited aggravated conduct by not controlling this violation at this operation.

(Ex. S-7)

Violation

The citation alleged that injury was reasonably likely and could reasonably be expected to be fatal, the violation was significant and substantial, it involved high negligence, and one person would be affected. (Ex. S-7) This citation was issued a week after the first set of citations described above, when Randolph went back to the mine for abatement purposes. He observed a truck at the same loading dock as the previous week (Tr. 94:10-18) backing up without a back-up alarm or spotter.⁷ (Tr. 79:24 – 20:2; Tr. 94:20-22; Tr. 94:24 – 95:2; Tr. 95:25 – 96:6; Tr. 97:18-24)

The Respondent argued that it had an observer program in place to signal trucks while backing up into the loading dock. (Resp. Br. at 16) It argued that as soon as a truck came on site, the driver was directed by signage to go to the drivers' lounge to sign in, receive instructions

⁷ The Respondent argued that there is a difference between a “spotter,” as Randolph testified, and an “observer,” as the regulation signifies. It is clear from the record that “spotter” and “observer” mean the same thing for purposes of this regulation. (Resp. Br. at 15) As such, I find the Respondent's argument unconvincing.

and a loading slip, and for the Respondent to tell the driver which loading dock to use. (Tr. 182:11 – 183:6; Tr. 198:23 – 199:2) After that, the miner working the loading dock (the same miner who checked the truck in) was to observe the truck back into the loading dock and lock the truck into place. (Tr. 183:19 – 184:3; Tr. 199:19-25) The Respondent claimed that if the observer saw a pedestrian miner in the path of a truck backing up, the observer could stop the truck. (Tr. 222:10-17)

Despite this argument and the testimony of Respondent's witnesses, Randolph testified that he saw no spotter or observer and concluded that no such program was in place, and if it was in place, it was ineffective. (Tr. 100:13 – 101:25; Tr. 173:2-5) Indeed, when Randolph asked a driver if there was a spotter program in place at the loading dock, the driver denied knowing about it. (Tr. 89:25 – 90:9) Randolph also asked Diego Mejia⁸ if the Respondent had a spotter program, and Mejia answered in the negative. (Tr. 179:15-20) Even if the Respondent intended for there to be an observer in place, there was no communication between the miner claiming to be the observer and the driver backing into the loading dock. (Tr. 90:13-15) This defeats the purpose of the standard, which is to protect pedestrian miners from being hit by a truck backing up.

I find that there was no observer program in place, and if Respondent intended for there to be one in place, it was ineffective. A reasonably prudent person familiar with the mining industry would have had an observer program in place, and would have communicated this to the truck drivers. Oil Dri violated Section 56.14132(b)(1).

Negligence

Randolph believed this citation arose from high negligence because there had been a fatal truck accident at a related company, the Respondent knew about it, and Randolph considered it Respondent's responsibility to ensure that a similar accident did not happen again. (Tr. 107:10-14; Tr. 108:2-7) This was the only testimony regarding the negligence determination.

This is sufficient evidence to support the conclusion that a reasonably prudent person familiar with the mining industry would have assured there was an adequate observation program in place and properly implemented. The inspector had been at the mine the previous week discussing the fatality at the sister plant and the lighting issues at the loading dock, which implicated a claim by the Respondent that it had an observer program in place. This violation involved high negligence.

Gravity

It is likely that a miner would be killed if hit by a truck backing into the loading dock area. (Tr. 105:15-19) Randolph believed that one person would be affected per incident. (Tr. 105:21-23) I agree.

⁸ At the time of the inspection, Mejia was the night shift plant supervisor. (Tr. 177:18)

Significant and Substantial

The first and fourth prongs of the *Mathies* test have been met. The failure to have an observer in place to monitor a truck without an alarm while backing up creates a discrete safety hazard. This hazard could have resulted in serious injuries. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

Randolph thought it reasonably likely that an accident would happen because truck drivers get out of their trucks and walk around in the loading dock area for various reasons, including chocking their wheels (Tr. 105:25 – 107:1; Tr. 219:23-220:3) or going into the break room or bathroom. This increases the chance that one of them might get hit by another driver's truck, particularly at night. (Tr. 102:14 – 103:6; Tr. 1047:6-11; Ex. S-8) Randolph felt that the lack of a functioning observer system was unsafe, even if the lighting issue were resolved. (Tr. 96:10-16)

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

Penalty

The operator does not have a history of violating this standard. The mine operates 128,832 mine hours per year. The operator was highly negligent and the violation was S&S. A fatal injury could have resulted. Payment of a penalty will not affect the operator's ability to continue in business. The operator demonstrated good faith in abating the violating condition. The Secretary specially assessed this penalty at \$9,300.00. I find that because Randolph had been at the mine the previous week discussing the loading dock and the issues that were present, Oil Dri should have been on notice that greater efforts to comply with the Mine Act were warranted. I therefore assess the penalty at \$6,000.00.

WHEREFORE, it is **ORDERED** that Oil Dri pay a penalty of **\$15,200.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 8731981 be **VACATED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

May 3, 2016

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

v.

SIMS CRANE,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2015-315
A.C. No. 08-01336-381845 (B1758)

Mine: S.D.I. Quarry

DECISION AND ORDER

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

W. Ben Hart, CMSP, W. Ben Hart & Associates, Tallahassee, Florida, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) against Sims Crane (“Sims” or “Respondent”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(a). This docket was designated for Simplified Proceedings and contains one section 104(a) citation alleging a violation of a mandatory health and safety standard.

A hearing was held in Miami, Florida on March 31, 2016. During the hearing, the parties offered testimony and documentary evidence.¹ Witnesses were sequestered. Thereafter, the parties presented closing arguments in lieu of submitting post-hearing briefs, pursuant to Commission Procedural Rule 108(e), 30 C.F.R. § 2700.108(e).

For the reasons set forth below, I affirm Citation No. 8819088, but increase the level of negligence from “moderate” to “high.” I assess a civil penalty of \$300.

¹ In this decision, “Tr.” refers to the hearing transcript; “Ex. ALJ-#” refers to the ALJ’s exhibits; “Ex. S-#” refers to the Secretary’s exhibits; and “Ex. R-#” refers to the Respondent’s exhibits. Exs. ALJ-1, ALJ-2, S-1, S-2, S-3, S-4, R-1, R-3, R-7, R-8, R-9, R-10, and R-11 were received into evidence at the hearing. Tr. 9-11, 60, 75, 104-108, 122-123. Exs. R-2, R-4, and R-5 were marked for identification at hearing, but were not offered into evidence. Tr. 63, 75-76. Finally, I found Ex. R-6 irrelevant and excluded it from record evidence. Tr. 78-79, 101.

Based on the entire record, including my observation of the demeanor of the witnesses,² and after considering the parties' closing statements, I make the following findings:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing, the parties agreed to the following stipulations:

1. Jurisdiction exists because Respondent was an operator of a mine as defined in section 3(b) of the Mine Act, 30 C.F.R. § 803(b), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Act, 30 U.S.C. § 803.
2. Sims is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.
4. The MSHA citation at issue in this proceeding was properly served upon Sims as required by the Mine Act.
5. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.
6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.
7. Sims was at all times relevant to these proceedings engaged in mining activities at the S.D.I. Quarry located in or near Florida City, Florida.
8. Sims' mining operations affect interstate commerce.
9. Sims is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the S.D.I. Quarry (Mine ID No. 08-01336) where the contested citation in this proceeding was issued.

² In resolving conflicts in the testimony, I have taken into consideration the demeanor of the witnesses, their interest in this matter, their experience and credentials, the inherent probability of their testimony in light of other events, the corroboration or lack of corroboration for the testimony given, and the consistency, or lack thereof, within and between the testimony of witnesses.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the Secretary, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the MSHA citation.

11. Sims demonstrated good faith in abating the alleged violation.

Exs. ALJ-1, ALJ-2; Tr. 9-11.

B. General Factual Background

MSHA Inspector Robert Peters³ issued the disputed citation at S.D.I. Quarry in Florida City, FL on April 7, 2015. Exs. S-2; ALJ-1; Tr. 36-37. During the inspection, the mine had contractors on-site to complete modifications to its plant. Tr. 24. As part of these modifications, the mine employed Sims to perform crane operations that day. Tr. 24, 101-104. Contractors performing services at mines must comply with MSHA health and safety standards. Tr. 38. The citation at issue alleges that Sims' crane operator and helper did not stay clear of a suspended load, violating MSHA standard 30 C.F.R. § 56.16009. Ex. S-2. The independent facts and circumstances surrounding the citation are discussed in greater detail below.

III. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). An operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

³ Peters is a mine safety and health inspector at MSHA's Bartow, Florida field office. Tr. 21. Peters has been working at MSHA for the past 19 years, and prior to working at MSHA, he spent 26 years working in underground coal mining. *Id.* To be an MSHA inspector, Peters completed a 26-week long training course. He also attends refresher training every two to three years. Tr. 22- 23. His formal education includes three years in college studying electrical engineering. Tr. 21.

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

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

C. Negligence

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

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

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating

circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

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

D. Penalty Assessment

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

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary’s penalty regulations and assessment formula as a reference

point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel, supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to the citation at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8819088: Failure to Stay Clear of Suspended Load

1. Further Findings of Fact

Inspector Peters began his inspection of S.D.I. Quarry at about 7:00 a.m. on April 7, 2015. Tr. 24. During the inspection, a mine supervisor informed Peters that the mine had contractors on-site to perform modifications to the mine's plant. *Id.* While inspecting the plant, Peters saw a crane operating approximately 50 feet away. Tr. 24-25. The crane had a spreader bar attached to its hoist hook. Tr. 24, 29-30.

A spreader bar is a rigging device used to aid crane operators in picking up heavier loads by distributing the load of the lift across multiple connection points. Tr. 29. The spreader bar that was attached to the crane that Peters observed consisted of a steel cylinder measuring approximately 14 feet long and 8 inches in diameter.⁴ Tr. 118; Exs. S-4, R-10. The spreader bar was hung from the crane's hoist hook by cables, which looped through to U-shaped shackles at each end of the spreader bar. Tr. 30, 93; Ex. S-4. Steel pins inserted through the shackles secured the shackles and cables to the spreader bar. Tr. 30-31, 94; Ex. S-4. The steel pins could be removed to detach the spreader bar from the cables and crane. Tr. 31. The spreader bar

⁴ Inspector Peters initially estimated that the spreader bar measured 10 feet long and 6 inches in diameter. Ex. S-2. However, crane helper, William Assad, subsequently testified that the spreader bar measured 14 feet long and 8 inches in diameter. Tr. 119-11. Assad is a certified rigger and oiler at Sims and has been working there for two years. Tr. 116; Ex. R-11. He has nine years of experience working in the crane industry. Tr. 117. His training includes both on-the-job training and an apprenticeship program provided by a local union. *Id.* Based on Assad's first-hand experience with the assigned task, I credit Assad's testimony and find that the spreader bar measured 14 feet by 8 inches.

weighed approximately 625 pounds.⁵ Tr. 118; Ex. R-10. When rigged up, the spreader bar is typically suspended at around chest to head height. Tr. 125.

The spreader bar was rigged to the crane and suspended approximately 25- to 35-feet in the air when Peters observed it. Tr. 25, 29, 111; Ex. S-3. At that point in time, the spreader bar had been lifted in order for crane operator Milton Minchener⁶ (“Minchener”) to scope out the crane. Tr. 111-12, 127. Minchener testified that he had finished scoping and began swinging and cabling the spreader bar down into the area where he and Assad would finish attaching the load they were assigned to move. Tr. 111-12. Meanwhile, Peters saw crane helper William Assad standing directly underneath the suspended spreader bar. Tr. 24; Ex. S-2. Peters immediately went over toward the crane to tell Assad to move out from underneath the spreader bar. Tr. 25.

Peters informed Assad that he was issuing a verbal imminent danger order for standing underneath a suspended load in violation of MSHA standards.⁷ Tr. 25-26. During this conversation, Minchener got out of the crane cab and walked over to Peters and Assad, passing underneath the spreader bar to get to their location. Tr. 34-35. When Minchener arrived, Inspector Peters informed him that he could not walk underneath a suspended load. *Id.* Minchener disagreed with the inspector and walked back toward the crane cab, passing underneath the spreader bar once more. Tr. 36.

Upon examining the situation further, Peters issued Citation No. 8819088, alleging a violation of 30 C.F.R. § 56.16009. Ex. S-2. Inspector Peters determined that this alleged failure to stay clear of a suspended load was unlikely to cause injury or illness to any workers, but that any injury could reasonably be expected to be fatal if the spreader bar fell and struck a miner. Tr. 37; Ex. S-2. Peters designated the operator’s negligence as moderate. Ex. S-2. Sims abated the violation by removing miners from the area underneath the spreader bar and lowering the spreader bar onto a truck. Tr. 38; Ex. S-2.

⁵ Sims Safety Director, Robert Berry, testified that a 10-foot by 6-inch spreader bar weighed 163 pounds. Tr. 88. However, the spreader bar actually measured 14 feet by 8 inches. According to Assad, a 14-foot by 8-inch spreader bar would weigh about 625 pounds. Tr. 118; Ex. R-10. Again, I credit Assad’s testimony based on his experience with the assignment and find that the spreader bar weighed about 625 pounds.

⁶ Minchener is a certified crane operator at Sims Crane. Tr. 101; Ex. R-7. He has been employed at Sims Crane for five years and has worked in the crane industry for nine years. *Id.* His training in crane rigging procedures includes on-the-job training and a four-year apprenticeship program, which covered OSHA and industry standards. Tr. 102.

⁷ Peters later determined that the violation did not meet the criteria for an imminent danger order and instead issued the instant citation. Tr. 26; Ex. S-2.

At the hearing, Sims called safety director Berry to discuss crane operation and industry standards.⁸ Tr. 55. Berry was not involved in the incident that led to the disputed citation, but offered testimony based on his knowledge and professional experience training crane operators and riggers. Tr. 55-58. According to Berry, the spreader bar did not constitute a load under OSHA standards. Tr. 60-65; Exs. R-2, R-3. OSHA defines “load” as the objects or weight of objects being hoisted, referring to both the objects and any load-attaching equipment. *Id.* Berry opined that a spreader bar does not constitute a load under OSHA’s definition until it is attached to the object being lifted. Tr. 76. Berry also explained that OSHA standards allow workers to stand within the “fall zone” of suspended loads in certain situations, which include rigging up a load. Tr. 65-69; Ex. R-3. OSHA defines “fall zone” as the area in which it is reasonably foreseeable that suspended materials could fall in the event of an accident. Ex. R-3. Berry additionally testified that if the spreader bar were to fall, it would have not caused any major injuries. Tr. 91-92.

2. Analysis and Conclusions of Law

i. Violation of 30 C.F.R. § 56.16009

30 C.F.R. § 56.16009 provides that “[p]ersons shall stay clear of suspended loads.” The standard aims to prevent individuals from being hit and injured by such loads should they fall or swing. The Secretary contends that Respondent’s crane operator and helper violated the standard by walking directly underneath the suspended spreader bar. Tr. 131-133. Respondent, on the other hand, relies on OSHA standards to assert that the spreader bar did not constitute a “load” and that its workers were allowed to be within the spreader bar’s fall zone. Tr. 18, 145-146.

It is undisputed that both Assad and Minchener walked directly beneath the suspended spreader bar. The issue here is whether the spreader bar constituted a “load.” MSHA regulations do not define the term “load,” nor has the Commission provided a clear definition of the term. In the absence of a statutory or regulatory definition, the Commission applies the ordinary meaning of a term. *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). Commission judges have relied on the dictionary definition of the term “load” in their interpretations of 30 C.F.R. § 56.16009.⁹ See e.g., *CCC Group, Inc.*, 34 FMSHRC 1192, 1196 (May 2012) (ALJ); *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504, 516 (Jun. 2008) (ALJ).

The dictionary defines a “load” as a “weight or mass that is supported.” *The American Heritage Dictionary of the English Language* 1025 (4th ed. 2009). In this case, the spreader bar weighed approximately 625 pounds. Tr. 118; Ex. R-10. It was supported by cables, which hung

⁸ Berry is the corporate safety director at Sims Crane. Tr. 55; Ex. R-1. He has been employed at Sims Crane for the past seven years and has over 40 years of experience in the crane industry, 26 of which dealt with crane safety. Tr. 55. He is a certified crane operator and practical examiner. *Id.*; Ex. R-1. He has also taught crane operating and rigging for the past 20 years. Tr. 56; Ex. R-1.

⁹ Although my colleagues decisions are not binding on me, they provide guidance to the extent their reasoning is persuasive.

from the crane's hoist hook and attached to the spreader bar by removable pins and shackles. Tr. 30, 93; Ex. S-4. Although the spreader bar was secured by cables and pins, those equipment pieces could fail and cause the spreader bar to fall. Tr. 92-95. Under the ordinary meaning of the term, therefore, I conclude that the spreader bar constituted a "load" for purposes of 30 C.F.R. § 56.16009.

Furthermore, OSHA standards are not legally binding on MSHA. Respondent has stipulated that it is subject to the jurisdiction of the Mine Act, was engaged in mining activities at the times relevant to this proceeding, and is an operator as defined by the Mine Act. Ex. ALJ-1. Therefore, I find that the OSHA regulations and definitions that Respondent's relies upon are not dispositive for purposes of determining whether Respondent violated the MSHA standard.¹⁰

Accordingly, I find that Respondent violated 30 C.F.R. § 56.16009.

ii. Gravity

Inspector Peters designated the violation's gravity as unlikely to result in injury or illness. Ex. S-2. He also found that if any injury or illness did occur, it would be fatal and affect one person. *Id.* The Secretary requests that I uphold the inspector's gravity findings. Tr. 143-144. Respondent agrees with the inspector's "unlikely" designation and does not make any arguments as to the number of persons affected. Tr. 145. However, Respondent disagrees that any injury resulting from the violation would be fatal. Tr. 47-48, 92.

I affirm the inspector's gravity designations. Inspector Peters determined that the spreader bar was securely attached to the crane. Tr. 45-46. For this reason, the inspector appropriately designated the probability of injury as unlikely. Also, I discount Berry's testimony that the spreader bar would cause only a minor injury if it fell on a worker, particularly since he was mistaken when he testified that the spreader bar was only 163 pounds. Tr. 92. Subsequent credited testimony from Respondent's witness Assad revealed that the spreader bar actually weighed over 3.5 times more. Tr. 118; Ex. R-10. In the event of an accident, a 625-pound steel

¹⁰ I note, however, that the cited OSHA regulations are not inconsistent with my finding that the spreader bar constituted a "load" under 30 C.F.R. § 56.16009. First, 29 C.F.R. § 1926.1417(e) provides conditions that must be met in order for an operator to leave crane controls unattended. Although the standard provides an exception for working gear, such as a spreader bar, it does not explicitly permit standing beneath working gear. Second, 29 C.F.R. § 1926.1425(b) allows employees to be directly beneath a load in certain limited situations, including hooking or attaching loads. However, the spreader bar in this case was already attached to the crane. Tr. 24, 29-30. Minchener testified that he was in the process of moving the spreader bar to an area for additional rigging. Tr. 111-112. Assad testified that rigging generally occurred when the spreader bar was suspended at chest to head height. Tr. 125. This testimony and the fact the spreader bar was suspended over 25 feet establishes that neither employee was attaching any objects to the crane at the time relevant to the citation's issuance. Tr. 25, 29, 111. Lastly, 29 C.F.R. § 1926.1401 provides a definition for the term "load," which explicitly includes the weight of any load-attaching equipment, such as a spreader bar, as part of a load.

spreader bar could potentially crush and fatally injure any worker caught beneath it. Accordingly, I find that this violation created an unlikely, but fatal risk of injury to one worker.

iii. Negligence

Inspector Peters charged Respondent with moderate negligence in connection with this violation. Ex. S-2. The Secretary requests that the undersigned at least uphold the inspector's negligence designation, but notes that the record could support a finding of high negligence. Tr. 137. Respondent made no specific arguments with respect to negligence in its closing statement, but requested that I vacate the citation as a whole. Tr. 147.

I find that this violation resulted from Respondent's high negligence. Inspector Peters testified that he designated the violation's negligence as moderate because Assad and Minchener were unfamiliar with MSHA regulations and had not performed work at a mine before. Tr. 38. However, Inspector Peters explicitly informed Minchener that walking underneath the suspended spreader bar violated an MSHA standard. Tr. 36. At that point, I find that the operator should have known of the violative practice. Yet, Minchener blatantly dismissed the inspector's instruction and violated the standard by walking underneath the spreader bar a second time. *Id.* Respondent offers no other mitigating circumstances for its crane operator's brazen behavior in disregarding the inspector's instruction concerning the MSHA standard. Based on a totality of the circumstances, therefore, a finding of high negligence is appropriate.

iv. Penalty Assessment

As previously discussed, the Mine Act requires the Commission to consider the six criteria set forth in section 110(i), 30 U.S.C. § 820(i), when assessing a civil penalty. I look to the Secretary's penalty regulations and proposed assessment as a helpful starting point when independently assessing the statutory penalty criteria to avoid the appearance of arbitrariness.

The Secretary proposed that Sims pay a penalty of \$100, the minimum penalty amount under the Secretary's criteria set forth in 30 C.F.R. Part 100. Sec'y Pet. The parties have stipulated that Sims abated this violation in good faith and that the proposed penalty will not affect Sims' ability to remain in business. Ex. ALJ-1. The Secretary's penalty petition demonstrates that he adequately accounted for Sims' size, violation history, and good-faith abatement efforts in reaching his proposed penalty. *See* Ex. S-1; Sec'y Pet. I affirmed the Secretary's gravity findings, but have increased the negligence from moderate to high. Because I find that the violation resulted from Respondent's high negligence, I determine that a penalty higher than the Secretary's proposed assessment is warranted.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that an assessment of \$300 is appropriate. Accordingly, I assess a civil penalty of \$300 against Respondent for the instant violation.

V. ORDER

For the reasons discussed above, Citation 8819088 is hereby **AFFIRMED**, but **MODIFIED** to increase the level of negligence to from “moderate” to “high.” In addition, Sims Crane is **ORDERED** to pay the penalty amount of \$300.00 for this violation within thirty (30) days of the date of this Decision and Order.¹¹

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

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¹¹ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 3, 2016

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

v.

ORIGINAL SIXTEEN TO ONE
MINE, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2014-527-M
A.C. No. 04-01299-345516

Docket No. WEST 2015-158-M
A.C. No. 04-01299-366336

Docket No. WEST 2015-251-M
A.C. No. 04-01299-368842

Mine: Sixteen to One Mine

Docket No. WEST 2015-77-M
A.C. No. 04-03065-363861

Docket No. WEST 2015-78-M
A.C. No. 04-03065-363861

Docket No. WEST 2015-240-M
A.C. No. 04-03065-368847

Docket No. WEST 2015-381-M
A.C. No. 04-03065-372727

Mine: Plumbago Mine

DECISION AND ORDER

Appearances: Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado, for Petitioner

Michael M. Miller, *pro se*, Alleghany, California, for Respondent

Before: Judge Moran

The Original Sixteen to One Mine and the Plumbago Mine are underground gold mines of historical significance within California's Alleghany Mining District. Tr. 17-18.¹ A hearing regarding the citations associated with the dockets listed above was held in Nevada City, California from November 17-19, 2015. Seven citations were settled or vacated at the hearing.²

Before turning to the particular contested matters, the Court believes it is important to make the following comments. For several of the citations in these various dockets the Court reduced the civil penalty from the amount proposed initially and, in some instances, from revised amounts sought by the Secretary at the hearing. The Court wishes to advise Respondent that it should not take the reductions as signaling that, by going to hearing, penalties may be reduced. Respondent is not new to mining, nor to MSHA, and as such, it may be that in future litigation penalty amounts may be adopted as originally proposed or as revised by the Secretary during a hearing. It is also possible that penalties may be increased by the Court beyond the amounts sought by the government. Of course, the penalty for established violations is dependent upon the particular facts adduced at each hearing.

A Preliminary Matter Pertaining to All of the Contested Matters in This Litigation

A running controversy during the hearing involving discovery was whether Respondent requested copies of the inspectors' field notes associated with the various citations. *See, e.g.*, Tr. 123, 302-04. The Court ultimately resolved this dispute by requiring counsel for the Secretary to determine if Mr. Miller made a request for the field notes of the inspectors who testified in this proceeding. If no request was made, that would end the matter, in terms of Respondent making objections about their absence. If the request was made, then the Secretary's Counsel was to advise as to the date such documents were delivered to Respondent, assuming such delivery was made. If, despite such a request, the field notes were not delivered, then the Court instructed that

¹ The Court will use the designations "Tr." to refer to the hearing transcript, "GX" to refer to the Secretary's exhibits, and "RX" to refer to Respondent's exhibits.

² At the outset of the hearing Respondent withdrew its contests related to Citation Nos. 8698193 (WEST 2014-527-M), 8783100 (WEST 2014-527-M), and 8793807 (WEST 2015-251-M), agreeing to pay the associated penalties as proposed. Tr. 10-11. The Secretary's post-hearing brief includes Citation No. 8793615 as among those in which Respondent withdrew its contest, but that Citation was among the contested matters during the hearing. See discussion *infra* for GX 33, which is the exhibit associated with Citation No. 8793615. For Citation No. 8793616 (WEST 2015-78-M), the Secretary agreed to modify the citation to reflect lost workdays or restricted duty from the original designation as fatal, with the penalty remaining as proposed. Tr. 11. During the hearing, the Secretary agreed to modify Citation No. 8698194 (WEST 2014-527-M) to No Likelihood, No Lost Workdays and Low Negligence and to reduce the penalty to \$50.00. The Secretary vacated Citation No. 8793619 (WEST 2015-158-M) at hearing. Citation No. 8698227 (WEST 2015-78-M) was accepted by the operator with the Secretary agreeing to remove from Section 8 of the citation the sentence, which reads, "This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed." Sec'y's Post-hearing Br. 4, 35 (quoting the citation) ("Sec'y Br.").

Counsel was to deliver all such field notes to Respondent, and Respondent would then have 2 weeks to review those notes and, if applicable, to identify in what manner the absence of those notes disadvantaged Respondent. Tr. 304-05.

Following the Court's instructions at the hearing, Attorney Horn responded on November 21, 2015, as follows:

Cc: Michael Miller (mmeistermiller@gmail.com)
Subject: Original Sixteen to One discovery

Your Honor,

In response to directions given by you at the hearing last week, I have inquired as to whether or not the General Field Notes associated with the seven dockets discussed at hearing were sent to Mr. Miller prior to hearing.

Per my records I received only one discovery request from the operator. It was sent on September 30, 2015, via e-mail and the discovery portion of the message from Mr. Miller read, "Please send me the citations MSHA has issued for the next hearing."

In response to this request, I sent the citations, citation notes and photographs for each citation which was discussed at the hearing last week. Contrary to my stated belief last week, I did not send the General Field Notes.

However, as the Mr. Miller's discovery request was limited to "citations" it is my understanding that this ends any issue regarding the non-production of the General Field Notes.

Thank you.
Michele Horn

The Court responded to Attorney Horn's email as follows:

Saturday, November 21, 2015

Dear Attorney Horn (and Mr. Miller):

Thank you, Attorney Horn, for your prompt attention to this issue. On the basis of your message below, you are correct that, per my order during the hearing, and your message, below, which relates that "as the Mr. Miller's discovery request was limited to "citations" it is [the Secretary's] understanding that this ends any issue regarding the non-production of the General Field Notes." Thus, absent Mr. Miller being able to show that he sent you or a representative for the Secretary a specific request seeking the General Field Notes related to the dockets in issue during our hearing this past week, the matter is ended.

I want to reiterate that I appreciate the professionalism displayed by all during the hearing.

Sincerely, Judge William Moran

No such showing was thereafter provided by Mr. Miller, thereby resolving the issue in the Secretary's favor.

Respondent's Post-hearing Brief

The Court read and considered Respondent's post-hearing brief and makes the following observations and comments about it. Not every point raised in the brief is discussed, but the entire brief was considered. Part of that consideration involves the Court's discretion as to the need to comment upon specific parts of the brief. The same principle was applied to the Secretary's post-hearing brief — not every contention is addressed. Among the contentions made in Respondent's Brief were the claims that some of the inspectors hired by MSHA are not qualified; that the Plumbago Mine, while a mining operation, is not conducting mining activities; and that the activities at that mine do not affect interstate commerce. Mr. Miller's position is that only Inspector Rogers was qualified and competent to conduct the inspections and issue the citations/orders which resulted from those events. The Court rejects each of these contentions, as they are without any merit.

The Court notes that even if one were to accept Respondent's claim that nearly all of the MSHA inspectors involved here were unqualified, *a claim with which the Court does not agree at all*, nearly all of the various citations in this litigation were established apart from one's mining knowledge. A few examples clearly show this. Citation No. 8783098 involved a violation of 30 C.F.R. § 57.15031(a) for failing to have a self-rescuer within 25 feet of a worker's location. If a self-rescuer is more than 25 feet away, there is a violation, and no previous mining experience is needed to make such a determination. Another example, among *many* such instances in this litigation, is Citation No. 8793805, which involved finding combustible materials, such as grass, brush, wood, and rubbish within 25 feet of a powder magazine. No mining expertise is required to make such a determination, though in fact the issuing inspector had 18 years of such experience. While more examples are not needed, a few more are here included. It is noted that Citation No. 8785247 involved a vehicle with no functioning brake or tail lights, a violation which Respondent acknowledged to exist. As a last illustration, Citation No. 8793806 involved a magazine that was not bullet resistant, as it had a steel exterior of about 1/8 inch with an interior lining of about 1/2 inch of plywood, instead of the required 1/4 inch of steel and 2 inches of hardwood.

Respondent also maintains that citations/orders must be the result of "specific conditions at the mine." Resp't's Post-hearing Br. 4. The Court was attentive to this claim, both at the hearing and during the Court's close review of the transcript, as reflected in this fifty-plus page decision, and finds that, for each alleged violation (other than the one that was dismissed), the violations were both established and based upon the specific conditions at the mine. To the extent that prior history was referenced during the course of the testimony, a mine's history of

violations and extensive mining experience are factors which may be taken into account, per the statutory penalty criteria, where violations have been established.

Of great concern to the Court, Respondent asserts that its “miners are ragingly mad with the administrative agency legislated to protect them. Mr. Boylan and his supervisors put them out of work.” Resp’t’s Post-hearing Br. 7. Except for the instances where inspectors found employees working at Respondent’s mine, despite a live withdrawal order in place, no one with MSHA put any employee out of work. The larger problem, and it must be faced directly, is that Respondent objects to MSHA’s lawful presence and the carrying out of its Mine Act obligations through the statutorily-mandated inspections under that Act. The sadly contentious nature of the relationship between MSHA and Respondent will not improve until Respondent comes to accept that MSHA’s presence and its inspections are legitimate. While it may be potentially useful for the MSHA district office to have discussions with Respondent, nothing positive can come of such discussions until Respondent first accepts the legitimacy of MSHA, its authorized representatives, the inspectors, and their statutory inspection obligations and duties. **The Court calls upon Mr. Miller to discard the combative and non-productive approach, as reflected vividly in his post-hearing brief, and to have a change of heart and attitude, as he approaches the last years of working experience in the mining industry.**

The Court also fully considered Mr. Miller’s Reply Brief. That submission largely continues with the themes raised in Respondent’s post-hearing brief, and the Court will not revisit those contentions. One distinction is that, for the Reply Brief, Respondent raises specific objections for a few of the citations. Having reviewed those contentions, not all merit a response from the Court. Where the Court considers that a response is warranted, those will be addressed *infra*.

Respondent’s Challenge to MSHA’s Jurisdiction

Throughout this litigation, Respondent has also taken the position that MSHA lacks jurisdiction to inspect its mines. The Court read all of the contentions made by Respondent and rejects them without qualification. Nothing sums up Respondent’s position better than the concluding line from its post-hearing reply brief which asserts that not a one of “[t]he citations and orders issued should not be affirmed by the court.” Resp’t’s Reply Br. 9.

At the hearing, the Court explained to Mr. Miller that the federal courts have long ago affirmed the jurisdiction and breadth of the Mine Act. Nevertheless, a few cases, among a plethora of such holdings, are noted. In *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116 (9th Cir. 1981), it was held that digging a tunnel into a hill for the purpose of assessing the value of talc deposits constitutes mining, even if minerals were not being extracted. In *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460 (2d Cir. 2004), it was held that the Commerce Clause permits Congress to regulate mines whose products are sold *entirely intrastate*. Finally, in

Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), it was held that Congress intended the definition of a mine under the Act to be given the broadest possible interpretation.³

Legal Standards

Significant and Substantial

The Significant and Substantial (“S&S”) terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to “significant and substantial,” i.e., more serious, violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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

Negligence

As the Commission recently clarified, “judges are not required to apply the definitions of Part 100.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Rather,

judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care - a standard of care that is high under the Mine Act[.]

Id. Accordingly, “a Commission Judge may find ‘high negligence’ in spite of mitigating circumstances or may find “moderate” negligence without identifying mitigating circumstances.” *Id.* at 1703. The Commission has stated that “the gravamen of high negligence is that it

³ As the D.C. Circuit noted its *Carolina Stalite* decision, “Cases decided by the Third, Ninth, and Fourth Circuits accord with [its] interpretation of the Act, and uniformly recognize *section 3(h)’s ‘sweeping definition’ of a mine.*” 734 F.2d at 1554 (emphasis added).

‘suggests an aggravated lack of care that is more than ordinary negligence.’” *Id.* (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Unwarrantable Failure

The Commission has stated that an “unwarrantable failure is aggravated conduct constituting more than ordinary negligence.” *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Unwarrantable failures are characterized by such conduct as “‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference,’ or a ‘serious lack of reasonable care.’” *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350 (Dec. 2009) (quoting *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. When determining whether a violation was due to an unwarrantable failure, the Court must consider all relevant factors and the relevant facts and circumstances of the case to determine whether the actor’s conduct was aggravated and whether mitigating circumstances exist. *IO Coal*, 31 FMSHRC at 1351.

Penalty Determinations

“The Mine Act sets forth a bifurcated penalty scheme under which the ‘Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty.’” *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) (quoting *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)). Under this bifurcated scheme, “[t]he Secretary’s regulations at 30 C.F.R. Part 100 apply only to the Secretary’s penalty proposals, while the Commission exercises independent ‘authority to assess all civil penalties provided [under the Act]’ by applying the six criteria set forth in section 110(i) [of the Mine Act].” *Id.* (quoting 30 U.S.C. § 820(i)). The six section 110(i) factors are:

the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of

the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Findings of Fact and Conclusions of Law for the Citations and Orders in These Dockets

Docket No. WEST 2014-527-M (Sixteen to One Mine)

Citation No. 8783098⁴

Proposed Penalty: \$100.00. Penalty Assessed: \$50.00.

The Secretary called MSHA Inspector Miles Frandsen, regarding Citation No. 8783098, GX 2(a).⁵ The inspector issued the citation to the Sixteen to One Mine on January 23, 2015, for an alleged violation of 30 CFR § 57.15031(a).⁶ Sec’y Br. 5. Frandsen found a worker, a contractor employee, without his self-rescuer device within the specified footage of his work area. The type of self-rescuer used for this type of mine, a metal-nonmetal mine, scrubs carbon monoxide from the air. Tr. 20-21. The cited standard requires that the device be within 25 feet of the worker’s location. The worker in this instance was about 50 feet away from the device. Tr. 22. The inspector listed the likelihood of injury as “unlikely.” His concern was that if a wall of smoke were to enter the mine and the worker couldn’t get to and find the self-rescuer, the worker could perish from the smoke exposure. Tr. 23. However, the inspector did not find anything that would be likely to cause a fire, noting, for example, that the mine’s timbers were moist. *Id.* Frandsen’s view was impacted by a personal experience where a miner couldn’t get to his self-rescuer, even though it was on the other side of the shuttle car. In that instance, the self-rescuer was a mere 5 to 6 feet away from the miner. Tr. 24. The inspector considered the negligence to be moderate, as the owner, Mr. Miller, did not challenge the distance from the worker to the self-rescuer, and had advised the worker to keep it “in the area.” Tr. 25. The inspector stated that a self-rescuer is as important in a gold mine as it is in a coal mine. Tr. 33.

⁴ The R-17 reports are GX 17 for the Sixteen to One Mine and GX 40 for the Plumbago Mine. Tr. 660. The reports detail the mines’ respective histories of violations.

⁵ By stipulation, Respondent agreed to the admission of the government’s exhibits, designated GX 1 through GX 40. Tr. 26.

⁶ Standard 30 C.F.R. § 57.15031, titled “Location of self-rescue devices,” provides:

- (a) Except as provided in paragraph (b) and (c) of this section, self-rescue devices meeting the requirements of standard 57.15030 shall be worn or carried by all persons underground.
- (b) Where the wearing or carrying of self-rescue devices meeting the requirements of standard 57.15030 is hazardous to a person, such self-rescue devices shall be located at a distance no greater than 25 feet from such person.
- (c) Where a person works on or around mobile equipment, self-rescue devices may be placed in a readily accessible location on such equipment.

Frandsen affirmed that he marked that a fatality could occur, a conclusion based on one not being able to breathe due to smoke from a fire. Tr. 34. However, he also marked that it was an unlikely to occur event. Thus, he expressed that “[i]t’s not the likelihood of the fire, it’s the result of not having [a self-rescuer] when [one is] in a fire.”⁷ Tr. 35.

Jonathan Farrell, a long-term employee of Respondent, testified with regard to the self-rescuer citation. Farrell was not present when the citation was issued but he believed that, because the mine has a reversible fan, ventilation can be controlled. It was also his view that the individual was within a safe distance of the self-rescue device. Tr. 66.

Mr. Miller also testified, asserting that the person cited was not a miner, nor an employee, but instead was an outside contractor’s employee who was doing exploratory work. Tr. 49. The operator also defended this citation by attesting that at the time the citation was written there were no hazards in the mine that would lead to the self-rescuer being needed and that a self-rescuer is only needed in an emergency situation. As such, the contractor’s failure to wear the device should be evaluated as if conditions existed such that a self-rescuer was needed. Tr. 50. The Court rejects this viewpoint and incorporates the Secretary’s arguments addressing this issue in its post-hearing brief but, for the other articulated reasons, including those in footnote seven, *supra*, does not adhere to the claim that the violation was S&S.

As the Secretary has noted, the standard requires, generally, that self-rescue devices be worn or carried “by all persons underground.” 30 C.F.R. § 57.15031(a). However, where doing so would be hazardous, the 25 foot rule applies, and the citation in this instance involved that exception. The Secretary correctly observes that there “is no requirement of any legal

⁷ Respondent stated that the cited area was a main adit and that there was no hazard present, as the rock there is very competent. Tr. 50. Respondent also expressed that there was no risk of a fatality because a person would only need to walk a short distance to safety, the mine is naturally ventilated, and the distance to the portal was less than 2,500 feet. Regarding the mine’s natural ventilation, the ventilation direction is determined by factors such as the barometric pressure and temperature. Tr. 52-53. Respondent’s argument in this regard, beyond air movement, is the amount of air in the mine. Respondent asserted that with “35 miles of tunnels” in the mine, there are millions of cubic feet of open space and many ways to exit the mine. In Respondent’s view, that makes the notion that one might not have sufficient air to breath farfetched. Tr. 53-54. Respondent also opined that there was not sufficient fuel to create a fire. Tr. 50. For those reasons, Respondent believed that the citation should have been marked as “no likelihood” and the mine’s negligence was none. Tr. 51. Under those conditions, Respondent urges, with the device not more than 50 feet away, the citation should not have been issued. Tr. 51. Respondent admitted that the cited worker was there at the invitation of Respondent and had been given the 40-hour site-specific mine training. Tr. 55. Respondent could not recall whether he informed the workers that the self-rescue device had to be within 25 of where they were working. Tr. 56. Respondent continued to assert that the worker was not a contractor, but did not commit as to whether he contended that the worker was not covered under the Mine Act. *Id.*

relationship between the person underground and the mine operator nor is there any requirement that the person be employed as a miner.” Sec’y Br. 6.

This violation was conceded in that Respondent admitted that the device was not within 25 feet of the miner. The citation was issued as unlikely, non-S&S, fatal, moderate negligence, and one person affected, with a proposed penalty of \$100.00. The Secretary’s Part 100 procedures for proposed assessment of civil penalties does not allow for a penalty of less than \$100.00.⁸ The Court is not so restricted as it looks to the statutory criteria, not Part 100. Given the conditions at this small mine, and the other evidence adduced, a fatal accident was not likely to be the result but rather lost workdays or restricted duty. Accordingly, the Court declines to modify the citation to reasonably likely and S&S. A penalty of \$50.00 is imposed for this violation.

Citation No. 8783099

Proposed Penalty: \$100.00. Penalty Assessed: Dismissed.

Citation No. 8783099, GX 3, citing 30 C.F.R. § 57.12010,⁹ was addressed by Inspector Frandsen. Issued on January 23, 2014, the inspector alleged finding the mine’s phone line touching a 480-volt power cable in several places underground. Tr. 37. The hazard was not what one might anticipate, however, as it did not involve any shock hazard. Instead, it pertained to the electrical field around the power cable. Where that cable touches the phone line, the electrical field from the cable has the potential to cause the phone line to malfunction, but only *during equipment start-up*. Photos showed the phone line touching the cable. GX 3c (the phone line is white). The inspector stated that it was *unlikely* that the power cable would short out the phone line. Tr. 40. This was because the mine did not then have any electrical equipment underground that would cause a surge when such equipment was started. *Id.* The inspector defended his designating the injury as “fatal” on the basis that if one couldn’t use the phone for help one could perish. The negligence was marked as moderate because a part-time electrician was designated to do the electrical work and this problem was obvious. *Id.*

The Court asked the inspector about this citation and the standard cited, which is titled “Isolation or *Insulation* of Communication Conductors.” 30 C.F.R. § 57.12010 (emphasis added). The inspector stated that the standard requires that such telephone lines have to be protected either by isolation or by suitable insulation and in this instance there was neither protection. Tr. 42. Abatement was achieved by separating the lines. *Id.*

Upon questioning by Respondent, the inspector admitted that he had no idea how long the condition had existed. Tr. 43. He did not know precisely what type of phone line was being

⁸ Part 100 actually provides for a minimum penalty of \$112.00, but a 10% “good faith” allowance may be factored in “where the operator abates the violation within the time frame set by the inspector.” 30 C.F.R. § 100.3(f).

⁹ The cited standard, § 57.12010, “Isolation or insulation of communication conductors,” provides: “Telephone and low-potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source.”

used. Respondent also inquired about SO wire¹⁰ and its use for phone lines. Tr. 43-44. Respondent's non-attorney representative Mr. Michael Miller testified about this citation. He stated that the insulation on the phone line was approved for underground use when it was purchased, that the wire is "well-insulated," and that it works. Thus, Miller contended that the wire had suitable insulation. Tr. 67. Miller also asserted that the inspector's designating the violation as potentially involving a fatality was too speculative. Tr. 68. Still, Miller did concede that the phone lines did touch the 480 volt power cable in several locations. Miller stated that the power cable had been there for some 15 or 20 years and the phone line was there and subject to numerous MSHA inspections without any citations being issued for this issue. Miller believed that the issuing inspector cited the condition because his background was mostly associated with coal mines and Miller considered the comparison inapt because the differences between the Sixteen to One Mine and a coal mine are so profound. Tr. 70. Miller continued, stating that the phone line insulation, as shown by GX 3c, was intact. As to the electrical lines, he stated that, being SO wires, they were already double insulated, and such electrical wires are MSHA approved. Tr. 71. Thus, Miller maintained that the phone wires are unlike house phone wires and would not be subject to the concerns expressed by the inspector. Tr. 72. Miller then reaffirmed his stance that the phone wires were adequately insulated. *Id.* This view was based upon his knowledge of the phone wires when they were purchased. Tr. 73.

The Secretary recalled the inspector, who stated that the power line has insulation in that the individual conductors are insulated and the jacketing around those conductors serves as protection, as opposed to insulation. Tr. 74. The same, he stated, is true of the phone line as it too has insulation on the inside wires and, like the power line, there is an outer covering, which he again distinguished as "protection" as opposed to "insulation." *Id.* Still, the inspector stated that the phone line's insulation was not sufficient to meet the cited standard, 30 C.F.R. § 57.12010, asserting that the standard requires *additional* insulation for the phone line. Tr. 75. However, the Court observed that the standard does not express that there must be *additional* insulation. *Id.* The Court pressed the inspector to explain his basis for asserting that the insulation on the phone line was not suitable. Tr. 77. The inspector maintained that his MSHA training was that when such wires touch, they are to cite the standard as being violated. *Id.* The Court then asked the inspector if there was any telephone wire that would meet the standard's requirement for adequate insulation and was advised there is no such wire. *Id.*

While isolating the phone line from the power cable is an option, the phone line can be wrapped with simple electrical tape to provide the insulation sufficient to protect the signal. Tr. 79. The inspector repeated that he evaluated the violation as unlikely, noting that there was "no underground equipment that would probably generate [the electrical field that concerned him]." Tr. 79. Despite that concession, he believed that it was possible, *in the future*, that such equipment could be added at some time. Tr. 79. Based on the inspector's later response, the Court asked why he did not mark the citation as "no likelihood" as opposed to "unlikely." Tr. 80. In response, apparently not understanding the question, he stated that he did not remember what was in the mine. *Id.* Respondent was successful in bringing out the lack of prior MSHA enforcement of this standard for the phone lines. Tr. 81.

¹⁰ SO refers to cable that is suitable for severe duty. Tr. 78.

Upon consideration, this citation, No. 8783099, is DISMISSED. The Secretary was unable to authoritatively respond to the Respondent's contention that the SO cable meets the standard. Further, the inspector's admission that there was no underground equipment that would probably generate the electrical field that concerned him suggests that the violation was not present with the equipment then in the mine.

Docket No. WEST 2015-77-M (Plumbago Mine)

Citation No. 8698235

Proposed Penalty: \$5,000.00. Penalty Assessed: \$500.00 (five hundred).

Citation No. 8698235, GX 19, dated May 12, 2014, and citing 30 C.F.R. § 50.10(a),¹¹ was issued because there was a death on the mine property which was not reported to MSHA. Tr. 512. The deceased was Mr. Buck Barker, who was present at the mine site strictly as a caretaker, not as a miner. Tr. 513. He died on May 2, 2014.

The standard cited requires that MSHA be notified within 15 minutes when anyone dies on a mine site. In this instance, notification did not occur until after the citation was issued. Tr. 513. The inspector stated that the standard exists because MSHA has jurisdiction at mines and when someone dies it is part of their responsibility to determine the cause of death. Tr. 514. He acknowledged that some deaths at a mine are unrelated to mining activity. For example, one could simply have a heart attack. Nevertheless, the circumstances do not change the duty to report. Tr. 514. Mr. Barker's living quarters at the mine were near a historical building at the mine. Tr. 515; GX 19c, photo 1.

The citation was listed as non-S&S, no lost workdays, and no likelihood because it was a notification, that is, a reporting, standard. Tr. 516. However it was marked as high negligence because the operator has been in the mining industry for a long time and knew of the requirement when a person dies at a mine site. In fact, the inspector asserted that Mr. Miller had dealt with a mine site fatality previous to this one. *Id.* The inspector, speaking to the issue of the operator's knowledge of the mine site death, stated that workers at the mine informed him that the mine operator called the local authorities about the death. Tr. 518. The individual had died a couple of days before the inspector's arrival. Tr. 518. Mr. Miller did not ask any questions of the inspector about GX 19.

Mr. Miller testified about GX 19, stating that, far from Mr. Barker being a "caretaker," the mine was a caretaker for him. Tr. 532. Miller believed that the cited standard's reference to whether an operator knew or should have known of an accident occurring was inapplicable because no accident was involved; instead, the 80-year-old man simply died of natural causes. Tr. 533. Miller added that he believed he spoke with someone in the MSHA district office for clarification on this matter but never received any response. The Court then took note that the

¹¹ 30 C.F.R. § 50.10, titled, "Immediate notification," provides: "The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine."

definition of “accident” under § 50.2(h), means the death of an individual at a mine. Tr. 536. Mr. Miller responded to the Court’s observation, effectively acknowledging that he was in violation of the standard. Tr. 536.

Taking into account the undisputed role of the deceased, who was not in any manner a miner, nor one who provided service to the mine in the way, for example, that an independent contractor might aid in the mine’s operation, and that this individual, who acted solely as a caretaker, essentially by his presence to deter trespassers, and also considering that the mine did contact other authorities, albeit not MSHA, the Court imposes a significantly reduced penalty of \$500.00. This penalty is consistent with the “no likelihood,” “no lost workdays,” non-S&S findings on the citation. In context, the negligence is found to be “low,” not the “high” designation made by the inspector.

Citation No. 8698236

Proposed Penalty: \$112.00. Penalty Assessed: \$75.00.

Citation No. 8698236, GX 20a, a section 104(a) citation, was issued on May 13, 2014, at the Plumbago Mine. This citation was issued because of an earlier-issued section 104(g)(1) order issued May 6, 2014, requiring the miners to be withdrawn from the mine until they received training. When the inspector returned to the mine for a compliance follow-up visit on May 13th, the miners were still working at the site, despite not having received the training. Tr. 519. At the time of the return visit, miners “Britt [McDaniel] and Joseph [Sauer]” were present and they were working in the shop at the mine site. Tr. 521, 525. They informed that they had received some training, that is, a “safety talk,” from Mr. Miller, but did not know it if was in compliance with the earlier-issued order. Tr. 521-22. Also, Mr. Miller told them it was okay for them to be working at the site. Tr. 525. The inspector noted that if the required Part 48 training had been done, there would be a record of that. *Id.*

At the time of his follow-up visit on May 13, 2014, no training plan had been submitted to MSHA for the Plumbago Mine. No records were produced for the inspector, nor had the section 104(g) withdrawal order been terminated. Tr. 523-24. The citation was marked as no likelihood and non-S&S, since it was a violation of a section of the Act but not a violation of a safety or health standard. Though the inspector initially marked it as “reckless disregard,” he ultimately marked the violation as high negligence, feeling that it met that lesser criteria better. Tr. 525. Mr. Miller did not ask any questions of the inspector about Citation No. 8698236.

Mr. Miller testified about the charge of working in the face of a withdrawal order. He began by stating that after the inspector raised the matter, he went back to the training records for the Sixteen to One Mine and determined that the only difference between that mine and the Plumbago was the communications. Tr. 537. However, this testimony related to the training plan, and not to the training itself. Tr. 538. Miller then conceded that there was a “paper problem” but adamantly asserted that no one was in any danger, and he believed they were not in violation based on his understanding of the law. Miller believed that everyone was trained and also had years of experience with his operations. *Id.* Miller reiterated that his men were trained but that, as a small operation, the paperwork lags behind. Tr. 539. Small mining operations such as these mines, Miller stated, are overwhelmed with paperwork. *Id.* Though he conceded that he

allowed the miners to go back to work, he probably told them to work on the surface only, not underground. Tr. 540.

Miller then asserted that he had certificates of training for Britt McDaniel, Skyler Noble, Joseph Sauer and Kevin George, dated July 22, 2014, to support his contention that those miners were not “newly hired experienced miners.” Tr. 541-42; RX 6. He stated that all the miners did was move over to a different mine, from the Sixteen to One Mine to the Plumbago. Tr. 542. An objection was made by the Secretary as the document related to the Sixteen to One Mine and it involved annual refresher training, not newly hired experienced miner training. *Id.* Besides, the training applied to the wrong mine, and there was the additional issue of it not being newly hired experienced miner training. Instead the proposed exhibit related to annual refresher training. Mr. Miller countered that the miners were not “newly hired,” as that would mean, in Miller’s view, that the miners were coming to the property for the very first time. Tr. 544. At most, he contended, they had made a paperwork error. The Court observed that, if it can be shown that the miners met the qualifications at the Sixteen to One Mine, such a fact could impact the penalty assessment. The Court allowed the exhibit, RX 6, a two page document, to be admitted. Tr. 545.

On cross-examination of Mr. Miller, he admitted that RX 6 reflects training records pertaining to the Sixteen to One Mine. Tr. 548. Miller stated that he completed the training for Britt McDaniel, Skyler Noble, and Joseph Sauer. Though he did not make out the forms, per RX 6, he did sign them. Tr. 549. Miller agreed that he is a certified MSHA trainer and that, as such, he is aware that annual refresher training is *not* the same as newly hired experienced miner training. Tr. 550. However, he stated he did not know that such training has to be site specific. *Id.* Mr. Miller expressed that he could not answer the question of whether every mine requires its own training plan, stating “there’s too many unknowns” in the question posed. As an example of an “unknown,” Miller stated that he did not know the definition of a mine as used in the question. Tr. 551. Significantly, Miller did concede that there was no training plan in existence for the Plumbago Mine at the time that the miners signed the training plans reflected in RX 6. *Id.* Miller agreed that the training record for Kevin George, per RX 6, was for newly employed experienced miner training on May 20, 2014. Tr. 552.

Continuing with regard to GX 20, relating to the first working in the face of an order received by Miller regarding this litigation, when Mr. Miller was asked if he was upset upon receiving the first 104(g)(1) withdrawal order on May 13th, he responded that he knew from his employees that the order had been issued and that he “probably got on the phone right away.” Tr. 554. He believed that the only issue was the training, not the paperwork. *Id.* He admitted that when inspector Dan Boylan returned to the mine on May 13th, MSHA considered the miners at the Plumbago mine to not be properly trained. Tr. 555. However, Miller denied that he sent the miners back to work without the required training being received. *Id.* His support for that view is that those miners had the training, albeit for the Sixteen to One Mine, but that there was no difference in the training for those two mines, except, as noted, for a different communication system at the Plumbago. *Id.* He then suggested, imprecisely, that the next morning they got the “procedure” (possibly referring to the communication system or perhaps the whole paperwork for the Sixteen to One Mine) in writing and took it over to the Plumbago

Mine. *Id.* However, he admitted that he had not submitted a plan to MSHA, but added that he didn't know he needed to do that. Tr. 556.

On further cross-examination, Miller agreed that following Inspector Boylan's issuance of a withdrawal order at the Plumbago Mine on May 17, 2014, the miners then came to the Sixteen to One Mine and met with him, informing him of the withdrawal order. Tr. 560. Miller then telephoned MSHA about the issue. However, he denied asking Boylan "what the hell" he was doing at the Sixteen to One Mine office. He could not recall if Boylan told him he had issued a 104(g) withdrawal order, or whether the inspector asked to see the mine's training records. Tr. 561. Miller agreed that he knew the issue was the training of his miners. Tr. 562.

On May 13, 2014, Boylan issued the working in the face of an order violation (GX 20a), but he had not delivered the 104(g)(1) order in person prior to that date. Tr. 570. Boylan saw what would become RX 6 on the first day he arrived at Plumbago in connection with the hazard complaint on May 6, 2014, but determined that it was insufficient because it related to the Sixteen to One Mine, not the Plumbago Mine. Tr. 572. Training is site specific. Tr. 572-73. This is because a training plan must address the geology, hazards, and conditions relevant to the particular mine site and these mines are at different sites. Tr. 573.

Mr. Miller attempted to show that the geology for the two mines was essentially the same, and by that, he was suggesting that one could have a single plan which applied simultaneously to both mines. Tr. 574. The inspector conceded that the geology was not different; rather the violation was based on the lack of a plan for the Plumbago Mine. Tr. 574-75. The Court then interjected that even if Mr. Miller could establish that in every regard the Sixteen to One and the Plumbago mines were identical, it still wouldn't affect the requirement to have a separate plan for each mine. Tr. 576. As noted, such a consideration could be considered in assessing a penalty. Mr. Miller noted that he had previously conceded that there was no separate plan for the Plumbago. *Id.*

Upon consideration of the evidence adduced, the Court imposes a civil penalty of \$75.00. This takes into account the slight differences between the plans but still holds Respondent responsible for the compliance obligation.

Docket No. WEST 2015-78-M (Plumbago Mine)

Order No. 8698224

Proposed Penalty: \$112.00. Penalty Assessed: \$112.00.

Inspector Boylan testified regarding the section 104(g)(1) order, Order No. 8698224.¹² This matter arose in connection with a verbal hazard complaint received by MSHA on May 5, 2014. Tr. 386. The complaint was anonymous and made by telephone. Thereafter, it was assigned to Boylan. The allegation was that the Plumbago Mine had no telephone and no permit for explosives storage and use, and that there was drug and alcohol storage, production, and/or

¹² As they are related, Order No. 8698224, Citation No. 8698225, and Citation No. 8698226 are discussed together.

use at the mine. In addition, the complaint asserted that workers were concerned over news that a caretaker at the property had died.

Finding the Plumbago Mine took some research on the inspector's part, but three IDs came up using MSHA's data retrieval system. Those ID numbers are reflected in GX 18. Tr. 386-88. The IDs, however, do not provide GPS locations, so the inspector had to drive to the vicinity and then try to find the mine. Tr. 389. Since the information MSHA had listed the mines as "abandoned," there were no directions to the mine, nor to a mine office location. Tr. 390. Eventually, the inspector found the location, coming upon a gated entrance with an old mill and rail dumps. At that time he also saw yellow caution tape on the gate leading to the mine. He then walked past the gate, arriving at the portal, some 1,700 feet from that point. Along the way to the portal he saw signs that mining activity had been taking place, observing relatively new PVC pipe, a box for power lines, with the box in the "on" position, and an electric locomotive of the type used for underground mining. The tracks were also shiny, an indicator of use. New timber and tools were also present outside of a shop and tools were in front of the portal. Tr. 395. These observations led him to conclude that there was mining activity.

No one was presently at the site but he then came into contact with someone who lived on a hill near the mine site, who informed him that people were coming and going from the site location. He told the inspector that the Miller boys were going in there. Tr. 396. Soon after that exchange, the inspector related that people started to show up at the site; they were Britt McDaniel, Joseph Sauer, and Skyler Noble. Tr. 397. Those individuals informed him that they were rehabilitating the mine and had been working there for about six months and were presently about 1,000 feet into it. They also confirmed to the inspector that this was the Plumbago Mine. Tr. 398. Interviewing the men, they spoke of their activities at the site, such as removing poor timber and replacing it with new wood, and checking ground and roof control for safety. Tr. 399.

All of the information led the inspector to conclude that it was an active mine site. Checking with his MSHA office, the inspector received confirmation that no one had reported the mine as being active. Further, he confirmed that no training plan had been submitted for the mine. Tr. 400. The individuals he interviewed advised that they had some training a few months earlier, but as there was no training plan for the mine, such training was for a different mine. Tr. 401. He later learned that the training the men mentioned was annual refresher training, but for the Sixteen to One Mine. *Id.* Original Sixteen to One Mine, Inc., owns the Plumbago Mine. Tr. 402.

Based upon his investigation, as described above, Boylan issued Order No. 8698224, a section 104(g)(1) order, GX 21(a), invoking 30 C.F.R. § 48.6.¹³ The order alleged that miners had not received the newly hired, but experienced, miner training. Tr. 402. The order withdrew the miners from the mine site, as untrained miners are deemed to be a hazard to themselves. A safety meeting was held the day after he issued the citation. Tr. 403. The order was marked as “reasonably likely” and “S&S.” The inspector’s issue was the miners not being trained under a training plan associated with the mine where they were working. Those miners had exposure for about six months, working in the formerly abandoned mine, as they made their efforts at the mine’s rehabilitation. Training plans must take into account the specific hazards at the specific mine. Tr. 404-05. The inspector also marked the Order as “fatal” because the history of mine fatalities correlates with untrained miners. Tr. 405. Also, the inspector considered that the mine did not have a ventilation plan or a mine rescue plan. Tr. 406. The negligence was marked as “high” because training is “101” for mining (i.e., a basic requirement) and the operator, being a “blue card holder” is able to give the training. This means that the operator, Mr. Miller, as a blue card holder, was well aware of the training requirements. *Id.* Subsequently, changes were made to some of the order’s designations, lowering them. Tr. 408.

In later testimony regarding this order, Inspector Boylan stated that he discussed the order with Mr. Miller in person. Tr. 566. This happened on the same date that Boylan came to the Sixteen to One Mine office after informing the miners of the withdrawal order. Boylan affirmed that, through his conversation, it was clear that Miller knew that he had issued a withdrawal order for failure to train the miners. Tr. 567. Boylan stated that in response Miller was upset and believed that the mine had been shut down. The mine was not shut down, but the miners had been withdrawn. *Id.* Because of the heated atmosphere, Boylan decided not to issue the order that day. Instead he returned to the MSHA office, typed out the order and delivered it via email, confirming by the software program that the order had been delivered. Tr. 569.

¹³ 30 C.F.R. § 48.6, titled “Experienced miner training,” provides:

- (a) Except as provided in paragraph (e), this section applies to experienced miners who are —
- (1) Newly employed by the operator;
 - (2) Transferred to the mine;
 - (3) Experienced underground miners transferred from surface to underground; or
 - (4) Returning to the mine after an absence of more than 12 months.
- (b) Experienced miners must complete the training prescribed in this section before beginning work duties. Each experienced miner returning to mining following an absence of 5 years or more, must receive at least 8 hours of training. The training must include the following instruction . . . [the standard then details the course of instruction in subsections (b)(1) through (b)(12) and (c) through (e)].

Respondent's post-hearing reply brief asserts that

[t]he opening quote of the citation implies that the miners lacked the required training to act as trained miners. This is patently false. These miners have long standing employment with Respondent. At most this is paper dumbness. There could not be an allegation of fatal. Negligence was zero. The proof is in our history.

Resp't's Reply Br. 4. Respondent misses the point. The order alleged that miners had not received the newly hired, but experienced, miner training. This was established. Respondent's contention only serves to show that it could have easily complied with the requirement. Training, for experienced and new miners, is a recognized safety fundamental. Characterizing it as "paper dumbness" is a misguided view.

Order No. 8698224 is upheld and the findings of the inspector are affirmed. The Court imposes a penalty of \$112.00.

Citation No. 8698225

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00.

Citation No. 8698225, GX 22, citing 30 C.F.R. § 48.3(a)(3), was also written on the same day as GX 21. It was based on the lack of an approved Part 48 training plan prior to the reopening and reactivation of the Plumbago Mine. Tr. 408. For this citation, the inspector marked it as no likelihood, no lost workdays, and non-S&S. He so marked it because he regarded it as a recordkeeping violation. However, because Mr. Miller was well aware of the requirements, he designated it as "high negligence." Tr. 409.

The Court upholds the violation and agrees that "high negligence" is the appropriate characterization. This finding is also appropriate when the violation is viewed in the context of Order No. 8698224, GX 21, and Citation No. 8698226, GX 23, as they are related. A penalty of \$100.00 is assessed.

Citation No. 8698226

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00.

Inspector Boylan's testimony also addressed Citation No. 8698226, GX 23, for failing to notify MSHA before starting operations, per 30 C.F.R. § 57.1000. Tr. 409. Prior to the inspector's arrival at the mine, MSHA had not been notified of the mine's rehabilitation status. Tr. 410. For this violation too, the inspector marked it as no likelihood, no lost work days and non-S&S, because he viewed it as a paperwork violation. *Id.* The reasons for the notification requirement are obvious. With awareness of mining activity: MSHA can arrive for help if the situation calls for it; it can make sure there are training plans; and, more fundamentally, it enables the agency to perform within its jurisdiction to inspect mines. *Id.* In the six months of failing to notify MSHA of the activity, at least one inspection would have otherwise occurred. Tr. 411. As before, the negligence was listed as "high" because the operator has a long history of mining and was well aware of these requirements. *Id.* In addition, the inspector learned that

other agencies had been notified of the mine's new activity. Tr. 413. Employee Rae Bell allegedly told the inspector that OSHA had been notified, but that Mr. Miller deliberately did not notify MSHA. *Id.* Later the same day, the inspector was at the Sixteen to One Mine and he met Miller there. Miller stated MSHA had no jurisdiction at the Plumbago Mine and was upset that it had been shut down. Tr. 415-16. As noted, while the mine had not been shut down, effectively it had been, as its employees could not work there until their training had been completed.

Mr. Miller's cross-examination of the inspector began with inquiring about the basis for the inspector being on the Plumbago Mine property, which he characterized as "private." Tr. 418. Miller asserted that MSHA did not have jurisdiction over the mine. This, he stated, was based on Section 4 of the Mine Act, the text of which was read into the record. That section, titled "Mines Subject to Act," provides: "SEC. 4. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." Tr. 421. From this, Miller asserted that no products entered into production from the operation, and therefore there was no impact on interstate commerce. *Id.* In addition, there was not any equipment there that would affect interstate commerce. Tr. 422. Mr. Miller then asked the inspector to distinguish between mining activity and tunneling. The inspector stated that mining is "producing, exploration and development and rehabilitation."¹⁴ Tr. 425. This claim by Respondent, that jurisdiction was lacking, completely lacking in merit, has been discussed earlier.

Mr. Miller then testified about the foregoing, grouped matters, beginning with offering RX 3 for identification. The Secretary objected to the exhibit as not relevant, as it reflects an approved training plan for *the Sixteen to One Mine*. These matters all relate to the Plumbago Mine, and therefore the training plan for another mine was not material. However, the Court utilized its discretion and admitted the exhibit, while noting that the weight afforded the exhibit was a distinct matter. Tr. 432. Miller then moved for the admission of RX 4, the Plumbago Mine's MSHA-approved Part 48 underground mining plan, dated June 26, 2014. The Court noted and Miller affirmed that his point in offering the exhibit was to show that it is virtually identical to the plan for the Sixteen to One mine. Tr. 433. The Court noted that the exhibit also can be viewed from a different perspective, as it shows how easy it would have been for the mine to have been in compliance, in large measure by just changing the name of the mine on the title page. *Id.*

¹⁴ Although Mr. Miller was then challenging the inspector's experience, the citations in issue at this point in the proceeding were Order No. 8698224 (GX 21), Citation No. 8698225 (GX 22), and Citation No. 8698226 (GX 23), involving, respectively, newly hired experienced miner training, no training plan, and no notification before starting operations. Tr. 429. The inspector stated that he has never worked in an underground mine. *Id.* The Court finds that Inspector Boylan was a well-qualified and knowledgeable inspector, who spoke with detail, both credibly and convincingly, regarding each of the citations/orders about which he testified.

The Court upholds the violation and agrees that “high negligence” is the appropriate characterization. This finding is also appropriate when the violation is viewed in the context of Order No. 8698224, GX 21, and Citation No. 8698225, GX 22, as they are related. A penalty of \$100.00 is assessed.

Citation No. 8698228

Proposed Penalty: \$243.00. Penalty Assessed: \$243.00.

Inspector Boylan also testified regarding Citation No. 8698228, GX 25a, issued May 7, 2014, and citing 30 C.F.R. § 49.2¹⁵ for the Plumbago Mine’s failure to “have at least two mine rescue teams available onsite, nor an alternative compliance under the small and remote mine rescue capabilities.” Tr. 437. Such an alternative plan has to be applied for and sent to the MSHA district office. That MSHA office had no such record on file. Tr. 438. Small mines are required to have their own mine rescue team or to have an agreement with another mine to provide mine rescue. The Plumbago mine had neither arrangement. Tr. 438-39. The inspector looked for documentation at the mine and the MSHA district office, but none was at either location. Tr. 439.

The inspector marked the citation as S&S and reasonably likely because, in context, there was no mine rescue, no ventilation plans, and no escape and evacuation plan, but there was exposure of miners. Miners had been working, untrained, and underground for six months in this formerly abandoned and now rehabilitated mine. Tr. 439. He added that the standard he cited is considered an “emergency standard.” This didn’t mean that there was an emergency underway, but rather that mine rescue comes into play when the event of a disaster has occurred to address

¹⁵ Section 49.2, titled “Availability of mine rescue teams,” provides:

- (a) Except where alternative compliance is permitted for small and remote mines (§ 49.3) or those mines operating under special mining conditions (§ 49.4), every operator of an underground mine shall:
 - (1) Establish at least two mine rescue teams which are available at all times when miners are underground; or
 - (2) Enter into an arrangement for mine rescue services which assures that at least two mine rescue teams are available at all times when miners are underground.
- (b) Each mine rescue team shall consist of five members and one alternate, who are fully qualified, trained, and equipped for providing emergency mine rescue service.
- (c) To be considered for membership on a mine rescue team, each person must have been employed in an underground mine for a minimum of one year within the past five years. For the purpose of mine rescue work only, miners who are employed on the surface but work regularly underground shall meet the experience requirement. The underground experience requirement is waived for those miners on a mine rescue team on the effective date of this rule.
- (d) Each operator shall arrange, in advance, ground transportation for rescue teams and equipment to the mine or mines served.

the need of rescuing miners who are in danger underground or trapped. Tr. 439-40. For those reasons, he also marked the citation as fatal. The citation was issued under section 104(d)(1) because of his determination that elevated negligence was involved, that the mine operator knew of the requirement, and that the requirement for a mine rescue team is basic and fundamental, not to mention that mine operator Miller used to be involved with mine rescue teams. Tr. 440.

In his cross examination regarding the mine rescue citation, Mr. Miller began with proposed exhibit RX 5, a letter from “Barrick Goldstrike Mines” to Mr. Miller as the manager of the Sixteen to One Mine, dated April 1, 2014. The inspector acknowledged he had seen the letter before. Tr. 451. Mr. Miller asked no other questions of the inspector about the letter. Mr. Miller attempted to use the letter to show that Barrick Mines would help in the event of a mine emergency. Tr. 452. The problem with it is that it references only the Sixteen to One Mine, not the Plumbago Mine. Tr. 452. Miller agreed that the letter makes no reference to the Plumbago Mine. Tr. 453. The Court ruled that the letter was not material to the issue of whether there were two mine rescue teams available and committed to respond to an emergency at the Plumbago Mine and therefore proposed exhibit RX 5 was not admitted. Tr. 454.

Upon consideration of the evidence for this citation, the proposed penalty of \$243.00 is adopted and imposed.

Citation No. 8698229

Proposed Penalty: \$308.00. Penalty Assessed: \$154.00.

For Citation No. 8698229, GX 26a, issued May 7, 2014, to the Plumbago Mine, and citing 30 C.F.R. § 57.11053, the inspector cited the lack of an escape and evacuation plan. A plan was not available for posting at the mine and therefore, in the event of a mine disaster, there were incomplete, non-existent, or inaccurate emergency plans. Tr. 441. Such a plan, obviously, is to address an emergency for miners as well as for rescue personnel or even mine visitors. Tr. 442. Mr. Miller stipulated that the mine did not have such a plan. Tr. 443, 458. Taking into account that the miners told him they had radios to call out in such an event, the inspector initially marked the citation as non-S&S and unlikely. However, after considering other deficiencies, involving the absence of a ventilation plan and mine rescue training, he then considered it to be reasonably likely. Tr. 444. He also marked the gravity as ‘fatal’ and high negligence. *Id.* Without such a plan, if an emergency arose, one would not have a specific escape and evacuation plan, which plan would facilitate rescues, too. With a plan, people would know the way in and out and where miners were working. It was also designated as high negligence because the operator was well aware of the standard. *Id.* With the inspector’s reassessment, he then revised the citation to a section 104(d)(1) violation. Tr. 445. Subsequently, however, as reflected on the fourth continuation page and Exhibit A to the penalty petition, the inspector later re-evaluated the paper and reduced the violation to a section 104(a) moderate negligence citation.

Mr. Miller’s cross-examination for GX 26 began by characterizing the citation as relating to a tunnel. The inspector stated that he did not go underground for this citation, as it involved the failure to have an escape and evacuation plan in the event of an emergency. Tr. 457. Apart from the claim that the mine was a tunnel, Respondent presented no defense to this citation.

The plan is obviously important, but given the small size of the mine, in terms of employees, and given the inspector's initial assessment that the gravity was unlikely, and that the miners had radios, a lesser penalty is appropriate. The Court imposes a civil penalty of \$154.00 for this violation.

Citation No. 8698230

Proposed Penalty: \$308.00. Penalty Assessed: \$154.00.

Citation No. 8698230, GX 27, citing 30 C.F.R. § 57.8520,¹⁶ was addressed. As originally issued, the violation was written as a section 104(a) citation. This involved the Plumbago Mine's failure to have a ventilation plan. Such a plan must be filed with the MSHA district office, but the inspector found none. Further, no plan was at the mine office and the miners did not know of such a plan either. Tr. 447. The inspector did know that the ventilation was natural, i.e. not accomplished through mechanical means. However, the miners didn't know where the ventilation was coming from. *Id.* As with Citation No. 8698229, GX 26a, the inspector revised his initial citation upward to S&S, likely, high negligence, and fatal, and converted it to a 104(d)(1) order after considering the other related violations for lack of mine rescue and escape plans. In the event of a fire, a ventilation plan is used to control it, by having knowledge of the airflow in the mine. The reasoning for those designations followed that cited by the inspector for Citation No. 8698229. Tr. 448. Just as with Citation No. 8698229, however, the inspector later reduced the negligence from high to moderate and re-evaluated the 104(d)(1) order to a 104(a) citation, as evidenced by the fourth continuation page of the citation. For GX 27, Mr. Miller stipulated that no plan of the mine ventilation system was set out by the mine operator in written form. Tr. 460. Mr. Miller's defense for Citation Nos. 8698228, 8698229, and 8698230 began by questioning his witness, Mr. Farrell, about mining law in 1872. Tr. 462.

The violation is upheld. Applying the same reasoning used for Citation No. 8698229, GX 26, the Court imposes a civil penalty of \$154.00.

¹⁶ Section 57.8520, titled "Ventilation plan," provides:

A plan of the mine ventilation system shall be set out by the operator in written form. Revisions of the system shall be noted and updated at least annually. The ventilation plan or revisions thereto shall be submitted to the District Manager for review and comments upon his written request.

The standard goes on to provide a detailed list of such plan's requirements, "where applicable." *See* § 57.8520(a)-(e).

Citation No. 8698231

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00

Inspector Boylan testified about Citation No. 8698231, GX 28, issued to the Plumbago Mine on May 5, 2014, and citing standard 30 C.F.R. § 57.18009.¹⁷ Tr. 465. The standard requires that a person be designated as the one in charge at a mine in the event of an emergency. When the inspector asked about who was so designated, no one was identified. Tr. 467. This was another violation for which the inspector changed his original designations upward to S&S and reasonably likely, high negligence and fatal. Here again, his more serious assessment was based upon the other violations he found during his inspection, such as the lack of a mine rescue team, and no escape and evacuation plan. Tr. 467-68. He later reduced the designations back to unlikely, no lost workdays, moderate negligence, and non-S&S, according to the second continuation sheet provided with the citation and the penalty petition.

Mr. Miller testified regarding Citation No. 8698231. Speaking to the competent person issue, Miller asserted that Britt McDaniels “has been a competent person working for our company . . . [and] Joseph Sauers is a competent person also.” Tr. 484. He added that the mine had radio communications. *Id.* The Court noted that the standard requires a competent person, designated by the mine operator, is to be in attendance but the inspector testified that no such person was present. Tr. 485. Miller then stated that Britt McDaniels, Joseph Sauer, and Skyler Noble were all at the mine that day and that all were competent persons. Tr. 486. Miller then reiterated that he designated McDaniels as the competent person at the Plumbago Mine and if that person was not there at a given time, Sauers was there. Tr. 487. Miller stated that he so designated those people as competent persons at the mine, “[p]robably well before May.” *Id.* While he could not give a precise date, Miller stated that it was approximately in January 2013. Tr. 488. Miller’s position was that the miners there at the time of the citation’s issuance simply didn’t speak up, viewing the inspector as a “stranger.” Tr. 491.

The Court noted that Miller’s testimony about the date he designated those individuals had implications about his claim concerning when the Plumbago Mine became active. Tr. 489.

In light of the testimony from Respondent, Attorney Horn recalled Inspector Boylan. Boylan stated that when he was at the mine he identified himself as an MSHA Inspector to the miners at that site. Tr. 505-06. Boylan reaffirmed that when he spoke with Britt McDaniels, asking if he knew who the designated person in charge in case of an emergency was, he responded there was none. Tr. 506. On re-cross, Boylan was asked how he identified himself to “Britt [McDaniel] and Joseph [Sauer].” Tr. 510. The inspector stated he responded: “My name is Dan, I’m with the Mine Safety and Health Administration, and I’m here on [a] hazard complaint.” *Id.* Mr. Miller had no questions of the inspector about the citation reflected in GX 28. Tr. 483.

The Court finds that this violation was established and imposes the penalty as proposed.

¹⁷ Section 57.18009, titled “Designation of person in charge,” provides: “When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency.”

Citation No. 8698232

Proposed Penalty: \$112.00 Penalty Assessed: \$112.00

Citation No. 8698232, GX 29, citing 30 C.F.R. § 57.4533(a),¹⁸ issued May 7, 2014, pertained to the mine shop, which was located right outside the portal, and asserts that the shop was not constructed of non-combustible materials. Mr. Miller then stipulated to the fact of violation. Tr. 469. However, Respondent did challenge the fatal and moderate negligence designations. The inspector stated that GX 29c accurately represented what he observed: the shop's proximity to the mine portal. A concern is that, with such combustible construction, smoke could enter the mine if the shop caught fire. Tr. 472. A fire, and smoke from it, could impede the ability to exit the mine. *Id.* At the time of the citation's issuance, there was only one portal, also as depicted in GX 29c. Moderate negligence was marked, on the basis that the inspector had no facts as to how often the mine operator had been on site and evaluated the mine property. Tr. 473.

Regarding Citation No. 8698232, Miller stated that his remarks applied to that citation and "the other one," apparently referring to Citation No. 8698233. He asserted there are two portals and that the second portal in fact is more than 100 feet from the building. He described the two portals as "like a Y." Tr. 492. Miller asserted that if the building did catch fire no danger would be presented. He based this on the statement that air was coming out of the portal, not going into it. Despite that assertion, the violation was abated by installing a sprinkler system, a fix Miller described as "very expensive." Tr. 493.

Mr. Miller had no questions of the inspector about the citation reflected in GX 29. Tr. 483. Upon consideration of the record evidence, the Court adopts the findings and proposed penalty derived therefrom. Therefore, the \$112.00 penalty is imposed.

Citation No. 8698233

Proposed Penalty: \$100.00. Penalty Assessed: \$75.00.

Citation No. 8698233, GX 30, citing 30 C.F.R. § 57.9300(a)¹⁹ and issued May 7, 2014, involved the lack of a berm on the roadway leading up to the mine. The roadway was elevated and miners used the road to travel to and from the mine. Tr. 473. Photos designated GX 30c were offered to show the cited road condition. Though he did not measure the elevation, the

¹⁸ Section 57.4533, titled "Mine opening vicinity," provides: "Surface buildings or other similar structures within 100 feet of mine openings used for intake air or within 100 feet of mine openings that are designated escapeways in exhaust air shall be — (a) Constructed of noncombustible materials."

¹⁹ Section 57.9300, titled "Berms or guardrails," provides at subsection (a): "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." As mid-axle height was mentioned in the testimony, subsection (b) of the standard is here noted. It states that such "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

inspector estimated it to be about 38 feet in height. GX 30c, photo two, shows the edge of the elevated roadway. Also, clarifying the photo's depiction, the inspector affirmed that, in photo one of GX 30c, the roadway cited is to the left of the private property sign. Tr. 477. The inspector agreed that, per that photo, he believed a berm was needed from the private property sign up to the gate. *Id.* No berm was present along the cited part of the roadway. The road itself was 18 feet wide. The inspector designated the citation as non-S&S and unlikely because it was not a haulage road, but instead was used to enter or exit the mine. However, he did mark it as "fatal" because, if a vehicle did go over the roadway edge, one would receive fatal crush and impact injuries. Once again, the negligence was marked as moderate because the inspector had no evidence that the mine operator was aware of the condition. Tr. 476. Thus, quite favorably to the mine operator in the Court's view, the inspector viewed the absence of evidence that the operator knew of the issue as a mitigating factor. *Id.*

Miller agreed that photo one of GX 30c was a fair representation, but asserted that photo two was not. He maintained that the depth of the rock cannot be seen and that there was a berm that came up to the mid-axle of the pickup truck. Tr. 494. He contended that repeated grading of the road over the years had created a sufficient berm. Later, the berm height was increased when they brought in a loader. Miller's position was that the citation should be vacated. Tr. 496.

On redirect for GX 30c, photo 3, Boylan was asked if he saw a berm in that photo, and he responded that he did not and that the photo reflected the condition of the roadway on May 6, 2014. Tr. 507. Directed to the right side of the photo where PVC pipe is shown, the Inspector stated that he did not consider that area of the roadway to have a berm. While he agreed that there appeared to be a "bump" or a "little material raised up" there, it was not a berm, as it was not mid-axle height of the vehicle that used that road, which was a pickup truck. Tr. 507-08. He did not measure the mid-axle height of the truck because it was so obvious that the berm was not mid-axle height. Tr. 508. The inspector stated that he did consider the density of forest in that location but added that the majority of the trees were not up to the roadway's edge. It was his view that one who over-traveled the road would overturn before going into the trees. Tr. 509.

Mr. Miller had no questions of the inspector about the Citation reflected in GX 30. Tr. 483.

The violation was established. However, given the small size of this mine and the minimal traffic along the cited berm-less road, a penalty of \$75.00 is imposed.

Citation No. 8698234

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00.

Citation No. 8698234, GX 31, citing standard 30 C.F.R. § 57.4131(a),²⁰ was issued May 8, 2014. For this matter, at issue was timber being stored about ten feet from the portal. As mentioned earlier, the standard requires that no more than one day's supply of combustible material may be stored within 100 feet of the mine opening. Tr. 478-79. The condition was photographed. GX 31c, photo 2. The wood, the pieces of timber, which the inspector cited, were not related to the building shown in the bottom center of the photo. Tr. 479. Mr. Miller stipulated that the material cited was less than 25 feet from the portal. Tr. 480. The citation was marked as non-S&S and unlikely as the inspector did not see any ignition sources or other sources of combustion such as liquids or gases. Tr. 481. He concluded that there was more than a one-day supply of wood by speaking with the miners at the site and learning how long the wood had been there and upon being informed that the mining progress had been slow going. Tr. 481. He never learned how long the wood had been there, other than being told it was more than a day. *Id.* He marked the violation as fatal because of the combustible materials' closeness to the mine entrance and because of the adverse impact it would have with mine rescue and escape and evacuation if a fire were to occur. *Id.* For the same reasons he gave earlier, no information as to the operator's knowledge of the condition, he marked the negligence as moderate. Tr. 482. Mr. Miller had no questions of the inspector about the citation reflected in GX 31. Tr. 483.

Regarding the one-day supply of lumber issue, Miller repeated that there are two adits, forming a Y shape, with the second adit of the Y being 100 feet from the other. Miller also asserted that, as any experienced miner would know, the wood cited was less than a one day's supply, especially when one is renovating a tunnel. Tr. 497. Miller added that because the air exits from that portal, even if the material did catch on fire, no smoke could enter it. Tr. 498. He added that there were no sources of fire. Miller concluded by stating that his only defense regarding that citation is that there was not more than a day's supply of lumber. Tr. 499. Attorney Horn then asked Miller, regarding GX 31c, photo 2, whether one of more of the lines depicted in that photo were electrical. Tr. 501. Miller admitted that to be the case, but responded that the electrical line or lines had no bearing on the citation regarding the wood. Tr. 502. Miller then agreed that there was a compressor at the mine and that it was powered by electricity. Tr. 504.

²⁰ The cited standard, § 57.4131, titled, "Surface fan installations and mine openings," provides:

- (a) On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation.
- (b) the one-day supply shall be kept at least 25 feet away from any mine opening except during transit into the mine.
- (c) Dry vegetation shall not be permitted within 25 feet of mine openings.

On redirect for Citation No. 8698234, Attorney Horn asked Inspector Boylan how he determined that there was more than a one day's supply of lumber. The inspector advised that it was based on his interviewing the miners. Further, nothing else he learned contradicted that view. Tr. 509.

Upon consideration of the record evidence, the Court adopts the findings in the citation and the proposed penalty derived therefrom. Therefore, the modest \$100.00 penalty is imposed.

Citation No. 8785247

Proposed Penalty: \$100.00. Penalty Assessed: \$75.00.

Inspector Nicholas Basich testified regarding Citation No. 8785247, which pertained to an alleged violation of a vehicle with no functioning brake or tail lights at the Plumbago Mine. The cited standard was 30 C.F.R. § 57.14100(b).²¹ Respondent agreed to the conditions and practices section of the citation, conceding the vehicle did not have functioning brake and tail lights, per item 8. Tr. 204. That the lights were non-functioning does not fully describe the condition, because the vehicle had no such lights present at all. Tr. 205. Miller did challenge the claim that the condition had been that way for about two months. A photo of the vehicle appears in GX 32c. The inspector did acknowledge the presence of a bar with a red rectangle on the back of the cab, but he did not know if it was a functioning brake or warning light. However, he did not consider it to be a brake or warning light. Tr. 207. The hazard is, with non-functioning lights, persons might be unaware of the vehicle stopping. Tr. 208. In addition, miners were in the truck's seats. However, the inspector listed the violation as non-S&S and unlikely. Tr. 209. He believed the condition had existed for two months. The inspector acknowledged learning that the needed lights had been purchased but not yet installed. Tr. 210. The inspector listed the negligence as "high" because the condition had existed for some time and the operator was aware of it. *Id.* As such lights are warning devices, the inspector stated that their absence is plainly a safety defect. *Id.*

Mr. Miller objected only to the high negligence designation for Citation No. 8785247. To begin, he stated that the light on the top of the cab was a brake light. Tr. 213. Further, the truck was never used at night, and in Miller's view, it did not need tail lights. In addition, he took issue with the inspector's claim that people would not be able to see the truck stop without the presence of such lights. Though he ordered his workers to install the lights, they failed to do so. Tr. 214. Miller felt the negligence should be low or at least moderate.

The truck was used to transport miners to various mines. At that time he employed five miners. Tr. 216. The truck transported men over a seven mile stretch of county road. Tr. 217. Miller continued to object to calling the site a mining operation. Rather he called it a "rehabilitation of an abandoned piece of property." *Id.* As noted, Respondent's claims that Plumbago is not a mine have been rejected.

²¹ 30 C.F.R. § 57.14100(b) requires 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."

Considering Mr. Miller's credible testimony on this matter, the Court agrees that high negligence is inappropriate and that moderate negligence is more accurate. Accepting the other designations made by the inspector, including that the violation was properly determined to be non-S&S, the Court imposes a penalty of \$75.00 for this violation.

Citation No. 8793615

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00.

Citation No. 8793615, GX 33, citing 30 C.F.R. § 57.12028,²² was issued on September 4, 2014, for the Plumbago Mine. Tr. 579. That citation related to testing for continuity and resistance for electrical components, a requirement to be performed annually as well as after installation and changes to such electrical components. Tr. 580. The inspector could find no record of the test having been performed and he also learned, through interviewing the miners, that it had not been done. *Id.* The standard is important as a failsafe and to ensure that the electrical equipment is operating correctly and safely. *Id.* Such testing must be recorded. The inspector inquired at the Sixteen to One Mine office and at the Plumbago Mine site as to such records, but none were presented. Tr. 581. The inspector also inquired, apart from the lack of records, whether the testing had been done, and learned from mine employee Britt McDaniel that it had not and that he would have been the person to do that. Tr. 582. Mr. Miller then stated that, assuming the inspector was accurately testifying about Mr. McDaniel's conversation, the citation was "deserved." Tr. 583. Miller then stipulated that the gravity and negligence markings for the citation were as written (unlikely for gravity, restricted duty or lost workdays, non-S&S, and moderate negligence). *Id.*

Accordingly, based on the foregoing, the Court imposes the same \$100.00 penalty as proposed by the Secretary.

Citation No. 8793617

Proposed Penalty: \$100.00. Penalty Assessed: \$50.00.

Citation No. 8793617, GX 35, issued September 4, 2014, involves standard 57.15030,²³ and the requirement for a weight test for self-rescuer devices. Those devices must be maintained in good condition and there is a requirement that they be inspected, with a weight test, within 90 days. Tr. 585. The weight test is not explicitly required in the standard. Rather, a program policy manual provides for such test. Mr. Miller then stipulated to the fact of violation for this citation as well. Tr. 586. He also agreed to each of the designations on the citation, save the

²² 30 C.F.R. § 57.12028, titled "Testing grounding systems," provides: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative."

²³ 30 C.F.R. § 57.15030, titled, "Provision and maintenance of self-rescue devices," provides: "A 1-hour self-rescue device approved by MSHA and NIOSH under 42 CFR part 84 shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition."

marking that it would be fatal. Tr. 587. With that designation, the last item in dispute for that citation, the inspector explained that he marked it as fatal because it is a life-saving device, called into use in an emergency and that, if it did not work when needed for an escape, the consequences would be fatal. Tr. 588.

Mr. Miller, objecting to the fatal designation, stated that there were two or three devices out of compliance with the 90 day requirement and essentially asserted that his son, an employee at the mine, was behind in the paperwork, and at that, he was late by only two to four days. Tr. 589. As to the fatality designation, Mr. Miller stated that air rapidly exits from the mine and the tunnel itself is very short. Tr. 590.

The inspector was then recalled. He acknowledged that the weight tests were not many days overdue but that he still believed the fatal designation was appropriate. Though unlikely that the devices were in a non-maintained condition, he still asserted that if they did not function, the expected injury would be fatal. Tr. 591.

Given that not all the devices were out of compliance and that the period of non-compliance was only a few days, the Court assesses a civil penalty of \$50.00 for this conceded violation.

Docket No. WEST 2015-158-M (Sixteen to One Mine)

Citation No. 8785248

Proposed Penalty: \$100.00. Penalty Assessed: \$25.00.

Inspector Nicholas Basich testified regarding this citation, which alleged a violation of 30 C.F.R. § 57.14207.²⁴ Miller stipulated to the “Condition or Practice” section of the citation — that the truck was parked without its parking brake being set — but he asserted that it was on level ground. He took issue with the moderate negligence designation. Tr. 220. Miller also disputed that the condition exposed miners to the hazard of contact by a slow moving vehicle. Inspector Basich stated that if the vehicle were bumped and it jumped out of park, it could have begun a slow roll, exposing miners to bumps or bruises. Tr. 221. However, the inspector conceded it was very unlikely that, if bumped, the truck would jump out of park. Tr. 223. The truck was not being used at the time he cited it. He marked it as moderate negligence because the standard is one within the “Rules to Live By,” meaning many accidents have been associated with it. Tr. 222. MSHA wants mine operations to set the parking brake in all instances, not simply when a vehicle is on a grade. On cross-examination, referring to the photograph in GX 10c, the inspector agreed that there was a bank and a tree on the other side of the truck and it was his understanding that the truck had recently been brought to the location where he observed it. Tr. 226. There was no indication that the truck had been tagged out, nor did the miner accompanying him assert that. *Id.*

²⁴ Section 57.14207 requires that “[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank or rib.”

Mr. Miller then testified about the citation, stating that there was no way another vehicle could bump the truck in that location. Tr. 228. Further, he stated that the truck, a used vehicle, had been recently purchased and had not yet been put in service. Tr. 229. Miller also disputed that two people worked at that location. Tr. 230. Miller couldn't speak to whether it had been tagged out, but he maintained it was at that location and not to be used until it had been checked out. *Id.* Therefore, he believed the citation should be vacated. Tr. 231. On cross-examination, he did acknowledge there was another vehicle near the cited one but contended that it was also there for repair work to be done. Tr. 233.

Upon consideration of the testimony, including the small size of the mine, the Court finds that the negligence was low and imposes a penalty of \$25.00.

Citation No. 8785249

Proposed Penalty: \$100.00. Penalty Assessed: \$ 50.00.

Inspector Basich testified regarding Citation No. 8785249, GX 11a, citing 30 C.F.R. § 57.6132(a)(6)²⁵ and issued September 9, 2014, at the Sixteen to One Mine. While inspecting the area around a magazine, the inspector noticed there was no sign informing that explosives were present. Tr. 236. The standard requires posting signs so that one shooting at the signs would not accidentally hit the magazine. Tr. 237. Shooting at signs is apparently a common practice in rural areas. Tr. 250. GX 11c consists of photographs of the cited condition and its abatement, and the white box depicted in the center of photo one is the magazine. Tr. 237-38; GX 11c. Detonators were stored in the magazine. The posting requirement applies to all approaches. Tr. 239. There was one sign on an A frame but it had fallen and therefore was not readily visible upon approaching the magazine. *Id.* From two approaches to the magazine, signs were not readily visible. Photos six and seven of GX 11c show the abatement of the condition. Tr. 241-42. The citation was marked as non-S&S and unlikely. This was based on the fact that those who worked at the mine site knew of the magazines. Tr. 242. However, the inspector deemed the negligence as moderate because these standards are well known in the mining industry. Tr. 243. Also relevant to the negligence determination was that it was obvious that the signs were not present. Tr. 244. He marked the injury as "fatal" because an explosion at the magazine could produce such a result. *Id.* Two magazines were cited for the one violation; one was the detonator magazine and the other was the high explosive/blasting agent magazine. Their relative locations were about 100 to 150 feet apart. Tr. 245.

On cross-examination, the inspector stated that simply seeing the magazines and no readily visible signs prompted the citation's issuance. Tr. 246. For the other magazine, the "powder" magazine, a sign was visible, but only from one direction. Tr. 247. Thus, the inspector agreed that there was a sign at both magazines but they were not readily visible. *Id.*

²⁵ 30 C.F.R. § 57.6132(a)(6), titled "Magazine requirements," provides, in relevant part, "Magazines shall be . . . [p]osted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine."

He also agreed that the miners knew of the magazines' locations.²⁶ Tr. 248. The inspector did sum up the issue with regard to both magazines. For photo one in GX 11c, depicting the detonator magazine, there were two approaches to it. Tr. 253. For that magazine, he saw only one sign and it had become loose so that it was not readily visible. However, two signs were needed. For the high explosives/blasting agent magazine, shown in GX 11c, photo 4, there were also two approaches. Tr. 256. Here, too, there was only one sign. Tr. 257.

Mr. Miller then testified about this citation involving the warning signs. He did not believe that any citation should have been issued. Other than the miners, anyone else on the property would be trespassers. However, he then volunteered that a creek passes through his property and that people are permitted to walk along it; they are not trespassing. Tr. 259. Miller viewed adding more signs as an invitation encouraging people to shoot at them. Tr. 260. Therefore, he wanted the signs to be in the least conspicuous location. Tr. 262. Miller also was of the opinion that there was only one approach, not two, to the magazines. Tr. 261. In addition, Miller did not think that a bullet would ignite the magazines, because the contents are non-detonating. Tr. 263.

This violation was established, but the Court takes into consideration that, while they were insufficient, there were signs present. Upon further factoring in the small nature of this mine and Mr. Miller's testimony (though his views were misplaced about whether more signs were ill-advised, as the standard requires appropriate warning signs from each approach), the Court views the negligence as less than moderate. A civil penalty of \$50.00 is imposed.

²⁶ As a side note, relating to an earlier citation, and referring to GX 11c, photo 1, the inspector agreed green vegetation is depicted in that photo and that he did not write a citation regarding that, because the vegetation was green. Tr. 250.

Citation No. 8785250

Proposed Penalty: \$100.00. Penalty Assessed: \$75.00.

Inspector Basich also testified regarding Citation No. 8785250, GX 12, issued on September 10, 2014, and alleging a violation of 30 C.F.R. § 57.8520.²⁷ Tr. 265. This dealt with alleged deficiencies in the mine's ventilation plan. Such plans, while not needing MSHA's approval, still must be submitted to the agency. The inspector asserted that the deficiencies

²⁷ A detailed standard, § 57.8520, titled "Ventilation plan," provides:

A plan of the mine ventilation system shall be set out by the operator in written form. Revisions of the system shall be noted and updated at least annually. The ventilation plan or revisions thereto shall be submitted to the District Manager for review and comments upon his written request. The plan shall, where applicable, contain the following:

- (a) The mine name.
- (b) The current mine map or schematic or series of mine maps or schematics of an appropriate scale, not greater than five hundred feet to the inch, showing:
 - (1) Direction and quantity of principal air flows;
 - (2) Locations of seals used to isolate abandoned workings;
 - (3) Locations of areas withdrawn from the ventilation system;
 - (4) Locations of all main, booster and auxiliary fans not shown in paragraph (d) of this standard.
 - (5) Locations of air regulators and stoppings and ventilation doors not shown in paragraph (d) of this standard;
 - (6) Locations of overcasts, undercasts and other airway crossover devices not shown in paragraph (d) of this standard;
 - (7) Locations of known oil or gas wells;
 - (8) Locations of known underground mine openings adjacent to the mine;
 - (9) Locations of permanent underground shops, diesel fuel storage depots, oil fuel storage depots, hoist rooms, compressors, battery charging stations and explosive storage facilities. Permanent facilities are those intended to exist for one year or more; and
 - (10) Significant changes in the ventilation system projected for one year.
- (c) Mine fan data for all active main and booster fans including manufacturer's name, type, size, fan speed, blade setting, approximate pressure at present operating point, and motor brake horsepower rating.
- (d) Diagrams, descriptions or sketches showing how ventilation is accomplished in each typical type of working place including the approximate quantity of air provided, and typical size and type of auxiliary fans used.
- (e) The number and type of internal combustion engine units used underground, including make and model of unit, type of engine, make and model of engine, brake horsepower rating of engine, and approval number.

30 C.F.R. § 57.8520.

included a failure to indicate air flow direction on the plan. Tr. 267. Also, the plan did not indicate seals for a vent, though there was a vent and sealed workings. The plan needs to indicate abandoned workings and seals. Tr. 268. Areas withdrawn from the ventilation system need to be on the plan, too. For such areas, the plan has to inform if air is flowing through withdrawn areas. Also, locations of known underground openings adjacent to the mine must be indicated on the plan. Diagrams, descriptions, or sketches showing how ventilation is achieved in each typical working place and the approximate quantity of air and the size and type of auxiliary fans, as well as the ventilation quantity and direction of airflow for current working places at the time of an inspection, must be provided. Still, despite the deficiencies alleged, the citation was marked as unlikely and non-S&S because the inspector found that the air was good. Tr. 270. However, because of the importance of the information in a mine emergency, the citation was marked as fatal, in terms of expected injury. *Id.* The lack of such information would hinder a mine rescue operation. Negligence was deemed “moderate” because the mine had submitted a plan, and the inspector’s review of the mine’s records reflected that some of the deficiencies had been raised to the mine at a prior time.

During cross-examination, the inspector stated that he did not believe that the plan’s deficiencies were made knowingly. The inspector confirmed that he had been told by a mine employee that there were abandoned areas that had been sealed off. However, the inspector did not dispute that if it were asserted there were no seals at the mine, he could not contradict such a claim, except for the one employee who told him there were seals. Tr. 276. The inspector agreed that he did find a drawing in the records about the seven existing openings. *Id.* Asked if such a drawing would aid a mine rescue effort, the inspector’s response was that this information would need to be part of the ventilation plan, not merely among the mine’s records. Tr. 276-77. As noted, the inspector agreed that if the mine had no seals, the ventilation plan need not reflect the absence of seals.

In the course of cross-examination, the Secretary’s Counsel stipulated that the ventilation plan does not reference mine rescue operations. Tr. 279. Respondent offered for identification an escape and evacuation plan, proposed exhibit RX 2, and the Secretary raised an issue about its materiality to the alleged violation. Tr. 280. Mr. Miller described it as “an Exploration and Operation Nonspecific Escape and Evacuation Plan.” Tr. 278. Some confusion developed about the nature of the exhibit and its materiality to the citation. The inspector could not recall if the proposed exhibit was among the papers presented to him when he asked to see the ventilation plan. Tr. 281. He viewed the proposed exhibit RX 2 as an escape and evacuation plan. Tr. 282. He acknowledged that RX 2 shows some information about air flow and quantity and direction but he could not recall if the mine’s ventilation plan was more specific or not. The inspector could not identify whether the plan reflected in RX 2 was the plan submitted to MSHA. Tr. 283. Despite the momentary confusion, the inspector confirmed that whatever ventilation plan was presented to him on the day of his inspection, it had the deficiencies he described. Tr. 284. RX 2 was later admitted into evidence. Tr. 359.

The inspector considered the citation to be a recordkeeping violation. Tr. 300. Inspector Basich expressed the view that the accuracy of a mine’s ventilation plan would be critical to mine rescue and recovery efforts, and it could impact how quickly such operations could proceed and such delays could create a fatal condition at the mine. He elaborated, using the example of a

mine fire and knowing how oxygen would be supplied to that fire, that knowing the direction smoke moves in such an event would be important. Tr. 309.

Mr. Miller then spoke to Exhibit GX 12. He stated that his mine does not use seals. He asserted that the employee who referred to seals meant barricades, diversions, or tarps to direct air, but they are not seals. Tr. 314. He acknowledged that, based on what he learned from the inspector's testimony, the map had deficiencies. Tr. 315. He also admitted that, in order to terminate the citation, the map had to be updated. *Id.* RX 2 is the map that the mine had at the time of the citation. Tr. 315. It was Miller's testimony that the mine made good faith efforts to have the plan contain all the required information and this included working with an MSHA inspector some three or four years ago, all in an attempt to have the mine's paperwork be compliant. On that basis, Miller believed that no negligence should be assigned to the violation. Tr. 316. Low or moderate negligence would be unfair because the mine has worked hard with MSHA to be in compliance on its paperwork. Miller also believed that no lost workdays should have been marked because there was no likelihood for such an event to occur. This is because of the site specifics, because of ways to get out of the mine, and because of the lack of fuel for a fire, among other reasons. Tr. 318-21.

The violation is upheld. Miller essentially conceded the fact of violation. Upon consideration, taking into account testimony regarding Miller's prior efforts and that the record was not clear as to the presence, or the lack of, seals, the Court deems the negligence to be slightly less than moderate. As noted earlier, for *each* of the contested citations, at both mines, these are very small mining operations, with size being a penalty factor to consider. Given these factors a civil penalty of \$75.00 is imposed.

Citation No. 8793618

Proposed Penalty: \$100.00. Penalty Assessed: \$50.00.

Testimony was received with regard to Citation No. 8793618, GX 6a, issued on September 9, 2014. For this matter, citing 30 C.F.R. § 57.14100(b),²⁸ which was in the upper shop, the inspector observed a hook for a two-ton hoist with its safety clip incorrectly installed, as it was on the outside of the hook. Tr. 333-34. The hoist was not being used when the inspector observed the condition of the hook, but it was ready and available for use. Tr. 333. The clip, when on the inside of the hook, prevents material from sliding out of it. He considered the clip, in the condition observed, to be a safety defect. Tr. 334-35. GX 6c, a photo, displays the clip when correctly installed. Tr. 335. The inspector marked the violation as non-S&S and unlikely because the hook was rarely used. He determined that any injury would be lost workdays or restricted duty because the hook was being used within its capacity. It would be when positioning something that had been lifted when the risk of the item coming off the hook would be greater. Tr. 336. The negligence was marked as moderate because it had not been reported to management and the person who incorrectly installed the clip didn't recognize that it was incorrect. Tr. 337.

²⁸ Section 57.14100, titled "Safety defects; examination, correction and records," provides, for the cited subsection: "(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

On cross-examination by Mr. Miller, he began by focusing on the words “in a timely manner” from the cited standard, § 57.14100(b). However, those words were not important to the violation in this instance. The standard is directed at safety defects, and when such defects are present, the standard directs that such defects be corrected in a timely manner. Tr. 338-39.

Jonathan Farrell testified for Respondent regarding the hoist citation and GX 6c, stating that he had used that hoist. He agreed that the purpose of the clip is to keep a chain or strap from sliding off the hook. However, he contended that, if one uses a chain or strap that uses the hook fully, the clip needs to be bypassed for such circumstances and then returned to its normal position. Clarifying his remarks, Farrell contended that the clip would then be repositioned so that it once again acts as a safety device. Tr. 364. While he conceded that the clip is meant to be moved back and forth, but not sideways (i.e., left or right), Farrell maintained that as a practical matter it was so moved to accommodate such larger chains or straps. Tr. 365. Farrell contended that the clip itself was fine; it was not replaced. Abatement was achieved by simply repositioning it on the hook. *Id.* However, Farrell agreed that if the clip for the hook had been used as depicted in GX 6c, its purpose would’ve been defeated. Tr. 366.

Mr. Miller then added his own testimony about the hook and clip citation, stating that his experience using the clip was the same as Farrell’s. *Id.*

As the Secretary noted in the post-hearing brief:

Farrell [the mine’s surface superintendent] agreed that the safety hook is intended to keep chains or straps from sliding off the hook when the hoist is in use. (Tr. 362-363). Farrell also testified that when the chains or ropes that are too large to fit through the hook opening with the safety clip attached, that the clip is bypassed by placing the clip outside the hook, as it was found by the inspector, and then replacing the clip inside the hook for [subsequent] use. (Tr. 363). On cross-examination, Mr. Farrell admitted that this is not how the safety clip is designed to be used; generally the clip moves frontwards and backwards within the bounds of the hook and [that it] is not designed to move around the tip of the hook to the outside. (Tr. 365). Farrell also admitted that if the hook were used in the condition in which it was found by the inspector, that the intended safety protections provided by the safety clip would have been defeated. (Tr. 365-366). That the safety latch “could” have been replaced prior to use does not mean that the latch “would” have been replaced prior to [its next] use. Respondent admit[ted] that had the hoist been used in the condition in which it was found by the inspector, it would have been a safety hazard. (*Id.*).

Sec’y Br. 16.

The violation was established. Given the small size of the mine, the infrequent use of the hoist, and the “unlikely” gravity designation, the Court assesses a civil penalty of \$50.00 for this violation.

Citation No. 8793620

Proposed Penalty: \$100.00. Penalty Assessed: \$75.00.

Regarding Citation No. 8793620, GX 8, issued September 10, 2014, to the Sixteen to One Mine and citing 30 C.F.R. § 57.4131(a),²⁹ the issuing inspector observed combustible material stored about 15 feet from the mine opening at the 800 portal. Tr. 342. GX 8c is a photo of the condition observed by the inspector. His concern was with the wooden rails and the pallet, per that photo. *Id.* As the wood appeared to be weathered, the inspector believed that condition increased the chance of it being combustible. He concluded that the wood was more than a one day's supply because it was being stored there. In addition, he saw the same material there the day before he issued the citation. Tr. 345. The hazards associated with such storage, if it were to catch fire, are the risk of smoke entering the mine and impeding the ability to leave the mine portal. Tr. 345. He stated that the mine "probably [had] quite a few [portals]" but the 800 portal, which is in the photo GX 8c, is the main one. Tr. 346. Miners did work underground that day. As noted, the mine uses natural ventilation. Though he could not recall the weather on the day the inspector issued the citations, he remembered it "being fairly dry." Tr. 347. The citation was marked as unlikely and non-S&S, because he did not see any immediate ignition sources around. In addition, while it was more than a one day's supply, the amount was not very large. *Id.* Lost workdays and restricted duty was marked because he believed that could be the effect of smoke inhalation. *Id.* Negligence was marked as moderate because it had not been reported to management.

On cross-examination, the inspector repeated that he considered the material to be more than a one day supply, because he observed it the previous day. Tr. 349. Mr. Miller asked if the standard's concern was over the quantity of timber, not the time it remained at the location. The inspector expressed that the intent was to permit such material near the portal when it is intended to bring it into the mine, as opposed to storing it outside the portal. Tr. 350.

Regarding Citation No. 8793620, Mr. Miller stated that the amount of wood was very small. It was used as track ties to fix rails. He agreed with the inspector's designation of unlikely, as there was no possibility of smoke going into the mine at that location, as the air exits there. Tr. 370. Miller maintained that the wood the inspector saw was in transit to the mine and that it was impractical to store it elsewhere. Tr. 368-70. He also asserted that the amount of wood did not impede the entrance to or exit from the mine. Tr. 371. Mr. Farrell also testified about this citation. It was his position that the standard speaks to the quantity of wood, not the length of time it is so located. Tr. 373. He contended that the amount of wood depicted in the photo was less than a one day's supply, and as such he believed it could remain there indefinitely. *Id.*

In the Secretary's cross-examination of Miller, regarding the combustible material citation, Miller did not deny that the combustible material had been as depicted in GX 8c for more than one day. Tr. 381. He also agreed that a day's supply of lumber will vary from day to day, depending on the mine's particular needs. *Id.*

²⁹ This text of this standard, § 57.4131, appears above. *See supra* note 20.

The citation, issued at unlikely, non-S&S, lost workdays or restricted duty, moderate negligence, and affecting one person, was assessed at \$100.00. Given the inspector's remarks about the attendant circumstances,³⁰ and the small size of the mine, a civil penalty of \$75.00 is imposed for this demonstrated violation.

Citation No. 8793621

Proposed Penalty: \$100.00. Penalty Assessed: \$100.00.

Inspector Boylan testified about Citation No. 8793621, GX 9, issued September 10, 2014, at the Sixteen to One Mine for an alleged violation of 30 C.F.R. § 57.11053,³¹ pertaining to

³⁰ In determining the civil penalty the Court also took into account the points and contentions referenced in the Secretary's post-hearing brief where it was noted:

The operator claims that the amount of wood the inspector found was minimal and far less than a days' supply of wood [and that] [t]he operator also claims that air was exiting the 800 portal on the day of the citation and, accordingly, there was no danger to miners from the accumulated combustible material. (Tr. 370). However, even if, on that date of the citation, air was exiting the 800 portal, the mine utilizes natural ventilation, and the direction of mine air changes with temperature and barometric pressure would likely expose miners on a later date. (Tr. 187). See, *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (1985). (Courts should consider alleged violations in terms of continued mining operations.).

Sec'y Br. 18. Having considered those points and contentions, along with the factors noted above, the Court determines that \$75.00 is the appropriate civil penalty.

³¹ The cited standard, § 57.11053, titled "Escape and evacuation plans," provides:

A specific escape and evacuation plan and revisions thereof suitable to the conditions and mining system of the mine and showing assigned responsibilities of all key personnel in the event of an emergency shall be developed by the operator and set out in written form. Within 45 calendar days after promulgation of this standard a copy of the plan and revisions thereof shall be available to the Secretary or his authorized representative. Also, copies of the plan and revisions thereof shall be posted at locations convenient to all persons on the surface and underground. Such a plan shall be updated as necessary and shall be reviewed jointly by the operator and the Secretary or his authorized representative at least once every six months from the date of the last review. The plan shall include:

- (a) Mine maps or diagrams showing directions of principal air flow, location of escape routes and locations of existing telephones, primary fans, primary fan controls, fire doors, ventilation doors, and refuge chambers. Appropriate portions of such maps or diagrams shall be posted
(continued...)

shortcomings with the mine's escape and evacuation plan. The plan did not illustrate escape routes available from the working area which was then at the end of the 800 level. Tr. 351-52. Thus, this violation was based on the escape routes not being indicated on the map. Tr. 352. The escape and evacuation plan was posted, albeit with the cited deficiency, throughout the mine. While at that location, the inspector asked the miners how they could get out if they needed to escape. The miners explained how they would escape but none of it was explained on the map. Tr. 353-54. In addition, the importance of the information is that such escape routes need to be inspected at regular intervals. Tr. 354. However, as the miner the inspector spoke with, Reed Miller, Mr. Miller's son, indicated that he knew how to get out, the inspector marked the violation as "unlikely." Tr. 354, 357.

Still, the inspector marked the injury, if the event were to occur, as fatal. Tr. 355. Negligence was deemed as moderate because there were postings of the plan, but there was no update for the working area. *Id.* The inspector believed that RX 2 was the map he saw underground, and about which he believed was deficient, as noted in his citation. To be sufficient, the map needed to illustrate the paths for escape from the mine. Only the main travel way, marked in yellow, was indicated, but two evacuation routes also needed to be listed. Tr. 359; RX 2. A single escape route is permitted only at the very beginning of a mine's excavation, but in such circumstances there must be a rescue chamber. Tr. 360.

On cross-examination by Mr. Miller, the inspector was shown RX 2, which was still not an exhibit at that point in the hearing, and the inspector acknowledged seeing a pick and shovel depiction on it. Tr. 356. However, that concession did not undercut that the violation was clearly established. As the Secretary observed in the post-hearing brief:

At the time of the inspection, there were miners working at the end of the 800 level who, when questioned by the inspector, could not indicate a designated escape route. . . . While there were escape routes available from the area where the miners were working, those routes were not clear to the miners nor were they reflected on the mine Escape and Evacuation Plan that was posted throughout the

³¹ (...continued)

- at all shaft stations and in underground shops, lunchrooms, and elsewhere in working areas where persons congregate;
- (b) Procedures to show how the miners will be notified of emergency;
- (c) An escape plan for each working area in the mine to include instructions showing how each working area should be evacuated. Each such plan shall be posted at appropriate shaft stations and elsewhere in working areas where persons congregate;
- (d) A fire fighting plan;
- (e) Surface procedure to follow in an emergency, including the notification of proper authorities, preparing rescue equipment, and other equipment which may be used in rescue and recovery operations; and
- (f) A statement of the availability of emergency communication and transportation facilities, emergency power and ventilation and location of rescue personnel and equipment.

mine and which was given upon request by mine personnel to the inspector. (Tr. 352-354). . . . [B]ecause in the event of an emergency, there needs to be established escape routes so that mine rescue and emergency personnel know where to find miners, the inspector found that the failure to designate escape routes and mark them on the Escape and Evacuation Plan to reasonably be expected to cause fatal injuries. (Tr. 355). And, because there was an Escape and Evacuation Plan, but that plan had not been updated, the inspector found that the operator had engaged in moderate negligence. (*Id.*).

Sec’y Br. 19.

Mr. Miller testified about the escape and evacuation citation. He contended that one entry and exit is allowed at a mine in the “steering phases of exploration.” He asserted that the mine was in such a phase, that is, this was an “exploration project.” Tr. 374-75. They were not in production. He believed that RX 2 meets the standard’s requirements. Tr. 376. He added that the location was less than 2,500 feet from the portal to the workplace. He also asserted that there are other ways to get out of the mine, but if the mine were to designate them, MSHA would then inspect them. Tr. 375. The government then cross-examined Mr. Miller. Referring to GX 9, Miller stated he was referring only to his son, Reed. Tr. 376. As for the other individuals Miller mentioned, he asserted they were not miners, but were task trained. Tr. 377. He asserted however that those individuals were very familiar with the mine and that they knew “all the ins and outs of it.” *Id.* Again, Miller asserted that no secondary escapeway is required at the mine.

The Court asked questions pertaining to GX 9 and the escape and evaluation plan. Miller agreed that the plan did not illustrate the escape routes for the working area of the mine. He also agreed that, per RX 2, the map of the escape and evaluation plan is depicted by the yellow line. Tr. 382. He agreed that only a single route is shown, but maintained that only one route was required. *Id.*

Further, addressing Respondent’s contentions in defense, the Secretary accurately observes that RX 2 was a deficient Escape and Evacuation plan, noting that the

only escape route indicated on the map is the main travelway; the travelway is not especially designated as an escape route but is a generally accepted escape route. (Tr. 358-359). And, even though each mine is required to have two escape routes at all times, only one is reflected on the map. (Tr. 359, 382).

Sec’y Br. 19-20.³²

³² Though the Secretary of necessity addressed Respondent’s contention that the mine was in exploration mode and therefore only one escapeway was necessary, it challenged that assertion, noting:

The Metal/Non-Metal Program Policy Manual, §57.11050, states that the phrase “‘exploration or development’ should be used in its narrowest sense, i.e., while

(continued...)

The violation was established. Upon consideration, given the importance of escape and evacuation plans for all mines, the Court imposes the same, modest penalty amount proposed by the Secretary in the amount of \$100.00.

Docket No. WEST 2015-240-M (Plumbago Mine)

Citation No. 8793801

Proposed Penalty: \$100.00. Penalty Assessed: \$50.00.

Inspector Rogers spoke about Citation No. 8793801, citing 30 C.F.R. § 57.11012,³³ which the Court described as the “bulkhead violation.” Tr. 127, 178; GX 36a. This occurred at Respondent’s Plumbago Mine. Tr. 129. The citation stated:

There was no bulkhead or any other form of protection, installed at the #1 raise to prevent material from sliding down the approx. 55 degree dip angle and contacting miners as they travel this area. This raise had been mined-out previously and an ore chute, ladderway and some stalls were installed. The old

³² (...continued)

ore body is being initially developed, or development or exploration work is being conducted as an extension of a currently producing mine.” (emphasis added). In addition, §57.11050(b) requires that a mine without two escapeways have, instead, a refuge chamber; the operator admits that it does not have a refuge chamber. (Tr. 380). *See also, Small Mine Development*, 37 FMSHRC 1892, 1898 (2015) (“Given the importance the standard places upon providing duplicative means of survival in an emergency, it makes sense that the same protections be extended to miners who are engaged in exploration or development work, which carries with it many of the same dangers as production mining.”). [The] Original Sixteen to One Mine does not satisfy the definition of “exploration or development” as defined in the Program Policy Manual. This is an old mine with over 35 miles of tunnels. (Tr. 53). The individuals underground . . . were not in a newly developed portion of the mine or in an area of the mine that was being extended. (Tr. 375-376). They were working in worked-out area of the mine within 2500 feet of the portal (Tr. 374). The mine operator cannot, by improperly claiming exploration, deny these workers, and other miners entering the mine, two safe means of escape.

Sec’y Br. 20-21. The Court agrees with the Secretary’s observations about the standard’s requirements.

³³ 30 C.F.R. § 57.11012, titled “Protection for openings around travelways” provides: “Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.”

dilapidated timber and material build-up, posed a fall of material hazard to miners traveling the main haulage.

For this matter, Respondent agreed with the condition and practice cited, including sections 10 and 11, listing the gravity as unlikely and the negligence as moderate, except where the citation asserted that “[t]he old dilapidated timber material buildup posed a fall of material hazard to miners.” Tr. 127. The area cited involved a chute and a ladder. Tr. 136. The inspector cited a mined out area where he found either a slick or a slide or a hanging wall that was on the primary travel way. That travelway was for ore cars or personnel on foot. There were no bulkheads³⁴ and therefore any materials, if they came out, would come at the hip or mid-torso level of a miner. Also the drift (i.e., tunnel) was not very wide, only about 8 feet or less, therefore there would be exposure every time one passed that area. Tr. 129.

Describing the area of the cited condition, the inspector stated that the travelway had a 55 degree angle and there was a ladder that went up that raise. *See* GX 36C. He asserted that “[t]here appeared to be some loose material that was on the right rib.” Tr. 131. He conceded that the material he was concerned about wasn’t probably all that loose, but if any did come down it would come into the drift. Tr. 132. Because the materials were not “all that loose,” he marked the violation as unlikely and non-S&S. *Id.* Negligence was marked as moderate, because in his estimation there did not appear to be a high degree of hazard. *Id.* It was the failure to install a bulkhead that drove his conclusion that the negligence was moderate. Similarly, he marked the injury as lost workdays or restricted duty because the angle any material would take was not severe. This led him to conclude that no fatality would result. Tr. 132-33. Respondent was permitted to install a nine-wire type (i.e., material similar to a chain link fence) bulkhead to remedy the problem, as that means would also allow one to visualize the area above. This abatement satisfied the inspector because, again, his concern was that smaller materials could strike a miner. If larger items had been his concern that remedy would not have been acceptable. Tr. 134.

On cross-examination, the inspector stated that he saw other areas that had a raise, where bulkheads had been installed for support. He reaffirmed that he did not climb the ladder at that location. Tr. 135. He agreed the ladder was not recently installed and he found no troubling³⁵ amount of rock fall below or around it. The inspector did not know what the angle of repose was of the rock left in the chute or raise. Tr. 136.

The inspector believed that the Plumbago Mine had two to three employees. Tr. 137. In his opinion, they were decent hands, that is, fairly knowledgeable individuals. *Id.*

³⁴ A bulkhead, typically, is used to barricade and block an area off for ventilation or to address some other potential hazard. Tr. 130. In this instance, its function would be to stop materials from going into the drift. Tr. 131.

³⁵ Respondent employed the word “troubling” in his question to the inspector. Tr. 136.

The Court had a few questions, beginning with GX 36c, the photograph associated with the citation. The inspector agreed that it was taken from the bottom, and directed upwards. His concern was material falling down, from the top area of the photo. Tr. 138. The bulkhead's function, being placed at the bottom, where the inspector was standing when taking the photo, would be to act as a barrier for anything which might fall down. Tr. 139. This area, within which things could fall down, was about 17 and a half feet wide. The opening from where he was standing was from left to right, and he was about in the centerline of that. *Id.* The raise in the photo goes up at an angle. Although the area cited had been mined out, it was along a primary travelway. Tr. 140. Without the bulkhead, material falling from above could potentially strike miners traveling by that area. Tr. 141. Again, abatement was achieved by installing a wire mesh bulkhead, not a wood bulkhead. The bulkhead would span the approximate 17 feet comprising the bottom length of the travel area. Tr. 142.

In his defense to the bulkhead citation, Respondent Miller testified that he believed Plumbago is not a mine, but rather an abandoned piece of property, that once was a mine.³⁶ Tr. 178. It was his view that no bulkhead was needed because there is no evidence of debris below. Tr. 179. Thus, he asserted that nothing could fall down from above. Respondent contended that the ground above was very competent and therefore nothing could fall out from above. As noted, Respondent took issue with calling Plumbago a mine. Rather, he asserted that it is a tunnel. There was no intention of mining. Tr. 180. Respondent asserted that there was only one stull present. It appears to the left side of the ladder. A stull is a single vertical pole. It is used instead of having caps or sets or rock bolts. *Id.* Respondent Miller, while admitting that he has not gone up the ladder, stated that someone else had done so. He also asserted that the scene captured in the photo exhibit has probably been that way for more than 30 years. Tr. 181. Thus, having assessed the situation, Respondent maintained that it would be frivolous to install a barricade. Tr. 182. Respondent asserted that generalities about other mines simply did not apply to this situation, noting that the inspector admitted that not every raise needs a bulkhead and that he saw no loose material. *Id.* Accordingly, he compromised with the inspector by installing the chain link fence, though that too, in his view, was completely unnecessary. Tr. 183.

On cross-examination, Mr. Miller again took issue with a question which included describing the cited area as part of a mine. The Court interjected that the inspector agreed that the cited location was not an active mine, but that miners traveled along the area to get to the mine. Miller agreed with that description. Tr. 184. The problem with that claim is that such locations are indisputably part of the mine and Respondent's contention is not worthy of additional comment. Miller, agreeing that the angle of the dip was 55 degrees and that the angle of repose was 35 to 37 degrees, still did not agree that anything that came loose from the rise would fall down it. However, his answer was not helpful to his position, as he asserted that "[t]here's a big 17 feet. We don't know what else is up [there] . . . [but he then agreed that] if you throw a ball up, it's going to come down." Tr. 185. Counsel for the Secretary then asked, "[I]f a rock would come loose or piece of wood would come loose or anything else that happens to be up in this old mined out section would come loose . . . there's nothing to stop it from

³⁶ All claims made by the Respondent that the Plumbago or the Original Sixteen to One Mine are not mines are without any merit. The acknowledged use and purpose of these is to mine gold ore.

coming out of the rise, correct?” Tr. 186. Critically, Miller acknowledged that it was “absolutely true. That is true.” *Id.*

Upon consideration, the violation was clearly established, but given the small size of the mine, that the condition had been that way, and uncited, for a very long period of time, and in consideration of the inspector’s evaluations of gravity and negligence, including that it was, properly, deemed non-S&S, a penalty of \$50.00 is imposed.

Citation No. 8793802

Proposed Penalty: \$100.00. Penalty Assessed: \$50.00.

Citation No. 8793802, GX 37, was issued on October 22, 2014, also at the Plumbago Mine. Cited was standard 30 C.F.R. § 57.8527,³⁷ for a failure to conduct oxygen testing. Tr. 145. Upon speaking with the miners, including Ms. Rae Bell, Respondent’s office manager, the inspector determined none of them were aware of any such testing being done. *Id.* The inspector stated that he would not enter any mine without an oxygen detector. Tr. 146. This mine utilizes “natural ventilation,” meaning that its ventilation is non-mechanical. Tr. 147. Oxygen testing is done to make sure miners have a minimum of 19.5% oxygen. Using his oxygen detector, the inspector found the oxygen level to be 20.6%. While the frequency of testing depends upon the particular metal/nonmetal mine, he believed that, at a minimum, such testing should occur weekly. Natural ventilation, he stated, only increases the importance of such testing because old workings, such as in this instance, can produce gasses. Tr. 149. Here, he found no evidence that *any* such testing had been done. This included, as noted, asking about the issue. *Id.*

Upon cross-exam, Respondent asked about the types of devices that would satisfy the standard, and the inspector (Rogers) gave some examples of such devices, some of which were multi-gas detectors. A flame safety lamp would also suffice. Tr. 150. The Court pointed out that the standard commands that such devices *shall* be used. The Inspector agreed that the Plumbago Mine is a non-gassy mine. Tr. 152.

In his defense, Miller stated that the mine is non-gassy, that no blasting takes place, that there was only a very small crew (2 or 3 persons) working, and that the climate is “consistent and predictable.” There are only occasional changes in the barometric pressures. For short periods there can be stagnant air. During winter, air is entering the mine, while in the summer it is coming out. Further, Miller stated that he has a flame safety gas lamp, which he has used often enough to inform himself that there is no oxygen problem at this site. In addition, some of those working in the mine, including Miller’s son, wear a device that is set to alarm at 19.6% and that device has never been triggered. Tr. 187-88. Miller’s overarching point was that, as there are millions of cubic feet of open space and the oxygen levels are always at 20.6%, testing the air is pointless. Tr. 188. On cross-examination by the Secretary, Miller affirmed that he has tested for oxygen at the Plumbago Mine. He stated that he usually tested once a week and that he had an oxygen tester until he purchased the small detector device he referred to during his direct

³⁷ Section 57.8527, “Oxygen-deficiency testing,” provides: “Flame safety lamps or other suitable devices shall be used to test for acute oxygen deficiency.”

testimony in defense. In response to further questions, Miller stated that he used a flame safety lamp to test for oxygen around May 2014, but now he relies upon the other, new, device.³⁸ Tr. 192. However, at the time of the citation's issuance, he only had the flame safety lamp to detect for oxygen. Tr. 193.

Asked about his practice of testing for oxygen when opening up new areas of the tunnels, Miller stated that they did not test for oxygen because there was no need to do such tests, as the mine has open stopes throughout, with raises going up every hundred feet or so. Tr. 194. In what may fairly be described as an afterthought, Mr. Miller brought up that the miners usually carry a BIC-type lighter, as may used by those who smoke cigarettes, and his belief that such lighters are "suitable" as detectors for bad air. Tr. 196-97.

Inspector Rogers was then recalled and asked about the use of BIC-type cigarette lighters as a suitable oxygen testing device. While such lighters can be *indicators* of oxygen, he stated that the flame on them will not illuminate when oxygen levels are around 16%, but the MSHA standard requires oxygen to be at 19.5%. Therefore, the device's use would not be sufficiently protective. In candor, the inspector admitted that back in the 1970s he used such cigarette lighters to check for oxygen. Tr. 200-01. The BIC lighter issue aside, the inspector stated that when he issued his citation, the miners told him they were unaware of such testing for oxygen being done, and neither the lead miner nor Mr. Miller later asserted to him that they were using suitable devices to test for oxygen. Tr. 201.

The violation was established but given the mine's small size, that the gravity was marked as unlikely, that it was non-S&S, and that the Court, based on Mr. Miller's testimony, considered the negligence to be low for this matter, a civil penalty of \$50.00 is imposed.

³⁸ Miller did not precisely identify the detection device, being uncertain about its name. Instead, he described it as a "little yellow device" that he bought in 2015 that tests for oxygen and cost about \$200.00. Tr. 192-93.

Docket No. WEST 2015-251-M (Sixteen to One Mine)

Citation No. 8793805

Proposed Penalty: \$243.00. Penalty Assessed: \$150.00.

MSHA Inspector Stephen P. Rogers also testified for the Secretary. Rodgers has 18 years of employment with MSHA and significant mining experience apart from his years with MSHA. Tr. 85-89. Directed to Citation No. 8793805, issued November 4, 2014, Rodgers, citing 30 C.F.R. § 57.6101(a),³⁹ issued it upon finding combustible materials — grass, brush, wood, and rubbish — within 25 feet of a powder magazine. GX 13c; Tr. 89. The concern is that a fire could propagate to that area and create an explosive hazard to the magazine, which was a blasting cap magazine. The inspector took measurements of the proximity of the combustible materials to the magazine, and Respondent stipulated that the material was within 25 feet of the magazine. Tr. 92. Still, the inspector found the gravity to be unlikely and also non-S&S. This was due to the lack of an ignition source for the cited material, such as a forest fire or vehicles in the area. Further, he noted that a lot of the brush had been cut back, so he concluded that it was not reasonably likely. Tr. 93. As the matter involved explosives, he did not feel that he could legitimately rate it any lower, as the “no lost workdays” category is primarily reserved for paperwork type violations. If a fire were to occur around a magazine, the practice is to simply get away from the area. One does not try to fight such a fire when explosives are involved. Tr. 94. The inspector did mark the negligence as “high,” explaining that a powderman, that is, one who is handling explosives, has great responsibility in such matters, which includes making sure that the magazine area is clean and clear. *Id.* On cross-examination, the inspector stated that the most likely source of a problem developing would be in connection with a forest fire occurring. While the inspector acknowledged that some work at cleaning up the area had been done, he did not view it as a “work in progress.” Tr. 98. The inspector’s notes also reflect that the condition was visible from the main road and therefore easily apparent to the mine operator. Tr. 101. The inspector did agree that his notes reflect that the mine operator had been making some efforts to clean up the area, but that the work had not been completed. Tr. 103.

Respondent, in its defense to this citation, called Mr. Miller. Miller testified that this was “a work in progress.” Tr. 154. He stated that the mine was aware of the issue. However, he stated that something must have interrupted the effort, and that something else took precedence. Also, he stated that the wooden spool was not within 25 feet, that the 55 gallon drum had some trash in it and was to be removed later, and that the 2x4’s, in his opinion, could not have presented a significant fuel source. Tr. 155. He also stated that non-els (non-electric blasting

³⁹ Section 57.6101, titled “Areas around explosive material storage facilities,” provides:

- (a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.
- (b) Other combustibles shall not be stored or allowed to accumulate within 50 feet of explosive material. Combustible liquids shall be stored in a manner that ensures drainage will occur away from the explosive material storage facility in case of tank rupture.

caps) are not self-detonating and that his recollection was that the inspector expressed his main concern as a forest fire. He believed that there was “no possibility” that a fire could ignite this. *Id.* In fact, he added that a disposal method for old explosives is to burn them. Tr. 156. However, he acknowledged the importance of clearing brush from around a magazine. *Id.* He also stated that there was very little fuel near the magazine and that the photo exhibit, GX 13, does not accurately represent the conditions that were present. Tr. 157. Thus, as the miners are there every day and are therefore more familiar with the situation, he viewed the condition as very remote and highly unlikely to occur. In the Secretary’s cross-examination of Mr. Miller, Miller acknowledged that the condition was visible every day from the road. Tr. 160. He reaffirmed his view that there was not sufficient brush to justify the citation’s issuance. In his view, the only real trash was the 2x4’s he mentioned earlier. As to the Secretary’s claim of brush close to the magazine, Miller described it as “green” and added that, if it’s green, it’s not brush, and it need not be removed. Tr. 161. Thus, he believed that the issue was minimal, stating that the grass didn’t appear as in the photo and that it was clipped very low with a Weedeater. Tr. 162. However, he admitted that CAL-OSHA had been out and told him that the area needed to be trimmed. Tr. 163. Again, he stated that the area had been considerably cleaned up since then and that CAL-OSHA did not issue a citation. He conceded that there had been a drought in the area for a long time. *Id.*

Following that, the Secretary recalled Inspector Rogers. Tr. 164. Redirected to GX 13c, he was asked about whether there was vegetation that he considered to be brush and therefore needed to be cleaned. He referred to his notes, and they reflected that he tested some of the brush to make sure that it was dry and crumply, not wet-type material. Tr. 165. Speaking to the material in the photo, GX 13c, to the right of the magazine, he concluded that none of that was acceptable. It had to be removed as in his view it could start a fire. Tr. 166.

Because this small mining operation was making some efforts at cleaning up the brush, coupled with the inspector’s admission that there were no immediate ignition sources observed, the Court views the negligence to be moderate, not high. Considering that view of the negligence and the small size of the mine, the Court imposes a penalty of \$150.00 for this violation.

Citation No. 8793806

Proposed Penalty: \$100.00. Penalty Assessed: \$75.00.

Inspector Rogers testified regarding Citation No. 8793806, issued November 4, 2014, and citing 30 C.F.R. § 57.6132(a)(3).⁴⁰ GX 14. The particular cited subsection requires that magazines are to be bullet resistant. The cited magazine is the same one cited in Citation No. 8793805, which contained blasting caps. Tr. 104-05. The inspector stated that the magazine was not bullet resistant as it had a steel exterior of about 1/8 of an inch with an interior lining of about 1/2 an inch of plywood. Tr. 105. In contrast, the ATF standard requires magazines to have a 1/4 of an inch of steel and 2 inches of hardwood. Tr. 106. Respondent stipulated that the cited magazine's exterior was 1/8 inch thick steel and it was lined with plywood. Tr. 121-22. The hazard is that if one were to shoot at the magazine, a bullet could penetrate it and detonate the explosives inside. The inspector acknowledged the scenario was unlikely as the mine's gate is locked and no hunting is permitted on the privately-owned land. Tr. 107. Negligence was also

⁴⁰ 30 C.F.R. § 57.6132, titled "Magazine requirements," provides:

(a) Magazines shall be—

- (1) Structurally sound;
- (2) Noncombustible or the exterior covered with fire-resistant material;
- (3) *Bullet resistant*;
- (4) Made of nonsparking material on the inside;
- (5) Ventilated to control dampness and excessive heating within the magazine;
- (6) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine;
- (7) Kept clean and dry inside;
- (8) Unlighted or lighted by devices that are specifically designed for use in magazines and which do not create a fire or explosion hazard;
- (9) Unheated or heated only with devices that do not create a fire or explosion hazard;
- (10) Locked when unattended; and
- (11) Used exclusively for the storage of explosive material except for essential nonsparking equipment used for the operation of the magazine.

(b) Metal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential. Suitable electrical bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined. Conductive portions of nonmetal magazines shall be grounded.

(c) Electrical switches and outlets shall be located on the outside of the magazine.

30 C.F.R. § 57.6132 (emphasis added).

evaluated as low as the magazine had been there for years, yet was not cited in previous inspections.

On cross-examination, the inspector stated that the cited magazine was a Class 2, which refers to a surface portable. Tr. 109, 111. There was another Class 2 magazine on the property, but it met the ATF standard. Tr. 110. The Respondent apparently filed paperwork with the fire marshall which listed the magazine as a Class 3 or 4 magazine. Tr. 112. Although the Respondent attempted to show that blasting agents need only be stored in a Class 4 magazine, the MSHA standard requires that the magazine must be bullet resistant. Tr. 114. MSHA accepts only Class 1 and 2 magazines. The inspector opined that, because the detonators were stored only in Ziploc bags, they would mass detonate. Tr. 117. In determining that the cited magazine did not meet the MSHA standard for bullet resistance, the Inspector relied upon the ATF and IME (Institute of Makers of Explosives) standards. Tr. 106, 121. Asked about the inspector's view that the magazine provided less protection to mine personnel than a bullet resistant one would, the inspector stated that the bullet resistant magazine would reduce the likelihood of a projectile penetrating the magazine. Therefore, the inspector's concern was focused on the construction of the magazine, not its particular location. Tr. 125.

In his testimony related to this citation, involving the thickness of the metal and the wood, and referring to Ex. 14, Mr. Miller stated that these were non-el detonating caps, and it was his view that they were "legal" as ATF inspected this, that is the thickness, the type of lock, etc. Tr.168. Miller's perspective was that ATF's view overrides MSHA's requirements. *Id.* Miller then proposed to enter as an exhibit a three page email between Respondent's employee, Rae Bell Abrogast, and Inspector Rogers. This was admitted as RX 1. Tr. 173.⁴¹ This was offered as mitigating evidence, with the purpose of showing that detonators that will not mass detonate may be stored in a Class 4 magazine. Miller maintained that this magazine had passed inspection for "years and years and years." Tr. 171-72. To abate the citation, Respondent had all of the explosives removed from it. Tr. 172.

This citation was assessed at \$100.00. Upon consideration of the statutory criteria, the mine's small size, and Mr. Miller's testimony on this matter, including that the magazine had not been cited in previous inspections, the Court imposes a civil penalty in the amount of \$75.00.

⁴¹ The Court raised an issue about the proposed exhibit, because the email is dated June 15, 2015, but the citation was issued November 14, 2014. Therefore it was unclear if the email related to Citation No. 8793806. Tr. 174. However, ultimately, the Court decided to admit the exhibit. That said, the Court expressed that it could be given little weight because OSHA's and ATF's views do not control. The Court did not decide then the impact of such information in evaluating gravity or negligence. Tr. 176.

Docket No. WEST 2015-381-M (Plumbago Mine)

Citation No. 8698267

Proposed Penalty: \$2,000.00. Penalty Assessed: \$2,000.00.

Inspector Daniel Boylan spoke to Citation No. 8698267, GX 38a, issued June 25, 2014, citing section 103(a) of the Mine Act.⁴² This was issued because of the alleged denial of entry to conduct an inspection. The inspector was at the Plumbago Mine with Inspector Jason Jenó for a compliance follow-up visit. That related to miner training and the training plan and to make sure that the miners had been withdrawn per the previous order. Tr. 600. When they arrived, they found that miners were working at the mine. Tr. 601. Mr. Miller then arrived at the site. The inspectors talked with the miners to determine why they were present, and they also examined some documents to determine if there were records of training. Mr. Miller asked to speak with the inspectors.

According to Inspector Boylan's testimony, while Miller was initially cordial, the inspector stated that Miller's attitude changed after the inspectors asked if a miners' rep was available to be present for such conversation. Miller, the inspector stated, informed that he would do the talking, not the inspectors. Tr. 603. The ensuing conversation became heated and Mr. Miller was angry, again, according to the inspector. The inspector stated that Miller asserted that there was no jurisdiction for their presence, Tr. 604, a perpetual assertion of Miller, which, as noted, was reasserted in Respondent's post-hearing briefs.

The inspectors informed Miller that he should direct his jurisdiction contentions to the MSHA District Office, not to them. *Id.* Miller then walked away and told his employees not to talk with the inspectors and for them to go home. Miller told the inspectors he was not talking with them anymore. With everyone leaving the mine site, the inspectors then left, too. Tr. 606. As all the employees had departed, the inspectors could not continue the inspection. The citation, reflected in GX 38, was issued as a violation of the Mine Act, and as such no safety standard was invoked. It was marked as non-S&S, no likelihood, and no lost workdays. However, it was also marked as high negligence, because Miller was well aware of MSHA's right to inspect. Tr. 607.

Citation Nos. 8698267 and 8698268 were each issued on June 25th, and for both, the inspector recommended a special assessment. This was because the inspector viewed the negligence involved for these two as "elevated." Elaborating, the inspector stated that Citation No. 8698268, involving *the second* instance of miners working in the face of an order, was associated with the need for withdrawal for the training to be conducted. The negligence for Citation No. 8698267 was elevated, the inspector maintained, because it is common knowledge that one may not impede MSHA inspections. Tr. 609.

The Court noted that, in making penalty determinations, it does not make "special assessments," but instead looks to the statutory penalty criteria only. In that regard it asked the inspector to further explain the basis of his "high negligence" designation. The inspector stated

⁴² Citation Nos. 8698267 and 8698268 were discussed together at the hearing and are so presented here.

that he found no mitigating factors and that Miller knew of MSHA's right to inspect. Tr. 610-11. On further cross-examination, the inspector stated that he had to leave the mine site to get the approval for the "impeding" citation. This required traveling some distance away from the mine, as the cell phone coverage was poor at the mine site.⁴³ Tr. 613.

Denial of entry to conduct an inspection, as occurred here, is a very serious violation. Upon consideration of the record evidence for this matter, the Court finds that the proposed penalty of \$2,000.00 remains appropriate and is so imposed.

Citation No. 8698268

Proposed Penalty: \$2,000.00. Penalty Assessed: \$2,000.00.

Citation No. 8698268, GX 39, was issued June 25, 2014, at the Plumbago Mine. Tr. 526-27. Four miners were at the mine at that time, moving a locomotive and working in the shop. For this matter, too, the earlier mentioned 104(g)(1) order, *see* discussion *supra* pp. 16-17, was still in effect, and because of that no miners should have been working. The citation, issued as a violation of the Mine Act itself, as opposed to a specific safety standard, was marked as no lost workdays, no likelihood, and non-S&S. However it was also marked as "reckless disregard." That last designation was used because it was the second instance of the mine working in the face of an order. Tr. 528. The inspector viewed it as demonstrating no apparent care in terms of abating the original order. *Id.* Again, the Plumbago Mine had not submitted a training plan to MSHA. Upon inquiring about any training they may have received, the inspector found some documents, but no "5000" training forms. Instead there was only something "scribbled off" with "Plumbago" written on the top of the form. Tr. 529. The form that was presented to him did not indicate that the required training had been completed, nor did it demonstrate that newly hired experienced miner training had been done. A proper form needs to show various numbers of training categories and certification that they had been done. The form that was presented to him had none of those items. Tr. 530.

Mr. Miller did not ask any questions of the inspector about Citation No. 8698268. As noted, this citation involved the assertion of working in the face of an order. Tr. 546. Mr. Miller again asserted that the required training was in fact given.

In cross-examination about Citation No. 8698268, again, the second citation involving working in the face of a withdrawal order, Miller acknowledged that he had knowledge that his men were told to leave the mine and that they needed to be trained, but he added that they had been working for him for years. When pressed about whether at that time he knew of the withdrawal order, Miller stated he did not know, and that he did not know "when [he] was delivered these final orders." Tr. 563. The Court did not find this claim to be credible. When asked to acknowledge the state of his awareness about the order's issuance versus receipt of the order itself, he stated there was a "huge difference" between "having something written and something orally given." Tr. 564. He did admit that he knew MSHA had issues with the

⁴³ Initially, Mr. Miller expressed concern about *the time* when the citation was issued, but the day it was issued, June 25th, was not in dispute. Tr. 615.

training of miners at the Plumbago Mine. *Id.* However, he stated that he did not know that he had received the first citation for working in the face of a withdrawal order. *Id.*

Mr. Miller then testified again about these matters. Tr. 620. He stated that he is well aware of MSHA's right to inspect but contended that he did not impede or deny their inspection. Tr. 624. He also stated that he is the president and director of the Sixteen to One Mine, and a shareholder, but not the owner. Tr. 621. When asked about his role at the Plumbago Mine, he stated that he is responsible for all operations, and the one who oversees, but that he is not the "day-to-day person" at the mine. Tr. 622. The latter tasks are done by competent, qualified, and lead miners under him. *Id.* He reiterated that he did not and has not ever told employees to leave mine property due to the presence of a mine inspector. Tr. 624. He also denied that he told the miners to leave and lock the mine entrance gate. Tr. 624-25. Instead, Miller stated that his miners told him that they did not want to stay at the mine with the inspectors present. Tr. 626. He told them they could stay or leave, as they preferred, because that is the mine's policy on such matters. Tr. 627. Elaborating, Miller stated that the mine's policy is that miners can leave "[f]or any reason that personally upsets them." Tr. 627. Yet, the miners were still paid for the day, even though they left the mine. Tr. 631. The policy, Miller contended, applies for any reason and is not just about mine inspectors. Tr. 627. Miller did not deny that he told the inspector that he was not going to talk about the issue any longer and that he then left in his truck. Tr. 628-29.

As noted, these events occurred at the Plumbago Mine. Tr. 631. Miller stated that he then drove back to the Sixteen to One mine office. Miller maintained that he could not recall if he was given the citation on June 25th. Tr. 632. Miller stated that, when he concluded that the conversation with the inspector would not "go anywhere," he decided that he would leave the mine, and left it to the miners as to whether they wished to remain or leave. Tr. 633. Miller admitted that he may have acted "a little bit excited," but he was not confrontational or threatening to the inspector. Tr. 635. Miller denied that he arrived at the mine on that day in order to challenge the jurisdiction of the inspectors. Tr. 638. However, once there, he admitted that he told the inspectors, politely, that they had no jurisdiction over the property. Tr. 638-39. He also admitted that, once they started talking, he knew the inspectors were there for the purpose of conducting an inspection. Tr. 639-40. It was Miller's statement that he chose to leave the mine property, but he agreed that he could have stayed and allowed the MSHA inspectors to finish their inspection. Tr. 643.

In light of Mr. Miller's testimony, Inspector Boylan was then recalled. He contradicted Miller's testimony, stating that the miners were instructed to leave the mine by Mr. Miller. Tr. 645. Further, he never heard Miller tell the miners they could stay or leave as they wished, nor did he hear any miners state that they didn't want to remain at the site. The inspector also took note that the Mine Act provides for miners to still receive their pay when a withdrawal order is issued and he so advised the miners of that. Thus, the inspector was firm that Miller told the miners to leave the site and to lock the gate behind them. Tr. 646.

The impeding order was subsequently lifted, upon the mine operator allowing the inspection to proceed. Tr. 647. Upon handing the citation for impeding to Miller, he relented, the inspection began, and the order was lifted. Tr. 648. On subsequent re-cross-examination, the

inspector agreed that he knew that all the paperwork for Plumbago was at the Sixteen to One office, so there was no need to return to the Plumbago Mine for that issue. Thus, the inspector admitted that the Plumbago Mine records were kept at the Sixteen to One Mine and that, as it was a matter of paperwork, he could obtain the records for the Plumbago there.

However, the inspector stated that he still elected to go to the Plumbago mine site first. Tr. 651. When asked why he chose to go to the Plumbago, the inspector stated that, while that mine tends to keep its records at the Sixteen to One mine office, he had a second reason for going to the Plumbago site, namely to determine if miners were working in defiance of the order issued at the Plumbago. Tr. 653. Thus, he had a valid, independent, reason to return to the site. The Court notes that this was certainly his legitimate prerogative. The inspector added that when they went to the Plumbago, he and the other inspector were presented with some documents but, as noted earlier, that those documents were “nowhere near [the] training documents required.” Tr. 654.

After considering the credibility of the inspector and that of Mr. Miller, at least as to these two matters, Citation Nos. 8698267 and 8698268, the Court finds that the Inspector’s version of the events is more credible. As noted in the discussion for Citation No. 8698267, denial of entry to conduct an inspection, as occurred here, is a very serious violation. Upon consideration of the record evidence for this matter and the statutory criteria, the Court finds that a civil penalty of \$2,000.00 remains fully appropriate for Citation No. 8698268.

Settled and Vacated Citations

At the hearing, seven citations were settled or vacated. Respondent withdrew its contest of the following citations and agreed to pay the originally proposed penalty: Citation Nos. 8698193 (WEST 2014-527-M), 8783100 (WEST 2014-527-M), and 8793807 (WEST 2015-251-M).

For Citation No. 8793616 (WEST 2015-78-M), the Secretary agreed to modify the citation to reflect lost workdays or restricted duty from the original designation as fatal, with the penalty remaining as proposed. The Secretary also agreed to modify Citation No. 8698194 (WEST 2014-527-M) to no likelihood, no lost workdays, and low negligence and to reduce the penalty to \$50.00.⁴⁴

Citation No. 8698227 (WEST 2015-78-M) was accepted by Respondent, and the Secretary agreed to remove the following sentence from Section 8 of the citation: “This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed.”

⁴⁴ For the record, this matter involved 30 C.F.R. § 57.16001, titled “Stacking and storage of materials,” which provides that supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards. The inspector found, at the second level of the upper shop, an above-ground location, materials were stacked in front of shelves which he believed created a tripping hazard for those accessing the shelves. Tr. 328. It was appropriate to settle this matter.

Finally, in an exercise of his prosecutorial discretion as recognized in *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993), the Secretary vacated Citation No. 8793619 (WEST 2015-158-M) at hearing. Having been vacated by the Secretary, Citation No. 8793619 is hereby DISMISSED WITH PREJUDICE.

The Court has considered the representations submitted in these cases and concludes that the proffered settled citations are appropriate under the criteria set forth in section 110(i) of the Act.

Summary of Violations and Penalties Imposed by the Court

Docket No. WEST 2014-527-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8698193	\$100.00	\$100.00
8783098	\$100.00	\$50.00
8783099	\$100.00	DISMISSED
8783100	\$100.00	\$100.00
8698194	\$100.00	\$50.00
TOTAL:	\$500.00	\$300.00

Docket No. WEST 2015-77-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8698235	\$5,000.00	\$500.00
8698236	\$112.00	\$75.00
TOTAL:	\$5,112.00	\$575.00

Docket No. WEST 2015-78-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8698224	\$112.00	\$112.00
8698225	\$100.00	\$100.00
8698226	\$100.00	\$100.00
8698227	\$100.00	\$100.00
8698228	\$243.00	\$243.00
8698229	\$308.00	\$154.00
8698230	\$308.00	\$154.00
8698231	\$100.00	\$100.00
8698232	\$112.00	\$112.00
8698233	\$100.00	\$75.00
8698234	\$100.00	\$100.00
8785247	\$100.00	\$75.00
8793615	\$100.00	\$100.00

8793616	\$100.00	\$100.00
8793617	\$100.00	\$50.00
TOTAL:	\$2,083.00	\$1,675.00

Docket No. WEST 2015-158-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8785248	\$100.00	\$25.00
8793618	\$100.00	\$50.00
8793619	\$100.00	VACATED
8785249	\$100.00	\$50.00
8793620	\$100.00	\$75.00
8785250	\$100.00	\$75.00
8793621	\$100.00	\$100.00
TOTAL:	\$700.00	\$375.00

Docket No. WEST 2015-240-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8793801	\$100.00	\$50.00
8793802	\$100.00	\$50.00
TOTAL:	\$200.00	\$100.00

Docket No. WEST 2015-251-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8793805	\$243.00	\$150.00
8793806	\$100.00	\$75.00
8793807	\$100.00	\$100.00
TOTAL:	\$443.00	\$325.00

Docket No. WEST 2015-381-M

<u>Citation/Order No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8698267	\$2,000.00	\$2,000.00
8698268	\$2,000.00	\$2,000.00
TOTAL:	\$4,000.00	\$4,000.00

TOTAL PENALTY ASSESSED BY THE COURT: \$7,350.00

ORDER

It is **ORDERED** that Citation No. 8793616 be **MODIFIED** to reduce the reasonably expected injury from fatal to lost workdays or restricted duty.

It is **ORDERED** that Citation No. 8698194 be **MODIFIED** to reduce the likelihood of injury or illness to no likelihood, to reduce the reasonably expected injury to no lost workdays, and to reduce the level of negligence to low negligence.

It is **ORDERED** that Citation No. 8698227 be **MODIFIED** to remove the following sentence from Section 8 of the citation: "This mine has been in operation in the past during times of favorable commodities prices, and the mine is having rehabilitation activity been [sic] performed."

Respondent Original Sixteen to One Mine, Inc., is **ORDERED** to pay a total civil penalty of \$7,350.00 within 30 days of the date of this decision.⁴⁵ Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

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⁴⁵ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 3, 2016

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

v.

D. HOLCOMB & COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. WEST 2015-382-M
A.C. No. 45-03570-371757

Mine: Black Diamond Quarry

DECISION

Appearances: Hanah Harris-Yager, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

Denis J. Holcomb, D. Holcomb & Company, LLC, Port Angeles, Washington for Respondent

Before: Judge David Barbour

This proceeding arises under the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* It involves one alleged violation of the Secretary of Labor’s mandatory safety standards for metal/non-metal mines found at 30 C.F.R. Part 56. The violation allegedly occurred on June 25, 2014, at the scale house trailer of the Black Diamond Quarry, a construction sand, gravel and rock quarry owned and operated by D. Holcomb & Company, LLC. According to the Secretary, on that date an inspector from the Secretary’s Mine Safety and Health Administration (“MSHA”) entered the trailer and observed a generator running inside the building near a company supervisor and a customer (a truck driver). According to the inspector, exhaust from the generator was not being vented directly outside, and the supervisor was not monitoring the exhaust to determine the carbon monoxide (“CO”) levels inside the trailer. The inspector checked the level and found it was in excess of 180 parts per million four feet inside the trailer’s only functioning door. The inspector cited the company for a violation of 30 C.F.R. § 56.5002, a mandatory safety standard requiring in part that “gas . . . surveys . . . be conducted as frequently as necessary to determine the adequacy of control measures.” The inspector found that the violation was highly likely to result in the deaths of the supervisor and the customer and that the violation was a significant and substantial contribution to a mine safety hazard. The inspector further found the alleged violation was the result of the company’s “high” negligence.¹

¹ Compounding the company’s negligence was the fact the company was cited previously for operating a generator inside the scale house trailer and for not monitoring the gas levels while doing so.

After issuance of the citation, MSHA applied its special assessment procedures and proposed a civil penalty of \$52,000 for the alleged violation. The company contested the proposal, and the Secretary petitioned the Commission to assess the penalty. The company answered the Secretary's assertions by stating the inspector who cited the company for the prior violation told the company if the windows in the scale house were kept open the generator could be used inside. The company asserted all of the windows and the trailer's only door were open when the generator was running. The company also asserted that exposure of persons inside the scale house was limited to two minutes.

After the answer was received, the Chief Judge assigned the case to the court which issued a prehearing order requiring the parties to confer to determine if they could settle the matter. The court also required the parties to exchange information, and the court set out the rules for discovery. Subsequently, the parties reported they were unable to agree on a settlement. Upon receiving the report, the court asked counsel for the Secretary and the representative of the operator if they would agree to the appointment of a settlement counsel to work independently of the court to resolve the case short of a hearing. The parties agreed, and the court appointed an independent settlement counsel. However, to preclude open-ended discussions, the court also set the case for hearing on March 29, 2016, in Port Angeles, Washington. The court made clear to the parties that if the efforts of the settlement counsel failed, the case would be heard on March 29.

In mid-March, 2016, the settlement counsel advised the court that his efforts were not successful. The case then proceeded to hearing and the parties appeared with documentary evidence and witnesses on the appointed day at the appointed hour in Port Angeles.²

The trial was scheduled to begin at 8:30 a.m., but due to a previously scheduled jury call, the clerk of the court advised all present that the room in which the case would be heard would not be available until approximately 9:30 a.m. The delay proved fortuitous. The court asked counsel and the representative of the company to use the time to make a final attempt to settle the case, and after a face-to-face discussion and a telephonic conference with the Solicitor's Office, counsel and the representative agreed to a compromise settlement. When the clerk then announced that the hearing room was available, the court convened the hearing so that counsel for the Secretary could describe the settlement and move for its approval. Upon hearing the explanation, the court granted counsel's motion for approval. Tr. 12. The court incorporates the explanation and the court's approval into the decision by reference.³ Tr. 9-12.

² Shortly before March 29, 2016, counsel for the Secretary withdrew and a substitute counsel entered her appearance on the government's behalf.

³ The court again thanks counsel and the representative for their persistence and their patience with one another and reiterates its view that the settlement is in the best interest of all involved. *See* TR. 7-12.

THE SETTLEMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
8780364	6/25/14	56.5002	\$52,500	\$30,000

Under the agreement, the compromise penalty will be paid in the amount of \$2,500 per month for a period of 12 consecutive months. Tr. 11.

ORDER

On June 1, 2016, the company **SHALL PAY** the Secretary of Labor the first of 12 consecutive payments each in the amount of \$2,500. The other eleven payments of \$2,500 **SHALL BE PAID** on the first business day of each succeeding month (to wit: July 1, August 1, September 1, October 3, November 1 and December 1, 2016 and January 2, February 1, March 1, April 3 and May 1, 2017).⁴ Upon the completion of full payment, this case **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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/db

⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO. 63179-0390.

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May 11, 2016

PRODUCTOS DE AGREGADOS DE
GURABO,

Petitioner,

v.

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

EQUAL ACCESS TO JUSTICE
PROCEEDING

Docket No. EAJA 2016-0003
Formerly SE-2013-0449-M

Mine ID No.: 54-00316
Mine: Productos de Agregados de Gurabo

DECISION AND ORDER

Before: Judge Lewis

This case is before me upon an Application for Fees and Other Expenses filed by Productos de Agregados de Gurabo (“P.A.G.,” or “Operator,” or “Petitioner,”) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the “Act”) and the Federal Mine Safety and Health Review Commission’s (the “Commission”) implementing regulations at 29 C.F.R. § 2704.100 *et seq.*

PROCEDURAL HISTORY

On April 12, 2013, MSHA Inspector Isaac Villahermosa conducted an inspection of the Petitioner’s Productos de Agregados de Gurabo surface mine. The inspector issued Citation No. 8723601 for violation of 30 C.F.R. § 56.11001, “Safe Access,” on the same date. *Productos de Agregados de Gurabo*, 37 FMSHRC 2441 (Oct. 2015).

After extensive prehearing discovery and numerous prehearing motions, a hearing was held on April 29 and 30, 2015 in Carolina, Puerto Rico.

On October 28, 2015, I issued a decision and order, vacating Citation No. 8723601, essentially holding that the Secretary had failed to present sufficiently reliable evidence to support a finding of a § 56.11001 violation. *Productos de Agregados de Gurabo*, 37 FMSHRC 2441 (Oct. 2015).

Neither party filed a petition for discretionary review with the Commission following the issuance of said October 28, 2015 decision nor did any party seek review by the Circuit Court.¹

On February 22, 2016, the Petitioner filed the subject application for fees and expenses.² 5 U.S.C. § 504.

¹ The Commission also did not direct the case for review on its own motion, pursuant to 29 C.F.R. § 2700.71.

² The operator's February 22, 2016 motion for fees explicitly stated that it was "**under the inherent power of the court.**" *Resp't Productos de Agregados de Gurabo's Petition for Attorneys' Fees and Litigation Expenses*, at 1 (emphasis in the original).

Notwithstanding the Petitioner's failure to title its claim as an application for EAJA fees, this Decision and Order treats P.A.G.'s February 22, 2016 filing as a petition for EAJA fees.

Despite the operator's insistence that the filing was made under the Court's inherent powers to award fees, the remainder of the filing uses language inseparable from its EAJA context, including terms like "prevailing party," and "adversary proceeding," in addition to arguing that "the position of the agency was not substantially justified." *Id.*, at 2-3. These are all terms specifically associated with EAJA proceedings and indeed, despite the Petitioner's protestations to the contrary, the filing otherwise follows a standard EAJA petition format.

Furthermore, it is unclear as to what "inherent powers," the Petitioner refers to. *Id.*, at 1. The Commission is not a court of general equity, and has no apparent "inherent powers," at least none this Court is comfortable exercising absent controlling Commission precedent. *See Jim Walter Resources*, 15 FMSHRC 782, at 790 (May 1993) (holding that the Commission is not a court of general equity, and that it is a fundamental premise that equity aids only those who have vigilantly pursued their rights). Moreover, as the Commission reasoned in *Kaiser Coal Corporation*, "[w]e begin with the fundamental principle that, as an administrative agency created by statute, we cannot exceed the jurisdictional authority granted to us by Congress." *Kaiser Coal Corporation*, 10 FMSHRC 1165, at 1169 (Sept. 1988). And, "[i]t also is a long-standing rule of law that the consent of the United States to be sued will not be extended beyond its literal terms and will not be implied." *Nibali v. United States*, 634 F.2d 494, 497 (Ct. Cl. 1980), citations omitted.

The Court declines to endorse Petitioner's view, and will not extend the United States' consent to be sued beyond the four corners of the statutes at issue.

In an attempt to have its cake and eat it too, the Petitioner contends in its March 31, 2016 filing that "the Commission will be furthering Congress's policy choice when Congress enacted the EAJA" by awarding P.A.G. attorneys' fees. *Resp't's Reply to the Secretary of Labor's Response and Objections*, at 8. Similarly, the Petitioner attempts to evade the 30-day requirement under EAJA by arguing that these time limits do not apply to the Court's inherent equity powers.

(continued...)

On March 24, 2016, the Secretary of Labor filed a response and objection to the Petitioner's application, contending, *inter alia*, that Petitioner's application was time-barred.

On April 4, 2016, the Secretary filed its sur-reply.

LAW AND REGULATIONS

29 C.F.R. § 2704.100 sets forth the purpose of Commission rules as to applications for Equal Access to Justice Act fees under 5 U.S.C. § 504:

The Equal Access to Justice Act, 5 U.S.C. § 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission's general rules of procedure, part 2700 of this chapter, apply where appropriate.

29 C.F.R. § 2704.100.

² (...continued)

Id., at 10. The Petitioner attempts to argue "in the alternative" that the filing should be treated as a properly filed EAJA petition. *Id.*, at 11.

Given that this Court has no inherent powers to render the relief sought, given the Petitioner's failure to cite a single FMSHRC decision for the proposition supporting the Commission's "inherent power," to award attorneys' fees, and given the Petitioner's initial decision to submit a filing that conformed almost totally to a standard EAJA format, this matter was properly docketed EAJA 2016-0003, and will be treated as such. The Petitioner's arguments to the contrary lack any grounding in Commission precedent, betray a troubling misunderstanding of the separation of powers, and fail to persuade.

29 C.F.R. § 2704.206 sets forth when an application may be filed:

- (a) An application may be filed whenever the applicant has prevailed in the underlying proceeding or in a significant and discrete substantive portion of that proceeding. An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. In no case may an application be filed later than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after issuance of a court judgment that is final and nonappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. § 816.
- (b) If review or reconsideration is sought or taken of a decision on the merits as to which an applicant has prevailed or has been subjected to a demand from the Secretary substantially in excess of the decision of the Commission and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.
- (c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. §§ 815(d) and 823(d))) and unappealable, both within the Commission and to the courts (pursuant to section 106(a) of the Mine Act (30 U.S.C. § 816(a))).

29 C.F.R. § 2704.206.

ISSUE

Given the above procedural history and applicable law and regulations, must Petitioner's application for EAJA fees be denied on the basis of untimely filing?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In my original, underlying decision I noted that the Petitioner's extensive prehearing challenges to Mine Act jurisdiction were clearly without merit. *See, inter alia, Productos de Agregados de Gurabo*, 37 FMSHRC 2441, at 2441-3 (Oct. 2015).³ Further, my decision in favor of the Petitioner essentially turned upon the Secretary's evidentiary failure to present sufficiently reliable evidence to support a finding of violation (*see, inter alia, 37 FMSHRC 2441, at 2450-2460.*)

³ In her application for EAJA fees, the Petitioner's counsel indicated that she was not seeking fees and costs related to previous jurisdictional challenges. *Resp't Productos de Agregados de Gurabo's Petition for Attorneys' Fees and Litigation Expenses, at 2.*

I am inclined to agree with the Secretary that the Petitioner's application for EAJA fees should also be rejected on substantive grounds.⁴ However, given the within procedural posture, I need not address the substantive merits of Petitioner's claim in that its application is clearly time-barred.

5 U.S.C. §504(a)(2) plainly provides that a party seeking EAJA fees shall submit "within thirty days of a final disposition in the adversary adjudication" its application. 5 U.S.C. § 504(a)(2).

29 C.F.R. § 2704.206 also clearly and unambiguously provides that "in no case may an application be filed more than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after the issuance of a court judgment that is final and unappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. § 816." 29 C.F.R. § 2704.206.

Petitioner's February 22, 2016 EAJA fee application was inarguably far beyond the mandated 30 day deadline.

Circuit Court case law holds that courts may not, by local rule, shorten or extend the time for filing in EAJA petition. *Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1082 (9th Cir. 2002).

My decision issued on October 28, 2015 became final and unappealable on or around November 30, 2015.⁵ The Petitioner failed to file its application until February 22, 2016 – almost two months after the statutory deadline of December 30, 2015.

⁴ See the Solicitor's response and objections to the Petitioner's application for fees, wherein, *inter alia*, the Solicitor avers that its offer to reclassify the citation from S&S to non-S&S with a penalty reduction from \$873.00 to \$131.00 had been rejected by the Petitioner prior to hearing. See also the Solicitor's arguments that Petitioner's EAJA application should be denied on the merits. *Sec'y's Response and Objections to Pet'r's Application for Fees and Expenses Pursuant to the Equal Access to Justice Act*, at 4.

The Undersigned is reminded of the Supreme Court's reasoning in *Ardestani v. I.N.S.*, 502 U.S. 129: "[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against *unjustified* governmental action and thereby to deter the *unreasonable* exercise of Government authority." *Ardestani v. I.N.S.*, 502 U.S. 129, at 138 (1991), emphasis added.

⁵ 29 C.F.R. § 2700.70 provides that a party adversely affected or aggrieved by a judge's decision may file with the Commission a petition for discretionary review *within 30 days* after issuance of the decision.

The Commission has consistently held that untimely applications under EAJA must be rejected.⁶ *See Signature Mining Services v. Secretary of Labor*, 18 FMSHRC 3261, n. 1 (Dec. 2014) (wherein ALJ McCarthy found that *Signature* was ineligible to be award EAJA fees due to its failure to apply for such within 30 days of the Commission's final disposition of the underlying proceeding); *See also James M. Ray v. Secretary of Labor*, 18 FMSHRC 2037 (Nov. 1996) (wherein ALJ Fauver acknowledged that an application for EAJA fees could be rejected for untimely filing, but rejected Secretary's motion to dismiss because the 30 day period, after excluding the day of decision's issuance and a Sunday, had not, in fact, elapsed.)

⁶ The Petitioner has not presented any Commission precedent to the contrary. Likewise, the Petitioner has cited no Commission case law supporting the application of equitable tolling to the EAJA context (instead, citing an irrelevant 10th Circuit opinion regarding equitable tolling and miners' rights to file discrimination complaints under § 815(c)(2) of the Mine Act). *Resp't's Reply to the Secretary of Labor's Response and Objections*, at 13, *citing Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007 (10th Cir. 2004).

Even if equitable tolling were a possibility in EAJA matters, the length of delay in filing and the problematic nature of the Petitioner's EAJA claim on-the-merits, would not qualify this for such tolling. As the Supreme Court noted in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, equitable tolling is extended only in exceptional cases:

“Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, (1990).

The Petitioner has alleged nothing resembling the circumstances described in *Irwin* to merit the relief asked for.

Therefore I am constrained to find that the Petitioner's application must be denied because it was filed beyond the statutory deadline.

ORDER

It is the decision of the undersigned that Petitioner's application for fees and expenses under the Equal Access to Justice Act was untimely filed and Petitioner's application is hereby **DENIED**.

/s/ John K. Lewis
John K. Lewis
Administrative Law Judge

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May 11, 2016

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

Petitioner,

v.

THE OHIO VALLEY COAL COMPANY,

Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2015-251
A.C. No. 33-01159-371484

Docket No. LAKE 2015-309
A.C. No. 33-01159-373906

Mine: Powhatan No. 6 Mine

DECISION AND ORDER

Appearances: Helga Spencer, Esq. and Christina Haviland, U.S. Department of Labor,
Office of the Solicitor, Philadelphia, PA, for the Secretary

Jason W. Hardin, Esq. and Jason Steiert, Fabian VanCott, Salt Lake City,
UT, for the Respondent

Before: Judge Lewis

I. Statement of the Case

These cases are before me upon two petitions for assessment of civil penalties under § 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Following an inspection of Respondent’s mine, an MSHA inspector issued Order No. 8061123 for coal dust accumulations along the South Mains belt line in violation of 30 C.F.R. § 75.400. Additionally, the inspector issued Order No. 8061124 to the Respondent for failing to record the accumulations in its examination books in violation of 30 C.F.R. § 75.363(b). A hearing was held in Pittsburgh, PA on December 16, 2015. At hearing the Respondent contested the high negligence and unwarrantable failure designations for both violations. Respondent also argued Order No. 8061124 should be vacated because the cited accumulations did not exist at the time of the on-shift examinations.

This Court now issues findings of fact and conclusions of law affirming Order No. 8061124 and affirming the high negligence and unwarrantable failure designations for both Order No. 8061123 and Order No. 8061124. This Court also affirms the penalties totaling \$14,536.00 for those two orders.

II. Procedural History

On September 9, 2014, two 104(d)(2) orders were issued at Ohio Valley Coal Company (“Respondent” or “Ohio Valley Coal”), Powhatan No. 6 Mine. Respondent contested these orders on February 18, 2015. On November 23, 2015, the Secretary filed a motion to preclude expert testimony in response to Respondent’s Prehearing Report of November 13, 2015. On December 1, 2015, the Respondent filed a motion in opposition, and the Secretary filed a reply on December 2, 2015. This Court denied the Secretary’s request for exclusion of Respondent’s proposed testimony and exhibits, and withheld determination as to the admissibility or weight to be given to the Respondent’s proposed witness testimony and exhibits. On December 16, 2015, a hearing was held in Pittsburgh, PA. After the hearing, the parties submitted Post Hearing Briefs and Reply Briefs, which have been fully considered.

III. Stipulations¹

1. Respondent was an “operator” as defined in §3(d) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(d), at the Mine at which the Orders in this matter were issued.
2. The operations of Respondent at the Mine at which the Orders in this matter were issued are subject to the jurisdiction of the Act.
3. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its assigned Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
4. The Orders in the matter were properly issued and served by a duly authorized agent of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated therein as required by the Act.
5. Exhibit “A” to the complaint accurately sets forth the Respondent’s Mine size points, Controller size points, VPID points, and RPID points used by the Secretary in setting the penalty for Orders 8061123 and 8061124.
6. An E01 inspection of the Powhatan No. 6 Mine was conducted by MSHA on or about September 9, 2014.
7. Representatives from MSHA and the Respondent were present at the underground site visit on September 9, 2014.

¹ The parties’ joint stipulations were read into the record at Transcript pages 10-14. (Tr. 10-14). A paper copy was said to be attached to the record as Joint Exhibit 1, however; the exhibit attached was a Mine Citation/Order Continuation modifying Citation No. 8057495. (Joint Ex. 1). The ALJ also incorporates the recitation of the stipulations set forth in the Secretary’s Post Hearing Brief that was not objected to by Respondent (except for the clerical error of using Order Nos. 802113 and 8062114 instead of the correct Order Nos. 8061123 and 8061124) as though fully recited herein. (Sec’y Post Hearing Br. at 3-4). Hereinafter, joint stipulations will be cited to as J.S. followed by the stipulation number. Exhibits will hereinafter be cited to as JX followed by a number for joint exhibits; GX followed by a number for the Secretary’s exhibits; and RX followed by a number for the Respondent’s exhibits.

8. On September 9, 2014, MSHA Inspector Terrence A. Saho (AR No. 25193) issued Orders 8061123 and 8061124 during an inspection of the Mine.
9. Respondent does not contest that the conditions cited in Orders 8061123 and 8061124 could be expected to cause injuries resulting in lost workdays affecting two miners.
10. The imposition of the proposed penalties will not affect Respondent's ability to remain in business.
11. The exhibits offered by the Parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.
12. The R-17 Assessed Violation History Report is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.
13. Pursuant to Section 103(i) of the Mine Act, Powhatan No. 6 Mine is subject to 5 day spot inspections for methane as this liberates more than 1 million cubic feet of methane during a 24 hour period.

IV. Factual Background

On September 9, 2014, Inspector Terrance Saho arrived at Powhatan No. 6 mine at 7:30 a.m.² (Tr. 28). He went to Powhatan No. 6 mine for an E0-1 inspection.³ (Tr. 27). Prior to conducting his inspection, Inspector Saho reviewed the exam books for the mine. (Tr. 28). After reviewing such, he began his inspection of the South Mains belt and South Mains return. (Tr. 29). Inspector Saho traveled with Bill Hagedorn, Inspector Saho's supervisor, Jeremi Hossman, a safety representative, and Nathan Carlton, the union representative. (Tr. 29).

During the inspection, Inspector Saho entered the belt line at one crosscut and proceeded inby along the South Mains belt, between crosscuts 35 and 36. (Tr. 30-31). There was a wall isolating two separate parts of the belt line. (Tr. 30-31). When Inspector Saho arrived at the wall, he went through the man door, on the walking side of the belt, from a fairly well rock dusted entry into an area with black coal dust covering the roof ribs, floor, and belt. (Tr. 32). He continued walking down to the end of the belt line where he found the tail roller was turning in compacted coal and coal fines. (Tr. 32-33). At approximately 10:00 a.m., Inspector Saho issued Order No. 8061123 for accumulations between crosscuts 36 and 39 in violation of § 75.400.

² Inspector Terrance Saho is an inspector for MSHA. (Tr. 20-21). In June 2014 he was authorized as a coal mine inspector. (Tr. 21). Prior to becoming a mine inspector, he received 21 weeks of training at Beckley, West Virginia at the Mine Academy. (Tr. 22). Before working for MSHA, Inspector Saho worked in the mining industry for approximately two and a half years. (Tr. 24-25). He worked two years with Consol Energy and approximately five months with GMS. (Tr. 25). He was a union coal miner at Consol, working as a bolter on the continuous miner, and various sections jobs, belt work, and general inside labor. (Tr. 25). At GMS, Inspector Saho worked on belts. (Tr. 25).

³ An E0-1 inspection is a general inspection. (Tr. 27). At this time, Powhatan No. 6 mine was subject to a five day spot inspection where inspectors would take bottle samples to test for methane liberated from the mine. (Tr. 27).

(GX-1). He measured the accumulations at the tail roller; the accumulations were six feet across and two feet in depth. (Tr. 33). The accumulations were black, which showed that there was no mixing of rock dust. (Tr. 36-37). Inspector Saho listed float coal and loose coal accumulations for the violation. (Tr. 37). There was also no evidence that anyone had cleaned up the site of the accumulations when the orders had been issued. (Tr. 38). The operator subsequently shut the belt down to abate the condition. (Tr. 34).

Inspector Saho proceeded around the tight side of the belt to the return regulator. (Tr. 34). There he saw float dust being sucked through the return regulator and sent down the return. (Tr. 34). This indicated to him that the float dust had been in this area for an extended period of time and that no one had been in the area past the wall to maintain the coal dust accumulations. (Tr. 34). He also believed that no one had been in this area that day because there were considerable coal dust accumulations and no sign of rock dusting. (Tr. 34).

The gravity of the violation was assessed as reasonably likely and Significant and Substantial (“S&S”) because the float coal dust and accumulations with the tail roller turning in the coal accumulations could have created a “fire triangle.”⁴ (Tr. 51-52). Inspector Saho testified that coal was impacted by the roller, which created friction that could have caused a fire. (Tr. 52). The coal was damp near the belt, and there was no other ignitable source other than accumulations around the tail roller. (Tr. 72, 76-77).

Inspector Saho determined that the injury or illness expected for the violation would be lost workdays or restricted duty because a potential fire on the belt could have led to smoke inhalation. (Tr. 52). He determined that two persons would be affected because there would have been two examiners present at any given time on a shift and a belt cleaner could have been in the area. (Tr. 52-53). Inspector Saho further found the violation was the result of an unwarrantable failure to comply with a mandatory health and safety standard. (Tr. 53).

Inspector Saho testified that the 2 South Section and West Mains Section had dumped coal directly on the South Mains belt at the 25 crosscut. (Tr. 50). The 1 South Section was not in production on September 9, 2014. (Tr. 50). Thus, there was no coal dumping on the South Mains belt that day near crosscuts 36-39. (Tr. 56). Therefore, Inspector Saho testified that the coal accumulations had to be there for longer than the on-shift exams at least. (Tr. 56).

Inspector Saho also issued Order No 8061124 for the examiner failing to report the accumulation conditions in the examination books, in violation of § 75.363(b). (Tr. 58). Inspector Saho reviewed the examination books and did not find any note of the accumulations from crosscuts 36-39. (Tr. 60). The exams were conducted between 2:00 and 2:28 a.m. and 6:00 and 6:26 a.m. (Tr. 60-61). The order was issued because the examiner failed to record all of the nine mandatory standard violations he observed. (Tr. 62). This order was designated S&S and indicated that two persons would be affected: the examiner and belt cleaner. (Tr. 61-62).

After the orders were issued, Jeremi Hossman, the safety representative, instructed miners to clean and rock dust crosscuts 36-39. (Tr. 51). The condition was abated in approximately two hours. (Tr. 51; RX 1).

⁴ Inspector Saho uses the term fire triangle, comprising of fuel, an ignition source, and oxygen, to indicate the conditions in a coal mine that can create a fire hazard. (Tr. 70).

Matthew Skolnick, the section foreman for Ohio Valley Coal, conducted the on-shift examination of the South Mains belt on September 9, 2014, before the midnight shift.⁵ (Tr. 150-51). He testified that he had inspected the whole belt line all the way to the end and had only noted a bad roller during the exam. (Tr. 152). He further testified that he did not see any accumulations along the belt. (Tr. 154).

On the evening of September 9, 2014, Skolnick found out about the orders involving accumulations. (Tr. 157). The following morning, at the end of the midnight shift, Skolnick was told a tear was found in the South Mains belt. (Tr. 157).

Skolnick reviewed the Production and Labor reports for September 9, 2014, to determine which sections had been loaded onto the South Mains belt that day. (Tr. 162). Skolnick testified that during the midnight shift, the 2 South Section and West Mains Section were mined, and the coal was dumped onto the belt at crosscut 25. (Tr. 162). 9,000 tons were mined from the 2 South Section, and 34 feet were mined from the West Mains Section. (Tr. 163). The first car from the 2 South Section was dumped on the South Mains belt at 1:50 a.m., and the last car was dumped at 8:05 a.m. (Tr. 164-65). The West Mains Section was dumped on the belt between 3:00 a.m. and 8:30 a.m. (Tr. 168). Skolnick testified that during this period, before the orders were issued, the coal could have fallen through the tear in the belt and rolled back to the tail, creating the cited accumulations. (Tr. 167-68).

However, Inspector Saho did not believe coal would have traveled along the bottom belt all the way to the tail roller. (Tr. 93-95). He testified that the coal would have fallen or been flung off the belt before it reached that far. (Tr. 94-95). Both Skolnick, the section foreman, and Hossman, the safety representative, also acknowledged that coal would have likely fallen off before reaching the tail roller on the belt if the coal did fall through the tear on the belt. (Tr. 174, 222).

Jeremi Hossman, the safety representative, accompanied the inspectors along the South Mains belt on September 9, 2014.⁶ (Tr. 202). He saw the accumulations that were cited along crosscuts 36-39. After Inspector Saho issued Order No. 8061123 at 10:00 a.m. and Order No. 8061124 at 10:01 a.m., the miners spent approximately two hours cleaning up the accumulations, finishing by 12:30 p.m. (Tr. 243; RX 1). Hossman testified that during the inspection he had not heard Inspector Saho talk about footprints in the accumulations, and Inspector Saho testified that his notes and photographs did not indicate he found any footprints. (Tr. 89, 119-20, 240-41; RX 5,6).

In the afternoon, Hossman found out that there was a tear in the South Mains belt, which he photographed. (Tr. 207; RX 14). He said he believed this tear was in the middle of the belt. (Tr. 215). As a result of this tear in the belt, Hossman testified that the coal dumped on the belt

⁵ Matthew Skolnick has been the section foreman for Ohio Valley Coal for three years. (Tr. 146). He has worked for Ohio Valley Coal for a total of 6 years. (Tr. 146). He has been certified in both West Virginia and Ohio. (Tr. 146).

⁶ Hossman was the safety representative at Ohio Valley Coal for almost six years. (Tr. 203). He also worked as a surveyor and in the warehouse at the mine. (Tr. 203). He has worked ten years in coal mining. (Tr. 203).

could have fallen through to the bottom and been carried back to the tailpiece and ground up, thus causing the cited accumulations. (Tr. 215-17). Additionally, Hossman testified that the accumulations were primarily on the edges, underneath the bottom of the belt, and behind the tail roller. (Tr. 216-17).

V. Contentions of the Parties

The Secretary contends that the coal dust accumulations by the tail roller of the Powhatan No. 6 Mine, South Mains belt, violated 30 C.F.R. § 75.400, as stated in Order No. 8061123. (Sec'y Post Hearing Br. at 11-12). The Secretary also contends this violation was S&S and reasonably likely to result in lost workdays or restricted duty affecting two miners. (*Id.* at 11). Further, the Secretary contends this violation was the result of an unwarrantable failure and high negligence, and the penalty of \$8,421.00 should be affirmed. (*Id.* at 22-23).

Respondent contends that the ALJ should give no deference to the inspector because he had less than the five years of experience recommended by the Mine Act. (Resp. Post Hearing Br. at 2-5). In response, the Secretary contends that the Mine Act does not require five years of experience and that Inspector Saho had the requisite MSHA Inspector training and two and a half years of mining experience. (Sec'y Reply Br. at 1-4). Respondent concedes that § 75.400 was violated, as stated in Order No. 8061123, and that the violation was S&S, with it being reasonably likely to result in lost workdays or restricted duty affecting two miners. (Tr. 248). However, the Respondent contends that violative conduct should not be assessed with high negligence or an unwarrantable failure designation, and the penalty should be lowered. (Resp. Post Hearing Br. at 5-26).

Additionally, the Secretary contends that the Respondent failed to record the accumulations by the tail roller on the South Mains belt line during the on-shift examinations in violation of § 75.363(b), as stated in Order No. 8061124. (Sec'y Post Hearing Br. at 23-26). The Secretary also contends the violation was S&S, and reasonably likely to result in lost workdays or restricted duty affecting two miners. (*Id.* at 26). Moreover, the Secretary contends this violation demonstrated high negligence, it was an unwarrantable failure, and that the penalty of \$6,115.00 should be affirmed. (*Id.* at 26-30).

The Respondent counters that Order No. 8061124 should be vacated because the accumulations did not occur until after the on-shift examinations. (Resp. Post Hearing Br. at 27-28). The Respondent contends that if a violation is found, the negligence level should be lowered, the unwarrantable failure designation should be removed, and the penalty should be lowered. (*Id.* at 28-29).

VI. Analysis

A. Burden of Proof and Standard of Proof

The Secretary bears the burden of proof of by a preponderance of the evidence for violations. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Each element in a violation must be proven by the Secretary. *In re: Contests of*

Respirable Dust Sample Alteration Citations: Keystone Mining Corp., 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

Further, the United States Supreme Court has found that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

B. Order No. 8061123

At hearing, Respondent conceded that the coal dust accumulations cited between crosscuts 36 and 39 violated 30 C.F.R. § 75.400 as stated in Order No. 8061123. (Tr. 248). 30 C.F.R. § 75.400 requires that:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Respondent also conceded that the violation was likely to result in lost workdays or restricted duty injuries affecting two miners. (J.S. 9). During hearing, Respondent conceded that Order No. 8061123 constituted a S&S violation. (Tr. 248). However, the Respondent contested the high negligence and unwarrantable failure assessments.

1. Negligence

Negligence is not defined in the Mine Act. MSHA regulations provide that violative conduct is properly designated as “high negligence” when “the operator knew or should have known of a violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. §100.3(d), Table X. The Commission has held that Commission Judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the perspective of a traditional negligence analysis rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015); *accord Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). “Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator’s negligence, *they are not limited to a specific evaluation of potential mitigating circumstances, and... may find ‘high negligence’ in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances.*” *Brody*, 37 FMSHRC at 1702-03; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is “...an aggravated lack of care that is more than ordinary negligence.” *Brody*, 37 FMSHRC at 1703, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). “Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly ‘mitigating’ circumstances...[and]may consider the totality of the circumstances

holistically.” Brody, 37 FMSHRC at 1702 (emphasis added). Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. Id.

In the instant case, the cited accumulations were up to two feet deep in some areas. (Tr. 33). The operator should have detected such an obvious violation. (*See* Tr. 33). Accumulations this extensive likely existed for several hours, if not days. The failure by the Respondent to abate these conditions, which posed such a fire hazard, displayed an aggravated lack of care.

Respondent alleges that there was a tear in the belt that was unknown to the operator. (Tr. 207). This created accumulations at crosscuts 36-39, which Respondent argues should constitute a mitigating circumstance. (Resp. Post Hearing Br. at 24-25). The tear in the belt was not found until the afternoon *after* the orders were issued. (Tr. 207). No one from the mine checked the belt and had found a tear at the time the order was issued. This would indicate that the tear may not have existed until after the order was issued. (Tr. 219-20). The inspector also did not find a tear in the belt at the time the accumulations were found. (Tr. 97-100). Further, Inspector Saho, Skolnick, and Hossman testified that—even if there was a tear in the belt—the coal would have fallen off the belt all along crosscuts 25 to 39.⁷ (Tr. 94-95, 174, 222). No evidence has been brought forward by the Respondent showing that coal had fallen off anywhere other than at

⁷ The Respondent essentially argues that Inspector Saho’s testimony should be accorded little weight because he lacks the five years of mining experience recommended by the Act. (See Also 20 U.S.C. §954, which states in pertinent part that “to the maximum extent feasible, in the selection of persons for appointment as mine inspectors, no person shall be so selected unless he has the basic qualification of at least five years practical mining experience.”)

The Act accepts that the length of prior mining experience is a relevant factor in determining the weight to be given an inspector’s opinion. However to the extent that Respondent implies that Saho’s lack of five years past mining experience, standing alone, would render his opinions uncredible, the ALJ expressly rejects such.

The ALJ notes that Saho did possess approximately two and a half years of prior mining experience at the time he inspected the subject mine. Additionally, the Act explicitly uses the disjunctive “or” in listing the qualifications for an authorized representative, stating that such persons “shall be qualified by practical experience in mining *or* by experience as a practical mining engineer *or* by education.” (*Id.*)(*emphasis added*). In addition to his mining experience, Inspector Saho received 21 weeks of training at the Mine Academy in Beckley, West Virginia.

Moreover, when Inspector Saho issued Order Nos. 8061123 and 8061124 on September 9, 2014, he had been accompanied by his supervisor, Bill Hagedorn, who did not disagree with any of Saho’s findings. (Tr. 29).

Finally, the ALJ notes that Saho’s testimony of his observations of the cited area and inspections of Respondent’s examination books were essentially uncontradicted by Respondent.

Considering *in toto* the inspector’s past experience and training, the additional presence of his supervisor and his uncontested observations, the ALJ found Saho to be both credible and persuasive in his expressed opinions.

crosscuts 36-39. (Tr. 222). Finally, there was no evidence that further accumulations had occurred *after* the order was issued near the tail roller. (224-28). It is unlikely that a tear, which caused accumulations in the morning, would not continue to cause accumulations until repaired later that afternoon. As a result, this Court finds that the Respondent's arguments concerning the tear are not persuasive. Therefore, this court finds that the violation was the result of high negligence.

2. 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).

As discussed *infra*, the Respondent has essentially offered the following "defenses" or mitigating circumstances to vitiate findings of "high" negligence and unwarrantable failure: there was an unseen tear in the upper belt; coal fell through the undetected tear onto the lower belt; the fallen coal was then transported along the beltway and deposited into unsafe accumulations in the cited areas; all of which occurred *after* the on-shift examinations.

This Court will discuss the *Manalapan* factors below *seriatim*. However, this Court feels constrained to observe there is no need for a sophisticated Pascalian risk analysis to discern the extremely problematic nature of Respondent's contentions. Why was the fallen coal not strewn along the entire length of the belt-way area in question rather than only in the cited areas? What are the odds that the accumulations would be so deposited and distributed in such a short period of time? Why did the inspector never observe the unsafe tear?

Much more probable and likely explanations for the unsafe accumulations and failure to report are the ones advanced by the Secretary throughout these proceedings: the operator's high negligence and unwarrantable failure in allowing the accumulations to build up and its highly negligent and unwarrantable failure to record and report such.

The Secretary has easily carried its burden regarding the operator's violative conduct and the unwarrantable nature of such by the preponderance of the evidence.

a. The length of time and extent of the condition

The accumulations that Inspector Saho found at crosscuts 36-39 were six feet wide and two feet deep under the belt tail roller. (Tr. 33). The accumulations covered the floor, roof ribs, and belt. (Tr. 17). The belt tail roller was turned in compacted accumulations. (Tr. 33). Inspector Saho testified that he did not believe accumulations so extensive could have accumulated after the on-shift examination. (Tr. 42). Conversely, the Respondent argues that a tear in the belt had caused coal to accumulate after the on-shift examination; thus arguing the accumulations existed for several hours instead of several days.⁸ Nonetheless, the extensiveness of the accumulations and the fact that no coal was loaded onto the belt from 1 South contradict Respondent's contentions and support the Secretary's contentions that these accumulations most likely had existed for more than one shift.

b. Whether the violation posed a high degree of danger

There was a high degree of danger created by the instant violation. Coal accumulations were packed around the tail end roller, and the belt was also running in contact with coal accumulations. (Tr. 33, 36, 45-47, 180; GX 7, 8). These conditions created a fire hazard that could have resulted in miners suffering smoke inhalation or burns. (Tr. 52, 122). Although the Respondent argued that the accumulations were damp, the Commission has held that "[t]he fact that there was some dampness in the coal did not render it incombustible and... wet coal can dry out in a mine fire and ignite." *Utah Power & Light Co*, 12 FMSHRC 965,969 (May 1990), *Aff'd*, 951 F.2d 292 (10th Cir. 1991)(citing *Black Diamond*, 7 FMSHRC 1117,1120-221 (Aug. 1985)). Moreover, the Commission has found that "even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite." *Black Diamond*, 7 FMSHRC at 1121. Consequently, even though the accumulations were damp, they were a dangerous condition that could result in a fire and smoke inhalation hazard.

c. Whether the violation was obvious

The unsafe accumulations were readily apparent to Saho. He found widespread combustible float coal dust, loose coal, and compact coal. (Tr. 33, 36-37, 71). The accumulations were black and were not rendered inert by rock dust. (Tr. 37, 108). Considering the testimony and photographic evidence presented at trial, this Court finds the violative condition had been clearly obvious. (Tr. 33, 36-37, 71; GX 4-8).

d. Whether the operator had knowledge of the condition

The Commission has held that an operator's knowledge of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1357 (Dec. 2009). As discussed within, there is some question as to how long

⁸ At hearing, the Secretary introduced a photograph showing an examiner's initials with the date of 8/24/14. (Tr.40-41; GX 5). However, as that examiner did not testify, this Court does not find that the initials indicate the accumulations existed since that date.

the operator *actually* knew of the accumulations' existence. However, with the two examinations that occurred on September 9, 2014, and given the extent of the accumulations shown by the photographic evidence, the operator and examiner reasonably *should have known* of the violative condition. (Tr. 33, 36-37, 71; GX-4-8). Thus, this factor weighs in favor of an unwarrantable failure finding testified to by the Secretary's witness.

e. The operator's efforts in abating the condition

The Commission has explained that the abatement efforts relevant to the unwarrantable failure analysis are those that were made *prior* to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013). Prior to the order being issued, there did not appear to be any efforts by the Respondent to abate the condition. Therefore, this factor also favors an unwarrantable failure finding.

f. Whether the operator had been placed on notice that greater efforts were necessary for compliance

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *San Juan Coal*, 29 FMSHRC 125, 131 (2007) *citing Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Additionally, "[t]he Commission has recognized that past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (2001)(finding unwarrantable failure where operator was cited 88 times in a two year period for § 75.400 violations). Respondent had been issued 107 § 75.400 violations in the two years prior for impermissible accumulations of combustible material at Powhatan No. 6 Mine. (GX 1; Sec'y Post Hearing Br. at 24). In light of these previous § 75.400 violations, it is clear that the operator had been placed on notice that greater efforts were required for compliance with accumulation violations.

3. Conclusion

After considering the above *Manalapan* factors, individually and holistically, this Court finds the record clearly supports a finding of unwarrantable failure.

C. Order No. 8061124

During Inspector Saho's inspection of the South Mains belt, he issued Order No. 8061124 for the Respondent's failure to record in the on-shift examiner's report the accumulations cited in Order No. 8061123. 30 C.F.R. § 75.363(b) requires that:

A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include the nature and location of the hazardous condition or violation and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found.

The on-shift examination report for the South Mains belt noted “N/O” or “none observed” under the dangerous/hazardous conditions section. (GX 11). The Respondent agreed that the accumulations existed during the MSHA inspection, but not that they were visible during the examination.⁹ (Tr. 57-58, 185). At approximately 2:28 a.m., Foreman Skolnick was in the area of the belt tail, and he was at the belt drive again at 6:26 a.m. (during this second exam, Skolnick was not near crosscuts 36-39). (Tr. 61, 151, 160, 183, 186). Inspector Saho observed the accumulations at approximately 10 a.m. (Tr. 84).

Inspector Saho’s testimony that the accumulations were up to two feet deep and that no coal was coming onto the belt from the 1 South transfer indicate that the accumulations likely existed since at least the last time coal came from the 1 South transfer. (Tr. 33, 50). As discussed, it was much more likely that coal came along the belt from left to right (starting at the 1 South transfer) than that the coal accumulations dropped through a tear exactly as the belt intersected with the West Mains transfer, dropping to the bottom of the belt and travelling all the way back to the tail of the belt, without leaving accumulations along the way. Consequently, the Secretary has shown by a preponderance of the evidence that the accumulations between crosscuts 36 and 39 existed during the on-shift examinations and that they were not properly recorded. Therefore, Order No. 8061124 is affirmed.

Order No. 8061124 was issued as S&S, and reasonably likely to result in lost workdays or restricted duty affecting two people. Respondent does not argue the potential S&S or lost workdays or restricted duty affecting two people. (Tr. 11-12, 248-49). However, the Respondent does contest the high negligence and unwarrantable failure assessments.

1. High Negligence

The Secretary has met the burden of proving high negligence. As discussed above, it is more probable that the accumulations between crosscuts 36 and 39 had existed during the on-shift examinations and that there was a failure to report such. The two feet deep accumulations and 1 South transfer not being used on September 9, 2014, indicate the § 75.400 violation had existed prior to the on-shift exams. (Tr. 33, 50).

The Respondent had a duty to record any of the nine mandatory health or safety standards and to take corrective action. 30 C.F.R. § 75.363(b). Between 2:00 and 2:28 a.m. and 6:00 and 6:26 a.m., on-shift examinations were made by Foreman Skolnick. (Tr. 60-61). At approximately 2:00 a.m., Skolnick alleges he examined the South Mains belt to the tail roller, where accumulations were later cited by Inspector Saho. (Tr. 61, 151, 160, 183, 186). However, he did not report any accumulations and did not undertake to have the coal dust eliminated or the area rock dusted. This failure to record the cited accumulations could have caused a fire and smoke hazard. Thus, this negligent act by the Respondent put the health and safety of at least two

⁹ Respondent emphasizes that there were no reported footprints in the accumulations as evidence that the accumulations did not exist until after the on-shift examination. (Tr. 89, 119-20, 240-41). Specifically, the Respondent believes the absence of footprints defeats the Secretary’s argument that Foreman Skolnick saw, but failed to report the accumulations during his on-shift examination. (Sec’y Post Hearing Br. at 19-20). However, even though footprints were not documented by Inspector Saho, this does not prove said footprints did not exist or that the accumulations were not present prior to the onshift exam at approximately 2:00 a.m.

miners, an examiner and a belt cleaner, in serious danger. (Tr. 52-53). Such violative conduct was more than just ordinary negligence and shows an aggravated lack of care without any clear mitigating circumstances. As a result, this Court finds the Respondent's conduct was properly designated as "high negligence" in Order No. 8061124.

2. Unwarrantable Failure

Given that Order No. 8061124 involves essentially the same facts and unwarrantable failure factors/analysis as Order 8061123, this violation also constituted an unwarrantable failure on the part of the Respondent. *See supra* Section B.2.

For this violation, there was the same obvious condition of accumulations covering crosscuts 36-39 that were up to two feet deep. (Tr. 33). Given the depth of accumulations and the lack of coal being loaded onto the South Mains belt from the 1 South transfer, this condition likely existed longer than one shift. (Tr. 33, 50). The accumulations of two feet of compacted coal dust by the tail roller created a fire hazard and posed a high risk of danger, which the examiner failed to report. (Tr. 33). The probability of the accumulations lasting longer than one shift also indicate that Foreman Skolnick was likely on notice of the condition and still did not abate the condition or report it. Finally, the Respondent was on notice that greater efforts were necessary for compliance with § 75.363(b) given the 107 § 75.400 accumulation violations the Respondent received in the previous two years. (GX 1).

In considering all of the *Manalapan* factors, this Court finds the unwarrantable failure assessment to be appropriate. *Cf. Manalapan Mining Co.*, 35 FMSHRC at 293. The Respondent had a duty to accurately report the accumulations in crosscuts 36-39 and it failed to do so, creating the possibility of a fire and smoke hazard for miners. Accordingly, the Secretary has shown by a preponderance of the evidence that the violative conduct cited in Order No. 8061124 constituted an unwarrantable failure and that the Respondent was highly negligent in failing to report the § 75.400 violation.

D. Penalty

In determining the appropriate civil penalty, the Commission applies the statutory criteria in § 110(i) of the Mine Act. This section provides:

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

30 U.S.C. § 802(i).

The Respondent is a large operator, with an annual coal tonnage of 5,550,146 produced at Powhatan No. 6 Mine. (GX 1, 9). The parties have stipulated that payment of the civil penalty proposed by the Secretary will not affect the Respondent's ability to remain in business. J.S. 10.

Order No. 8061123 was assessed as S&S with lost workdays or restricted duty. (GX 1). This court has affirmed the high negligence assessment and the unwarrantable failure designation. The gravity of injury was high due to the fire and smoke inhalation dangers posed by the accumulations. While there was compliance with the order in the two hours after the order was issued, the other statutory criteria weigh heavily against the Respondent. (GX 1). Thus, the originally proposed penalty for this violation was appropriate. Accordingly, Respondent is assessed a civil penalty of \$8,421.00.

Given that the violative conduct in Order No. 8061124 has been assessed as S&S with lost workdays or restricted duty, and given the high negligence and unwarrantable failure findings, and having considered all of the statutory criteria in § 110(i), this Court finds the Secretary's originally assessed penalty to be appropriate. (GX-9). Additionally, as the same circumstances involving the mine size, ability to remain in business, gravity, and compliance apply to this order, the proposed civil penalty of \$6,115.00 is affirmed.

VII. Conclusion

This court **AFFIRMS** Order No. 8061123 and Order No. 8061124. Consequently, it is **ORDERED** that Respondent pay the Secretary of Labor the sum of \$14,536.00 within 30 days of the date of this Decision.¹⁰ Upon receipt of payment, this case is hereby **DISMISSED**.

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

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¹⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 16, 2016

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-0620
A.C. No. 15-17497-354134

v.

BLUE DIAMOND COAL COMPANY,
Respondent

Mine: Mine No. 68

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge McCarthy

This case is before me upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Respondent has filed a Notice of Withdrawal of Contest, which I will construe as a motion to approve settlement. The Respondent has agreed to pay the \$139,100.00 penalty proposed by the Secretary.

Blue Diamond Coal Company's parent company, James River Coal Company, filed for Chapter 11 Bankruptcy Protection on April 7, 2014 in the United State Bankruptcy Court for the Eastern District of Virginia, *In Re James River Coal Co. Et al.*, Case No. 31848-KRH (E.D. Va.). Section 362(a) of the Bankruptcy Code provides for an automatic stay of the commencement or continuation of any administrative or judicial proceedings against a Chapter 11 Bankruptcy petitioner. 11 U.S.C. § 362(a). An exception to this stay, however, is granted by §362(b)(4), which exempts from the automatic stay any proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. §362(b)(4). This exception has been applied to cases seeking equitable relief and cases concerning monetary damages or penalties. *See In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988); *United States v. Nicolet, Inc.*, 857 F.2d 202, 208-10 (3d Cir. 1988); *U.S. v. Oil Transport Co., Inc.*, 172 B.R. 834 (Bankr. E.D. La. 1994); *U.S. v. Energy Intern., Inc.*, 19 B.R. 1020 (Bankr. S.D. Ohio 1981)(holding that action by the United States to collect a civil penalty assessed by the Department of the Interior, Office of Surface Mining, against debtor, for numerous violations of Surface Mining Control and Reclamation Act of 1977, was one to enforce its regulatory power and thus not stayed by the debtor's filing of a bankruptcy petition)). The Commission has held that the Secretary of Labor,

Department of Labor, and MSHA are “government units” within the meaning of 362(b)(4), as the Secretary of Labor brings civil penalty proceedings in an effort to effectuate and enforce the mandatory safety standards of the Mine Act. *Big Laurel Mining Corp.*, 37 FMSHRC 1997, 1997-99 (Sept. 2015); *Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1549-50 (June 2013); *Hoist Excavating, Inc.*, 17 FMSHRC 101, 102 (Feb. 1995); *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990).

Although the entry of a money judgment by a governmental unit, if related to its police or regulatory powers, is not affected by the automatic stay, actual enforcement of such judgment must take place through the bankruptcy court. *In re Weller*, 189 B.R. 467, 471 (Bankr. E.D. Wis. 1995); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 834 (9th Cir.1991); *NLRB v. P.I.E. Nationwide, Inc.*, 923 F.2d 506 (7th Cir.1991); *Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir.1991); *In re Tauscher*, 7 B.R. 918 (Bankr. E.D. Wis. 1981).

Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraph four from the Secretary’s Motion as immaterial and impertinent to the issues legitimately before the Commission. This paragraph incorrectly cites and interprets the case law and misrepresents the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
8386785	\$3,700.00	\$3,700.00
8386786	\$47,200.00	\$47,200.00
8386793	\$52,500.00	\$52,500.00
8386794	\$35,700.00	\$35,700.00
	<hr/>	<hr/>
	\$139,100.00	\$139,100.00

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

It is further **ORDERED** that the operator pay a total penalty of \$139,100.00 within thirty (30) days of this order.¹

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

Eric Johnson, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

John Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Circle, Suite 375, Lexington, KY 40513

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¹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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May 16, 2016

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

v.

TRIAD UNDERGROUND MINING,
LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2014-0610
A.C. No. 12-02323-354949

Mine: Freelandville West

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge McCarthy

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Respondent has filed a Notice of Withdrawal of Contest, which I construe as a motion to approve settlement. The Respondent has agreed to the \$52,500.00 penalty proposed by the Secretary.

Triad Underground Mining’s parent company, James River Coal Company, filed for Chapter 11 Bankruptcy Protection on April 7, 2014 in the United State Bankruptcy Court for the Eastern District of Virginia, *In Re James River Coal Co. Et al.*, Case No. 31848-KRH (E.D. Va.). Section 362(a) of the Bankruptcy Code provides for an automatic stay of the commencement or continuation of any administrative or judicial proceedings against a Chapter 11 Bankruptcy petitioner. 11 U.S.C. § 362(a). An exception to this stay, however, is granted by §362(b)(4), which exempts from the automatic stay any proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. §362(b)(4). This exception has been applied to cases seeking equitable relief and cases concerning monetary damages or penalties. *See In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988); *United States v. Nicolet, Inc.*, 857 F.2d 202, 208-10 (3d Cir. 1988); *U.S. v. Oil Transport Co., Inc.*, 172 B.R. 834 (Bankr. E.D. La. 1994); *U.S. v. Energy Intern., Inc.*, 19 B.R. 1020 (Bankr. S.D. Ohio 1981)(holding that action by the United States to collect a civil penalty assessed by the Department of the Interior, Office of Surface Mining, against debtor, for numerous violations of Surface Mining Control and Reclamation Act of 1977, was one to enforce its regulatory power and thus not stayed by the debtor's filing of a bankruptcy petition)). The Commission has held that the Secretary of Labor, Department of Labor, and MSHA are “government units” within the meaning of 362(b)(4), as

the Secretary of Labor brings civil penalty proceedings in an effort to effectuate and enforce the mandatory safety standards of the Mine Act. *Big Laurel Mining Corp.*, 37 FMSHRC 1997, 1997-99 (Sept. 2015); *Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1549-50 (June 2013); *Hoist Excavating, Inc.*, 17 FMSHRC 101, 102 (Feb. 1995); *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990).

Although the entry of a money judgment by a governmental unit, if related to its police or regulatory powers, is not affected by the automatic stay, actual enforcement of such judgment must take place through the bankruptcy court. *In re Weller*, 189 B.R. 467, 471 (Bankr. E.D. Wis. 1995); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 834 (9th Cir.1991); *NLRB v. P.I.E. Nationwide, Inc.*, 923 F.2d 506 (7th Cir.1991); *Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir.1991); *In re Tauscher*, 7 B.R. 918 (Bankr. E.D. Wis. 1981).

Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraph four from the Secretary’s Motion as immaterial and impertinent to the issues legitimately before the Commission. This paragraph incorrectly cites and interprets the case law and misrepresents the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amount is as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
8450217	\$52,500.00	\$52,500.00
	\$52,500.00	\$52,500.00

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

It is further **ORDERED** that the operator pay a total penalty of \$52,500.00 within thirty (30) days of this order.²

/s/ Thomas P. McCarthy
 Thomas P. McCarthy
 Administrative Law Judge

² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 16, 2016

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-1149
A.C. No. 46-06750-326262

v.

EAGLE CREEK MINING, LLC,
Respondent

Mine: Eagle Creek No. 5 Mine

DECISION AND ORDER

Appearances: Paige Bernick, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner

Mark A. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West
Virginia, for Respondent

Before: Judge McCarthy

I. INTRODUCTION

“[I]n this world, with great power there must also come -- great responsibility.” *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, *Amazing Fantasy No. 15: “Spider-Man,”* p. 13 (1962)). MSHA inspectors are entrusted with great power to ensure a safe working environment for miners in an inherently dangerous industry. An MSHA inspector’s testimony is given great weight by the Commission, but abuse of position can undermine confidence in the inspection process.

The credible testimony in the instant case indicates that MSHA inspector Curtiss (Bud) Vance III overtly displayed animus toward foreman Jay Curry for prior discipline that Vance received pursuant to Curry’s recommendation when both worked at the Old Hickory Mine years earlier. Further, inspector Vance prevaricated and cursorily checked the abatement measures for some allegations in the citations at issue in this matter. This irresponsible conduct by an MSHA inspector does a large disservice by undermining public faith in the agency’s critical inspection process.

II. STATEMENT OF THE CASE

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. §814(d). The parties filed a Joint Motion to Approve Settlement of eight of the thirteen citations in Docket No. WEVA 2013-1149. Specifically, the parties agreed to settle Citation Nos. 7162341, 7162347, 7162348, 7162349, 7162350, 7162353, 7162354, and 7162356. I issued a Decision Approving Partial Settlement on September 29, 2014. Five citations, Citation Nos. 7162340, 7162343, 7162344, 7162346, and 7162351, were litigated and remain at issue.

Four of the five remaining citations involve various alleged violations concerning two Caterpillar 777D and two Caterpillar 777F rock haulage trucks cited during Vance's inspection of Eagle Creek Mine #5, a surface bituminous coal mine in Logan County, West Virginia, on April 30, 2013. The fifth citation involves a water truck cited on May 2, 2013. The Respondent argues that Citations Nos. 7162346 and 7162351 involving the Caterpillar 777F trucks should be vacated. Further, Respondent disputes the significant and substantial (S&S) designations for all five citations, and the fatality designation as the injury or illness that could reasonably be expected to occur for four of the citations. Respondent also disputes the appropriateness of the civil penalties proposed by the Secretary. R. Br. 1. Respondent argues that inspector Vance's alleged bias against foreman Curry greatly affected the paper that was written, its classification, and the Secretary's case. R. Br. 1.

A hearing was held in Charleston, West Virginia. The parties introduced testimony and documentary evidence,¹ and witnesses were sequestered.² The parties filed post-hearing briefs.

On July 21, 2014, the Secretary filed a Motion to Reopen the Record to admit certified data for April and May 2013 from the National Climatic Data Center for Logan, West Virginia. ALJ Ex. 1. Thereafter, Respondent filed an Opposition, or in the alternative, a Motion to Permit Rebuttal Evidence and to Take Judicial Recognition of Related Evidence. ALJ Ex. 2. The undersigned grants both motions and receives all proffered evidence from each party.

¹ There are two volumes of transcripts. Volume I contains pages 1 to 352, and volume II contains pages 1 to 199. Citations to transcript volume I are indicated by "Tr." followed by the page cite. Citations to transcript volume II are indicated by "Tr. II," followed by the page cite. Jt. Exs. 1-6 were received into the record. Petitioner Exhibits (P. Exs.) 1-13 and Respondent's Exhibits (R. Exs.) 1-4 were received into evidence. The Secretary's post-hearing motion to reopen the record, and memorandum of law in support, with attached exhibit A, is received as ALJ Ex. 1. Respondent's opposition and alternative motion to permit rebuttal evidence and take judicial notice of related evidence is received as ALJ Ex. 2.

² In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

On the entire record, and after considering the post-hearing briefs and motions, I make and rely on the following findings of fact and conclusions of law:

III. CONTROLLING PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the credible evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability by showing that it was not properly on notice of the violative nature of its conduct. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013). Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *Id.*; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator’s conduct with respect to that standard in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

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

C. Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1).³

³ See also *Id.* § 814(e), the Mine Act’s pattern-of-violations provision, which is the only other provision that mentions S&S, and which defines the term the same way as § 814(d)(1).

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary’s argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. *Id.* The Commission found that the Secretary’s interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act’s graduated enforcement scheme. *Id.* at 825, 828. The Commission also found that the Secretary’s interpretation would leave little room for inspectors to exercise their independent judgment. *Id.* at 825-26.⁴ In addition, the Commission found that the Secretary’s interpretation would render the Act’s S&S language almost superfluous, and would render the Act’s pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id.* at 826-27. Although the Commission did not develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term “hazard” denotes “a measure of danger to safety or health” and that a violation is S&S if it “could be a major cause” of such a danger. *Id.* at 827.

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

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming “continued normal mining operations.” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130

⁴ The Commission has consistently reiterated that the inspector’s judgment is an important element of the S&S determination. However, the concept has generally been raised in the context of deferring to the inspector’s opinion that a violation was S&S, rather than in the context of examining whether the inspector exercised independent judgment in forming this opinion as opposed to merely following the “mechanical approach” advanced by the Secretary and rejected by the Commission in *National Gypsum*, 3 FMSHRC at 825. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563 n.6 (Aug. 2005); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

(Aug. 1985)). The assumption of continued normal mining operations considers “the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued,” without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission’s rejection of “snapshot” approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn*’s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit’s decision in *Buck Creek, supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g., Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).⁵ Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard if it occurs”).

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

Traditional Application of *Mathies* Test

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that “the reference to ‘hazard’ in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that

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

the violation present a measure of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). “There is no requirement of ‘reasonable likelihood’” encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which “requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, “The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not.” *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a reasonable likelihood that the hazard will result in injury under the particular facts of the case at hand, with the caveat that normal mining operations are assumed to continue without abatement of the violation. The crux of this traditional *Mathies* analysis is the third and fourth prongs of the test, which effectuate *National Gypsum*’s definition of S&S (reasonable likelihood of a reasonably serious injury) and are often combined into a single showing (reasonable likelihood that a particular serious injury will occur under the facts of the case). Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.⁶

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

Effect of Recent Fourth & Seventh Circuit Decisions

The Fourth Circuit’s recent *Knox Creek* decision issued in January 2016 appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict

⁶ The Secretary’s citation/order form contains boxes for inspectors to check the likelihood of injury and the expected severity of injury immediately above the line where they designate the violation S&S or non-S&S. Inspectors are trained not to designate a violation as S&S, unless item 10.A on the form is marked “reasonably likely,” “highly likely,” or “occurred,” and item 10.B is marked “lost workdays or restricted duty,” “permanently disabling,” or “fatal.” *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

consideration of the facts bearing on the reasonable likelihood of injury under the third prong. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

In our view, the second prong of the test ... primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Knox Creek, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162. The particular hazard confronted by the Fourth Circuit was the escape of ignited gas into the mine atmosphere through impermissible enclosures. *Id.* at 164. The parties had stipulated that the mine was a "gassy" mine that liberated more than 500,000 cubic feet of methane or other explosive gases per day. *Id.* at 164. Consequently, the ALJ had found that methane was reasonably likely to accumulate to explosive concentrations. *Id.* The ALJ had also found that a resulting explosion was reasonably likely to cause serious injuries, but he had ultimately declined to find that the violation was S&S because the Secretary had failed to prove the likelihood of an ignition. *Id.* at 154, 164-65. Without discussing the likelihood of ignition, the Fourth Circuit deemed the ALJ's other findings sufficient to satisfy the third *Mathies* prong. *Id.*

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

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

that the hazard, not the violation itself, will cause injury). 811 F.3d at 161-62.⁷ The Fourth Circuit rejected the operator's argument that under *Zeigler Coal Company, supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be "flatly contradicted" by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

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

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

⁷ It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant except to the extent necessary to establish a "discrete" hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that "[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard." 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the Court's failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator's argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, that could trigger a fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a "confluence of factors" analysis or a showing that an ignition source existed at any prong of the *Mathies* test.

not surprising that the Circuit Courts have departed somewhat from the traditional *Mathies* analysis because the Secretary's attorneys, and not the Commission's, are the ones who argue for enforcement of the Commission's decisions in the Circuit Courts of Appeals. That is strange. It should be obvious that since the Secretary is one of the litigating parties before the Commission at the trial level, the Commission's and the Secretary's views on interpretation of the Act may differ. See e.g., *The American Coal Co.*, 36 FMSHRC 1311 (May 2014)(ALJ), *petition for interlocutory review granted*, Unpublished Order dated July 11, 2014. In my view, the Commission's interpretations of Mine Act provisions that turn on adjudication and not enforcement should be accorded at least some form of "Skidmore" deference based on the power to persuade, as evidenced by the fact that courts and litigants have uniformly followed the Commission-derived *Mathies* test.⁸ It is within the Commission's authority to specify how the second and third factors of the *Mathies* test should be applied – particularly, whether the hazard must now be assumed at the third factor, and if so, what steps of the test account for the facts surrounding the violation – and whether the *Mathies* test is still intended to effectuate *National Gypsum's* interpretation of the S&S provisions of the Mine Act or whether the Commission now interprets S&S differently.

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

D. Negligence

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

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

⁸ *But see Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013) (expressly declining to address validity of *Mathies* test).

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

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

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

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

E. Penalty Assessment

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

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel, supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations.⁹ Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. I will also account for the fact that, although the violations at issue in this case were written under broad, general safety standards, each citation contains a myriad of specific allegations with respect to which the Respondent's history of repeat violations is unavailable. This means that the Secretary's proposed penalty assessment for each citation is based on a violation history that may disadvantage the Respondent by capturing prior dissimilar violations that were written under the same broad standard, but did not involve the same allegations. *See* 30 C.F.R. § 100.3(c) (indicating that the Secretary's violation history formula considers, along with the total number of prior violations, "the number of repeat violations of the same citable provision of a standard"). My independent penalty assessment analysis applies to each of the citations at issue in this case.

IV. STIPULATED FACTS

At hearing, the parties agreed to the following stipulations:

1. Eagle Creek Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Eagle Creek Mining, LLC has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

⁹ See, for example, my discussion of the negligence penalty criterion for Citation Number 7162340, *infra*.

4. Eagle Creek Mining, LLC operates the Eagle Creek No. 5 Mine, Mine Identification Number 4606750.
5. The Eagle Creek No. 5 Mine produced 312,391 tons of coal in 2013, and had 54,626 hours worked in 2013.
6. The proposed penalties will not affect Eagle Creek Mining LLC's ability to remain in business.
7. Respondent, Eagle Creek Mining LLC, abated the citations involved herein in a timely manner and in good faith.
8. P. Exs.1-10 and P. Exs. 12-13 are authentic and admissible.
9. R. Exs. 1-3 are admissible and R. Ex. 3 is admissible and authentic.

Jt. Ex. 1.

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

A. Inspector Vance's Animosity Toward or Bias Against Foreman Curry

1. Background at the Old Hickory Mine

When Inspector Curtiss (Bud) Vance III¹⁰ initially took the stand, he confined his testimony to the events of April 30 and May 2, 2013, the days on which he wrote the four citations at issue in this case. However, the Respondent subsequently presented evidence revealing that Vance and foreman Jay Curry¹¹ have a tangled history. Curry credibly testified that Vance and Curry worked together at the unionized Old Hickory Mine in Sharples, West Virginia about 1996 or 1997. Tr. II, 55-57. There was some animosity between groups of miners at Old Hickory after a merger resulted in changed job responsibilities under the seniority provisions of the collective-bargaining contract. Tr. II, 57-59. Curry was a shift superintendent. Tr. II, 57.

Vance was one of four miners suspected of willful damage to equipment by Old Hickory foreman Art Hale, who reported to Curry. Tr. II, 60. Curry investigated the sabotage incident and Curry and Hale recommended that Vance and the other miners be suspended with intent to

¹⁰ Curtiss Vance is a surface coal mine inspector at MSHA's Logan, West Virginia field office in District 12. Tr. 21-22. Vance worked for Old Hickory Coal from 1994 until he was laid off in 1999. Tr. 23. Vance then worked at various Massey Energy mines from 1999-2006. Tr. 23-24. Vance operated rock trucks during his mining career, but never performed mechanical repairs on them. Tr. 160-61. After serving as a surface mine inspector for West Virginia for one year, Vance joined MSHA in 2007 as an inspector/accident investigator. Tr. 25-26.

¹¹ Jay Curry is the foreman at the Eagle Creek No. 5 Mine. Tr. II, 51. He has over 40 years of mining industry experience, with 30 years of experience as a foreman. Tr. II, 50-51.

discharge. Tr. II, 60, 63-64. Curry credibly testified that Vance knew of Curry's recommendation because Curry told Vance that they would have to suspend him pursuant to company policy. Tr. II, 61, 64. Vance was formally suspended without pay and lost work for about a month. Tr. II, 61.

Vance and the other miners filed a grievance under the National Bituminous Coal Wage Agreement and the grievance proceeded to arbitration. Tr. II, 62. The arbitrator reinstated Vance and two of the other miners with backpay, and expunged the discipline from their personnel files. Tr. II, 60-62. One miner's discharge was upheld. Tr. II, 60-61.

The Secretary attempted to impeach Curry on cross examination because the alleged events occurred almost 20 years ago and Respondent proffered no notes or other documents to confirm what actually happened. Tr. II, 113-14. However, Curry testified that company records were expunged after the arbitration, and Curry specifically recalled, on questioning from the undersigned, that he was present at the arbitration at which foreman Hale was called as a witness, but Curry was not. *Id.*

During cross examination, Vance denied that he was ever recommended for discipline, took any grievance to arbitration, or lost any work while working at Old Hickory. Tr. 161.

2. Inspector Vance's April 30, 2013 Statements to Curry and Curry's Follow Up with MSHA District 12

On April 30, 2013, inspector Vance arrived at Eagle Creek Mine No. 5 to conduct a regular EO1 inspection. Tr. 30. Vance met with foreman Curry to tour work areas and to obtain an equipment list. Tr. II, 54. Vance then informed Curry that he was going to start checking equipment. *Id.* Curry credibly testified that he asked Vance, "do you need me to go with you?" Vance replied, "No, I don't really want you near me" during the inspection. Tr. II, 54, 65. "We'll just do it the normal way." Tr. II, 54.

According to Curry, the normal way meant that Respondent's chief mechanic, Tony Lusk, would accompany Vance. *Id.* Curry radioed Lusk and told him to proceed to the area where Vance was going to start inspecting equipment. *Id.* In these circumstances, I find no violation of Respondent's section 103(f) walkaround rights, particularly since Respondent does not pursue the issue.

After his conversation with foreman Curry, Inspector Vance inspected four rock trucks and shut all four of them down due to alleged safety-related defects. Vance initially denied and then could not recall whether he told Curry that he did not want Curry anywhere near him during the inspection. *Compare* Tr. 163 *with* 203.

Shortly after the April 30, 2013 inspection, Curry signed an undated letter that was sent by Respondent's corporate safety director to MSHA District 12 manager, Timothy Watkins. Tr. II, 65-69; R. Ex. 1. In this letter, Curry mentioned Vance's statement that Vance did not want Curry near him during the inspection and complained that Vance had unfairly documented the severity of citations during the April 30, 2013 inspection and other inspections because Vance had been discharged from Old Hickory while under Curry's supervision. R. Ex. 1. In his letter, Curry concluded, "I have been a foreman on Eagle Creek #5 for Eagle Creek Mining, LLC for five years with a very good citation and incident rate. I feel that my reputation and integrity as a

foreman has been targeted by this particular inspector unfairly. I have had no issues with prior inspections or inspectors and wish for a fair inspection by a MSHA inspector other than Mr. Vance.” R. Ex. 1.

The Secretary attempts to impeach Curry’s credibility by emphasizing that Curry’s letter (R. Ex. 1) informed Watkins that Curry was Vance’s “direct supervisor” at Old Hickory, while Curry testified that he was not his direct supervisor. Tr. II, 113. Curry credibly explained, however, that he wrote “direct supervisor” in the letter to Watkins because Curry was charged with investigating the sabotage charge against Vance. Tr. II, 113. I find the discrepancy immaterial as to whether Vance told Curry on April 30, 2013 that Vance did not want to be near Curry during the inspection. I credit Curry’s specific recollection over Vance’s denial, particularly since other witnesses for Respondent credibly testified about Vance’s animus toward Curry, as explained below.

3. Other Miners’ Corroborating Testimony Regarding Vance’s Animus Toward or Bias Against Curry

Several witnesses from Respondent’s camp provided testimony that lends credence to Respondent’s argument that Vance held a personal vendetta against Curry for the Old Hickory incident. According to these Eagle Creek miners, various statements were made by Vance, which demonstrated his disdain for Curry.¹² The Secretary had the opportunity to cross examine Respondent’s witnesses regarding these statements, but elected not to do so. Nor did the Secretary elicit any rebuttal concerning these statements after Vance was recalled to the stand. Tr. II, 179-182.

Ballard Smith¹³ operated rock truck 4058, a 777F model, during Vance’s inspection on April 30, 2013. Tr. II, 6-9. Smith had met Vance several years earlier when Vance dated Smith’s niece. Tr. II, 33. Smith credibly testified that the first time Vance ever inspected his truck at the Eagle Creek No. 5 Mine was about two years prior to the April 30, 2013 inspection. On that occasion, Vance asked Smith what he thought about Curry. Tr. II, 33. Smith said, “He’s all right.” *Id.* Vance then allegedly told Smith, “Well, I used to work for him, and I can’t stand him.” *Id.* On questioning from the undersigned, Smith recalled that the conversation took place at the Eagle Creek Mine while Vance was “stooped down on my walk rail on the side of my cab in my truck.” Tr. II, 46-47. Smith did not recall any other conversation in which Vance indicated any type of dislike for Curry. *Id.* When asked by the undersigned whether Vance indicated why he did not like Curry, Smith candidly testified that, “[H]e didn’t go into detail. He just said that he used to work for him and he could not stand him.” Tr. II, 47.

¹² I have carefully considered the alleged out-of-court statements made by Vance to Respondent’s miners as they relate to Vance’s bias against Curry. Material and relevant hearsay evidence is admissible in Commission proceedings. *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 n.1 (Sept. 1991) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135 (May 1984)). In fact, the Commission’s procedural rules expressly state that “[r]elevant evidence, including hearsay evidence” is admissible. 29 C.F.R. § 2700.63(a).

¹³ Smith has 25 years of mining experience, and seven years at Eagle Creek. Tr. II, 7. Smith has driven rock trucks for almost 20 years. Tr. II, 7.

Steven Newsome¹⁴ operated rock truck 4013, a 777D model, during Vance's inspection on April 30, 2013. Tr. 314-15. The dozer that Newsome normally operated was not operating that day. Tr. 348. As more fully explained below, Vance "downed" truck 4013 during his April 30 inspection after citing Respondent for excessive ball stud and steering linkage slack, leaking steering hoses, an excessive audible air leak during brake application, a broken bracket that mounted the driver-side mirror, and a broken handrail behind the driver-side door. P. Ex. 3. Newsome testified that Vance took "just a couple of minutes" to check for slack in the ball studs. Newsome did not know the exact time, but knew that Vance "wasn't under there long." Tr. 318-19. Newsome testified that when Vance signaled for Newsome to move the steering wheel, Vance "went under the truck a minute or two and then back out." *Id.* Newsome testified that Vance checked the ball studs one time. Tr. 321-22. Newsome further testified that he would have seen a dial indicator if Vance had been carrying one. Tr. 322.

Newsome testified that after downing Newsome's truck that day, Vance laughed and said "I love it." Tr. 320. Although Newsome candidly could not testify that the remark pertained to Curry because Vance "didn't specify," in the absence of rebuttal from Vance, I infer that the remark indicated the pleasure that Vance derived from shutting down another one of foreman Curry's trucks on April 30, 2013. *Id.*

Newsome also recalled a few prior occasions on the job and one occasion at a Subway shop in Logan, West Virginia during which Vance indicated to Newsome that Vance did not like Curry. Tr. 328, 348-50. For example, Newsome recalled a prior inspection when Vance was in the cab of Newsome's dozer and asked Newsome what he thought about Curry and then told Newsome that Vance did not like him. Tr. 349-350. Newsome also recalled being with a buddy and running into Vance at a Subway in Logan, West Virginia. *Id.* During the conversation, Vance indicated that he would make it rough on Curry because Vance did not like him and that Vance could make Curry fix whatever Vance wanted Curry to fix, such as air conditioners. Tr. 350. As noted below, Vance wrote an S&S citation in an effort to make Curry fix an air conditioner on the first haulage truck inspected on April 30, 2013.

Finally, Respondent's chief mechanic Tony Lusk testified that on April 30, 2013, when Lusk was working on the trucks that Vance had downed, Vance asked Lusk, "You think I got him smothered yet? If not, I'll be back with a few more." Tr. II, 164-165. Lusk conceded that Vance did not mention Curry by name, but Lusk assumed that Vance was referring to Curry. Tr. II, 165. As explained below, Vance did come back on May 2, 2013 to cite a water truck for additional violations. Based on the totality of this record, I infer that Vance was talking about smothering Curry with paper.

A few weeks after the April 30, 2013 inspection, Lusk signed an undated letter that was sent by Respondent's corporate safety director to MSHA District 12 manager, Timothy Watkins. Tr. II, 167; R. Ex. 2. In this letter, Lusk wrote:

On 4/30/2013 at approximately 8-9:00am Bud approached me after he had downed 4013, 4058, and 4045. At that time he told me what

¹⁴ Newsome has over 14 years of experience in mining and holds a West Virginia surface and underground certification. Tr. 314. He has driven rock trucks and dozers for over eight years. Tr. 314.

needed to be fixed on those three trucks, he said that he would be back with another list in a minute. We went to check the 992G and he walked over to me laughing and said “Do you think I have him smothered out yet? If not I can get a few more.” He told me that I had twenty-four hours to fix the equipment and I explained to him that I would not be able to get all the parts in that amount of time. I made the repairs to 4058 and 4045 and explained to him how to examine the emergency steering on the trucks because they were working fine when I checked them. I ordered the rest of the parts for the trucks and he told me that if I didn’t have 4013 fixed by the end of the day that he would write a “D-order” on it. A few days later, he came back to check the equipment and he came to me and asked me if we had made the repairs, I said yes and he left without checking. He has done this on previously [sic] inspections as well.

/s/ Tony Lusk

R. Ex. 2.

4. Vance’s Incredible Denials on Cross Examination

On cross examination, in addition to denying the Old Hickory suspension, which was eventually expunged, and denying that he told Curry that he did not want to be near him during the inspection, Vance further denied that he ever told any miners at the Eagle Creek Mine that he did not like Curry. Tr. 162. Vance also denied that he ever asked an Eagle Creek miner about his impression of Curry. *Id.* Further, Vance said he did not recall talking to chief mechanic Lusk during the April 30, 2013 inspection, unless it was documented in Vance’s inspection notes. Tr. 163-64. Vance did concede that Lusk was in the same work area as Vance, making repairs to conditions that Vance cited. Tr. 164-65. Vance did not recall telling Lusk words to the effect, “Do you think I’ve got him [Curry] smothered out yet? ... If not, I can go get a few more.” Tr. 164. Vance also did not recall or document that Lusk allegedly told Vance that Vance was not correctly testing the secondary steering on the 777F model haul trucks. Tr. 164-65.

5. Conclusions

After considering all the evidence before me, I credit the evidence presented by the Respondent regarding Vance’s history at the Old Hickory mine and his animosity toward or bias against foreman Curry. I credit Curry’s specific recollection of the disciplinary incident at the Old Hickory mine over Vance’s general denials that he was ever disciplined or lost any work at Old Hickory. I find it difficult to believe that Curry would spin such an elaborate tale in an effort to avoid liability for the instant citations. I further credit Curry’s testimony that Vance told him “I don’t really want you near me” during the April 30, 2013 inspection. Tr. II, 54, 65. Overall, Curry’s testimony struck me as forthright and unembellished. Tr. II, 114. He was persuasively conveying facts as he recalled them. His recall was detailed and specific, in contrast to Vance’s general, unconvincing denials. Tr. 163, 203.

I also credit the testimony of Smith, Newsome, and Lusk over Vance’s blanket, self-serving denial of and failure to recall anything that would cast doubt on his good faith, including

his denial that he told any miners at the Eagle Creek Mine that he did not like Curry, his denial that he asked any Eagle Creek miners about their impressions of Curry, and his denial that he mentioned “smothering” Curry during the inspection. The testimony from Smith, Newsome, and Lusk corroborates foreman Curry’s belief, first expressed in his letter to the MSHA District 12 manager, that he was being targeted by inspector Vance.

Based largely on the above findings, I conclude that Vance did not exercise good faith in dealing with Curry. I find that Vance was biased against and out to get Curry because of his discipline years earlier at the Old Hickory Mine. In my view, this is a fundamental infringement of fair and impartial due process of law. It is against the foregoing backdrop of Vance’s animus toward Curry that I assess the validity of the four citations that Vance wrote on April 30, 2013, and the additional citation that Vance wrote on the water truck when he returned to the Eagle Creek No. 5 Mine on May 2, 2013.

B. The April 30, 2013 Inspection of Rock Trucks and Inspector Vance’s Typical Inspection Procedures

Upon arriving for his April 30, 2013 EO1 inspection at the Eagle Creek No. 5 Mine, Vance had a brief conference with Curry about the inspection, checked the on-shift examination book to find no violations recorded, and arranged to inspect mobile equipment (haul trucks) at the pump house pit area after performing an imminent danger run. Tr. 30, 32-33, 35. Four rock trucks were then driven to the flat and level pit area for inspection. Tr. 35. Two of the large haulage trucks were Caterpillar 777D models and two were Caterpillar 777F models. Tr. 173. Vance proceeded to check the brakes, steering, secondary steering, gauges, and other various parts of the trucks for safety hazards or defects. Tr. 39-41; P. Exs. 1, 3, 5, and 7.

Vance testified about his typical vehicle inspection process. Initially, Vance discusses the inspection process with the driver in the operator’s cab and checks to see if pre-operational inspections have been performed and recorded for each vehicle. Tr. 37, 40-41. Vance inspects the seats, seat belts, gauges, warning alarms, and brakes, while in the operator’s cab. Tr. 41. Vance utilizes a “pull-through” brake test in which the driver releases the parking brake so that Vance can check whether the service brake and secondary brakes will hold and not pull through at certain revolutions per minute (rpms). Tr. 41-42.

After exiting the cab, Vance checks the lights, signals, horns, and wipers via hand-signal communication with the operator. Tr. 43. Vance walks around the vehicle to check tires, rims, and fuel tanks and to check for any hydraulic oil or fuel leaks. Tr. 43. At the back of the vehicle, Vance checks the backup lights, brake lights, turn signals and stabilizing bar. Tr. 44.

Vance also directs the driver through several steering movements to check the steering linkage system under the truck and determine if any leak or excessive movement is present. Tr. 45, 47. As the operator turns the steering wheel left or right, Vance crouches under the truck to check the steering components and look for any slack or horizontal movement in the ball stud of the steering jack. Tr. 46-47. In response to questioning from the undersigned, Vance testified that he never has to get down on a knee or lie on the ground to check for slack in the steering linkage ball joints. Tr. 46.

Vance testified that if any slack or movement is observed, Vance measures the slack using a dial indicator, before citing the play in the ball joint. Tr. 46-47, 183. Vance testified that he sets up his dial indicator on the steering linkage under the vehicle and then directs the driver to steer back and forth while Vance measures the slack between the ball stud and steering jack. Tr. 186.

At hearing, Respondent proffered into evidence portions of Caterpillar's maintenance manuals for the 777F and 777D models. See R. Exs. 3 and 4, respectively. The record was left open for the Secretary to proffer additional pages from the 777D manual (R. Ex. 4), and the Secretary did so after the hearing with pages that covered inspection of brakes and inspection of steering linkage assemblies. P. Ex. 11; see Tr. 171.

The Operation and Maintenance Manual for the 777D models provides that the steering linkage inspection should take place on a level surface, with the parking brake engaged. The magnetic base of the dial indicator should be placed on the steering rod link to check for horizontal wear on the ball studs. The dial indicator should then be placed on the side of the steering arm and set to zero. The front wheels should be turned left and right. The amount of horizontal play should be recorded by placing the dial indicator on the side of the center arm, repeating the wheel movement, and then recording the measurement on the dial indicator. The indicator is then reset to zero. *See* P. Ex. 11, p. 194.

When asked how long it takes to set up a dial indicator to measure ball stud slack on a steering jack assembly, foreman Curry testified as follows:

By the time you got it out of the case and put it on the mount and set it up, it would probably take you -- if you was real good with it and the truck was real clean, it would probably take you 15, 20 minutes to get everything together and get set and have the proper work done.

If you have to clean mud and material off so the magnet will stick, you know, it could take longer.

Q. And typically, when you're under a rock truck on a surface mine is everything clean to be able to --

A. No. Because -- the old saying on a surface mine, if it's not raining and muddy, we water the roads to make it muddy.

Q. All right. Have you ever seen Mr. Vance use a dial indicator on your job?

A. No sir.

Q. Has any of your –Mr. Lusk or anybody else ever reported seeing him use a dial indicator?

A. No.

Tr. II, 82-83.

At hearing, Curry was shown his own dial indicator as a demonstrative exhibit, and he briefly described the components and how calibrated measurements were taken. Tr. II, 82-90. Curry explained that dial indicators are mounted by a magnet and must be attached to a clean stationary area that is free of dirt and mud to record the measurement. Tr. II, 82, 86-87. Curry further testified that the dial indicator must be calibrated regularly, and the measurement should be taken two to three times to ensure that it is accurate. Tr. II, 85, 91.¹⁵

Inspector Vance testified that although there is no regulatory standard regarding play in ball joints, MSHA generally adheres to the manufacturer's recommendations. Tr. 192. Caterpillar's Operation and Maintenance Manual for the 777D model provides that "[t]he maximum amount of horizontal wear is 1.02 mm (.040 inch [40,000ths]). If any of the measurements exceed this limit, replace the worn ball studs and the outer bearing races." R. Ex. 4, p. 194, para. or step 9.

As part of his standard vehicle inspection, Vance also checks the secondary steering. Tr. 47-48. Secondary steering is an emergency or backup steering mechanism designed to allow a driver some limited steering to control and stop the vehicle if the engine loses power or the vehicle runs out of fuel. Tr. 63-64, 197. Vance testified that during the secondary steering test, the driver remains in the cab to operate the steering. Tr. 48, 53. Vance then checks the secondary steering by hitting the "kill switch" on the front bumper to simulate a power loss, with the steering set in the automatic position, and then he listens for the electric motor to come on automatically. Tr. 49, 53. Vance further testified that the driver can check the secondary steering himself by shutting the vehicle off and pushing the steering from automatic to manual and then manually checking the steering. Tr. 53.

¹⁵ Curry testified that a typical dial indicator has a 2¼ inch gauge. Tr. II, 84. Measurements circle the gauge in 10,000ths-of-an-inch increments or smaller increments of 1,000ths. *Id.* The gauge measures up to 1 inch (in thousandths). Tr. II, 84-85. These indicators are incredibly precise and must be calibrated regularly. Tr. II, 85. To use the indicator, a measuring stem on the indicator is placed onto a piece of equipment. Tr. II, 86. When a ball stud or tie rod is moved, a needle on the dial indicator will move to measure the slack. *Id.* The needle moves because the indicator has a magnetic bracket or brace that is placed on metal equipment for measurement. Tr. II, 88. The position of the indicator can be adjusted by vertical and horizontal rods. Tr. II, 88-89. To measure the play in a ball stud, the indicator is mounted to a rod and once the ball stud hits a component on the indicator, the needle on the gauge moves accordingly. Tr. II, 89.

The Caterpillar Operation and Maintenance Manual for the 777F model lists the following steps for testing the secondary steering:

1. Stop the machine on a level surface. Place the transmission control in the PARK position and stop the engine.
2. Push the top half of brake release and secondary steering switch and hold the switch in order to manually activate the brake release and secondary steering pump. The switch is located on the overhead switch panel.
3. Turn the steering wheel completely to the right. Then turn the steering wheel completely to the left.
4. Release the switch in order to return the switch to the AUTO position.

R. Ex. 3, at 2-3.

The Caterpillar Operation and Maintenance Manual for the 777D lists the following steps for testing the secondary steering:

1. After you stop the engine, push the top half of the brake release and secondary steering switch in order to select the MANUAL position.
2. Turn the steering wheel completely to the right. Then, turn the steering wheel completely to the left.
3. Return the switch to the AUTO position.

R. Ex. 4, p. 193.

Thus, as Vance acknowledged on cross examination, testing the secondary steering for 777D model is different from testing the secondary steering for the 777F model. Tr. 173. To test the steering for the 777D, the manual indicates that the operator must "stop the engine, push the top half of the brake release and secondary steering switch in order to select the manual position." R. Ex. 4; Tr. 179-180. By contrast, when testing secondary steering in the 777F model, the switch has to be held in while the test is performed. Tr. 180; Tr. II, 11. Once the button is depressed, a light comes on to indicate that the secondary steering is on. Tr. II, 13. Vance acknowledged that the 777D secondary steering test would not work on a 777F model because the operator must manually hold the switch in on the 777F model for the secondary steering to engage. Tr. 180-81, 250-51.

1. Citation No. 7162343 – Caterpillar 777D, Truck No. 4016

The first truck that Vance inspected on April 30, 2013 was a Caterpillar 777D (No. 4016) used to haul overburden from the pit area to the dumpsite during the mining process. Tr. 38-40, 55. The truck weighed approximately 100 tons. Tr. 39. The cab was about ten to twelve feet off the ground. *Id.* Chief mechanic Lusk was present when Vance began the inspection of the 777Ds. Tr. II, 136-38, 177-78.

Upon checking inside the cab, Vance discovered that the air conditioning was not working. Tr. 55. When engaged, the system would not blow cold air. *Id.* Lusk testified that he told Vance even before he inspected the truck, that the air conditioning was down and the parts were on order, but would not arrive until morning. Tr. II, 153.

After the cab inspection, Vance inspected outside of the vehicle. Tr. 42. Vance testified that he observed excessive slack in the inside ball stud on the left-side steering jack when the driver steered from left to right. Tr. 55-56. Vance testified that he used a dial indicator that measured horizontal movement of 70,000ths of an inch between the ball stud and steering jack. Tr. 57-59. Vance's inspection notes indicate side-to-side movement or slack between the ball stud and the steering jack, which measured 70,000ths of an inch with a dial indicator. P. Ex. 2, p. 3. Vance relied on the manufacturer's aforementioned out-of-service criteria of 40,000ths of an inch to determine that the truck should be taken out of service and repaired. Tr. 53, 59, 62; P. Ex. 2, p. 3.

Vance also testified that the nut, which holds the ball stud in place, was moving. Tr. 60. Upon questioning from the undersigned, Vance testified that he did not determine whether the nut was physically loose because it was too big to check. Tr. 60-61. Vance acknowledged that the cotter pin was still in place. Tr. 61. Vance's notes include a diagram of the steering jack and nut. P. Ex. 2, p. 3. Vance concluded that a ball stud, with play of more than 40,000ths of an inch, was reasonably likely to compromise steering, particularly since the slack exceeded Caterpillar's out-of-service criteria. Tr. 62; P. Ex. 2, p.3.

Lusk testified that he was present right beside Vance when Vance began his examination for slack in the ball studs and that Vance did not use a dial indicator. Tr. II, 179. In fact, Lusk testified that Vance did not use a dial indicator when inspecting any of the haul trucks that day. *Id.*

On rebuttal, the Secretary recalled Vance, who brought his own dial indicator to the witness stand. Tr. II, 181. In response to leading questions, Vance testified that this was the dial indicator that he used on April 30 and May 2, 2013. Tr. II, 182. I note that aside from this questioning, however, there is no indication that Vance ever used a dial indicator on May 2, 2013, as he did not, in fact, write any violations that would have required the use of a dial indicator on that day, but only cited a water truck for non-functioning brakes and a broken water bed bracket mount. See P. Ex. 9. Contrary to Curry's testimony that it generally takes 15-20 minutes to set up the dial indicator, Vance testified that it would only take him about 5 minutes or less to set up the dial indicator. Tr. II, 183.

On extensive cross-examination following rebuttal, Vance testified that he has never calibrated his dial indicator. Tr. II, 184. Vance testified that "you calibrate it each time by going back to zero." *Id.* Vance testified that he leaves the dial indicator assembled in its padded pelican case in his truck, and retrieves it each time he is going to write a violation for slack in a ball joint. *Id.* Specifically, Vance testified that "[w]hen I'm going to write a violation, I use this for my notes. To get my measurement. Only when I'm going to write a violation." *Id.* Although Vance took numerous pictures during his inspection, he did not take any pictures of the measurement(s) that he claims to have observed with his dial indicator. Tr. II, 185.

Vance then testified that when he sets up the dial indicator, he tells the operator that he is going to set it up. "Stay still. Don't move the steering wheel." Tr. II, 186. Then, in response to questioning from the undersigned as to whether Vance tells the operator whether he is going to use a dial indicator, Vance testified, "No. I just signal for him not to move. I go get it out of the pickup, and then go back under the truck." Tr. II, 186.

On further cross examination, Vance acknowledged that the operator should see him walking to his truck and carrying back the dial indicator, "if he's watching." Tr. II, 187. Vance testified that after he retrieves the dial indicator, he tells the operator what side he is going to check. Tr. II, 187. Vance testified that he usually takes just one measurement, unless he has a problem with the dial indicator. Tr. II, 188.

When asked whether he needed a clean spot to set up the dial indicator, Vance testified that it depends on whether the truck is kept clean or not. Tr. II, 191. Vance was then asked, "Well in a mine that's a surface mine, running over dirt and mud, don't you generally have mud you got to clean and get it ready before you can attach that magnet?" Tr. II, 191. Vance testified, "Not normally, no. It's according to how often the mine operator steam cleans his equipment." *Id.* When shown P. Ex. 4, p. 1, a picture of the left-side steering jack cited for excessive slack on the 777D Caterpillar Truck No. 4013 written up in Citation No. 7162344 (P. Ex. 3), discussed below, Vance was asked what he used to clean mud and dirt from the area to mount the dial indicator. Tr. II, 193-95. Vance testified, "I usually just wipe it off with my hand. If I need to, my shirt," or a "rag in my pocket." *Id.*

Vance testified that he next checked the secondary steering on Truck No. 4016. Tr. 62. Vance testified that he shut off the kill switch and did not hear the electric motor for the secondary steering turn on. Tr. 62-63. Vance testified, "I shut it off and the driver never could get it to function." When asked whether he gave the driver an opportunity to try to have it turn on, Vance testified, "Yes. And he [the driver] seemed to have good working knowledge of it, so I assumed that he was trained and knew how to operate it." Tr. 63. Vance's notes indicate that the secondary steering was not functioning, so if the truck lost power, the driver would have no other steering during daily, off-road, haulage of overburden. P. Ex. 2, p. 3.

Based on this inspection, Vance issued Citation No. 7162343 and served Curry. P. Ex. 1. The Citation alleged a significant and substantial (S&S) violation of 30 C.F.R. § 77.404(a), which requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The Condition or Practice narrative alleges:

1. Excessive slack existed on the inside ball stud located on the left side steering jack. Excessive slack existed when the truck was steered in either direction. Also, slack existed where the nut was located on the ball stud.
2. The secondary steering was not functioning when tested.
3. The AC was not functioning when tested.

This Truck is being operated in the Pump House Pit area. It is reasonably likely if these conditions continue to exist an accident will occur. . . .

P. Ex. 1.

The citation was designated as significant and substantial because the alleged violative conditions contributed to a hazard that was reasonably likely to result in a fatal injury, with 1 person affected, as a result of Respondent's moderate negligence. P. Ex. 1. The proposed penalty was \$12,248. Vance testified and documented that the following measures were taken to abate the conditions cited: (1) a new ball stud was installed; (2) a new solenoid was installed; (3) and a new compressor was installed and the AC charged up. Tr. 75-76; P. Ex. 1.

Lusk performed the repairs on the truck. When asked by the undersigned whether the secondary steering was functioning on Truck No. 4016, Lusk testified, "I would say that it was. Oh yes." Tr. II, 153. When asked by Respondent, what was wrong here, Lusk testified, "we had a wire broke." *Id.* Lusk was then asked, "[W]ere you able to find out what the condition of the secondary steering was at the start of the shift, when the pre-operational examinations would have been done?" *Id.* Lusk testified, "Yeah. They're not allowed to move it. If the secondary steering doesn't come on, they're not allowed to pull out. But you get a lot of dirt and mud under them and it pulls wires. And, you know, it's hard to keep up with them." Tr. II, 154.

Contrary to abatement measures listed in Vance's citation, Lusk testified that no solenoid was installed on the secondary steering. Rather, Lusk testified the he simply repaired the wiring. Tr. II, 154. Lusk confirmed that a ball stud and a compressor were installed. *Id.* Although Lusk replaced the ball stud on Truck 4016 in order to abate the citation, Lusk did not confirm Vance's allegations of excessive slack on the inside ball stud located on the left side steering jack.

With regard to his S&S designation, Vance testified that if the ball stud is moving, the steering jack can pop off causing the driver to lose control and the truck to wreck. Tr. 61-62. Vance essentially supported his reasonably likely and fatal designations with regard to the excessive slack by testifying that the truck regularly hauled 50 to 100 loads of overburden a day on steep grades and elevated roadways and dumpsites. Tr. 72. Therefore, if the steering jack popped off the ball stud, a driver could be killed if he lost control of the vehicle or the truck collided with another truck that operated in close proximity in the pit area. Tr. 61-62, 67-68.¹⁶

¹⁶ Vance testified that while working at Massey Energy sometime between 1999 and 2006, he witnessed two incidents where a truck driver ran into a spoil bank. Tr. 66-67, 195. Vance was operating a dozer during both incidents. Vance testified that when he went to check on the driver, he noticed that the steering jack had popped off the ball stud. In both instances, the driver was not injured. Tr. 66-67. On cross examination, Vance conceded that he played no role in the investigation of the accidents and did not have any personal knowledge about what caused the steering jacks to pop off the ball studs. Tr. 195-96. I find that Vance's vague and general anecdotal testimony is not particularly probative as to whether the alleged excessive slack on the steering assembly of Truck No. 4016 contributed to a hazard that was reasonably likely to result in a fatal injury.

On cross examination, Vance conceded that the steering jack would have to pop off the ball stud for the driver to lose control of the truck and be injured. Tr. 205. Vance further testified that the 70,000ths of alleged slack satisfied the out-of-service criteria, but Vance could not confirm that it would cause the steering jack to pop off the ball stud. *Id.*

With regard to the secondary steering, Vance testified that in an emergency, with loss of power, a functioning secondary steering mechanism would permit limited control of the truck to avoid an accident until it could be stopped safely. Tr. 68. Vance's notes indicate that if the steering fails and the truck wrecks, the driver would receive fatal injuries. P. Ex. 2, p. 3.

With regard to the broken air conditioner, Vance testified that the cab of the trucks become extremely hot and it is hard to just roll down the window like in a pickup because the driver does not wear a respirator and would be exposed to dust. Tr. 69. Vance recalled an incident in which a driver purportedly blacked out because heat in the cab triggered the driver's high blood pressure. Tr. 69-70. I give little weight to this non-specific, general testimony.¹⁷

Vance designated Respondent's negligence as moderate. He determined that the amount of slack in the ball stud developed from excessive wear over a period of time greater than one shift, that the slack was obvious, that no defects were noted on the pre-operational examination, and that Respondent presented no evidence that it was performing two-man "buddy" checks. Tr. 74; P. Ex. 2, p.3.¹⁸

Newsome, the driver of truck 4013 (discussed below), testified that he could not check steering joints by himself and "sometimes once a week, once every two weeks, we buddy up. One gets in the truck and you check the ball studs and all that. Alone, you can't check them." Tr. 316. Newsome testified that on April 30, Vance did not ask Newsome how he conducted his pre-operational examinations or whether Respondent ever used buddy checks. *Id.*

Smith, the driver of truck 4058, testified on cross examination that buddy checks were performed more or less weekly. Smith testified that the greaser/fueler, who was a "decent mechanic," would pull the drivers over about once a week to check for movement in the ball studs. Tr. II, 38.

¹⁷ Curry recalled that the air temperature that morning was below freezing at 25°F. Tr. II, 73-74. He testified that the outside temperature that time of year is damp, with a little freeze during the morning that will thaw out during the day. *Id.* The Secretary argues in his motion to reopen the record that the certified weather data for Logan, West Virginia shows that on April 30, 2013, the maximum temperature was 71°F with a minimum temperature of 53°F, and a trace of rain. ALJ Ex. 1 at 6, citing Ex. A, p. 4. Contrary to the Secretary, I do not find this source "especially reliable and probative" since the elevation of the Eagle Creek Mine is over 1,000 feet higher than Logan, West Virginia, where the data was collected. ALJ Ex. 2, Affidavit of Richard R. Stacey Jr.; see also n. 19, below. I find that the Secretary's certified weather data does not materially contradict Curry's recollection and testimony. Curry generally struck me as a truthful and forthright witness.

¹⁸ It is undisputed that two men are needed to inspect the ball joints in the steering linkage assembly. One miner must be in the cab to manipulate the steering, while another must be under the vehicle checking for movement or play in the ball joints. Tr. 316; Tr. II, 38, 100.

Foreman Curry testified that Caterpillar recommends checking for slack in the ball studs every 1000 hours, which equates to about every 100 mining days for Respondent's rock trucks, which operate about 10 hours per day. Tr. II, 100. Curry further testified that Respondent checked the ball studs every week or week and one-half. Tr. II, 100-01. Curry testified that the 777D models that Vance cited for excessive slack had been parked for about three months and there were intentions of removing them from the job, but higher management apparently decided to put them back in service about a week prior to Vance's April 30 inspection. Tr. 101-02.

a. Legal Analysis Concerning Citation 7162343

i. The Alleged 77.404(a) Violation

Section 77.404(a) imposes two duties upon an operator: (1) to maintain machinery and mobile equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of *either* duty violates the standard. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

777D Caterpillar Truck No. 4016 cited by inspector Vance was mobile equipment. Such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Ambrosia Coal & Constr. Company*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (applying identical standard in underground coal mines)).

Applying this test, I find that the Secretary has failed to establish by a preponderance of credible evidence that Respondent violated Section 77.404(a) by failing to maintain the steering linkage assembly and secondary steering on the haul truck in safe operating condition. I find a non-S&S violation with regard to Respondent's failure to maintain the air conditioner in safe operating condition.

The Allegation of Slack in the Ball Joint

I credit Lusk that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on April 30, 2013. Vance testified that the slack was obvious, which undercuts the need for measurements. Vance never showed Lusk his measurements. Although Vance took many pictures of cited conditions during his inspection, Vance never took a picture of the measurements. In addition, I find it difficult to believe that Vance never had to get down on a knee or on the ground to check for slack in the steering linkage ball joints, particularly when setting up a dial indicator. Tr. 46. Further, the excessive slack allegations concerning the first two rock trucks inspected in the instant citation and Citation 7162344 were verbatim and Vance's purported dial indicator measurements were exactly the same, 70,000ths of an inch. The identical wording and measurements cast further doubt on Vance's claim that he independently measured and evaluated each ball joint.

Most importantly, I observed Vance as a witness and do not believe his testimony or his notes indicating that he observed excessive slack that was obvious and used a dial indicator to

measure it. Vance struck me as an unreliable witness, who was out to get Curry and was not beyond creating false documentation of dial indicator measurements in an effort to do so. For example, Vance wrote that a new solenoid had been installed as an abatement measure to correct the secondary steering problem cited on this truck. P. Ex. 1, p. 2. Lusk credibly testified that no solenoid was installed. Rather, Lusk just repaired a broken wire. Tr. II, 153-54. I credit Lusk, as explained below. Vance did not rebut Lusk's testimony, even though Citation No. 7162343 indicates that a new solenoid was installed for abatement purposes. P. Ex. 1. Vance had poor recollection of events and abatement measures without reading from or consulting his notes and the citations. Tr. 32, 261. Moreover, Lusk's testimony is supported by R. Ex. 2, in which Lusk wrote MSHA District 12 Manager Watkins that when Vance returned to check on abatement efforts, Vance asked Lusk if he had made the repairs and then left without checking.

Similarly, regarding Citation No. 7162346, discussed below, I have credited Lusk's testimony that contrary to abatement measures listed on the citation by Vance, no sensor was installed for the brake oil temperature gauge, no sensor was installed for the brake action warning light, and no sensor was installed for the fuel gauge. Rather, I have found below that Vance prevaricated certain abatement measures listed on the citation and cursorily checked abatement measures consistent with Lusk's letter to District Manager Watkins. *See* R. Ex. 2. In addition, regarding Citation 7162351, discussed below, I have credited Smith's testimony, as corroborated by Lusk and Curry, concerning Vance's apparently fabricated abatement measures.

I also emphasize that Curry credibly testified that he has never seen Vance use a dial indicator, and no one from Respondent, including Lusk, has ever reported seeing Vance use a dial indicator. Tr. II, 82-83. Newsome essentially corroborated Curry and Lusk when testifying that that he would have seen a dial indicator if Vance had used one. Further, Newsome confirmed that Vance was only under his truck about a minute or two when he was checking the ball studs. Based on Curry's credited testimony, this was not enough time to set up the dial indicator and take a proper measurement after cleaning off mud and debris from the trucks.

Accordingly, despite his notes, I find that Vance's measurements were unreliable and the Secretary failed to prove by credible, probative evidence that any ball joint movement met Caterpillar's out-of-service criteria. Further, although Vance's citation indicated that slack existed where the nut was located on the ball stud (P. Ex. 1), Vance did not check to see if the nut was loose, and the ball stud still had the cotter pin in place. Tr. 60-61. In these circumstances, I find that the Secretary failed to prove that excessive slack existed on the inside ball stud located on the left side steering jack such that movement in the steering linkage ball joints was sufficient to establish that the truck was not maintained in safe operating condition. *Cf. Extra Energy*, 36 FMSHRC 2733, 2744 (Oct. 2014) (ALJ) (crediting inspector's testimony which established that tape-measured inch of vertical play in the ball joint constitutes a hazard making continued operation of the haul truck unsafe and requiring its removal from service pursuant to Commercial Vehicle Safety Alliance, North American Standard Out-of-Service Criteria, particularly given credited testimony that the nut at the bottom of the ball joint was loose and ready to fall off, had sheared the cotter pin keeper, and was removed with bare hands).

The Allegation that the Secondary Steering Was Defective

With regard to testing the secondary steering on the 777D Caterpillar Truck No. 4016, the Secretary failed to establish that Vance applied the proper test. As noted, the Caterpillar

Operation and Maintenance Manual for the 777D indicates that the operator must stop the engine and push the top half of the brake release and secondary steering switch to select the manual position. Then the steering wheel should be turned completely to the right and then left. Then the switch should be returned to the automatic position. R. Ex. 4, p. 193; Tr. 179-180. Vance did not have the operator do this. Rather, Vance shut off the kill switch from outside the vehicle and did not hear the electric motor turn on for the secondary steering. Tr. 62-63. Vance testified, "I shut it off and the driver never could get it to function." *Id.* When asked whether he gave the driver an opportunity to try to have it turn on, Vance testified, "Yes. And he [the driver] seemed to have good working knowledge of it, so I assumed that he was trained and knew how to operate it." Tr. 63. Vance did not cite the Respondent for a training violation regarding operation of the secondary steering. Since Vance did not testify that he applied a proper secondary steering test, I find that the Secretary has failed to establish that the secondary steering was not functioning. Further, I have discredited Vance's allegation that a solenoid was installed to abate the secondary steering allegation. Although Lusk credibly testified that he repaired a broken wire, the Secretary failed to establish that repair of such wire equated to Respondent's failure to maintain the truck in safe operating condition. I dismiss the secondary steering allegation.

The Allegation that the Air Conditioning Was Defective

Finally, with regard to the air conditioner, I find that the system would not blow cold air. Tr. 55. In fact, Lusk told Vance even before Vance inspected the truck, that the air conditioner was down and the parts were on order, but would not arrive until morning. Tr. II, 153. Vance did not rebut this testimony. I find that the failure to maintain the air conditioning system rendered the cab of the truck unsafe during extremely hot weather because the driver could overheat or pass out. In fact, Vance recalled an incident in which a driver blacked out because heat in the cab triggered the driver's high blood pressure. Tr. 69-70. Although Vance testified that a driver who rolled down the window would be exposed to dust because he would not be wearing a respirator, Vance did not write the citation as a health violation. Tr. 69; P. Ex. 1.

ii. S&S, Gravity, and Negligence

I find that the safety violation was non-S&S under the second prong of the *Mathies* test. The second prong requires the showing of a "discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation." *Mathies*, 6 FMSHRC at 3. As the Fourth Circuit recently recognized, this prong "primarily accounts for the Commission's concern with the likelihood that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *See Knox Creek*, 811 F.3d at 160. In this regard, I find it unlikely that the non-functioning air conditioner would result in harm, much less a fatal accident, under continued normal mining operations because the Secretary's evidence (ALJ Ex. 1) and Respondent's rebuttal evidence (ALJ Ex. 2, p. 4 and Aff. of Richard R. Stacey Jr.) suggest that mine temperatures in late April 2013 were generally mild at the mine's higher elevation. Moreover, although an S&S determination is made at the time the citation is issued without any assumptions as to abatement (*Knox Creek*, 811 F.3d at 165), Lusk's credited testimony establishes that the air-conditioning parts (compressor) had already been ordered for the summer season *prior* to issuance of the citation. Tr. II, 153. In these circumstances, the Secretary failed to demonstrate that the violation was at least somewhat likely to result in harm.

As discussed above, the Commission has traditionally framed the second *Mathies* element slightly differently than the Fourth Circuit's interpretation, in that the Commission has not traditionally required a showing at this step that the violation was "at least somewhat likely to result in harm." See *U.S. Steel Mining Co.*, 6 FMSHRC at 1836 (indicating that the requisite showing is simply "that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger"). However, even if I reframe the inquiry to correspond to the *U.S. Steel* formulation rather than the wording of *Knox Creek*, the Secretary's evidence still fails to establish that the air conditioning violation satisfies the second *Mathies* prong. This was essentially a technical violation under the unique circumstances of this case. Due to the mild temperatures at the mine, the violation did not present any measure of danger to miners' safety. Nor has the Secretary established that the violation would have endangered anyone's safety with continued normal mining operations, because even before the citation was issued, the operator had already taken the steps necessary to timely prevent any danger from developing (namely, ordering the parts needed to repair the unit before the summer weather arrived). No hazard existed. Accordingly, I need not reach *Mathies*' often-combined third and fourth prongs, which require evidence that the hazard contributed to by the violation is reasonably likely to result in a serious, injury-producing event. See *Knox Creek*, 811 F.3d at 162-63.

I find that the gravity of this violation was not serious because there is no evidence that the lack of a functioning air conditioner was at all dangerous under the circumstances.

The fact that Lusk's credited and un rebutted testimony establishes that Respondent had already ordered a new compressor and apprised inspector Vance about the order prior to issuance of the citation, supports a reduction in negligence from moderate to low.

iii. Penalty

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent, Eagle Creek Mining, LLC, operates the Eagle Creek No. 5 Mine, which produced 312,391 tons of coal in 2013, and had 54,626 hours worked in 2013. Jt. Ex. 1. The parties stipulated that the originally proposed penalty will not affect Respondent's ability to remain in business. *Id.* MSHA recognized Respondent's good-faith compliance in abating the citation. I have modified MSHA's gravity and S&S determinations from reasonably likely and S&S to unlikely and non-S&S. I have modified MSHA's negligence determination from moderate to low. As discussed above in the legal principles subsection of this opinion, I have also considered that the history of repeat violations relied upon by the Secretary may have been overbroad. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a \$200 civil penalty against the Respondent.

2. Citation No. 7162344 – Caterpillar 777D, Truck No. 4013

Vance next inspected Caterpillar 777D, Truck No. 4013. Tr. 77. Newsome drove this truck on April 30, 2013. Tr. 314-15. Vance checked the pre-operational examination record for the truck. Tr. 99. Vance then apparently began in the cab by checking the brakes, seats, seat belts, gauges, steering and mirrors. Tr. 77-78.

When testifying about the citation's allegations, Vance read from the citation (P. Ex. 3); "5. Where the mirror mounts to the driver's side door is broke," "And No. 6, the handrail located

behind the driver's side door is broke." Tr. 78; see P. Ex. 3. Vance testified that the mirror was there, "but where it mounts to the door was broke, causing the mirror to vibrate real bad under operation." Tr. 79. In response to questioning from the undersigned, Vance testified that he did not operate the truck, but after counsel answered affirmatively for him, Vance testified that he learned through a conversation with a miner informant "[t]hat the mirror was shaking. Can I read my notes? It's in my notes." Tr. 79-80.

When pressed by the undersigned to divulge the substance of what he learned from the informant, Vance testified as follows:

Through my experience as a truck driver, if the mirror bracket is broke, it shakes. Extremely. And it's hard to visually see as you back up. And like I said, you're really high up in this cab, and the depth – I mean, you depend solely on these mirrors when backing up.

Tr. 80. Vance was then essentially led by counsel to testify that he learned from the informant that the mirror was shaking during operation.

Q. Did you learn through these conversations that – that the mirrors were shaking?

A. Yes.

Q. During operation?

A. Yes.

Judge McCarthy: Did you learn whether the shaking of the mirrors had any effect on the driver's ability to see?

The Witness: Yes.

Judge McCarthy: What did you learn?

The Witness: That he was having difficulty seeing backing up with the shaking mirror.

Tr. 80-81. Vance's notes state, "Driver said it was hard to see out mirror from vibrating because it was broke at door & mount." P. Ex. 2, p.34.

The abatement measure as set forth on the citation for the cited mirror states, "5. A new door has been installed and the mirror bracket installed in place to the door securely." P. Ex. 3, p. 5.

Contrary to Vance's notes, Newsome, the driver, testified that he did not have any problems seeing out of his mirror, and he would not have been driving if he could not use the mirror. Tr. 327. I credit Newsome over the hearsay testimony from Vance, even as corroborated by Vance's notes. In fact, Vance essentially recanted his testimony and testified that the operator just told him that there was a problem with the mirror. Tr. 267-68.

Vance also testified that the handrail behind the driver's side door was broken. Tr. 78, 81. Vance testified that the handrail is used to maintain three-point contact when the driver is walking on the two-foot wide "cat walk" area to enter and exit the cab, and clean mirrors and windows. Tr. 81, 83.

On cross examination, Vance was shown P. Ex. 8 and he indicated where there was a break in the bottom of the handrail. P. Ex. 8; Tr. 252-53. The upper and lower parts of the handrail, however, were intact, and Vance conceded that the handrail would prevent one from falling through "as long as it don't break." P. Ex. 8; Tr. 253. Vance also conceded that the steel handrail would have to break at the top and bottom for one to fall through the handrail. Tr. 253. Vance testified that the cited handrail itself would not establish an S&S violation. Tr. 253-54.

Upon checking the parking brake, Vance testified that he heard an "excessive audible air leak" in a hose when the brakes were applied while Vance was still on the ground. Tr. 95-98. Vance testified that he told the operator to release the parking brake because the wheels were scotched, leave the truck off, and pull the brake, either the hand spike (retarder), or the foot brake (service brake) so that Vance could listen for air leaks while on the ground. *Id.* Vance testified that he told the operator to release the park brake and hold the retarder and Vance heard an excessive audible air leak from the general area underneath the truck, towards the center "where you get up under to check the tire rods and ball studs." Tr. 95. Vance heard an air leak from a hose when the brakes were applied. Tr. 96-97. Vance did not measure the decibels of the air leak or use any other device to measure the alleged air leak. Tr. 96.

Vance testified that after hearing the air leak from a hose while on the ground, Vance climbed back up into the cab, asked the driver to start the truck to build the air pressure back up, and then asked the driver to apply the brakes again. Tr. 97. Vance testified that when this happened, Vance observed the air pressure gauge start dropping, but Vance did not take any measurement as to how far it dropped or what the difference was in pounds per square inch (psi). Tr. 96-99. Vance was confident that that there was a brake leak because "it would only leak once he applied the brakes." Tr. 96.

On cross-examination, Vance acknowledged that when you apply the brakes, the air gauge drops. Tr. 222. He testified that if the air pressure leaks off, the service brake and the park brake set up, if functioning properly. Tr. 222-23. Vance did not cite any brake problems on the truck. Tr. 224. When asked by Respondent's counsel how the air leak was reasonably likely to cause a serious injury, Vance testified that "... if the truck is traveling with a load and a line blows and the brakes set up, you could lose control of the truck by the wheel locking up if the roads were wet." Tr. 224.

As noted, Vance could not determine precisely where the air leak was other than from some alleged hose somewhere underneath the center of the truck where one checks the tire rods and ball studs. Tr. 95-97, 222. Vance did not visually observe any leaking line or hose and could present no evidence that the truck was reasonably likely to blow a line. Tr. 225.

As Vance continued to inspect outside and underneath the vehicle, Vance noticed that there was oil leaking from both steering hoses onto the metal fittings where the hoses enter the right and left steering jacks. Tr. 83-84, 86. At trial, the Secretary entered pictures of the oil leaks into evidence and Vance identified the conditions that he observed. Tr. 84-90; P. Ex. 2, pp. 5-6;

P. Ex. 4, pp. 1-2. Vance testified that the steering hoses supply oil to the steering cylinders in the steering jack so that the truck can be steered. Tr. 94. Vance further testified that the leaking hoses could cause a catastrophic failure because when the steering hose blows, you can lose oil pressure to the steering jacks, which would cause loss of steering control during operation of the vehicle. *Id.*

Lusk admitted that the steering hoses were leaking, but he testified that the leak(s) did not affect operation of the steering. Tr. II, 155. As explained below, I discount this testimony from Lusk.

Vance further observed that the center pin, which goes through the center arm in the steering linkage, had excessive slack where the pin mounts inside the center arm. Tr. 90-92. Vance testified that the center arm is where all the steering linkage comes together. Tr. 91. The center pin pivots or moves as the center arm rotates. Tr. 93. The Secretary entered a picture of the outside bottom end of the pin into evidence. P. Ex. 4, p. 3.

When asked by the Secretary whether he noticed any other slack on the steering jack, Vance essentially read from the citation and testified that it was the same situation as the first truck he cited that day meaning that “[e]xcessive slack existed on the inside ball stud located on the left side steering jack” and “[a]lso slack existed where the nut was located on the ball stud.” Tr. 93; *compare* P. Ex. 3 with P. Ex. 1. Vance testified that he again used a dial indicator to take a measurement. Tr. 93. According to Vance’s testimony and his notes, this ball stud was also 70,000ths of an inch out of adjustment. Tr. 94; P. Ex. 2, p. 4. For the same reasons discussed in connection with the previous citation, for which the pertinent facts were the same, I do not credit this evidence and find it unreliable.

At 9:58 a.m., Vance issued Citation No. 7162344 to Curry for an alleged violation of 30 C.F.R. § 77.404(a) because Truck No. 4013 was not being maintained in safe operating condition. Specifically, the Citation alleged that:

1. Excessive slack existed on the inside ball stud located on the left side steering jack. Excessive slack existed when the truck was steered in either direction. Also slack existed where the nut was located on the ball stud.
2. The steering hoses were leaking to the right and left side steering jacks.
3. Excessive slack existed in the center arm pin located on the steering linkage.
4. Excessive audible air leak existed.
5. Where the mirror mounts to the drivers [sic] side door is broke.
6. The handrail located behind the drivers [sic] side door is broke.

P. Ex. 3.

Citation No. 7162344 was designated as a significant and substantial violation that contributed to a hazard that was reasonably likely to result in a fatal injury, with 1 person affected, as a result of Respondent's moderate negligence. *Id.* The Citation indicated that the truck was operated in the Pump House Pit Area and "[i]t was reasonably likely that if these conditions continued to exist an accident will occur." The truck was removed from service immediately. *Id.* The proposed penalty was \$12,248.

Vance's initial testimony regarding the significant and substantial designation was general and vague.

Q. Okay. Why did you mark this reasonably likely?

A. Based on the conditions of the truck and the conditions in which the truck operates under on a regular basis. Daily basis.

Q. What injury of illness did you mark?

A. Fatal.

Q. Why?

A. It is the injury most likely to occur in an incident based on the conditions in which his truck operates on a regular basis. Daily.

Tr. 100-01.

Upon questioning from the undersigned about the nature of the hazard(s), Vance testified that the excessive slack on the inside ball stud would cause the steering jack to pop off the ball stud while the truck was in operation causing the driver to lose control of the truck. Tr. 102. He testified that "[i]f the steering hose blows, it loses pressure to the steering, unable to steer, causing the driver to lose control of the truck and wrecking." *Id.* Vance further testified that

“[E]xcessive audible air leak on the pressure to the brake system, brake failure, causing the . . . driver to lose control and wreck. The handrail, this is where he enters and exits the cab. It's a very narrow area. The driver without the proper handrail and handling, could fall off the truck causing fatal injuries from his elevated height of approximately 10 to 12 foot.”

Tr. 102-03. Vance testified that he designated Respondent's negligence as moderate because the leak on the steering hoses, the audible air leak, and the condition of the handrail and mirror were all obvious, the excessive slack in the ball stud occurred over time, and Respondent could not provide any records showing that the ball studs were checked by two people. Tr. 104.

As noted, Newsome operated Truck No. 4013 during the April 30, 2013 inspection. Tr. 315. Newsome testified that he found no problems during a pre-operational inspection of Truck No. 4013 on the morning of April 30. *Id.* Newsome testified that buddy checks are done on the

ball studs about once a week or once every two weeks, and Vance never asked Newsome about buddy checks or how he performed his pre-operational checks. Tr. 316.

Newsome testified that Vance began his inspection on the ground first and not in the cab. Tr. 317. As noted previously, Newsome testified that Vance was only under the truck for a couple of minutes when he checked the ball studs and that Newsome did not see Vance with a dial indicator. Tr. 316--19. Although he could not see under the truck, Newsome testified that if Vance had been carrying a dial indicator, Newsome would have seen it. Tr. 322.

Newsome testified that after Vance came out from under the truck, Vance hit the kill switch on the bumper of the truck and then climbed up into the cab. Tr. 317. Newsome testified that Vance asked Newsome to turn the key on and when he did so “there was a small leak. Nothing to affect anything. It was like a hose or something leaking. And he heard that, and he said, “You’re down.”” Tr. 320; *see also* Tr. 322 (“[H]e heard the small air leak and said, ‘You’re down.’”). Newsome testified, “Then he [Vance] laughed and said he loved it.” Tr. 320. Newsome testified that, “[t]hen he -- well, he checked, I think the mirror and something -- not the mirror, but the casing or something was broke on the door.” Tr. 320, 322 (“[T]he door casing was busted or something. I mean it wasn’t nothing pertaining to safety, but he -- he mentioned something about it.”).

Newsome was shown P. Ex. 4, p. 4, a picture of the cited handrail on the outside of his cab on Truck No. 4013. Tr. 323. Newsome testified that when the door to the cab was opened, the handrail area was not accessible because of the way the door swung open. Tr. 323-24. When asked whether there was any problem with the stability of the handrail, Newsome testified, “No. It’s used for nothing really.” Tr. 324. Newsome further testified that there was no window or anything that one needed to clean, which would require use of the handrail. Tr. 324-26. In essence, Newsome testified that the cited handrail was not used because it was located behind a door hinge, and was not needed to clean the window in the door. *Id.*

As noted, Newsome testified that he never saw Vance with a dial indicator during the inspection. Tr. 317. Furthermore, Newsome testified that Vance was only under the truck for a minute or two when Newsome was manipulating the steering wheel to the left and right to check the steering linkage system, and that Vance only checked under the truck once after directing Newsome to turn the steering wheel. Tr. 316, 322. I credit Newsome’s testimony, particularly because he was forthcoming with regards to conditions that did exist and candidly admitted when he was unfamiliar with a particular system or did not have the requisite knowledge to answer a question. Tr. 333, 336, 343, 346.

a. Legal Analysis Concerning Citation 7162344

i. The Alleged 77.404(a) Violation

Under Section 77.404(a), 777D Caterpillar Truck No. 4013 cited by inspector Vance on April 30, 2013 was mobile equipment that must be maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal, supra*, 1 FMSHRC at 1495. It is undisputed that such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Applying the reasonably prudent operator test set forth above, I find that the Secretary has established that Respondent violated Section 77.404(a) by

failing to maintain the steering hoses in safe operating condition and that the violation was significant and substantial. I find a non-S&S violation with regard to Respondent's failure to maintain the truck in safe operating condition free from a small air leak, since the Secretary failed to establish through Vance's testimony that the air leak contributed to a discrete brake-failure hazard which was likely to result in an injury during continued mining operations. I dismiss the remaining allegations in the citation.

The Allegation of Slack in Steering Linkage Components

For the reasons previously set forth with regard to Citation 7162343, I discredit Vance's testimony that he used a dial indicator on Truck 4013 and found 70,000ths of excessive slack (i.e., the same amount of slack attributed to Truck 4016 in Citation 7162343) on the inside ball stud located on the left side steering jack, and slack where the nut was located on the ball stud. Rather, I have credited Respondent's witnesses, particularly Lusk and Newsome, that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on any truck inspected on April 30, 2013. Further, Citation 7162344, like its predecessor Citation 7162343, indicated that slack existed where the nut was located on the ball stud, but Vance did not testify about any such slack on Truck No. 4013.

With regard to the allegation that excessive slack existed in the center arm pin located on the steering linkage, Vance identified a picture of the bottom of the center pin (P. Ex. 4, p. 3) and testified that he observed excessive slack in the center arm pin where the pin mounts inside the center arm. Tr. 91. Vance confirmed that the pin is inside the center arm and the picture just shows the outside of the pin. Tr. 91-92. Vance did not testify what amount of slack was excessive slack in the center arm pin and he did not take any measurements.

I find Vance's testimony and notes about excessive slack in steering linkage components to be unreliable and motivated by his bias against Curry. I find that the Secretary failed to prove by credible, probative evidence that any ball joint movement or excessive slack in the center arm pin met Caterpillar's out-of-service criteria such that truck 4013 was not maintained in safe operating condition.

The Allegation of a Broken Mirror

With regard to the allegation that the mount for the mirror on the driver-side door was broken, I find that the Secretary failed to establish that the cited mirror interfered with visibility and safe operation of the vehicle. *See, e.g., Walker Stone Co.*, 17 FMSHRC 1389, 1394 (Aug. 1995) (ALJ). I rely on the credible testimony of Newsome that he did not have any problems seeing out of his mirror (Tr. 327), the fact that the Secretary failed to establish that Vance sat in the driver's seat of the truck to check for vision impairment, the fact that P. Ex. 8 shows the cited mirror and an additional mirror above it to be intact, and the fact that Vance demonstrated clear bias against Curry. Accordingly, this allegation in the citation fails of proof and will be dismissed.

The Allegation of a Broken Handrail

With regard to the allegation that the handrail located behind the drive-side door was broken, I find that the broken bottom portion of the handrail did not render the truck in unsafe operating condition under the cited standard. On cross examination, Vance was shown P. Ex. 8

and pointed out where there was a break in the bottom portion of the handrail. P. Ex. 8; Tr. 252-53. The photograph and Vance's testimony establish that the upper and middle portions of the handrail were intact and Vance conceded that the handrail would have to break through steel at the top and bottom for one to fall through. P. Ex. 8; Tr. 253. Vance further opined that the cited handrail itself would not establish an S&S violation. Tr. 253-54. In addition, the Secretary failed to establish that the existing handrail was insufficient to grasp onto as a miner walked up or down the adjacent steps. In these circumstances, I find that the Secretary failed to establish that the Respondent failed to maintain the truck in safe operating condition because of the missing portion of the otherwise intact handrail. Accordingly, this allegation fails of proof and will be dismissed.

The Allegation of an Air Leak

With regard to the allegedly "excessive audible air leak" that Vance heard emanating from underneath the center of the cab when the operator released the parking brake and held the retarder, I find that there was an audible air leak when the brakes were applied. Tr. 98. Newsome confirmed that after Vance hit the kill switch, climbed up into the cab, and asked Newsome to turn the key, one could hear "a hose or something leaking." Tr. 320. Vance did not determine where the leak was coming from or measure the amount of air or air pressure that was leaking. I credit Newsome that the leak was small. Tr. 320.¹⁹ I further credit Newsome that when Vance heard the small air leak, he said "You're down," laughed, and said he "loved it."

I find that a reasonably prudent operator should recognize that an air leak, although small, amounts to a failure to maintain the leaking component of the truck in safe operating condition in violation of section 77.404(a).

The Allegation that the Steering Hoses Were Leaking

With regard to the leaking steering hoses, I credit Vance's testimony, as corroborated by photographs (P. Ex. 2, pp. 5-6; P. Ex. 4, pp. 1-2), that there was oil leaking from both steering hoses onto the metal fittings where the hoses enter the right and left steering jacks. Tr. 83-84, 86; P. Ex. 2, pp. 5-6; P. Ex. 4, pp. 1-2. As noted, the steering hoses supply oil to the steering cylinders in the steering jack so the truck can be steered. I credit Vance's testimony that the leaking hoses could cause a catastrophic failure because when the steering hose blows, you can lose oil pressure to the steering jacks, which would cause loss of steering control during operation of the vehicle. Tr. 94. Lusk admitted that the steering hoses were leaking, but he testified that the leak(s) did not affect operation of the steering. Tr. II, 155.

¹⁹ Vance provided no frame of reference for his allegation that the leak was "excessive." He did not measure the decibels or use any other device to measure the air leak. Tr. 96. Although Vance observed the air pressure gauge start dropping after he climbed back up in the cab, he did not take any measurement as to how far it dropped or what the difference was in pounds per square inch (psi). Tr. 96-99. Further, Vance acknowledged on cross examination that applying the brakes can cause the air gauge to drop. Tr. 222. Given Vance's animus and bias toward Curry, as set forth herein, I find that his use of the term "excessive" to describe the air leak was overstated. Moreover, it was unnecessary, because an air leak constitutes a defect regardless of its magnitude.

Contrary to Lusk's cryptic attempt to downplay this safety issue, I find that a reasonably prudent operator should recognize that the failure to maintain the steering hoses free from oil leaks amounted to a failure to maintain the truck in safe operating condition in violation of the section 77.404(a).

ii. S&S, Gravity, and Negligence

Although the air leak constituted a violation of a mandatory safety standard, satisfying the first *Mathies* prong, I find that the Secretary has failed to meet his burden of proof under the second prong with regard to this particular condition. As noted, the second prong of the *Mathies* test requires showing a "discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation." *Mathies*, 6 FMSHRC at 3. The Fourth Circuit recently held that the second prong of the test contemplates a showing that the violation was at least somewhat likely to result in harm. *Knox Creek*, 811 F.3d at 162. Vance alleged that the air leak violation contributed to the hazard of the brakes failing due to loss of pressure in the brake system. However, the Secretary has failed to substantiate this speculative allegation. Vance conceded that if the air pressure leaks off, the service brake and park brake set up, if functioning properly. Tr. 222-23. Vance did not cite any brake problems on the truck. Tr. 224. Moreover, Vance could not determine precisely where the air leak was other than somewhere underneath the center of the truck where one checks the tire rods and ball studs. Tr. 95, 222. Thus, it is not clear whether the leak was coming from the brake system, as he suggested, or whether it actually originated in some other part of the vehicle. I further note that Vance did not visually observe any leaking line or measure the pressure that was allegedly leaking off and could present no evidence that the truck was at all likely to blow a brake line. Tr. 225. Rather, Vance's testimony focused on a speculative loss-of-control hazard at *Mathies* prong three assuming that a line blew and the wheels locked up on a wet road. When asked by Respondent's counsel how the air leak was reasonably likely to cause a serious injury, Vance merely testified that "... if the truck is traveling with a load and a line blows and the brakes set up, you could lose control of the truck by the wheels locking up if the roads were wet." Tr. 224. Vance's testimony lacked any explanation as to how the air leak contributed to this hazard. In these factual circumstances, I find that the Secretary failed to establish that the air leak violation, as litigated, contributed to a discrete brake-failure hazard that was likely to result in harm.

Turning the leaking steering hoses, I have already found that this condition violated a mandatory safety standard, satisfying the first prong of the *Mathies* test. I further find that the other three elements of the *Mathies* test were satisfied and that the violation of the mandatory safety standard was significant and substantial.

With regard to the second *Mathies* element, the Secretary established that the leaking steering hoses contributed to a discrete safety hazard or measure of danger to safety and were "at least somewhat likely to result in harm," satisfying both the traditional formulation and the *Knox Creek* Court's formulation of *Mathies* prong two. The steering hoses supply oil to the steering cylinders in the steering jack so the truck can be steered. Tr. 94. Vance testified that the leaks in the hoses could cause the hoses to fail catastrophically, resulting in loss of pressure to the steering jacks and loss of steering control during operation of the vehicle. Tr. 94, 102. Lusk denied that the leaks affected the steering, but did not consider what would happen if the leaks were to continue unabated. Tr. 155. I find that the leaking fluid, if left unabated during the course of continued normal mining operations with normal use of the truck, would be reasonably likely

to cause the steering hoses to blow and pressure to be lost to the steering jacks, resulting in loss of steering control. The cited truck is a large haul truck driven over uneven, curved, and graded mine roads. It is used regularly and carries heavy loads. Under the circumstances, loss of steering control would be reasonably likely to result in injury to the driver due to the vehicle overturning or wrecking, injury to another driver during collision with another vehicle, or injury to another miner traveling on foot in the vicinity of haul truck operations. Accordingly, I find that the violation was more than “somewhat likely to result in harm” due to its contribution to a discrete safety hazard that was reasonably likely to occur and to cause injury during continued normal mining operations.

Regarding the third *Mathies* element, the Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., loss of control of the large haul truck on mine roads, was reasonably likely to result in an injury during continued mining operations, for the reasons described above.

Concerning the fourth *Mathies* element, I find a reasonable likelihood that any such injury would be of a reasonably serious nature given the nature of the hazard, the size of the truck, and the impact from any collision. The loss-of-control hazard contributed to by the failure to maintain the large haul truck in safe operating condition was reasonably likely to result in a collision and concomitant serious or fatal injury to the truck driver, miners in a colliding vehicle, or miners struck on foot. The Caterpillar 777D is a very large haul truck capable of carrying loads weighing hundreds of thousands of pounds. A collision with another vehicle or miner likely would be serious or fatal. Accordingly, the Secretary has shown a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious or fatal.

The gravity of this violation was serious, although not as serious as indicated by the inspector. I have dismissed four of the six defects that Inspector Vance allegedly observed (slack in the steering ball joint, slack in the center arm pin, and the alleged defects in the mirror and handrail), and I have found the Secretary’s evidence to be lacking with regard to the hazard presented by the fifth defect (the air leak). However, the sixth defect (the leaks in the steering hoses) was serious in light of its contribution to a discrete risk of serious injury.

I further find that Respondent’s level of negligence was properly designated as moderate. Respondent knew or should have known of the leaking steering hoses, although it is unclear how long the oil was leaking.

iii. Penalty

As noted, Respondent is a large operator. The parties stipulated that the originally proposed penalty of \$12,248 will not affect Respondent’s ability to remain in business. MSHA recognized Respondent’s good-faith compliance in abating the citation. I have dismissed four specific allegations in the citation. I have modified the S&S determination concerning the air leak in the braking system from reasonably likely to unlikely and non-S&S. I have affirmed the allegation concerning the leaking steering hoses as S&S, as written. I have affirmed MSHA’s moderate negligence determination. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a \$3,050 civil penalty against the Respondent.

3. Citation No. 7162346 – Caterpillar 777F, Truck No. 4045

Vance inspected a third truck on April 30 at 11 a.m. -- Caterpillar 777F, Truck No. 4045. Tr. 106. Vance testified that the 777F is the “same type of truck” as the 777D, with some upgrades, and that he followed the same inspection protocol. *Id.* Vance began in the cab and observed that the brake action warning light was on, and that the brake oil temperature gauge was not working properly. *Id.* Vance testified that the brake action light remained on, regardless of whether the brakes were engaged. Tr. 107. Vance testified that a driver would not know about a problem with the braking system if the warning light was continuously engaged. Tr. 114.

Vance explained that the brake oil temperature gauge is important because it allows the driver to monitor the temperature of the brakes, especially on a downhill slope or steep grade, and to determine when to switch gears or to change braking technique. Tr. 107. Vance testified that the brake action warning light comes on when the brake oil temperature gauge reaches a certain temperature and gives warning that the driver needs to change gears, lighten the load, or try different braking options. *Id.* Vance speculated that the light was stuck on and stayed on continuously, but Vance never tested his assumption during operation of the truck. *Id.*

Vance took a picture of the brake warning light. P. Ex. 6. Tr. 236-37. On cross examination, Vance testified that the truck would move when the warning light was on based on his experience. Tr. 237. On further cross, however, it became clear that Vance’s experience was based on a warning light that was engaged during operation of a different truck, and the cited truck was parked and not operating. Tr. 237-38. Vance continued to maintain that the cited truck could be driven while the brake warning light was on. Tr. 238. Vance conceded that he had never driven a 777F, only a 777D or a lesser model. Tr. 238.

When asked by the undersigned how he knew that the truck could move with the light on, Vance replied, “[b]ecause the brake is not set up. Now with the park brake light on, the park brake is set up ... But this light will come when you start getting some indication that there’s a problem with the braking system.” Tr. 238-39. Vance could not identify the illuminated light with the gear and exclamation point next to the illuminated brake warning light and above the illuminated parking brake. Tr. 239. Vance never checked the manual to see if the truck could be driven with the brake warning light on. Tr. 239.

Contrary to Vance, Lusk testified that a truck can be started, but cannot move with the brake action warning light on. Tr. II 158, 160. I credit Lusk over Vance since he has driven the 777F model and Vance has not.

Both Vance and Lusk testified that a warning buzzer will go off if there is a problem with the brakes. Tr. 244; Tr. II 159. In fact, on cross examination, Vance acknowledged that the buzzer was an audible three alarm that was working and would go off before there was problem with the brake system or any brake failure. Tr. 244. Vance then attempted to retract his admission, but Respondent’s counsel would not let him do so.

Q. So the brake light and the oil temperature light would not cause an injury, because if we’re getting into a problem with the brake system, the buzzer is going to go off, correct?

A. The buzzer will go off.

Q. And that tells an operator he's got a problem with his brake system; right?

A. It could be another thing, too. I mean, it doesn't necessarily -- it could go off for the steering, it could go off for oil pressure loss. It works off all the alarms.

Q. It would tell him he has a problem with the system; right?

A. Yes.

Q. Okay. And that tells him to stop; right?

A. Yes.

Id.

When asked on cross examination how the allegedly defective brake oil temperature gauge was reasonably likely to cause a serious injury, Vance testified, “[b]ecause the driver does not have no warning that if he’s overheating the brakes or not. Because the light is on and the temperature gauge is pegged out.” Tr. 240. When pressed further about how ignorance of the brake oil temperature is reasonably likely to cause a serious injury, Vance testified, “[b]ecause the hotter the brakes get, you’re pretty much, more or less, cook them. So the less brake friction you’re going to have as far as stopping capability.” *Id.* Vance further testified that the brake oil would have to heat up to a sufficient degree that the driver would lose the capability to stop the truck, and you will probably see smoke coming from the brake drum. Tr. 241.

Although the citation indicated that the fuel gauge was not working properly (P. Ex. 5), Vance did not testify how the fuel gauge was malfunctioning. Rather, Vance testified that it was “good practice to know if you’ve got fuel” and testified that once while driving a large rock truck out of a pit, the truck ran out of fuel and rolled back until the brakes set up. Tr. 108. On cross examination, counsel asked Vance *how* it was reasonably likely to have a serious injury from a fuel gauge not working. Vance replied, “[b]ecause the truck could run out of fuel while traveling uphill or downhill, and the truck is going to roll a certain distance until the brakes actually stop the truck.” Tr. 233-34. Vance testified that the truck could be dumping in a valley field down a grade about a quarter mile to a mile from the pit. Tr. 235-36.

When counsel asked how far the truck had rolled during the incident that Vance described, Vance replied, “[p]robably 50 feet or better.” Vance testified that he was driving on a steep grade under the heavy load of a much larger 793 model rock truck, capable of carrying 2.5 times the tonnage of the 777D or 777F models cited. Tr. 233-34.

At the time of the inspection, Curry credibly testified that the rock trucks were refueled at the end of every shift, and could run for two days, or 20 hours, on one tank of fuel. Tr. II, 102-03. At the time of hearing, Curry testified that Respondent was refueling midday. Tr. II, 103. Vance conceded on cross examination that for an injury to occur, Respondent would have to deviate from its practice of refueling at shift’s end. Tr. 234.

With regard to the alleged slack in steering linkage components, Vance read from the citation and testified as follows: "The first item, 'Excessive slack existed on the inside ball stud located on the right side steering jack. Excessive slack existed when the truck is steered in either direction. Also, slack existed where the nut was located on the ball stud.'" Tr. 108. Vance testified that he observed the slack and measured 80,000ths of slack with a dial indicator. Tr. 108-09.

Q. Can you tell us about that?

A. Measurement with a dial indicator, 80,000ths.

Q. You use the same --

A. Horizontal movement, yes. Steering jack and the ball stud.

Q. Were they making the same movement as the stuff you observed before?

A. Yes.

Judge McCarthy: Did you measure both the right side of the steering jack and where the nut was located?

The Witness: Just the top part where the -- where the -- top of the ball stud and the steering jack itself. Not the nut.

Judge McCarthy: Is that true for all the measurements?

The Witness: Yes. It's the same as -- just this one had a little bit more slack.

By Ms. Bernick:

Q. Did anybody else take any measurements of this?

A. Not at the time when I was there.

Id. Vance's notes for the citation indicate "Pic's taken, no pics taken by company." P. Ex. 2, p. 15. As noted, however, no pictures of dial indicator measurements were proffered by the Secretary.

Vance testified that the slack in the ball joint, combined with the braking issues could cause a driver to lose control of the truck and wreck. Tr. 110. Vance testified generally that he had investigated numerous truck accidents that were caused by brake system defects. Tr. 111. Vance testified that in each instance, brake defects caused the driver to lose control and wreck the truck. Tr. 111. According to Vance, none of these incidents resulted in a fatality, but did result in permanent disability. Tr. 111-12. Vance did not present any accident or investigation reports, nor provide specific information about any of the accident investigations in which he was involved. Tr. 112-13.

Following his inspection, Vance issued Citation No. 7162346 for an alleged violation of 30 C.F.R. § 77.404(a). The citation alleged that:

1. Excessive slack existed on the inside ball stud located on the right side steering jack. Excessive slack existed when the truck is steered in either direction. Also slack existed where the nut was located on the ball stud.
2. The brake oil temperature gauge was not working properly.
3. The brake action warning light was on.
4. The fuel gauge was not working properly.

P. Ex. 5. The citation was designated as S&S and reasonably likely to result in a fatal injury, with one person affected, as a result of Respondent's moderate negligence. The proposed penalty was \$12,248. The citation described abatement steps as follows:

1. A new ball stud has been installed.
2. A new sensor has been installed.
3. A new sensor has been installed.
4. A new sensor has been installed.

P. Ex. 5.

These abatement steps were largely disputed by Lusk, who repaired the truck. Tr. II, 161. Although Lusk testified that an inside ball stud on the right side steering jack was replaced, no sensor was installed for the brake oil temperature gauge. Rather, Lusk repaired some wiring. Tr. II, 160-61. Lusk testified that nothing was wrong with the brake action warning light and no sensor was installed. Tr. II, 162. Similarly, Lusk testified that no sensor was installed for the fuel gauge. *Id.* Rather, Lusk testified that the sensor was plugged back up because dirt had pulled it apart. *Id.* I credit Lusk regarding these abatement steps that he personally undertook. I find that Vance prevaricated certain abatement steps and cursorily checked abatement measures consistent with Lusk's letter to District Manager Watkins. *See* R. Ex. 2.

a. Legal Analysis Concerning Citation 7162346

i. The Alleged 77.404(a) Violation

Under section 77.404(a), the primary issue is whether the 777F Caterpillar Truck No. 4045, cited by inspector Vance on April 30, 2013, was maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal*, 1 FMSHRC at 1495. It is undisputed that such mobile equipment was in service when cited. The primary issue is whether the truck was maintained in safe operating condition. Applying the reasonably prudent operator test set forth above, I find that the Secretary established that Respondent violated 30 C.F.R. §77.404(a) by failing to maintain the brake oil temperature gauge in safe operating condition, but failed to establish that the violation was significant and substantial. I find that the Respondent further

violated the standard by failing to maintain the fuel gauge in safe operating condition and that this violation was significant and substantial. I dismiss the remaining allegations in the citation.

The Allegation of Slack in the Ball Joint

For essentially the reasons previously set forth herein, except for Vance's slight modification of the amount of slack purportedly measured, I discredit Vance's testimony that he used a dial indicator on Truck 4045, and that he found 80,000ths of an inch of excessive slack on the inside ball stud located on the right side steering jack, excessive slack when the truck was steered in either direction, and slack where the nut was located on the ball stud. Rather, I have credited Respondent's witnesses, particularly Lusk and Newsome, that Vance did not use a dial indicator to take any measurements of slack in ball joint movement on any truck inspected on April 30, 2013. Further, Citation 7162346, like predecessor Citations 7162343 and 7162344, all indicated that slack existed where the nut was located on the ball stud, but as with Citation 7162344, Vance did not testify about the alleged slack where the nut was located on Truck 4045. As with the prior citations, I find Vance's testimony and notes about excessive slack or slack in steering linkage components to be totally unreliable and motivated by his bias against Curry. I find that the Secretary failed to prove by credible, probative evidence that excessive slack existed on the inside ball stud located on the right side steering jack or that slack existed where the nut was located on the ball stud. Accordingly, the Secretary failed to establish that any such slack met Caterpillar's out-of-service criteria such that truck 4045 was not maintained in safe operating condition.

The Allegation that the Brake Action Warning Light Was Defective

With regard to the allegation that the brake action warning light was on, I have credited Lusk's testimony that nothing was wrong with the brake action warning light and no sensor was installed to abate the violation. Tr. II, 162. Lusk testified that the light comes on when the truck starts, and it remains on, preventing the truck from moving, until pressure builds up for the brakes. Tr. II, 158-60. Vance indicated that the warning light is linked to the brake oil temperature gauge, which was not functioning properly. Considering this information, I reject Vance's allegation that the light was "stuck." Tr. 107. It is likely that the light had turned on because the truck had just been started, or else it had been automatically activated by the problem with the brake oil temperature gauge in order to alert the driver to the need to check the brake oil, which is exactly the way the light is supposed to work. Further, I have credited Lusk's testimony that the truck cannot be driven while the brake action warning light is on. I discredit Vance's testimony to the contrary and find that the Secretary failed to establish that the brake action warning light was not functioning properly while the truck was operating. Accordingly, this allegation in the citation fails of proof and will be dismissed.

The Allegation that the Brake Oil Temperature Gauge Was Defective

With regard to the allegation that the brake oil temperature gauge was not working properly, Lusk conceded that he repaired the wiring leading to the gauge. Tr. II, 161. Further, Vance testified that the brake oil temperature gauge allows the driver to monitor the temperature of the brakes, especially on a downhill slope or steep grade, and determine when to switch gears or change braking technique.

I find that the gauge was not working properly due to faulty wiring and thus Respondent violated 30 C.F.R. § 77.404(a) by failing to maintain the truck in safe operating condition.

The Allegation that the Fuel Gauge Was Defective

With regard to the allegation that the fuel gauge was not working properly, Vance did not explain how the fuel gauge was malfunctioning. I have credited Lusk's testimony that the operator did not need to install a new sensor to repair the fuel gauge, as the sole problem was that a component of the sensor had come unplugged. Tr. II, 162.

As previously stated, § 77.404(a) requires operators to maintain vehicles in safe condition and remove them from service if unsafe. Thus, the question before me is whether the unplugged fuel gauge rendered the truck unsafe. The fuel gauge serves to alert the driver when fuel is running low. A nonfunctional fuel gauge creates a risk that the driver will not realize the vehicle needs to be refueled, and as a result, the vehicle may run out of gas unexpectedly. As Judge Gill recently noted in a case involving a runaway truck, running out of gas causes a truck's engine to die, which can affect the operability of the steering and brakes, leading to a loss-of-control hazard on steep, winding mine roads. *Clintwood Elkhorn Coal Co.*, 37 FMSHRC ___, Docket No. KENT 2011-42R et al., slip op. at 7 (Mar. 22, 2016). Similarly, Vance recalled a prior incident when he had been driving a truck that ran out of fuel and rolled along an incline until the brakes kicked in. Tr. 108. I conclude that the unplugged fuel gauge rendered the truck unsafe, and therefore the condition violated § 77.404(a).

ii. S&S, Gravity, and Negligence

As discussed above, I have found that the brake oil temperature gauge and the fuel gauge were defective, in violation of the mandatory safety standard at § 77.404(a). These findings satisfy the first *Mathies* element.

Turning to the second *Mathies* element, with regard to the brake oil temperature gauge, the Secretary established that the defective gauge created a hazard in that the driver could no longer determine whether the brakes were overheating, which could contribute to an accident if the brakes were to overheat. Tr. 240-41. However, I find that the second *Mathies* element is not satisfied because the hazard did not constitute a genuine measure of danger to safety under the particular circumstances surrounding this violation and because the evidence does not establish that the violation was at least somewhat likely to result in harm. When asked on cross examination how the brake oil temperature gauge that was not working properly was reasonably likely to cause a serious injury, Vance testified, "[b]ecause the driver does not have no warning that if he's overheating the brakes or not. Because the light is on and the temperature gauge is pegged out." Tr. 240. However, I have credited the operator's testimony that the vehicle could not be moved because the brake action warning light was on. Because the truck could not be moved, there was no measure of danger to safety. Even if it could be moved, there was no evidence of any problems with the brakes. Moreover, both Vance and Lusk testified that a warning buzzer will go off if a problem with the brakes were to arise. Tr. 244; Tr. II 159. In fact, on cross examination, Vance acknowledged that the audible three alarm buzzer was working and would go off before there was problem with the brake system or any brake failure. Tr. 244. In these circumstances, I find that the Secretary failed to establish a likelihood that the brake oil would heat up without warning to a sufficient degree that the driver would lose the capability to

stop the truck. Accordingly, I need not address the remaining *Mathies* elements, and I find that the defective brake oil temperature gauge was not a significant and substantial violation.

However, I uphold the S&S designation with regard to the defective fuel gauge. Curry credibly testified that at the time of the inspection, the rock trucks were refueled at the end of every shift and could run for two days, or twenty hours, on one tank of fuel. Tr. II, 102-03. Vance conceded on cross examination that for an injury to occur, Respondent would have to deviate from its practice of refueling at shift's end. Tr. 234. Nonetheless, I find that the Secretary has overcome the very low burden imposed by the second prong of the *Mathies* test by establishing that the defective fuel gauge presented a discrete hazard – that is, a measure of danger to safety – that was at least somewhat likely to result in harm. As discussed above, the defective fuel gauge created a loss-of-control hazard if the truck were to unexpectedly run out of gas. Given the vagaries of human conduct and assuming continued normal mining operations, it was at least somewhat likely that the truck would not be refueled despite the operator's refueling policy and would run out of gas, which would occur without warning due to the inoperable fuel gauge. *See Peabody Coal Co.*, 19 FMSHRC 1381, 1385 (Aug. 1997) (finding that operator's safety practices do not preclude S&S finding because such an approach would rely on miners' skill and attentiveness to prevent injury, which impermissibly "ignores the inherent vagaries of human behavior") (citing *U.S. Steel, supra*, 6 FMSHRC at 1838 n.4). Because the truck was regularly driven on steep, curving mine roads, any loss of control occasioned by the truck unexpectedly running out of gas would be reasonably expected to cause a vehicular accident such as a collision, a fall from a precipitous height, or a rollover accident. *See, e.g., Clintwood Elkhorn, supra* (discussing accident wherein an out-of-control truck ran out of gas, accelerated down a mountain road, crashed through a berm, struck a utility pole at the base of the hill, and rolled over). Any such accident would be reasonably likely to result in harm to a driver, a passenger, or anyone in the path of the out-of-control vehicle. Accordingly, I find that the defective fuel gauge contributed to a discrete safety hazard that was at least somewhat likely to cause harm, satisfying the second *Mathies* element.

The third and fourth *Mathies* elements are also satisfied. Assuming the loss-of-control hazard were to occur, the hazard would be reasonably likely to cause an accident resulting in serious or fatal injuries to the driver, a passenger, or anyone in the truck's path, as this is a heavy rock truck that is operated in mountainous terrain.

Because the four *Mathies* elements are met, the operator's failure to maintain the fuel gauge in safe condition was S&S.

Having rejected two of the four allegations at issue in this citation and determined that one of the two remaining safety defects (the defective brake oil temperature gauge) did not present a genuine measure of danger to the safety of miners, I find that the gravity of this violation was not as serious as suggested by Inspector Vance.

I further find that Respondent's level of negligence was properly designated as moderate. Respondent knew or should have known that the brake oil temperature gauge needed rewiring and that the fuel gauge needed to be repaired, although it is unclear how long the conditions existed.

iii. Penalty

Respondent is a large operator. The parties stipulated that the originally proposed penalty of \$12,248 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have dismissed two specific allegations in the citation. I have modified the S&S determination concerning the brake oil temperature gauge from reasonably likely to unlikely and non-S&S, but have upheld the S&S determination concerning the fuel gauge. I have affirmed MSHA's moderate negligence determination. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a \$3,050 civil penalty against the Respondent.

4. Citation No. 7162351- Caterpillar 777F, Truck No. 4058

Vance inspected Caterpillar 777F Truck No. 4058 at about 1:20 p.m. on April 30, 2013. Tr. 115. Vance testified that the handrail on the offside was broken and needed repair, and the mirror bracket was bent and needed adjustment. Tr. 116.

Vance checked the secondary steering by standing at ground level, hitting the "kill switch," and listening for the electric motor to engage. Tr. 118. Vance testified that the driver of the truck (Ballard Smith) manually held the switch in once Vance climbed up in the cab. Tr. 181.²⁰ Vance did not indicate, however, whether the secondary steering worked at that point. As set forth below, Smith, Lusk and Curry all testified for Respondent that the secondary steering did work. I credit Respondent's witnesses, as explained below.

When asked whether the electric motor came on, Vance testified:

A. No. And he did not -- wasn't able to do it from the cab neither by releasing the -- the brake in the -- the transmit -- or the steering in the manual position.

Q. Well, can you tell us about what the safety conditions here are on the secondary steering?

A. Power loss engine failure, the driver wouldn't have no secondary steering, no back up to get the truck stopped, under control, safely while in operation without secondary steering in the case of a power failure, as far as loss of engine, loss of fuel.

Tr. 119.

²⁰ Ballard Smith was the driver of the truck on the day the citation was issued. Tr. II, 12-13.

Vance issued Citation No. 7162351 for an alleged violation of 30 C.F.R. § 77.1606(c). The condition or practice narrative alleged:

1. Secondary steering was not functioning when tested.
2. The handrail located on the offside of the truck was broke.
3. The offside mirror bracket needed repaired (sic).

P. Ex. 7. The citation was designated as a significant and substantial violation because reasonably likely to result in a lost-workdays or restricted-duty injury, with 1 person affected, as a result of low negligence. P. Ex. 7. The proposed penalty was \$1,530. The citation described abatement steps as follows:

1. The wiring has been repaired to the secondary steering.
2. The handrail has been welded back up in place.
3. The mirror bracket has been adjusted up properly.

P. Ex. 7.

Vance testified that he cited 30 C.F.R. § 77.1606(c) rather than 30 C.F.R. § 77.404(a) because he “didn’t feel this truck was not being maintained. Just that these conditions existed that affected it. These safety defects. So that’s why I went with this instead of the 404(a).” Tr. 121. Vance did not describe how the handrail was broken, but testified that if a driver or greaser used it they could lose contact with the vehicle and fall. Tr. 117. Vance testified that the bent offside mirror bracket that was out of adjustment is used each time the driver backs up, and he could “back into something. Back over a rock. Back into another piece of equipment.” Tr. 116.

Vance testified that he designated the citation as reasonably likely to result in a lost-time injury because the truck was operated in reverse about 50 percent of the time and the bent offside mirror bracket “makes it difficult for the driver to see” during operation of the truck around other equipment and in close proximity to confined areas. Tr. 121. Basically, Vance opined that the citation was significant and substantial because the bent mirror bracket prevented a driver from seeing while backing up, which could cause a collision. Tr. 123. Vance further supported his reasonably likely designation because the secondary steering would not function if there was a power failure of the truck, which operated ten hours per day for five days per week. Tr. 122. Vance testified that he only relied on the secondary steering and bent offside mirror bracket for his S&S designation, and not on the defective handrail. Tr. 265-66.

Vance testified that “lost workdays or restricted duty” was the appropriate injury designation because the operator could back up and hit another object or piece of equipment. Further, Vance distinguished this injury designation from the fatal designation in prior citations because only secondary steering was cited, and not primary steering linkages or brakes. Tr. 122-23.

On cross examination, consistent with P. Ex. 8, a photograph of the cited mirror and handrail, Vance testified that there were two mirrors on the driver side and he circled the cited bottom mirror. Tr. 254-56; P. Ex. 8. Vance testified that the bottom mirror bracket was bent, but the top mirror bracket was not bent and the top mirror was fully functioning. Tr. 254. Vance did not know whether another operator, who drove the truck, had requested that the bottom mirror bracket be bent. Tr. 244-45.

To abate the alleged violation, Vance testified that “[t]he mirror bracket has been adjusted up properly.” Tr. 256. When asked how they adjusted it, Vance testified, “Probably loosened it up and adjusted the mirror. It’s got – it’s mounted from the top to the bottom and you can adjust either side to side or - -.” *Id.* The following exchange then occurred with Respondent’s counsel:

Q. Okay. So what’s the problem here? Is it the bracket or is it the way the mirror is lined up? What’s your issue?

A. Well, if the bracket is bent and you haven’t adjusted it to make up the difference, you won’t be able to see completely what you need to see when operating the truck.

Q. What about the mirror above it?

A. Well, as a truck driver, the bottom mirror is usually towards the bottom of the truck and the top mirrors are used for the upper section of the truck when you’re loading on the offside of the truck to see your loader. When you stage up.

Q. So you went and sat in the operator seat?

A. No. This is from prior experience.

Q. Okay. So you don’t know on this truck how the operator had these two mirrors lined up for his use?

A. No.

Q. And you didn’t take any pictures of it?

A. Just the picture that you see.

Q. Right. And that doesn’t really tell us what either one of these mirrors are showing. We’re seeing the back of the mirrors, aren’t we?

A. Yes.

Q. It doesn't show us what the view of the operator sitting in the operator's cab would see?

A. The depth of it would be hard with the picture.

Q. All right. And -- are you aware that they made no changes to this mirror after your citation?

A. They told me the mirror bracket had been adjusted, and the driver was okay with it.

Q. Who told you that?

A. Whoever I spoke to. Jay Curry.

Tr. 256-58.

In short, on cross examination, Vance admitted that the driver had another higher mounted mirror that was fully functional, that Vance did not sit in the operator's seat to check visibility from the higher mounted mirror, that the bent mirror bracket could have been adjusted for operator use, and that Vance did not know what the operator saw, rather Vance was "[j]ust going by experience." Tr. 254, 257, 267. Subsequently, the following colloquy occurred between the undersigned and Vance:

Judge McCarthy: Well, did you -- did the operator tell you what he saw or didn't see on the day you wrote the citation?

The Witness: It's been took out of the notes.

Judge McCarthy: Well --

The Witness: What was exactly said, I don't remember. I mean, exactly what was said. Did he --

Judge McCarthy: Well, what do you remember the operator telling you?

The Witness: The day the citation was issued?

Judge McCarthy: Right. About the mirror.

The Witness: Evidently, there was a problem with the mirror. Without me sitting in the seat and him not telling me, I would not know.

Judge McCarthy: Okay. You have a problem, don't you? I mean, you have the steering. Okay? It's like a crack in the windshield. I have had cases where the inspector didn't get up – well, you can read them or you can find them. But – so we don't know what the operator told you. He just said there was a problem?

The Witness: Yes

Tr. 267-68.

Vance designated Respondent's negligence as low. The Secretary's counsel conceded that she was not seeking to modify that designation. Tr. 128.

As noted, Ballard Smith operated Truck No. 4058 during the inspection. Tr. II, 7-8. Smith testified that buddy checks were performed more or less on a weekly basis at Eagle Creek. Tr. II, 38. Smith acknowledged that there was a crack in the weld on the truck's handrail. Tr. II, 15. In addition, Lusk admitted that the handrail had broken from its weld at one point and Lusk repaired it to abate the citation. Lusk noted, however, that the handrail had several other points of contact with the truck. Tr. II, 144.

Smith did not remember any problem with the mirror bracket and did not have any trouble using the mirrors while driving the truck. Tr. II, 28. When asked on direct whether the mirrors angled to the appropriate areas to allow Smith to see behind him, Smith testified, "I didn't have any problem with it. I wouldn't pull out if I had a problem seeing." Tr. II, 29. Smith confirmed that he did a pre-operational check on the truck that morning and did not have any problems with the mirror that he could remember. *Id.* Smith did not recall having any conversation with Vance about the mirrors. *Id.* Smith did recall that the offside mirror bracket had been bent a little bit during shipping, but one could adjust the mirror. Tr. II, 29-30. When asked whether the mirror had been adjusted to be in the proper location, Smith testified, "I didn't have any problem with it." Tr. II, 30. Smith testified that he could adjust the bottom mirror from the steering wheel to see behind him on the offside when backing up to judge the distance of objects behind him. Smith could also adjust the mirror to look at the side of the truck or the wheel area. *Id.* Smith testified that Vance probably noticed that the bracket was bent a little bit, but Smith did not recall Vance questioning Smith about the mirror and it was not a problem. Tr. II, 31. The Secretary redacted any alleged conversation that Vance may have had with Smith about the mirror. *Id.*; P. Ex. 2, p. 30.

Smith further testified that Vance could not check the secondary steering on the 777F model from the ground by hitting the kill switch. Tr. II, 12. As noted, on questioning from the undersigned, Vance testified that Smith manually held the switch in once Vance climbed up in the cab. Tr. 181. Tr. II, 12-13. Vance did not indicate whether the secondary steering worked at that point. As explained below, I credit Smith, Lusk and Curry, who all testified that the secondary steering did work.

Smith testified that he had never been inspected in a 777F model, and that after Vance "downed" and left Smith's vehicle, Tony Wallace, the driver in the truck next to Smith, radioed

Smith to inform him how to check the secondary steering. Tr. II, 13, 22-24. Smith testified that he turned the key without starting the engine, held the switch in, and the secondary steering light came on with a little hum. Tr. II, 13, 23. Smith further testified that there was nothing wrong with the emergency steering and that Smith showed Vance that the secondary steering worked after Vance had downed the truck and came back about an hour later to check on abatement efforts. Tr. II, 13, 24-25. Smith did not know whether Vance had already written up the citation after Smith showed Vance that the secondary steering was working. Tr. II, 26. Smith assumed that Vance also did not know that when you hit the kill switch on the 777F model, the secondary or emergency steering would not engage. Tr. II, 27.

Smith further testified that two of the three abatement measures listed by Vance on the citation were inaccurate. Specifically, Smith testified that there was no repair to the wiring on the secondary steering because Smith was with the truck and nobody notified him that they were going under the vehicle to repair the wiring. Tr. II, 41-42. Smith also noted that nothing was done to the mirror bracket that day. Tr. II, 48.

I credit Smith's testimony concerning abatement measures and his testimony that he had no problem seeing out of the offside bottom mirror when driving the truck. I further credit Smith that the secondary steering was working and that Vance's test was executed incorrectly.

Smith's testimony was essentially corroborated by Lusk. Lusk testified that when Vance climbed up the ladder into Smith's cab, Vance told Smith that the emergency steering was not working. Tr. II, 140. Lusk then asked Smith in Vance's presence whether Smith had held in the button, and Smith said, "No, I thought you just had to push it." Tr. II, 140-41. Lusk then hollered over to foreman Curry that Vance was not testing the 777F model correctly, as Vance started to walk away to another truck. Tr. II, 142. As Vance passed Lusk, Vance told him to weld the handrail, which Lusk began doing. *Id.* Lusk conceded that the handrail had broken loose from the weld and needed to be re-welded. Tr. II, 144. Lusk testified that when Vance returned to check on the handrail, Lusk told him that there was nothing wrong with the emergency steering. Tr. II, 142, 144. Lusk testified that Vance said, "Okay. Fine. Let's test it," and the test was fine. Tr. II, 143. Lusk further corroborated Smith that nothing was done to adjust the mirrors that day. Tr. II, 142.

Finally, I note that Curry testified that Lusk informed Curry on April 30, 2013 that Vance was not testing the emergency steering on the 777F models properly. Tr. II, 69. Accordingly, Curry directed Lusk to walk Vance through the proper test for the secondary steering system on the 777F model. Tr. II, 70. Curry further testified that he was present in the area when Lusk and Vance rechecked the secondary steering and there was no problem with it. Tr. II, 72.

a. Legal Analysis Concerning Citation 7162351

i. The Alleged § 77.1606(c) Violation; S&S; Gravity; Negligence

Section 77.1606 pertains to loading and haulage equipment. The cited portion of the mandatory safety standard states: "Equipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

I have credited Smith's testimony concerning Vance's apparently fabricated abatement measures and Smith's testimony that he had no problem seeing out of the offside bottom mirror when driving the truck. I further have credited testimony from Smith, Lusk, and Curry that the secondary steering was working and that Vance's emergency steering test was executed incorrectly on the 777F model. Accordingly, I find that the Secretary failed to establish that the bent offside mirror bracket and the secondary steering system were equipment defects that affected safety and that needed to be corrected before the equipment was used under the cited standard.

Respondent's witnesses conceded that a weld on the handrail was missing and needed to be re-welded. Inspector Vance testified that he only relied on the secondary steering and bent offside mirror bracket allegations for his S&S designation, and not on the defective handrail. Tr. 265-266. Contrary to Respondent's efforts to vacate the handrail allegation completely (Tr. II, 145), I find that the missing weld was an equipment defect that affected safety if one tripped or fell since it was located in close proximity to the steps and could be latched onto as one was falling down, but consistent with the Secretary's litigating position, it was not S&S, and the gravity of the violation was not serious.

I affirm the low negligence determination since the remainder of the handrail was intact.

ii. Penalty

After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, my findings on gravity and negligence set forth above, and the fact that the violation was abated immediately in good faith, I assess a \$310 civil penalty against the Respondent for the defective handrail.

5. Citation No. 7162340 – Water Truck No. 8147

On May 2, 2013, Vance returned to the Mine to terminate the citations issued on April 30 and to continue his E01 inspection. Tr. 200. At about 12:35 p.m., Vance inspected the White Sterling Water Truck, No. 8147. Tr. 135. The water truck is used to water down roads for dust control. Tr. 152.

Vance testified that the walk-around inspection protocol for the water truck was similar to a haul truck, but the out-of-service criteria was different because haul trucks are confined to off road, and water trucks can be operated on and off road. Tr. 136, 138. Vance used the Commercial Vehicle System Alliance's North American Standard Out-of-Service Criteria for inspecting the water truck. Tr. 136. This criteria is not written into any MSHA standard, it is only used as a guideline. Tr. 283.

Vance testified that to check the brakes, he crawled under the water truck and checked the amount of slack or overstroke to determine whether the brakes should be taken out of service. Tr. 143. Vance testified that when the brakes are engaged on the water truck, a pushrod extends from the brake canister near the slack adjuster and applies pressure to the S-Cam, and the brakes expand against the drum. Tr. 146-147. Depending on the size of the canister, the length of rod

that extends from the canister is then measured in inches. Tr. 147. Vance testified that he measured the overstroke with a wooden, folding tape measure. Tr. 145.

Vance testified that the type-30 canisters used for the back brakes on the water truck had a 2-inch limitation under the North American Standard Out-of-Service Criteria. Tr. 146-47. Vance testified that he measured 2 and $\frac{1}{4}$ inches of overstroke for the left-side rear axle, which exceeded out-of-service criteria. Tr. 148. Curry testified, however, that a brake with a 2 and $\frac{1}{4}$ inch overstroke would still stop the water truck. Tr. II, 81. As explained below, I discount Curry's testimony.

Vance also testified that the brakes on the left and right side of the front-drive axle did not function when tested. Tr. 146. He testified that there was no movement in the pushrod when the brakes were engaged. *Id.* On cross examination, Vance could not determine why the brakes did not move on the left and right side of the front-drive axle (Tr. 283), but he testified earlier on direct examination that caps were missing from the brake canisters, which would allow dust to fill the canisters and prevent the brakes from moving. Tr. 150-51.

Vance also observed that the brake pads did not contact the brake drum as they were supposed to do when the brakes were fully applied on the right side of the rear-drive axle. Tr. 148. Vance testified that a filler gauge is used to check space between the pads and the drum, but Vance never testified specifically that he used a filler gauge. *Id.*

In addition, Vance observed that the water bed bracket that mounts the water bed to the frame on the right side of the truck was broken. Tr. 149.

At about 12:35 p.m., Vance served Curry with Citation No. 7162340 alleging that the water truck was not being maintained in safe operating condition in violation of 30 C.F.R. § 77.404(a) because of the following conditions:

1. The brakes located on left and right side of front drive axle were not functioning when tested.
2. The service brake chamber pushrod stroke for the left side chamber on the rear drive axle measured to be 2 $\frac{1}{4}$ " inches (over stroked).
3. The brakes located on the right side of the rear drive axle [were] not working properly when tested. With the brakes fully applied the brake pads would not contact the brake drum.
4. The water bed bracket mount located on the right side of the truck was [broken] off from the water bed.

These conditions expose the miner to hazards while operating the truck. This truck is being operated throughout mine property to water the roadways. It is reasonably likely if these conditions

continue an accident will occur. Management removed the truck from service immediately.

P. Ex. 9.

The S&S citation was designated as reasonably likely to result in a fatal injury, with one person affected, as a result of Respondent's moderate negligence. *Id.* The proposed penalty was \$10,437. The citation listed the following abatement steps to correct the conditions:

1. The air lines have been plumbed up properly and the brakes are now functioning properly when tested.
2. The brake was readjusted back up properly.
3. The air lines have been plumbed up properly and the brakes are now functioning properly when tested.
4. The bracket was welded back into place on the water bed.

Id.

Essentially, Vance supported his S&S designation by testifying that four of the six sets of brakes on the water truck were either out of alignment or not working, and since the brakes were not functioning properly, a driver could lose control of the water truck on the mine's steeply graded roadways and suffer a fatal injury after traveling through a berm or colliding with another oncoming truck. Tr. 151-156. Further, with regard to the broken water bed bracket mount, Vance testified that the water bed is mounted to the frame by brackets on each of the four corners of the bed. Tr. 149, 274. When asked on direct, what happens if you don't have brackets, Vance testified that ". . . the water bed on the truck could come off under normal operation, causing the truck to overturn, wreck, driver loses control of the truck." Tr. 149. Vance testified on cross examination that under continued normal mining operations, the water truck would be driven on steep grades and curvy roads and under heavy loads, which conditions would put stress on the remaining brackets, causing them to fail and the truck to become unbalanced and overturn. Tr. 274, 276. Vance opined that any injury from such accident was reasonably likely to be fatal because the water truck is driven in and out of the pit area and on steeper grades than the haul trucks. Tr. 155.

Vance determined the violation to be the result of moderate negligence because the Respondent could not provide any evidence that a two-man or buddy check had been conducted on the brakes, although the operator had performed a pre-operational examination on the vehicle. Tr. 156-57.

On cross examination, Vance did not have any independent recollection of where he inspected the water truck, although he testified, after consulting his notes, that he probably inspected the water truck in the pump house area. Tr. 268-69; P. Ex. 10. Vance then testified that he saw the water truck in operation in the pump house area on the main pump house haul road

which extends from the pit to the dump. Tr. 270. Vance testified that the water truck was in operation and not parked because Vance would have reflected the fact that it was parked in his notes. Tr. 269, 271. Vance's notes just indicate that the water truck was checked. P. Ex. 10, p. 3.

Curry testified that the water truck was idle on May 2, 2013 because it had just rained the night before, and the air temperature that morning was below freezing, making it too cold to water the roads and create ice. Tr. II, 73.²¹ Curry testified that a brake adjustment was scheduled for the water truck that day because the operator had informed him on April 30 that the brakes needed adjustment. Tr. II, 75. Curry testified that he told the operator to park the truck in the maintenance area at the top hill on the No. 8 curve and that is where the truck was inspected when out of service. Tr. II, 75, 77. Lusk confirmed that the truck was in the maintenance yard and scheduled for brake adjustment when Vance inspected it on May 2, 2013. Tr. II, 163. Curry acknowledged, however, that the water truck was not locked and tagged out. Tr. II, 77.

I credit the mutually corroborative and specific testimony of Curry and Lusk that the water truck was idled in the maintenance yard and scheduled for brake adjustment when inspected by Vance on May 2. Vance's recollection of the location of the inspection was hazy and poor and I have found that Vance was not a forthright and reliable witness.

a. Legal Analysis Concerning Citation 7162340

i. The 77.404(a) Violation

Under section 77.404(a), the water truck cited by inspector Vance on May 2, 2103 was mobile equipment that must be maintained in safe operating condition and removed from service, if unsafe. *Peabody Coal*, 1 FMSHRC at 1495. Although I have found that the water truck was idle on May 2, 2013 and awaiting maintenance in a makeshift lot, I find that the truck was still in service because the vehicle was not locked and tagged out. The Commission has held that a vehicle that is not locked and tagged out is still considered in service. *Wake Stone Corporation*, 36 FMSHRC 825, 828 (Apr. 2014) (citing *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001) (reinforcing the rule that equipment not tagged out of operation and parked for repairs must be

²¹ As noted, after the hearing, the Secretary moved to reopen the record to submit certified weather data from April 30 and May 2, 2013 showing that the temperature ranges for Logan, West Virginia those days were well above freezing and there was no rain in Logan, West Virginia on May 1 or 2, 2013. ALJ Ex. 1, Ex. A. I have admitted the evidence, but accord it no weight as it relates to Curry's credibility or the water truck citation. Any discrepancies between Curry's testimony about the temperature and precipitation and the weather data submitted by the Secretary may be attributed to the elevation of the Eagle Creek Mine, which is over 1,000 feet higher than Logan, West Virginia where the data was collected. ALJ Ex. 2, p. 4 and Affidavit of Richard R. Stacey Jr. I also note that the certified weather data submitted by the Secretary shows that that was some rain in the Logan area on April 30, 2013, the day Curry testified that the truck was parked for a brake adjustment. Tr. II, 75. Moreover, as explained below, the water truck was not locked and tagged out, and was not being maintained in safe operating condition. Further, for the reasons explained below, I have found that the violation was significant and substantial.

maintained in functional condition “whether or not the equipment is to be used during the shift)). The Respondent concedes that the brakes needed to be adjusted, which is why the truck was idled, and Respondent did not challenge the allegation that a water bed bracket mount was broken. I find that both the defects in the brakes and the broken bracket violated 77.404(a).

ii. S&S, Gravity, and Negligence

I further find that the Secretary has proven an S&S violation of 77.404(a) because the water truck’s brakes and a mount on the water bed bracket were not being maintained in safe operating condition and these conditions contributed to loss-of-control safety hazards that were reasonably likely to result in serious or fatal injury.

I credit Vance’s testimony that four of the six sets of brakes on the water truck were either out of alignment or not working. He testified that the brakes were over stroked on the rear drive axle, and that the brake pads on the left and right side of the rear drive axle were not working properly. There was no conflicting testimony regarding these conditions. In fact, Lusk and Curry confirmed that the truck was in the maintenance yard and scheduled for brake adjustment when Vance inspected it on May 2, 2013. Although the water truck was idled, it was not properly locked and tagged out of service. Given the vagaries of human behavior and assuming normal mining operations were to continue, I find it reasonably likely that a driver would use the water truck with the defective brakes and lose control of the truck on the mine’s steeply graded roadways, and suffer a fatal injury after traveling through a berm or colliding with another oncoming truck. Tr. 151-156.

The broken water bed bracket mount also contributed to a loss-of-control safety hazard that was reasonably likely to result in serious or fatal injury. The Respondent’s witness contended that the hazard was mitigated by the presence of other brackets to hold the water tank in place. Tr. II, 79-81. But Vance persuasively testified on cross examination that under continued normal mining operations, the water truck would be driven on steep grades and curvy roads and under heavy loads, which conditions would put stress on the remaining brackets, causing them to fail and the truck to become unbalanced and overturn. Tr. 274, 276. I agree. Consistent with Vance’s testimony, I find that any injury from such accident was reasonably likely to be fatal because the large water truck is driven in and out of the pit area and on steeper grades than the haul trucks, and if the water bed was not properly secured, the driver would lose control of the truck and collide into surrounding equipment, overturn, or run through a berm. Tr. 155. Accordingly, I find that the citation was properly designated S&S.

I further find that the gravity of this violation was serious because the two cited defects contributed to a discrete loss-of-control hazard that was reasonably likely to result in serious injury to miners.

With regard to negligence, I have credited the testimony of Curry and Lusk that the water truck was idled in the maintenance yard and scheduled for brake adjustment when inspected by Vance on May 2, 2013. The Respondent’s efforts to address the brake problems might support a reduction to low negligence in other circumstances. However, the Respondent did not properly

lock and tag the truck out of service, meaning that miners were not prevented from using the vehicle prior to adjustment of the brakes, and the Respondent further failed to address the broken bracket mount at all. Under these circumstances, I find that although the Respondent's conduct falls somewhere along the continuum between low and moderate negligence, it is more properly described as closer to moderate negligence.

iii. Penalty

As noted, Respondent is a large operator. The parties stipulated that the originally proposed penalty of \$10,437 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I find that Respondent is entitled to additional credit for good faith compliance because the water truck was already idled and slated for brake maintenance at the time the citation was written. I have affirmed the S&S determination concerning the water truck's defective brakes and the broken water bed bracket mount. Although I have affirmed the Secretary's moderate negligence designation, I have further found that the level of negligence is actually somewhere along the continuum between low and moderate, but closer to moderate. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a \$6,550 civil penalty against the Respondent for Citation No. 7162340.

VI. ORDER

It is **ORDERED** that Citation Nos. 7162343 and 7162351 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the "significant and substantial" designation.

It is **ORDERED** that Citation No. 7162343 be **MODIFIED** to reduce the level of negligence from "moderate" to "low."

It is **ORDERED** that the operator pay a civil penalty of \$13,160 for the five citations litigated within 30 days of this decision.²²

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

²² As noted herein, I assess a penalty of \$200 for Citation No. 7162343, \$3,050 for Citation No. 7162344, \$3,050 for Citation No. 7162346, \$310 for Citation 7162351, and \$6,550 for Citation No. 7162340.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 2016

MICHAEL WILSON,
Complainant,

v.

JIM BROWNING,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. KENT 2016-0095-D
MADI-CD 2015-16

Parkway Mine
Mine ID: 15-19358

DECISION AND ORDER

Before: Judge Miller

This matter is before me on the parties' cross motions for summary decision. After careful consideration of the parties' motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Complainant's motion for summary decision and grant Respondent's motion for summary decision.

I. BACKGROUND

Michael Wilson is a former employee of the Parkway Mine, an underground coal mine operated by Armstrong Coal Company in Muhlenberg County, Kentucky. Comp. Ex. B (Affidavit of Michael Wilson) at 1. He was employed at the mine as a continuous miner operator and loader operator from August 2009 until he retired on May 6, 2015. *Id.* He also served as a representative of miners beginning in February 2014, and continued in this capacity after his retirement. *Id.* at 1-2. Jim Browning was at all relevant times a miner at the Parkway Mine. Resp. Mot. at 2.

On Saturday, June 13, 2015, Wilson visited the mine in his capacity as a representative of miners. Comp. Ex. B at 2. He sat at a table in the bathhouse to review the mine's examination books. *Id.* Jim Browning was also at the mine to work the day shift. Resp. Ex. A (Affidavit of Jim Browning) at 1. Several other miners were in the bathhouse at the time. Comp. Ex. C (Affidavit of Justin Greenwell) at 1; Comp. Ex. D (Respondent's Answers to Complainant's First Set of Interrogatories) at 1. Wilson alleges that Browning walked up behind him, leaned over him, and asked what he was doing. Comp. Ex. B at 2. Although the two disagree over who was the first to become aggressive, they agree that they became involved in a verbal altercation over Wilson's activities at the mine. *Id.*; Resp. Ex. A at 1-2. Wilson alleges that Browning accused him of looking at the books to find a violation so that inspectors could issue a citation to the company. Comp. Ex. B at 2. According to Wilson, Browning angrily told him to put the book down and leave because Wilson didn't work at the mine anymore and there were other miners'

representatives at the mine. *Id.*; Comp. Ex. C at 1. Wilson also claims Browning told him Wilson was taking money out of his pocket by serving as a miners' representative. Comp. Ex. B at 2-3; Comp. Ex. C. at 1. Wilson says he refused to leave because he had a right to look at the books. Comp. Ex. B at 3. Browning claims he initially spoke with Wilson to see whether there was a safety problem at the mine he needed to be concerned about. Resp. Ex. A at 1. Browning claims he asked Wilson twice what he was doing, to which Wilson replied, "Nothing," shut the book, and turned and stood up in an agitated manner. *Id.* Browning claims he wanted to speak to Wilson about reporting safety violations to mine officials prior to reporting them to inspectors, but that he never got the chance because of Wilson's aggressive response. *Id.* at 2.

The parties agree that the mine superintendent, Danny Thorpe, intervened in the conversation after a few moments, telling Browning to leave and escorting him out of the bathhouse. Comp. Ex. D at 1-2. Thorpe suspended Browning for the rest of the day without pay and told him not to question Michael Wilson in the future. *Id.* at 2.

Wilson continued to work as a miners' representative that day and on future occasions. Comp. Ex. B at 3.

Wilson filed a discrimination complaint regarding the incident with the Mine Safety and Health Administration (MSHA) on June 18, 2015. MSHA notified him on October 21, 2015, that it did not believe there was enough evidence to establish a violation of the Mine Act. On November 17, 2015, Wilson filed the instant complaint of discrimination with the Commission pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("Mine Act").

II. SUMMARY JUDGMENT STANDARD

Commission Rule 67 provides:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material facts; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has explained that summary decision is an extraordinary procedure. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

Wilson claims that Browning violated Section 105(c) of the Mine Act by interfering with Wilson's exercise of his rights as a miners' representative. Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against ... or *otherwise interfere with the exercise of the statutory rights* of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(3) permits a miner or his representative, after making an unsuccessful complaint to the Secretary, to file an action before the Commission on his own behalf "charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3).

While the framework for evaluating interference claims has not been clearly established by the Commission, a framework proposed by the Secretary of Labor has been adopted by two Commissioners and a number of Commission Administrative Law Judges. See *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07; *Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.*, 38 FMSHRC ___, slip op. at 7, No. WEVA 2015-904-D (May 2, 2016) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 311 (Feb. 2015) (ALJ). Under the *Franks* test, an interference violation occurs if:

- (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
- (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108. A claim of interference is "separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework," which requires that a complainant prove he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Franks*, 36 FMSHRC at 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs); *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2

FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Commission has recognized conduct as tending to interfere with the exercise of protected rights on a number of occasions. In *Moses v. Whitley Development Corp.*, the Commission found that interference occurred when a miner's supervisor questioned him about an accident report made to MSHA and repeatedly accused him in front of his coworkers of making the report. 4 FMSHRC 1475, 1477-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). The Commission noted that "The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Id.* at 1479. Two Commissioners reached a similar conclusion in *Franks*, which involved two miners who were repeatedly interrogated by a panel of managers, MSHA, and union officials, and ultimately suspended after a safety complaint was made at the mine. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2104 (Aug. 2014) (Jordan & Nakamura, Comm'rs) (emphasizing persistence of the mine's questioning of the miners), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). Finally, *Gray v. N. Star Mining* involved potentially threatening statements made by an assistant mine superintendent to a miner after the miner was subpoenaed to testify in a grand jury investigation. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 2-3 (Jan. 2005). The Commission remanded the case for the judge to determine whether the comments were coercive in light of the totality of the circumstances. *Id.* at 10-11. The Commission directed the judge to consider factors including:

the nature of Brummett's [the speaker's] and Gray's relationship (the two were friends and Brummett helped him secure a job at North Star, and Brummett was a supervisor at North Star); the fact that the statements were made along with inquiries about Gray's and Young's testimony in a confidential grand jury investigation into alleged criminal actions at the mine; and the fact that, on each occasion when Brummett spoke to Gray, he apparently sought to isolate him and talk to him one-on-one.

Id. at 11.

A number of decisions by Commission Administrative Law Judges have also addressed interference complaints based on threatening or harassing conduct towards miners. In *Shemwell v. Armstrong Coal Co.*, the judge found that a miner had pled a valid interference claim where a supervisor encouraged other employees to build a disciplinary record against the miner when he returned to work after a previous discrimination proceeding. 36 FMSHRC 2352, 2357 (Aug. 2014) (ALJ). The supervisor also made comments suggesting that future safety complaints by the miner would not be taken seriously, and the mine's safety director told the miner he should "think about another career," which the judge deemed threatening. *Id.* at 2358. In *Pendley v. Highland Mining Co.*, the judge found that interference occurred where managers took examination books away from Pendley, a miners' representative, when he tried to view them; and a miner with whom Pendley had a long-standing feud approached and shouted at him in a threatening manner on two occasions while he was accompanying inspectors. 37 FMSHRC 301, 303-05, 313-15 (Feb. 2015) (ALJ); *see also Sec'y of Labor on behalf of Clapp v. Cordero*

Mining, LLC, 33 FMSHRC 2977 (Dec. 2011) (ALJ) (noting that threatening comments made by a supervisor to an employee after she made a safety complaint were interference, but resolving case under discrimination provision because she was actually discharged), *aff'd*, 699 F.3d 1232 (10th Cir. 2012).

Finally, the Commission has expressed that it is appropriate for Commission judges to refer to cases interpreting the National Labor Relations Act (NLRA) when construing analogous provisions of the Mine Act. *See Franks*, 36 FMSHRC at 2107 n.2; *Gray*, 27 FMSHRC at 9 n.8. The Seventh Circuit has enumerated factors relevant to whether interrogation of an employee constitutes interference under Section 8(a)(1) of the NLRA. *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001). While the case at hand does not involve interrogation, the factors are nevertheless instructive:

Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

Id. (citation omitted).

Wilson argues that Browning's conduct on June 13, 2015, interfered with his exercise of his rights as a miners' representative under the Act. Comp. of Discrim. at 3. Viewing the facts in the light most favorable to Wilson, on the day in question, Wilson was seated in the bathhouse reviewing the mine's examination books in his capacity as a miners' representative. At least one other miner was present. Browning walked up behind Wilson, leaned over him, and asked what he was doing. Browning accused Wilson of looking at the books to find a violation he could report to MSHA. He angrily said that Wilson was trying to hurt the company and was costing him money, and repeatedly told him to go home. After a few minutes, the mine superintendent entered the bathhouse, observed the scene, and told Browning to leave, escorting him out. The superintendent suspended Browning for the remainder of the day without pay and told him not to question Wilson in the future. Wilson continued to work as a miners' representative that day and on future occasions.

The altercation between Wilson and Browning seems to have arisen out of Browning's concern that Wilson's activities as a miners' representative would cause financial harm to the company and therefore threaten Browning's job. He ultimately expressed that opinion in an agitated manner that Wilson may have perceived as threatening. However, applying the factors from *Multi-Ad* and Commission interference cases, I do not find that the record supports an interference claim against Browning.

First, the Seventh Circuit and the Commission have stated that the position of the person whose conduct is at issue is an important factor in analyzing interference claims. *Multi-Ad Servs.*, 255 F.3d at 372; *Gray*, 27 FMSHRC at 11. In all of the cases discussed above except for *Pendley*, the actions found to constitute interference were done by a supervisor or other management official. In *Gray*, the Commission noted that speech between an employee and his employer has special significance because of “the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” 27 FMSHRC at 10 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). In an employment relationship, in other words, there is heightened potential for communications to have a coercive effect. In this case, however, the person accused of interference was not a manager, but rather a miner. Wilson was not an employee at the mine, and Browning had no authority over him. Accordingly, Browning’s actions should be understood as having less coercive effect than in comparable cases like *Gray* where the actions were done by a supervisor.

The Seventh Circuit and the Commission have also instructed judges to consider the tone and setting of the encounter. *Multi-Ad Servs.*, 255 F.3d at 372; *Gray*, 27 FMSHRC at 11. In several of the Commission cases, the complainant faced intimidating situations such as questioning by a panel of managers, *Franks*, 36 FMSHRC at 2112, or a one-on-one encounter with a supervisor outside of work, *Gray*, 27 FMSHRC at 11. Here, Browning took an aggressive tone with Wilson that could have been interpreted as intimidating. The effect was mitigated slightly by the fact that the encounter took place in the bathhouse in front of several witnesses.

Finally, the Commission and Seventh Circuit have looked at the duration of the conduct and whether the subject was brought up repeatedly. *Multi-Ad Servs.*, 255 F.3d at 372; *Moses*, 4 FMSHRC at 1479. In *Franks*, the Commissioners noted that “The persistence of the managers’ questioning, in the face of the miners’ repeated refusal to provide the names of the firebosses, also added to the coercive quality of the questioning.” 36 FMSHRC at 2114. The Commission in *Moses* similarly emphasized “the persistence with which the subject” of the miner’s protected activity was raised. 4 FMSHRC at 1479. In this case, however, the encounter between Wilson and Browning was an isolated incident. Browning was suspended as a result of his conduct, and so was unlikely to disturb Wilson again. Wilson has not alleged that any similar incidents involving Browning have occurred subsequently. Thus, it is unlikely that Wilson views Browning as an ongoing threat that would dissuade him from working as a miners’ representative.

In addition to these factors, it is worth noting that the incident does not appear to have had an actual effect on Wilson’s exercise of his rights as a miners’ representative. Wilson continued working as a representative that day and in the future, and has not alleged that he altered his conduct as a result of the incident. Browning argues that Wilson’s failure to plead an adverse action compels dismissal of the case. Resp. Mot. at 7. However, the Commission has not established that a demonstrable adverse impact is a necessary element of an interference claim. See *Gray*, 27 FMSHRC at 9 (“[I]nterference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer’s motive or on whether the coercion succeeded or failed.” (second alteration original) (quoting *Am. Freightways Co.*, 124 N.L.R.B. 146, 147 (1959))); see

also Nat'l Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (“An employer violates § 8(a)(1) if its actions have merely a tendency to coerce, regardless of their actual impact in a particular case.” (internal quotation omitted)). I therefore decline to dismiss the case on that basis alone. Nevertheless, I find the fact that Wilson continued to serve as a representative to be persuasive evidence that a reasonable miner would not have been dissuaded from exercising his rights in this situation.

Considering all of these factors together, I conclude that Browning’s actions did not constitute interference with Wilson’s exercise of his rights as a miners’ representative. A single altercation between a miner and a representative with no discernible effect on protected activity at the mine does not rise to the level of interference recognized as actionable in past Commission cases. It is simply beyond the scope of Section 105(c). Because I base my decision on this rationale, I do not find it necessary to discuss the First Amendment defense raised by Browning in his motion for summary decision. Finally, I find no basis to award attorney’s fees in this case.

IV. ORDER

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and that Respondent is entitled to summary decision as a matter of law. Accordingly, Respondent’s motion for summary decision is **GRANTED** and Complainant’s cross motion for summary decision is **DENIED**. The complaint of discrimination filed by Michael Wilson is hereby **DISMISSED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 25, 2016

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

v.

MACH MINING, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2014-77
A.C. No. 11-03141-334561

Docket No. LAKE 2014-132
A.C. No. 11-03141-337701

Mine: Mach Mining No. 1 Underground
Mine

DECISION AND ORDER

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

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

Before: Judge McCarthy

I. Statement of the Case

These cases are before me are upon two Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). The two dockets at issue contain 16 citations alleging violations of mandatory health and safety standards. Prior to hearing, one citation was vacated and the parties settled nine others. At hearing, Respondent moved for a directed verdict on Citation Nos. 8443200 and 8443901 in Docket No. LAKE 2014-132. The undersigned granted the motion

because the Secretary's evidence did not support a violation of section 75.821(a). Tr. 242-62.¹ Citations No. 8451651 in Docket No. LAKE 2014-132, and Citation Nos. 8439446, 8432319, 8439454, and 8452203 in Docket No. LAKE 2014-77, remain to be adjudicated after hearing.

¹ Both citations alleged that Respondent violated Section 75.821(a) because chip alerts were not working on longwall equipment. A mule train is comprised of several pieces of equipment that distribute power to the longwall. Tr. 53. Power enters the unit through a disconnect box, which can be switched on or off, and then travels to the power centers within the mule train. Tr. 55. Chirp alerts indicate that the equipment is energized by making a chirping noise and emitting a flashing light. Tr. 32-33. On the cited disconnect box in Citation No. 8443200, the chirp alert failed to make the chirping sound. Tr. 37. On the cited power center in Citation 8443901, the chirp alert failed to make the chirping sound and the flashing light failed. *Id.* MSHA inspector John Butcher testified that without notification from the chirp alerts that a piece of equipment is energized, the miners are at risk of fatal injuries from electrocution. Tr. 65-66, 74-75. Essentially, the Secretary argues that since the equipment was not being maintained, there was a violation of Section 75.821(a). Section 75.821(a) requires that every seven days, a person qualified to perform electrical work must test and examine longwall equipment to determine that such equipment is being properly maintained. 30 U.S.C. §75.821(a).

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

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

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

A hearing was held on in Carbondale, Illinois. During the hearing, the parties introduced testimony and documentary evidence.² Witnesses were sequestered. Thereafter, the parties submitted post-hearing briefs.

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

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

II. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC

² ALJ Exhibits (ALJ Exs.) 1-8, Petitioner Exhibits (P. Exs.) 100-115, Respondent Exhibits (R. Exs.) 1-8 and 11, and Joint Exhibit (J. Ex.) 1 were received into evidence. Tr. 10, 19-20, 304. R. Exs. 9 and 10 were not offered into evidence. Tr. 757.

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

1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

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

C. Significant and Substantial (S&S)

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

In a seminal early decision interpreting this statutory provision, the Commission held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In so holding, the Commission rejected the Secretary's argument that all violations are S&S except technical violations or violations that pose only a remote or speculative risk of injury or illness. The Commission found that the Secretary's interpretation would result in almost all violations being categorized as S&S, which would be inconsistent with the statutory language and the role the S&S provision is intended to play in the Mine Act's graduated enforcement scheme. 3 FMSHRC at 825, 828. The Commission also found that the Secretary's interpretation would leave little room for inspectors to exercise their independent judgment. *Id.* at 825-26.⁵ In addition, the Commission found that the Secretary's interpretation would render the Act's S&S language almost superfluous, and would render the Act's pattern-of-violation provisions wholly punitive by making it almost impossible for a mine to be relieved of withdrawal order liability once placed on notice of a pattern of violations. *Id.* at 826-27. Although the Commission did not

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

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

develop a test to determine whether violations are S&S, it enunciated several guiding principles. Specifically, it stated that the term “hazard” denotes “a measure of danger to safety or health” and that a violation is S&S if it “could be a major cause” of such a danger. *Id.* at 827.

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

Ensuing case law has solidly established several general principles regarding the proper application of the *Mathies* test. The Commission has held that the S&S determination should be made assuming “continued normal mining operations.” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). The assumption of continued normal mining operations considers “the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued,” without any assumptions as to abatement. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *see also Knox Creek*, 811 F.3d at 165-66 (upholding Commission’s rejection of “snapshot” approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (citing with approval *McCoy Elkhorn*’s discussion of operative timeframe for S&S). The Commission has repeatedly stated that the S&S determination must be based on the particular facts surrounding the violation. *See, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (remanding S&S finding for further consideration of relevant circumstances); *Black Beauty*, 34 FMSHRC at 1740; *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

A line of cases beginning with the Seventh Circuit’s decision in *Buck Creek*, *supra*, has established that an operator cannot rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *See, e.g., Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug.

2015).⁶ Finally, Commission precedent indicates that the likelihood of injury is the key consideration in determining whether a violation is S&S. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard if it occurs”).

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

Traditional Application of *Mathies* Test

Under the traditional approach, Commission Administrative Law Judges (ALJs) have conducted the fact-intensive component of the analysis and evaluated the reasonable likelihood of injury at the third prong. In one of its earliest decisions applying the *Mathies* test, the Commission explained that “the reference to ‘hazard’ in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation present a measure of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836. “There is no requirement of ‘reasonable likelihood’” encompassed in this element. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280 (Sept. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which “requires that the Secretary establish a *reasonable likelihood* that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC at 500). As the Commission explained in another early decision, “The third element embraces a showing of a reasonable likelihood that the hazard will occur, because, of course, there can be no injury if it does not.” *Consolidation Coal Co.*, 6 FMSHRC 189, 193 (Feb. 1984).

Following this guidance, ALJs have traditionally applied *Mathies* by identifying the potential hazard at the second prong, and then at the third prong, assessing whether there is a

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

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

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

Effect of Recent Fourth & Seventh Circuit Decisions

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

In our view, the second prong of the test ... primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Knox Creek, 811 F.3d at 162. Significantly, the Fourth Circuit further held that the occurrence of the hazard must be assumed under the third prong of the *Mathies* test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong, according to the Fourth

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

Circuit. Rather, the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.* at 162.

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

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

Peabody Midwest does not discuss the proper role of deference in the S&S context, but the Fourth Circuit reached its holding in *Knox Creek* by deferring to the Secretary’s interpretation that the third *Mathies* element requires proof that the hazard, not the violation itself, is likely to cause injury. 811 F.3d at 161 (declining to afford deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but finding the Secretary’s interpretation persuasive and therefore entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Fourth Circuit further asserted that this interpretation is consistent with a number of prior cases, including the Seventh Circuit’s decisions in *Peabody Midwest* and in *Buck Creek*, *supra*, 52 F.3d at 135 (assuming occurrence of fire at third *Mathies* prong when ALJ had engaged in “confluence of factors” analysis at second prong); the Fifth Circuit’s decision in *Austin Power*, *supra*, 861 F.2d at 103-04 (declining to require evidence that the hazard was likely to occur); and the Commission’s decision in *Musser Engineering*, *supra*, 32 FMSHRC at 1280-81 (stating that the third *Mathies* prong requires a showing that the hazard, not the violation itself, will cause injury). 811 F.3d at 161-62.⁸ The Fourth Circuit rejected the operator’s

⁸ It is debatable to what extent *Austin Power* and *Buck Creek* truly stand for the proposition the Fourth Circuit seems to be embracing, which is that the actual likelihood of injury is irrelevant, except to the extent necessary to establish a “discrete” hazard at the second *Mathies* prong. In *Austin Power*, the Fifth Circuit upheld an S&S finding for a fall protection violation, reasoning that “[a] danger of falling is a necessary element of this violation, so by the very nature of a violation there was a discrete safety hazard.” 861 F.2d at 103. However, the hazard had actually occurred and had resulted in a fatality, which may have influenced the

(continued...)

argument that under *Zeigler Coal Company, supra*, the Secretary must show that an ignition is reasonably likely under the third *Mathies* prong. 811 F.3d at 164. The Court found this position to be “flatly contradicted” by *Musser Engineering* and by decisions of other federal appellate courts. *Id.*

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

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

⁸ (...continued)

Court’s failure to require additional evidence of likelihood at the third *Mathies* prong. 861 F.2d at 100. In *Buck Creek*, the Seventh Circuit did not expressly discuss the proper application of the *Mathies* test, but simply rejected the mine operator’s argument that the ALJ had not put enough emphasis on the third and fourth *Mathies* factors when evaluating S&S for an accumulations violation. 52 F.3d at 135. The ALJ had made a finding at the second *Mathies* prong (rather than the third) that there existed a confluence of factors, including fuel sources and ignition sources, that could trigger a fire. *Id.* By contrast, in *Knox Creek*, the Fourth Circuit did not require a “confluence of factors” analysis or a showing that an ignition source existed at any prong of the *Mathies* test.

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

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

D. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry,

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

the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

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

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

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

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

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

E. Penalty Assessment

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

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

III. Stipulated Facts

A. Stipulations of Fact

At hearing, the parties agreed to the following stipulations:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 803.
4. At all relevant times, Respondent operated Mach No. 1 Mine, Mine ID 11-03141.
5. The violations in this docket are complete, authentic and admissible, but the Respondent does not stipulate to the allegations asserted therein.
6. Respondent mined 7,528,061 tons of bituminous coal in 2012 at Mach No. 1 Mine.
7. The violations in this docket were properly served on Respondent by a duly authorized representative of the Secretary on the dates stated therein.
8. The penalties proposed in this docket would not affect Respondent's ability to remain in business.
9. Respondent abated the citations involved herein in a timely manner and in good faith.
8. Tom Crum, Jr. is an agent of the operator Mach Mining. Tr. 272.

J. Ex. 1.

IV. Background Information

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

V. Citation No. 8451651

A. Findings of Fact

1. The Inspection

On October 15, 2014, MSHA inspector Chad Lampley¹⁰ issued Citation No. 8451651 during an E16 inspection of Mach Mine's No. 1 mine.¹¹ Tr. 140-42. Mark Schilke, the mine safety manager, accompanied Lampley during the inspection.¹² Tr. 143, 152, 159-160. The inspection was conducted during a production shift. Tr. 155. At the time of Lampley's inspection, however, mining had halted due to a problem with a conveyer belt. Tr. 153-54, 214-15.

2. The Location of the Truck

During the inspection, Lampley noticed a Dodge Ram pickup truck parked facing inby in the #3 tailgate entry at the no. 109 crosscut, two crosscuts from the longwall face. Tr. 144-45, 152; *see* P. Ex. 113.¹³ Lampley used a 25-foot tape measure and determined that the diesel-powered truck was approximately 144 feet from the face, rather than the required 150 feet. Tr. 146-47.¹⁴ Shilke observed Lampley measure the distance between the face and the truck. Tr. 302, 316. Neither Shilke nor Lampley reported any other measurements of the truck's location. Tr. 147, 301-02. Respondent does not dispute that the truck was closer than 150 feet from the longwall face. R. Post Hr'g Br. 4.

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

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

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

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

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

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

Crum testified that he drove his truck into the #3 tailgate entry to repair a conveyor belt. Tr. 265-67, 287.¹⁵ Schilke testified that the truck was parked “slightly” inby the outby corner of crosscut 109. Tr. 305-06. Crum, however, testified that the truck was even with the outby corner. Tr. 268-69. I credit Schilke, particularly since his testimony is consistent with Respondent’s map of the area where Crum parked. See R. Ex. 8.

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

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

3. The Presence of Methane

a. The Temperature of the Air

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

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

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

Longwall coordinator Parker Phipps drove an Electric Mine Utility vehicle (EMU) to the longwall tailgate that day. Tr. 324.¹⁶ Phipps was aware of the requirement to park in intake air at least 150 feet from the face. Tr. 339. He parked approximately 150 feet from the face near open crosscut no. 109. Tr. 324, 340; *see* P. Ex. 110 and R. Ex. 8. After learning about the citation, Phipps observed Crum's truck underground. Tr. 330. Phipps testified that Crum's truck was parked even with the outby rib, approximately two feet from the solid coal wall. Tr. 330-331, 333. Phipps testified that the front of Crum's truck was within ten feet of the front of his own vehicle. Tr. 343. Facing inby, Phipps walked into the area between Crum's truck and the solid right-hand rib. Tr. 333. Phipps testified that the air was cool and moved inby. *Id.* Because return air from the longwall was warmer and more humid, Phipps opined that the truck was in intake air. Tr. 325, 328.

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

b. Inspector Lampley's Smoke Test

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

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

The smoke test revealed that the air traveled down the longwall face to the T-split, where it either seeped into the gob or branched off towards the #2 and #3 tailgate entries. Tr. 145, 176, 182-84.¹⁷ Because the #2 entry had lower air pressure than the #3 entry, the majority of the air moved from the #3 entry into the #2 entry through the open no. 110 crosscut. The remaining air in the #3 entry reached the open no. 109 crosscut where the truck was located. Tr. 145, 184, 205-07. Stoppings were legally removed at the nos. 109 and 110 crosscuts (the first two crosscuts after the T-split) to allow this air movement. Tr. 187.

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

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

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

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

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

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

c. Other Considerations

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

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

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

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

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

4. Issuance of Citation No. 8451651

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

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

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

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

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

Lampley testified that a methane ignition in a gassy mine could result in a "massive" explosion. Tr. 162. A massive methane explosion would be fatal to some or all of the miners on the face. Tr. 162-63. Lampley ascertained that at least two shearer operators, a shieldman, and a stage loader operator would be affected by an explosion. Tr. 162-64. Lampley referenced the Upper Big Branch explosion as one caused by the ignition of methane on a tailgate. Tr. 158.¹⁸

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

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

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

B. Analysis and Disposition

1. The Violation of §75.1907(a)

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

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

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

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

With regard to the second *Mathies* factor, the Secretary must show that the violation contributed to a discrete safety hazard. For the reasons set forth below, I find that the violation of parking an impermissible diesel-powered truck in return air where permissible equipment was required contributed to a discrete safety hazard or measure of danger to safety, that is, a methane ignition or explosion.

Whether the violation in question contributes to a discrete safety hazard implicitly assumes that a danger to safety is at least somewhat likely to result from the violation. *Knox Creek*, 811 F.3d at 163 (finding that “the second prong of *Mathies* . . . implicitly requires a showing that the violation is at least somewhat likely to result in harm,” citing *Black Beauty*, 34 FMSHRC at 1741, n.12 (“[I]f the roadway here had lacked berms for only a short distance [thereby making the hazard of a vehicle falling off the edge less likely], or if the violation had been otherwise insignificant, the trier-of-fact could have found that the violation did not contribute to a discrete safety hazard, and hence that the Secretary had failed in her proof under the second element of *Mathies*.”), *aff'd sub nom. Peabody Midwest*, 762 F.3d 611; *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2368 (2011) (the violation, under the particular circumstances, was likely to contribute to the relevant hazard under *Mathies*' second prong), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *E. Associated Coal Corp.*, 13 FMSHRC 178, 183 (1991) (same); *Utah Power & Light Co.*, 12 FMSHRC 965, 970 (1990) (same).

Permissibility requirements like the one at issue here ensure that ignitions occurring within enclosures on mining equipment with electrical circuits will not escape into the mine atmosphere. *Knox Creek*, 811 F.3d at 153-54; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2336 (Aug. 2013) (permissibility requirement is designed to prevent hot gases from escaping from an enclosure containing electrical connections, thus causing an ignition outside the enclosure.”). Thus, the permissibility requirements are intended to prevent the ignition of explosive air-methane mixtures surrounding mine equipment. Consequently, I must determine whether it was somewhat likely that the violation contributed to the hazard or danger of allowing an ignition source to be available in this gassy mine. *Cf.*, *Consolidation Coal*, 35 FMSHRC at 2335-36 (Commission affirmed judge’s description of relevant hazard contributed to by the violation and her determination that second prong of *Mathies* was satisfied because the violation contributed to the hazard of “the danger of allowing an ignition source to be available in this gassy mine.”).

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

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

Applying the confluence-of-factors analysis to the instant facts, I find that supervisor Crum’s truck was a non-permissible ignition source that was parked in return air and would

therefore likely be exposed to an explosive concentration of methane released from the longwall face during continued normal mining operations. Parking impermissible, diesel-powered equipment within 150 feet of the face in return air contributed to the discrete safety hazard that restarting the truck could ignite any explosive concentration of methane present in return air during continuous mining operations. Accordingly, I find that the violation contributed to the hazard of a methane explosion caused by the location of impermissible equipment in return air.

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

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

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

It is important to emphasize that the Mach #1 Mine was subject to section 103(i) spot inspections every five days because of its excessive liberation of methane. Although the Secretary put on no evidence of any prior ignition at the Mach #1 Mine, and there is no mention of a prior methane ignition on MSHA's data retrieval, there is some evidence of the presence of high dust concentration, including float coal dust, which might propagate a methane ignition. For example, inspector Robert Bretzman specifically testified that the mine normally had high dust concentration. In this regard, with respect to Citation 8432319, alleging that on September 12, 2013, almost a year before Citation No. 8451651 was written, the longwall shearer on the headgate six unit did not have a visible warning device to adequately alert the shearer operator when the methane concentration reached 1.0 percent, inspector Bretzman testified as follows:

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

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

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

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

Respondent argues that the truck would have been removed before production restarted, thus eliminating the presence of the ignition source. Tr. 286. I reject this argument. As the Fourth Circuit recently recognized, the Commission has long “held that an S&S determination ought to be ‘made at the time the citation is issued (*without any assumptions as to abatement*).’” *Sec’y of Labor v. U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (1984) (emphasis added); see also *Sec’y of Labor v. McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (2014) (rejecting the argument that an S&S finding was erroneous ‘because [the mine operator] was in the process of cleaning the accumulations when the inspector arrived’); *Sec’y of Labor v. Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (1992) (finding that the ALJ erred in ‘inferring that the violative condition would cease’ in the course of normal mining operations).” *Knox Creek*, 811 F.3d at 165. In addition, Crum’s testimony that the truck would have been removed before production restarted is speculative and unsupported by any evidence. Apart from Crum’s interest as a longwall maintenance supervisor in remaining by the longwall to ensure that the belt and longwall operated properly before he returned to his truck and the surface, Crum likely would have been delayed in any number of ways as longwall maintenance supervisor. Furthermore, because Crum was ignorant of the violative condition (see e.g., Tr. 284), I find it likely that he would have started the truck while it was in return air after production restarted, thus increasing the likelihood of a methane ignition.

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

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

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

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

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

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

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

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

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

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

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

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

4. Civil Penalty for Citation No. 8451651

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

VI. Citation No. 8439446

A. Findings of Fact

1. Inspector Stanley's Testimony

After determining that Respondent's methane monitor attached to a roof bolting machine failed to register explosive concentrations of methane, Inspector Phillip Wayne Stanley¹⁹ issued Citation No. 845394446 for a violation of 30 C.F.R. § 75.342(a)(4). Tr. 465-66. The cited standard requires that methane monitors be maintained in proper operating condition. Tr. 465. Properly operating monitors de-energize electrical equipment when methane concentrations reach 2.0 percent or when the monitor is not operating properly. 30 C.F.R. § 75.342(c); Tr. 465. Stanley determined that the violation was S&S and contributed to a methane ignition hazard that

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

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

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

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

Stanley issued Citation No. 8451651 for a violation of 30 C.F.R. § 75.342(a)(4). Tr. 465-66. The cited standard requires that methane monitors be maintained in proper operating condition. Tr. 465. Properly operating monitors de-energize electrical equipment when methane concentrations reach 2.0 percent or when the monitor is not operating properly. 30 C.F.R. § 75.342(c); Tr. 465.

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

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

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

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

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

2. The Testimony from Respondent's Witnesses

a. Mark Schilke's Testimony

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

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

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

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

b. Johnny Robertson's Testimony

General Manager Johnny Robertson²⁰ testified that methane was only liberated when the continuous miners or the longwall shearers cut coal. Tr. 710-11, 742. Robertson testified that methane is less likely encountered during roof bolting than mining, and is usually only present when roof bolting into a coal seam. Tr. 716. Robinson testified that during his four years of tenure with Respondent, there were no reports of methane released from the roof or during bolting. Tr. 718-19.

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

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

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

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

B. Analysis and Disposition

1. The Violation of § 75.342(a)(4)

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

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

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

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

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

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

A properly functioning methane monitor is expected to automatically de-energize electrical equipment in two percent methane to avoid the potential ignition of explosive levels of methane at the 5-15% range. The monitor at issue in the present citation did not detect two percent methane when tested, and would not automatically de-energize the roof bolter in rising concentrations of methane, thus contributing to the likelihood of a methane ignition should methane accumulate to an explosive level during continued normal mining operations. Consequentially, I find that the hazard contributed to by the violation was a methane-related ignition caused by undetected explosive levels of methane where ignition sources were present.

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

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

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

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

In short, Respondent roof bolted with a malfunctioning methane monitor in an area of methane emission and accumulation within a gassy mine. The inspector credibly testified that

sparks released from roof bolting in excess methane concentrations will cause an ignition. I find that this combination of risk factors satisfies the confluence-of-factors test for a methane ignition hazard and supports a finding that the hazard is at least somewhat likely to occur. Accordingly, I find that the second *Mathies* factor is satisfied.

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

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

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

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

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

3. Respondent’s Negligence was Appropriately Designated as Moderate

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

4. Civil Penalty for Citation No. 8439446

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

assessment criteria set forth in section 110(i) of the Act, I assess a \$1,412 civil penalty against the Respondent for Citation No. 8439446.

V. Citation No. 8432319

A. Findings of Fact

1. Inspector Bretzman's Testimony

After observing the absence of an auxiliary methane alarm light on a longwall shearer, MSHA inspector Robert L. Bretzman²¹ issued Citation No. 8432319 for a violation of 30 C.F.R. § 75.342(b)(2), which requires that “[t]he warning signal device of the methane monitor shall be visible to a person who can de-energize electric equipment or shut down diesel-powered equipment on which the monitor is mounted.” Tr. 409. Bretzman determined that the violation was unlikely to contribute to a methane ignition hazard, but that any injuries that did result from the hazard would result in lost work days or restricted duty affecting three miners, as a result of Respondent's low negligence. Tr. 409-411. The Secretary proposed a penalty of \$117.

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

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

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

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

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

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

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

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

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

2. The Testimony from Respondent's Witnesses

a. James Key's Testimony

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

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

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

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

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

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

b. Johnny Robertson’s Testimony

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

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

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

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

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

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

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

B. Analysis and Disposition

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

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

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

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

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

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

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

2. The Violation of § 75.342(b)(2)

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

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

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

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

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

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

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

3. Respondent's Negligence was Appropriately Designated as Low

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

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

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

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

4. Civil Penalty for Citation No. 8432319

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

VII. Citation No. 8439454

A. Findings of Fact

1. Inspector Stanley's Testimony

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

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

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

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

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

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

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

2. The Testimony from Respondent's Witness

a. Schilke's Testimony

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

According to Schilke, after Stanley's inquiry, Wilkins told Stanley that Wilkins had checked the Kubota prior to use and found no issues with the steering. Tr. 560-61, 624, 627. Stanley then directed Wilkins to drive the Kubota to the repair shop. Tr. 561-62. Schilke observed no problems with the steering as Wilkins drove the vehicle to the shop. *Id.*, Tr. 624. At the shop, the vehicle was lifted and the ball joints were examined. Tr. 561, 567. There Schilke observed movement in the ball joint, although neither he nor Stanley used an instrument to quantify how much movement was present. Tr. 561-62, 567-68, 621, 625. Schilke opined that the movement was less than an eighth of an inch, or less than the thickness of a quarter. Tr. 568, 622, 625. Schilke conceded that the movement would get worse over time if not repaired. Tr. 625.

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

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

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

b. Jeff Wilkins' Testimony

Jeff Wilkins was a mine examiner for Respondent.²⁵ Tr. 683. Wilkins operated the Kubota in question every day. Tr. 685-686, 697. On the date of the inspection, Wilkins conducted a pre-operational check of the Kubota. Tr. 687. This check included an examination of the steering, which he performed by turning the wheel back and forth to ascertain any slack.²⁶ Tr. 687-88. Wilkins stated that a visual inspection of the ball joint while the wheel was turned was not necessary to detect movement in the ball joint. Tr. 688-89. Instead, the movement would manifest as play in the steering wheel. *Id.* Wilkins testified that without turning the wheel, he would not notice wear in the ball joint, unless it was substantial. Tr. 699. Wilkins claimed that he would notice gradual slack in the Kubota's steering over time. Tr. 698. Wilkins further testified, consistent with Schilke's account, that Wilkins did not notice any problems with the steering during his pre-operational check of the vehicle. *Id.*

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

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

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

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

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

B. Analysis and Disposition

1. The Violation of § 75.1914(a)

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

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

The Commission has recognized that movement in steering linkage ball joints alone can rise to the level of a hazardous defect. *See LaFarge North America*, 35 FMSHRC at 3500 (applying § 56.14100(c), which concerns defects that make continued operation hazardous, and remanding to determine amount of movement in ball joints and whether such amount constitutes a hazardous defect). Stanley credibly testified that MSHA finds violations where there is excess play in the ball joint. Tr. 507. Both Stanley, and through Schilke's hearsay admission, Respondent's mechanic, reported that the Kubota manufacturer requires no movement in the ball joint. Tr. 475, 561. In addition, I take administrative notice of the North American Standard Out-

of-Service Criteria, issued by the *Commercial Vehicle Safety Alliance*.²⁷ This manual provides that a vehicle is to be taken out of service if any of its ball and socket joints exhibit “any motion, other than rotational, between any linkage member and its attachment point of more than 1/8 inch (3.2 mm) measured with hand pressure only” or if any tie rod exhibits “any looseness in any threaded joint.” *Commercial Vehicle Safety Alliance*, North American Standard Out-of-Service Criteria, at 44 (revised April 2010).

I credit inspector Stanley’s testimony that there was impermissible movement in the lower left ball joint. A simple visual inspection by Stanley as the operator turned the wheel revealed a hesitation in steering, while the shine on the ball joint itself supplied physical evidence of wear. Tr. 474. Schilke corroborated the play in the ball joint when recalling the examination conducted in the repair shop. Tr. 561-62. The operator, Wilkins, used the Kubota after conducting a pre-operational examination, which he admits did not include a visual examination of the ball joint, and failed to reveal the play in the ball joint. Tr. 687-89.²⁸ Neither side disputes that, if left unchecked, the movement would grow worse over time. Tr. 477, 625. Accordingly, I find that excess play in the ball joint as visually observed by inspector Stanley constitutes a hazard making continued operation of the Kubota unsafe and requiring its removal from service.

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

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

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

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

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

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

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

My finding of a violation supports a finding of a discrete measure of danger to safety as the standard violated requires a failure to maintain mobile equipment in safe operating condition. Accordingly, if the Kubota is not maintained in safe operating condition, there is necessarily a discrete measure of danger to safety. This conclusion is supported by the fact that MSHA, the Kubota manufacturer, and the North American Standard Out-of-Service Criteria manual require that vehicles with ball joints exhibiting excessive wear must be immediately repaired or removed from service. Tr. 507, 475. Furthermore, Stanley credibly testified that such a ball joint, if left unrepaired, would fail and result in compromised steering and control over the vehicle. Tr. 477. Accordingly, I find that the second *Mathies* factor is satisfied.

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

Regarding the third *Mathies* factor, the Secretary demonstrated that the hazard contributed to by the violation, i.e., loss of steering of a Kubota within the mine, was reasonably likely to result in an injury. Schilke and Wilkins testified that Kubotas are slow to a stop when pressure is removed from the gas pedal. Tr. 499, 692-93. However, a Kubota driven at speeds up to approximately twenty-one miles an hour on rough mine roads at an eight degree slope with undiscovered excess wear on the ball joint, is reasonably likely to contribute to compromised steering and loss of control of the Kubota, which hazard is reasonably likely to result in injury to the driver or injury to a miner working nearby. The driver is exposed to injury due to the excessive wear in the ball joint, which contributes to a compromised or loss-of-steering-control hazard that would likely result in collision with an object or rib and injury to the driver. Further, Stanley's testimony credibly establishes that miners working along the conveyer belt adjacent to the travelway were exposed to injury from a collision due to the loss of control of the Kubota. In these circumstances, the loss-of-control hazard contributed to by the violation, was reasonably likely to result in injury during continued operation of the Kubota with excessive wear in the ball joint.

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

With regard to the fourth *Mathies* factor, I find a reasonable likelihood that any such injury would be of a reasonably serious nature. The loss-of-control hazard contributed to by the failure to maintain the Kubota in safe operation condition was reasonably likely to result in a collision with associated serious or fatal injury to the Kubota operator or pedestrian miners working nearby. The Kubota is large enough to seat two people and has a dump bed in the back.

See R. Ex. 5. A collision with a miner, the rib, or other equipment would likely be serious or fatal. A miner struck by the Kubota and pinned against the vertical supports within the mine would likely suffer serious injuries. Accordingly, the Secretary has shown a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious or fatal.

3. Respondent's Negligence was Appropriately Designated as Moderate

As discussed above, a reasonably prudent operator engaging in appropriate buddy-checks of steering linkage components should have been aware of the cited condition. Based on the testimony and briefs, I do not find considerable mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent's assertion that the soft floor of the mine would reduce the impact of malfunctioning steering is not persuasive. There was no evidence that the floor disturbed the speed or performance of a Kubota in safe operating condition. Therefore, I discredit Schilke's inference that the same floor would hinder a Kubota with compromised steering. Tr. 569. Further, the assertion that the Kubota's operator (Wilkins) noticed no defect in the steering that day does not eliminate the likelihood of the danger. Rather, the insufficient examination procedure supports at least a moderate negligence designation. Respondent's Kubota operator failed to perform any visual examination the vehicle, much less while another person turned the wheel. Tr. 699. In these circumstances, I find that the Secretary properly designated the Respondent's level of negligence as moderate.

4. Civil Penalty for Citation No. 8439454

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The parties stipulated that the originally proposed penalty of \$1,026 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity, negligence, and S&S determinations. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a \$1,026 civil penalty against the Respondent for Citation No. 8439454.

VII. Citation No. 8452203

A. Findings of Fact

1. Inspector Horseman's Testimony

After observing a missing portion of an emergency lifeline, MSHA inspector Steven Paul Horseman²⁹ issued Citation No. 8452203 for a violation of 30 C.F.R. § 75.380(d)(7)(i), which

²⁹ At the time of hearing, inspector Horseman had been employed with MSHA for one year and eleven months. Tr. 515. Apart from a four-year stint with a phone company, Horseman had worked in mining since 1991. Tr. 516. He has experience in longwall and continuous mining and has held various positions, including equipment operator, examiner, IT specialist, electrician, and mine supervisor. *Id.*

requires that lifelines be installed and maintained throughout the entire length of the escapeway. Tr. 465, 476. Stanley determined that the violation was S&S and contributed to an inability-to-timely-escape hazard that was reasonably likely to result in injuries affecting thirty miners as a result of Respondent's moderate negligence. Tr. 156, 162-63. The Secretary proposed a penalty of \$13,268.

On September 8, 2013, Horseman conducted an EO2 section 103(i) spot inspection, while being accompanied by safety manager Schilke. 30 U.S.C. §813(i); Tr. 517; P. Ex. 109. On the way toward headgate seven, Horseman lost sight of the lifeline along the East Mains travel road. Tr. 517. He asked Schilke to pull over and the two of them located the lifeline one entry over in the secondary escapeway. Tr. 517, 529. They returned to their vehicle and followed the lifeline until they found a break in the line. *Id.* The lifeline dangled from the ceiling, approximately five feet above the ground. Tr. 517-18. The other end of the line was located approximately 160 feet away. Tr. 518. Horseman measured the gap between the ends of the lifeline, while Schilke found replacement line. *Id.* With the extra line, Horseman and Schilke connected the two ends of the lifeline. *Id.*, 525-26.

Horseman issued Citation No. 84522036 for a § 75.380(d)(7)(i) violation. Tr. 519. §75.380(d)(7)(i) requires lifelines to be installed and maintained throughout the entire length of the escapeway. *Id.* A lifeline is typically a durable, nylon rope. In the event of an emergency, a lifeline provides disoriented miners with a tactile method of escape if the entry fills with smoke. Tr. 520. The lifeline has cones and reflective lights that direct the miner towards the exit near the slope. Tr. 543-45; 30 C.F.R. § 75.380(d)(7)(iii-v).

Horseman opined that all lifeline citations are not automatically S&S. Tr. 526. He designated the instant violation as S&S because he determined that the violation contributed to a hazard that was reasonably likely to result in fatal injuries affecting 30 miners. Tr. 523-24. With respect to likelihood, Horseman testified that the lifeline would only be used in the event of an emergency. Tr. 523. If a fire or explosion occurred, Horseman testified that it would not be unusual for ventilation control devices to fail. *Id.* With failed ventilation, Horseman testified that miners would inhale toxic fumes from smoke, or find themselves in a buildup of carbon monoxide. *Id.* Even assuming sufficient time to don self-contained self-rescuers (SCSRs), Horseman noted the reduced efficacy of these devices should the miners panic or fumble during the emergency. Tr. 523. He recalled an incident from his own experience as a miner when a smoke-filled entry limited visibility to the point where "you could not see your hand in front of your face." Tr. 521. He testified that in such conditions, 160 feet of missing lifeline would prevent a miner from locating the other end of the lifeline and escaping the mine. *Id.* Additionally, he testified that the miners may not have been aware that the lifeline changed entries, which left them susceptible to further disorientation. Tr. 522. Given these conditions, Horseman believed that fatal injuries were reasonably likely. Tr. 523. With respect to the number of persons affected, Schilke informed Horseman that three loading crews comprised of ten miners apiece were working inby the missing lifeline. Tr. 524.

Horseman designated the Respondent's negligence as moderate. *Id.* He made this designation because he could not determine how long the condition existed. Tr. 524-25. He conceded that of the 35,000 feet of secondary escapeway, he found only 160 feet of the lifeline

that was missing. Tr. 542-43. He confirmed that Respondent held escape drills for miners to familiarize themselves with using the escapeways. Tr. 547. Additionally, Respondent's vehicles had tethers. *Id.* A tether allows miners to stay attached to one another in case a single miner grows disoriented. Tr. 547-49.

2. The Testimony from Respondent's Witnesses

a. Schilke's Testimony

Schilke confirmed that a portion of the lifeline was missing in the East Mains #1 travelway. Tr. 570-72. Schilke did not know how the condition occurred, or for how long it had existed prior to discovery by Horseman. Tr. 601-02. Schilke admitted that he traveled that route daily and had not discovered the condition. Tr. 615. The mine records did not contain any notations regarding the missing lifeline. Tr. 602. The cited condition was in an area where tractors were driven all day long, including the third-shift tractors, which had passed through the area before the inspection. Tr. 602-03. Schilke did not find the disconnected section of the lifeline and speculated that it could have been dragged away by a passing vehicle. Tr. 612-15. The remaining ends of the lifeline, normally at shoulder height, were on the ground. Tr. 613-14.

Schilke testified about the location of the missing lifeline. If one walked towards the exit of the mine, the lifeline primarily followed the direction of the travel road. Tr. 600. The travel road headed north before turning west into the #3 entry of the East Mains #1 route. *Id.* The lifeline did not turn with the travel road, but continued into the #2 entry before turning west. Tr. 601. This detour ran parallel to the travel road and past three crosscuts. *Id.* The gap in the lifeline occurred within this detour in the #2 entry. Tr. 578, 599-601. The detour turned south down the #29 crosscut to rejoin the travel road in the #3 entry. Tr. 597-601; *see* R. Ex. 11. A miner, who followed the lifeline into the #2 entry, needed to walk through two crosscuts to find the other end of the line. Tr. 574-75.

Schilke testified that the miners were aware of the detour because the lifeline had followed that path since the area was developed. Tr. 610. He conceded, however, that miners would not be expecting the section of the lifeline to be missing. Tr. 611. Schilke opined that miners, who encountered a gap in the lifeline, would continue forward following the flow of air rather than choose to retrace their path to rejoin the travel road. Tr. 608. However, he admitted that in an emergency, the direction of air can change, thus preventing miners from using air courses as directional indicators. Tr. 616. Nonetheless, he opined miners would know which direction they were walking because the mine graded up as it headed outby. Tr. 616-17.

According to Schilke, if the miner could not find the other end of the line, he or she would eventually hit stoppings placed west and north of the detour through the #2 entry.³⁰ Tr. 596, 608. Thus, disoriented miners would eventually be forced to turn south or return east in the

³⁰ There was a stopping in the #2 entry inby the # 29 crosscut, which prevented miners from walking further westward. Tr. 595-96. There were additional stoppings that blocked access to the crosscuts and entries to the north of the #2 entry. One of the stoppings in the crosscuts north of the #2 entry had a man door. Tr. 596. A man door allow miners to cross through a stopping. *Id.* During normal production, man doors are closed. Tr. 595-96.

direction from which they came. Tr. 596-98, 608. When choosing between these options, Schilke opined that the miners would not return east in the direction from where smoke traveled. Tr. 608. The remaining direction, south, would lead the miners to the travel road. Tr. 596-97, 608.

The self-contained self-rescuers (SCSRs) are equipped to last from forty-five minutes to an hour. Tr. 617. Schilke recalled that the nearest self-rescuer caches were approximately 2,500 feet inby the missing lifeline, and 3,000 feet outby the missing lifeline. Tr. 640-42. As noted, the height of the mine is generally nine to ten feet. Tr. 619. Schilke estimated that it would take approximately an hour to travel about 5,700 feet, although some miners may move more slowly than others. Tr. 619, 637, 644. Additionally, disoriented or lost miners may take longer to reach a cache. Tr. 644-45. According to Schilke, the distance from the three working sections to the missing lifeline was 15,000 feet. Tr. 618. The distance between the missing lifeline and the slope exit of the mine was about another 15,000 feet. Tr. 617-18. On foot, it would take a miner nearly three hours to reach the slope from the missing lifeline. Tr. 619, 637.

Schilke opined that directional signals on the lifeline and Respondent's safety protocols reduced the danger of the violation. On either end of the missing lifeline section, Respondent's lifeline had cones and reflectors that indicated the direction towards the exit. Tr. 572-73, 614. The reflectors were visible in the cited area. Tr. 573-74. Reflectors were spaced every twenty-five feet and were attached to either a cone or the lifeline itself. Tr. 573. Schilke recalled that the cones were spaced every 100 feet. Tr. 573. The cones were situated on the lifelines so that a miner's hand would slide smoothly over the tip of the cone towards the base as the miner traveled towards the exit. Tr. 573. If a miner traveled in the wrong direction, the miner's hand would stop against the base of the cone. Tr. 573.

Additionally, Schilke testified that escaping miners would not rely solely on lifelines during an emergency situation. Tr. 609. He testified that in the event of an emergency, the ideal method for escape was by vehicle. Tr. 574, 604-05, 609. He further testified that an escaping vehicle would continue along the main travelway, rather than detour into the adjacent entry to follow the lifeline. Tr. 574. Depending on the level of smoke, however, Schilke was uncertain whether the vehicle could drive down the secondary escapeway. Tr. 611-12. Schilke opined that a pedestrian miner would exit the mine along the main travelway, rather than follow the lifeline. Tr. 574-576. He conceded, however, that a miner might become disoriented, panic, and become lost in an emergency. Tr. 611, 644-45.

Schilke confirmed that Respondent held escapeway drills every ninety days and instructed miners to use tethers to keep together during a mine evacuation. Tr. 603-605, 609, 611. Additionally, he testified that signs labelling the crosscut numbers would indicate a miner's location. Tr. 573-74. Schilke maintained that these precautions, combined with the miner's knowledge of the mine's topography and air flow, were sufficient for miners to find their way out of the mine in an emergency situation. Tr. 608-10.

B. Analysis and Disposition

1. The Violation of § 75.380(d)(7)(i)

Section 75.380(d)(7)(i) provides that a continuous directional lifeline must be installed and maintained throughout the entire length of each escapeway. 30 C.R.F. § 75.380(d)(7)(i). Neither side contests that a portion of the lifeline was missing. Tr. 572; *see* R. Ex. 14 (missing lifeline denoted in red). The missing portion of the line was approximately 160 feet. Tr. 518. A missing portion or gap in the lifeline makes it non-continuous under the plain meaning of the standard and creates a violation of § 75.380(d)(7)(i).

Respondent argues that the violation was not S&S because the missing portion of the lifeline was relatively small compared to the full length of the line, and because additional safety measures were adequate to ensure the safe evacuation of the miners.

2. The Violation was Significant and Substantial

a. There was a Violation of a Mandatory Safety Standard

For the reason explained above, I find the underlying violation of mandatory safety standard § 75.380(d)(7)(i).

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

With regard to the second *Mathies* factor, the violation created a discrete safety hazard or measure of danger to safety. The Commission has found that an accurate description of the hazard contributed to by an inaccessible lifeline is “the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine.” *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1124 (May 2014). This description supports the Commission’s earlier understanding of the hazard as “miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” *Cumberland*, 33 FMSHRC at 2346, *aff’d sub nom.*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). I find that a 160-foot gap in the lifeline is a significant and substantial hindrance that contributes to the hazard of not being able to use the lifeline to escape the mine in an emergency situation.

Respondent argues that an S&S designation is inappropriate because 160 feet of missing lifeline is a small percentage of the length of the entire lifeline. R. Br. 20-21. The percentage of uninterrupted line is essentially immaterial to the impact that a 160-foot break in the line would have on escaping miners. In *Black Beauty*, the Commission found that 110 feet of inaccessible lifeline was reasonably likely to contribute to an inability-to-timely-escape hazard that would result in injury. *Black Beauty*, 36 FMSHRC at 1124-25. Given the greater length of missing lifeline in the present case, I find that 160 feet of missing lifeline supports my S&S finding for this violation.

Respondent also argues that its miners would use quicker alternatives to escape, and that their knowledge of the primary escapeway would keep them on the quickest path towards the exit, allowing them to disregard the lifeline entirely. I reject this argument. Although the Commission has not yet defined the weight that must be given to the presence of additional safety precautions, the Commission discounts the argument that additional safety measures prevent an S&S finding. See *Brody Mining*, 37 FMSHRC at 1691 (stating that evidence of redundant safety measures has been consistently rejected as irrelevant); *Black Beauty*, 36 FMSHRC at 1125 n.5 (stating that additional safety measures do not prevent a finding of S&S); *Cumberland*, 33 FMSHRC at 2369 (stating that allowing redundant safety measures to provide a defense to a finding of S&S would defeat the purpose of any safety protection, and citing *Buck Creek*, 52 F.32 at 136). Thus, alternative safety protocols do not undercut the significant and substantial contribution that violations of mandatory standards have toward discrete safety hazards.

In the present case, I examine the impact of a missing lifeline on a miner that must rely upon said lifeline to quickly and safely exit the mine in an emergency situation. In short, I find that the hazard contributed to by the violation was the prevention of a quick escape from the mine by miners who were entitled to rely on a continuous lifeline when escaping the mine during an emergency. Accordingly, the second *Mathies* factor is satisfied.

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

I find that the violation contributed to the hazard that miners would become lost, disoriented, or otherwise unable to quickly escape from the mine because of a compromised lifeline, and that such hazard was reasonably likely to result in injury. The Commission requires its judges to examine the S&S factors for lifeline violations within the context of emergency conditions. *Cumberland*, 33 FMSHRC at 2357, *aff'd Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). The Commission has discussed different hazards that are reasonably likely to result in an injury because of a lifeline violation in an emergency situation. *Black Beauty*, 36 FMSHRC at 1125 (inaccessible lifelines contribute to injuries that are reasonably likely to result from hazards such as tripping or stumbling, an interruption of ventilation, miner panic and disorientation during an emergency, and excessive smoke filling a corridor as a result of an a fire inby). In the present case, should miners follow the lifeline into the secondary escapeway, and should the secondary escapeway fill with smoke, visibility may be completely compromised. Because the gap in the lifeline occurs within the secondary escapeway, miners will be unable to use the lifeline to navigate out of the secondary escapeway in conditions of reduced visibility, re-enter the primary escapeway and continue exiting the mine via the primary escapeway. Tr. 522; R. Ex. 11. Inspector Horseman testified that he personally experienced a situation where smoke within the mine was so thick that he could not see his hand in front of his face. Tr. 521. With such reduced visibility, locating a lifeline 160 feet away is a staggering and time-intensive obstacle to overcome. A miner with little to no visibility and no lifeline is likely to be disoriented or lost.

The Commission has discussed different ways a lifeline violation in an emergency situation was reasonably likely to result in injury. *Black Beauty*, 36 FMSHRC at 1125

(inaccessible lifelines contribute to injuries that may result from hazards such as tripping or stumbling, an interruption of ventilation, miner panic and disorientation during an emergency, and excessive smoke filling a corridor as a result of an a fire inby). Should ventilation fail in an emergency, miners may breathe toxic air or a buildup of carbon monoxide. Tr. 523. The miners carry portable ventilation self-rescuers that only last for forty-five minutes to an hour. Tr. 617. This time is reduced if the miners fumble or panic in an emergency. Tr. 523. In an emergency, time spent lost or disoriented due to a missing lifeline reduces precious air supply, may prevent miners from reaching the next self-rescuer supply cache, or may thwart them from escaping the mine entirely.

Respondent put on evidence that it has adequate safety protocols and training to ensure that miners will not panic in an emergency. Tr. 608-10. However, the Commission has reasoned that even experienced miners “panic and become disoriented in an emergency.” *Black Beauty*, 36 FMSHRC at 1124. I find it likely that panic will exacerbate the consequences of reduced visibility or limited ventilation.

I conclude that a miner who becomes lost, disoriented, or delayed in locating a missing portion of the lifeline in order to escape during a mine emergency is reasonably likely to suffer injury from smoke inhalation, carbon monoxide inhalation, or entrapment during the emergency. Accordingly, the third *Mathies* factor is satisfied.

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

With regard to the fourth *Mathies* factor, any such injury from a delayed escape from the mine is reasonably likely to be of a serious nature. *Black Beauty*, 36 FMSHRC at 1125 (“The hazard of delayed or no escape at all due to an inaccessible lifeline in an emergency is reasonably likely to result in serious or fatal injuries”); *Cumberland*, 717 F.3d at 1029 (“[T]he lifeline violations at issue here would delay miners from escaping from an emergency and that such a delay would be reasonably likely to cause serious injuries or death”). The hazard of a delayed escape is supported by inspector Horseman’s testimony. He reasonably determined that limited air supply from the self-rescuers in a corridor filled with smoke and carbon monoxide, miner panic and disorientation during an emergency, and reduced visibility are reasonably likely to inhibit a timely escape from the mine. Tr. 523-24. I credit his testimony that the prolonged inhalation of smoke and carbon monoxide during such an escape from the mine is reasonably likely to be of a reasonably serious nature or fatal. *Id.* Accordingly, the Secretary has demonstrated a reasonable likelihood that any injury resulting from the hazard contributed by the violation would be serious or fatal.

3. Respondent’s Negligence is Raised from Moderate to High

I find that Respondent’s negligence should be raised from moderate to high. Respondent knew or should have known of the missing lifeline and there are no mitigating circumstances. Initially, I note that escapeways must follow “the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners.” 30 C.F.R. § 75.380(d)(5). The lifeline followed a circuitous route used by drivers to avoid a belt drive that was once installed in

the main travelway. Tr. 610. However, at the time of the citation, the belt was no longer within the travelway. Tr. 610. Respondent's failure to move the line to the primary travelway indicates that Respondent paid little to no attention to the path of the line after the belt drive was removed. Furthermore, Respondent failed to discover the condition of the lifeline for an undetermined length of time.

The violation before me presents more than a lifeline that was merely in poor condition. A portion of the primary escapeway did not have a lifeline because the lifeline took a detour into the secondary escapeway that was costly in both time and distance for a miner escaping on foot. Within that detour, 160 feet of lifeline was entirely absent. Schilke testified that he traveled the route daily and did not notice the condition. Tr. 615. Respondent's inability to definitively explain why the line was missing or for how long the violation existed is not a mitigating circumstance, but instead, is further evidence of a cavalier lack of care towards a condition that is essential to the survival of miners in an emergency situation. Further, Respondent's ignorance raises the concern that a similar section of the lifeline could go missing again without discovery. Finally, Respondent has not justified its failure to maintain an intact lifeline -- a failure that jeopardized the lives of thirty miners. I find that the Respondent should have known of the violative condition and corrected it immediately as a top priority. Accordingly, Respondent's negligence is raised from moderate to high.

4. Civil Penalty

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, I find that Respondent mined 7,528,061 tons of bituminous coal in 2012. The Secretary originally proposed a penalty of \$13,268 and the parties have stipulated that the total proposed penalty from all seven citations equaling \$39,500 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's S&S determination. I have modified MSHA's negligence determination from moderate to high for the reasons stated above. After consideration of the penalty assessment criteria set forth in section 110(i) of the Act, I assess a \$25,000 civil penalty against the Respondent for Citation No. 8452203. Respondent's new total penalty from the combined citations is now \$32,636. Given that this is lower than the total amount which Respondent stipulated will not affect its ability to remain in business, I find that this increase in penalty is appropriate and justified for the gravity and severity of the violation and would not affect Respondent's ability to remain in business.

VIII. ORDER

It is **ORDERED** that Citation No. 8451651 be **MODIFIED** to reduce the level of negligence from high to moderate.

It is **ORDERED** that Citation No. 8439446 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8432319 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8439454 is **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8452203 be **MODIFIED** to raise the level of negligence from moderate to high.

It is **ORDERED** that the operator pay a total penalty of \$32,636³¹ within thirty days of this decision.³²

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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³¹ As noted herein, I assess a penalty of \$5,081 for Citation No. 5481651, \$1,412 for Citation No. 8439446, \$117 for Citation No. 8432319, \$1,026 for Citation 8439454, and \$25,000 for Citation No. 8452203.

³² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 31, 2016

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

v.

KENTUCKY FUEL CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2015-575
A.C. No. 15-19475-384304

Mine: Beech Creek Surface Mine

DECISION AND ORDER

Appearances: Latasha Thomas, Esq., U.S. Department of Labor, Nashville, Tennessee,
for Petitioner

James F. Bowman, Midway, West Virginia, for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Involved are two alleged violations concerning a Cat 329 excavator: a section 104(d)(1) order, Order No. 8302707, citing 30 C.F.R. §77.404(a),¹ for failing to maintain equipment in safe operating condition, and a second (d)(1) order on the same piece of equipment, Order No. 8302708, citing 30 C.F.R. § 77.1606(a),² for an inadequate pre-shift exam of that excavator. For the reasons that follow, the Court affirms both violations, but, having determined that neither involved unwarrantable failures, reduces the civil penalties to appropriate amounts.

¹ Section 77.404, titled, Machinery and equipment; operation and maintenance, provides:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

² Section 77.1606, titled, Loading and haulage equipment; inspection and maintenance, provides:

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

Findings of Fact

MSHA Inspector Melvin Keith Wolford testified for the Secretary. Inspector Wolford is a coal mine inspector service specialist. His employment with MSHA began in October 2006. Tr. 26. His prior experience in the mining industry includes working for a trucking company, taking care of coal trucks, and performing general maintenance. He has also operated bulldozers and end loaders. As an equipment operator, he was responsible for doing pre-operational checks on such equipment. *Id.*

The inspector was at Kentucky Fuels' Beech Creek Surface Mine on February 7, 2015 to complete an MSHA regular E01 surface mine inspection. Tr. 30. After arriving at the mine he traveled down to the open pit area, where he met the foreman, Bernie Harper, who was then operating the Cat excavator in issue. Tr. 31. On that day, Wolford inspected three pieces of equipment: an articulating truck, and two excavators. As noted, this matter involves the two orders issued on the Cat 329 excavator, No. 6024.

The first 104(d) order, Order No. 8302707, Sec'y Ex. 1, lists nine alleged safety defects.³ Each of these defects will be discussed in turn.

The loose handrail

The Order first listed that the handrail used to access the excavator's engine had mounting bolts missing and moved when pulled on to mount the machine. The inspector stated that when he went to mount the machine,

initially, with the first step and the first handrail, when I grabbed this thing and went to pull my weight up, where the mounting bolt was missing out of the upper part of the bracket, it just allowed the handrail to pull back with me, and I kind of went back down to the ground and had to refigure how I was going to mount the machine.

Tr. 32-33.

³ The nine alleged defects include the following: 1) the handrail used to access the excavator's engine had mounting bolts missing and moved when pulled on to mount the machine; 2) the lower step, used to mount the engine deck, was damaged; 3) the deck lids that are walked on to access the engine compartment were damaged and had shifted out of place because it was being held by a bungee cord; 4) the fuel tank mounting bolts were loose causing the fuel tank to wobble when stepped on; 5) the safety latch for the engine cover was out of the bracket; 6) the bottom windshield wiper blade was missing on the lower glass; 7) the handrail on the left side used to access the cab was loose and the bottom mount was damaged; 8) engine oil leaks were found on the engine compartment, turbo, valve cover gaskets, and running down the sides of the engine block onto the exhaust manifolds; and 9) the hydraulic pump compartment was covered with hydraulic oil due to a large crack located on the side of the aluminum filter housing (Tr. 32 Sec. Ex. 1).

Sec'y Ex. 3F is a photo of the subject handrail on the equipment. Tr. 52. It shows a black bar on the left third of the photo. The bar in issue turns out at an approximate 60 degree angle and it is away from a mounting point on the handrail. Tr. 52. One can visualize that if the bar was pulled up, it would be capable of being bolted into a threaded hole. *See* Sec'y Ex. 3F. The bar provides a hand hold for one ascending to the machine's deck. Tr. 55. The inspector's issue with this condition was:

[W]hen you first get up to mount the machine, that's the handrail that you would use to pull all your weight up initially to get up to the track, and this mounting bolt was loose, which would — when I grabbed the bar to mount it, it caused the handrail to kind of come back toward me, and I had to step back to the ground, and then mount the machine a second time.

Tr. 53. In short, the handrail moved when grabbed to ascend the excavator. Reduced to its essence, a single bolt to secure the handrail was missing. Tr. 59. The inspector stated that the type of injuries that could arise from the missing handrail bolt were:

Fall-related injuries, you know, whether you would've been on the ground level coming up, or stepping up from the track up to these other two steps to get up on top of the deck, you know, this is the rail you hold onto until you get up on the top of the machine.

Tr. 53.

The Court, noting that the condition would make the handrail, which was also described as a “grab bar” or “grab iron,” a little shaky, remarked that there would still be two bolts above that point, securing the handrail. The inspector agreed. Tr. 56. The Court commented that it did not appreciate the alleged safety hazard, as the rail was still secured by the two other bolts. Tr. 57. The inspector responded that, with the bolt missing, the iron would rotate, instead of being firm. He expressed that, alluding to a different alleged defect on the equipment, a bent step, if one were to “curl an ankle” on the damaged step and then grab the handrail, it would then rotate. Tr. 57-58.

On cross-examination, the inspector agreed that the preferred method for safely mounting and dismounting a machine is to use three points of contact. Tr. 113. The inspector, also agreeing that he had seen the operator's videos associated with the cited equipment, was then asked if the foreman safely mounted it.⁴ Again, the inspector was reluctant to concede the point, initially responding only that the foreman “didn't fall.” Tr. 113. *Pressed, he then acknowledged that the foreman mounted the equipment safely.* Tr. 114. He then admitted that handrails will move a little, even when fastened securely. Nor could the inspector speak to the condition of the handrails on that morning when the pre-op exam was made. *Id.*

⁴ In addition to the testimony from witnesses, the evidence of record includes the Secretary's photographs and the operator's videos of the cited excavator.

The Court concluded that the inspector was reluctant to concede what was plain about the video involving the use of the handrails. When asked if there was support on both ends of the handrail leading to the engine compartment, he then conceded that,

[t]here was a mounting location down near the track, and then the one that we talked about in the photos where the rubber mount on the top part of where the bottom portion was at, yes. So you had one on top, and one on the bottom.

Tr. 114. He also admitted that one could stand with both feet on the ground and reach the handrail to the engine compartment, and that one could do the same thing to mount the cab compartment. Asked when a person stands on the ground with two feet and reaches up and grabs that handrail, when he pulls on it, whether he would know then if it was secure enough to pull his weight up on, he responded, “Yeah. I would say so.” Tr. 114-115. Similarly, he agreed that once one had mounted the machine, using the handrail that runs back to the engine compartment, it was stable enough for a person to hold onto and keep his balance: “Yeah. You could hold onto it as you climbed up the other steps, yeah.” *Id.* The inspector also acknowledged that there was a hasp near the top of the handrail with two bolts. Further, he found no problems with the how the bottom part of the handrail was attached. Tr. 116. He confirmed that the handrail would not fall off. Thus, his essential issue was that the rail would “give around” (i.e. move) when one tried to pull up on it, but couldn’t speak to whether it would support one’s weight when pulling up on it. He also conceded that, after letting go upon his initial effort to mount the rail, he started back and was able to mount the equipment. Tr. 117.

The foreman, Bernie Harper, who was operating the cited excavator, and was also the person who did the pre-op check, testified about both orders. Regarding the handrail, he stated that it supported his weight. Tr. 165. As to whether handrails are rigid, with no movement, he informed that some are rigid but that the cited handrail was

on the off side is mounted – the way it’s mounted, it goes to a rubber grommet, and then it – and it’s got a bushing, and then it’s bolted to the bottom. The support of it [is] a rubber bushing. It’s meant to give a little bit because this type of – this particular machine, when you move it in and out in tight areas with brush and so forth, it’s designed to just give a little bit or it’d break it completely off.

Id.

He described the mounting procedure: With both feet on the ground, there is

a step that’s on the undercarriage as your first step. You reach up, you mount it, you grab the handle with both hands, put your foot on the -- on the step that’s on the undercarriage, step up on the track, then the handrail proceeds on up the side

of the machine, you hold onto that, and you go to step, and then it goes up, I think, onto the fuel tank, and then up onto the top.

Tr. 166. The foreman stated that there was nothing that would affect his safety that morning when mounting to ascend to the engine compartment. *Id.* Further, upon learning that the inspector would be issuing a violation, he told him:

Melvin, I said, This is not – these violations is not there. I can get on and off of this machine with no problem. The hazard is not there.

Tr. 168.

The Respondent, through the testimony of foreman Harper, described each of the nine videos, which were taken shortly after the alleged violations were issued. The first video, no. 0627, reflects accessing the equipment using the cited handrail. Harper stated that he ascended the equipment using the three points of contact. He added that the handrail was fastened at the bottom with a sleeve, and with a rubber bushing and two bolts and a bracket. At the top of the handrail, he was not sure how it was fastened, but believed it had the same arrangement as the bottom, bolted at the top. Tr. 176. In the Court's estimation, the video does show that the handrail functions and that the foreman was able to use it to step up on the vehicle. It is true that the handrail had some motion, but the Court cannot say that the amount of motion shown demonstrated that it constituted a hazard. Foreman Harper stated that when he mounted the machine, he *did* use the handrail to pull his body weight and used both hands in doing so. Tr. 178. When the video shows him shaking the rail, he was using one hand for the purpose of showing the amount of looseness in the rail. Tr. 178. Cross-examination noted that it was the top portion of the handrail which was cited.

Based upon the totality of the evidence, the Court concludes that the handrail, while not in perfect condition, was in safe operating condition.

The deformed lower step

The second item listed on the order asserted that “the lower step, used to mount the engine deck is damaged. The step has been pushed back greatly reducing the footing area.” Sec’y Ex. 1. The inspector described the condition as “probably” the third step one would take, and also described it as the lower step, used to mount the engine deck. He stated that it was damaged in that the metal for that step was bent up and pushed back. Sec’y Ex. 3C fairly shows the deformed step from a view looking down from above. While there is a reduced surface area, the photo does not support that the surface area reduction was 50%, although the inspector asserted that it reduced the area for that step from what would have been about six inches to about half that distance. The reduced area was unevenly reduced. The step is used to ascend to a deck to get on top of the engine to perform pre-op checks. Tr. 46. He expressed that the safety hazard associated with the condition was the risk of missing a step when mounting the machine, creating the chance of rolling an ankle or perhaps falling due to the unsure footing. As the step area was reduced by about 50%, he noted that there is less footing available. If step area was wet or iced, this would increase the risk. Tr. 46. The next step up was fine. Tr. 49. To abate the condition, the

lower engine access step was pulled out and straightened up to restore the full surface area. Tr. 87.

Upon cross-examination, the inspector continued with inadequate responses regarding basic questions. When asked at what point he considered the step to be unsafe, he responded, “Can you rephrase your question, sir? Tr. 118. He was then asked, “[i]n reference to the step that was cited that was bent in in the front, at what point d[id] you consider the step to be unsafe?” He responded:

Where I was at on this violation was you’ve got a step there that’s – and I’m just guessing – 12, 14 inches wide, and I think it was two, four, about six inches out, and it had been compressed back 50 percent or more. You get to where, going up, you don’t have a real good place to put your foot, and then coming back down, you’re trying to step with your heel, and you just have a real small area there to step on.

Id.

Asked if one “had a step that is bent in the front, and you can take both feet and stand on the step, is that safe,” the inspector responded, “Well, that would depend on, you know, how big of an area that you had to stand on, you know, if you’ve got two or three inches, or have you got six or eight inches, or what kind of area are we talking about?” *Id.* When asked if he knew the area of the step that was left, the inspector stated, “[j]ust looking at the photos, I was – I think I said that two, four, five-ish – four-ish inches, I think – I’d have to look again – was, you know, compressed back, leaving two, maybe three inches or so to put your foot on in that one area.” Tr. 119. Contradicting his earlier assertion that the step was also bent up, when asked if the compressed step was still flat, he stated: “[r]elatively flat, that I can remember, yes.” *Id.*

The same video, no. 627, demonstrating the handrail issue also shows the use of the deformed step. Foreman Harper’s video shows that he was able to place both of his feet on the step. As with the handrail, the step was not in pristine, showroom-like condition, but as the video shows, it was still serviceable, albeit with a diminished surface step area. It seems unreasonable to deem the step to be in an “unsafe condition” and the Court therefore declines to uphold the Secretary’s claim.

The deck lid

The Order asserts that “the deck lids that are walked on to access the engine compartment are damaged. One is bent up several inches and one has the mounting brackets broke out and the lid is moved out of the intended location.” Sec’y Ex. 1. This condition is displayed in Sec’y Ex. 3A and 3B. The inspector stated that photo 3A shows, in the left bottom quadrant, a bungee cord securing the deck lid. The inspector stated that the deck lid should’ve been spun around to be positioned properly and bolted down. Persons walk on this deck lid. However, the inspector conceded that the bungee cord was keeping the lid secure, but “not secure where it’s supposed to be.” Tr. 36. The inspector stated that the lid was on top of another damaged lid “and it had probably a couple inch raised lip” that made it unstable or one could catch a toe, and it was

unstable and the arrangement created a hole that one could accidentally step in. Tr. 36. Sec'y Ex. 3B, also shows the deck lid and the raised lip that concerned the inspector. The lid would wobble when one stepped on it.

As he summarized his concerns about the lid, the inspector stated:

So you could either step in the hole over here to the left where the deck lid should be, or trip on the lid itself, or step on the lid that's unstable because it's not over there in position and mounted down.

Tr. 39.

A better depiction of the inspector's concern about the lid appears in Sec'y Ex. 3D. It more clearly shows the lid in its out of position state, held by the bungee cord (the bungee cord was circled on the photo with the words "bungee cord" added on the photo), the hole that concerned the inspector, as well as the tripping hazard where the lid is shown to be resting atop two other plates. One standing on the plates would be about seven to eight feet above the ground. Tr. 41. The inspector stated that the bungee cord was not a good secure way to hold the lid in place. He expressed that the condition created "fall-related type" injuries, such as strains, sprains, and "maybe" broken bones. Tr. 42. The area beneath the hole has hydraulic components and these would be too hot to touch when the machine is running and under a load. Tr. 43. The inspector agreed, however, that the machine operator would *not* be on the deck lid when the excavator was running. Instead, that area would be examined *before* the machine was operated in order to check oil levels and perhaps clean the windows. Tr. 44.

Upon cross-examination regarding the deck lids, the inspector was asked whether the deck lids were safe to travel over when they were in place. The inspector replied that "[w]ith everything in place and everything bolted down, they would've been safe to travel." Tr. 120. The inspector also acknowledged that he traveled over the deck lids and that he did not need to put them back in place in order to travel over them. Instead, he simply stepped around the one lid over to the other lid and didn't need to step on the one that was out of position. Asked further whether he agreed that he traveled over the deck lid safely, the inspector responded: "I didn't fall. Yes, sir." Tr. 121.

It is clear that at the time of the inspection the deck lid was out of place and that the means to hold it was a bungee cord. In discussing the hazard presented by the condition, the inspector that with the deck lids "missing" one could step on it and turn, and possibly fall seven, eight feet down to the ground. Tr. 103. To abate the condition, the deck lid or plate was straightened and bolted down, no longer relying on the bungee cord to secure it. Tr. 87-88.

From his perspective, foreman Harper did not consider the condition to be a safety hazard because he still had safe access across it. Tr. 181. He also stated that the plate was not askew, but rather was in the correct position the morning that he got on the machine to perform his pre-operation inspection. Tr. 181. However, he agreed that the plate was out of position at the time the inspector viewed it. He maintained that there was the strap, the bungee cord, holding the plate in place. Later the mechanic "put it back in there." Tr. 182. Harper did not know why the

plate was out of place, but guessed that he left the strap loose and when tramping the machine later, it turned. Tr. 182. Harper's contention was that the video reflects the position of the plate at the time he did his pre-shift that morning. Tr. 183. There is a small corner with the metal bent up. As to the other plate, in this video, Harper testified and stated in the video that it was in place at the time he did his pre-op that morning. Video no. 628 shows the fuel tank and the handrail. This video pertained to item no. 3, the deck lids. Tr. 180.

The government's attorney then asked some additional questions about the deck lid, referring to Exhibits 3B and 3D. Harper agreed that the lid was lying loose. Tr. 194. The area had a six to eight inch opening. Tr. 195. He also agreed that his video shows the deck lid as it looked when he mounted the machine earlier that morning and did his pre-shift. Tr. 196. Harper acknowledged that when the mechanic addressed the issue, it was apparently corrected without use of a bungee cord. Tr. 197.

The Court accepts the testimony of foreman Harper that the plate was in place at the time he performed his pre-operational check that morning and it so finds that as the fact. Given that finding, while the bungee cord arrangement was hardly ideal, it is difficult to conclude that the method employed to hold the plate in place rendered the equipment in an unsafe operating condition, especially when one takes into account that no person would be on the plate while the equipment was being operated. Despite these observations, with the plate out of position, albeit post the pre-op inspection, the condition must be deemed to have constituted a violation when inspected. Finally, regarding the small portion of the decking material which was bent up,⁵ and therefore not in perfect condition, the Court, having viewed the photographs and videos, along with the testimony, considered that defect as having only a *de minimus* effect on safety. Accordingly, the violation was established.⁶

Loose fuel tank mounting bolts, causing the tank to wobble

The inspector stated that the "tank was actually fairly unstable, wobbly." Tr. 119. He added that the Respondent's video shows this condition. *Id.* However, he conceded that he did not examine the mounting bolts, as they were located under the tank. He also admitted that the tank was not at risk to fall through to the ground and that one traveling over the fuel tank *would not fall*. Tr. 120. The bolts were tightened to correct the condition. Tr. 87. Video no. 628 speaks to the fuel tank and the handrail issues. In that video foreman Harper, standing on top of the tank, clearly shows that the wobbling was minimal. Accordingly, the Court does not agree with the inspector's characterization that the tank was "fairly unstable." This minimal wobbling simply cannot be considered as evidencing an unsafe operating condition.

⁵ The inspector described the extent of it as: "it had a probably a couple inch raised lip." Tr. 36.

⁶ Though as discussed later, it is important to distinguish that although the Court has found that the lid was not maintained in safe operating condition, in violation of 30 C.F.R. § 77.404(a), it has found that the condition was *not* present at the time of the foreman's pre-op exam. Accordingly, the parallel charge that the pre-op for deck lid was deficient, is *not* sustained. The lid *was* in place that morning when foreman Harper did his pre-op inspection.

Safety latch to secure engine hood out of bracket

Inspector Wolford described this item as follows:

[T]he safety latch that, when you raise the hood to check oil, it locks it in place, and keeps that hood – just say you’re reaching down there grabbing the dipstick, maybe a gust of wind come through and catch the hood, and it could blow, you know, fairly – probably five foot by three or four foot wide hood back down on you while you were laying down in there pulling your dipstick to check your engine oil.

Tr. 32.

Elaborating, the inspector referred to Sec’y Ex. 3A, which depicts the hood safety latch. The engine hood is open in the photo. Wolford stated that the latch should have been in an upright position and locked to keep the hood from blowing back down, if there were a gust of wind, if one were checking engine oil. The latch apparently is to catch and go into a bracket hole on the hood, thereby preventing the hood from coming back down inadvertently. The Court sought clarification about the issue with the safety latch, noting that the latch was present. The inspector stated that his issue was that the latch was not *attached* to the hood bracket. Thus, it did not latch automatically. As it was, one would need to grab the latch and put it up in place. Tr. 37. When the Court inquired if it was possible for one to manually attach the safety latch to the hood, the inspector stated that he did not know the answer. Tr. 37. Later testimony established that the latch could be manually attached, thus securing the hood from accidentally coming back down.

Although the inspector did not know if the latch could be disconnected, the Court inquired if the inspector’s concern was that the latch would not be secured automatically upon opening the hood. He confirmed that the automatic feature was his concern and therefore he was not contending that the latch would not secure the hood, if done manually. Tr. 123. He did not know if the mount itself was broken, as his focus was upon the latch not setting automatically. The inspector believed that another miner using the machine might open the hood, unaware that it did not latch automatically. He did not know the method for disconnecting the latch from its automatic set position. He conceded that if one knows about the latch, and one was to set it manually, there would not be a hazard. Tr. 124. He did not dispute that one could’ve manually set the latch, and thereby secure the hood and that, under those circumstance, there would not be hazard. Tr. 125. The inspector also agreed that many cars employ a manual method to secure a hood so that it will not come down. Tr. 124. However, it is true that this excavator had an automatic hood latch feature. *Id.* Thus, while “[t]he safety latch on the engine cover was out of its bracket and could not support the engine cover while leaning in to check the engine oil,” the hood could be secured manually. Although the Respondent presented a video of the hood latch issue, it only shows the latch in its secured position. Inspector Harper admitted that the latch was not in place when the excavator was inspected by inspector Wolford. Tr. 185; Resp. Ex. 3.

The Court cannot conclude that the hood latch issue constituted an unsafe condition. The entire assembly, both the support arm and the bracket, were present. There is no contest about that. The only question is whether if, as here, one can manually and fully set the support arm, but that it did not set automatically, such a situation constitutes an unsafe condition. The Court finds that there is no requirement that a hood latch must be automatically set. While a design feature, the inspector conceded that some equipment sets the hood latch automatically, while others are set manually. If there were no way to manually secure the hood latch, and thus no protection against the hood falling inadvertently, that would be a different matter.

Bottom wiper blade missing on lower glass

The order for this condition states that the “bottom wiper blade is missing on the [excavator’s] lower glass.” Sec’y Ex. 1. There is no real challenge to this matter, but there are some mitigating considerations. The inspector identified Sec’y Ex. 3E, another photograph, and it shows, in the center of the photo, where a wiper arm should’ve been present, but was not. That wiper, also described as the “foot glass” wiper, had it been present, serves to wipe the lower portion of the glass on the front of the machine. Tr. 49-50. A separate wiper on the machine covers a larger area of glass on the machine’s front but there was no issue with that larger wiper, which wipes the main front glass for the machine operator’s eye level viewing. Simply explained, the machine’s front windshields have a lower and upper wiper, each covering a different area of glass. It was the lower glass that was missing a wiper blade. Tr. 50.

The Court inquired why viewing through the lower glass is important. The inspector stated that this becomes important when digging back or down low, that is to say, when digging close to the machine itself. Tr. 52. The inspector considered both wipers to be important. The Court agrees. The inspector described the safety issue with the missing lower blade: “This wiper blade, again, you’re running during foggy conditions, rain, snow, whatever.” With “stuff accumulating on your glass, you can hit your wiper blade and turn it on, and you continue to see.” Tr. 127.

However, he conceded that “individually, with that one little glass, you know, that’s a – that’s a totally separate scenario, but individually, that’s not what I would call a real serious condition.” Tr. 128. Further, at least on that morning, the inspector stated that the operator *could* see through the foot glass. *Id.*

It is apparent that the inspector viewed the various problems he perceived collectively. That means that to the extent that some number of the nine conditions have been determined by the Court either not to be an unsafe operating condition or *de minimus* conditions, the significant and substantial and unwarrantability determinations are undercut. In support of the conclusion that the inspector’s conclusions in this regard was a cumulative finding, resting on all nine conditions, he conceded that, with regard to the foot glass, on the same day as this inspection, he issued a wiper violation on another piece of equipment at this mine, also an excavator, Citation No. 83202706 for an inoperative wiper blade but found that it was unlikely to cause an injury. Tr. 128. Seeing a justifiable difference for his contrary conclusions, the inspector fell back on his

approach that all nine conditions were taken together in reaching his conclusions about negligence and gravity, stating:

[w]ith the violation in question, you know, you've got, I can't take a violation that's got nine items and pick out the – say, the least likely item hazard in this violation, and evaluate my whole complete citation based on one little fact, versus if I only issued a violation, say, for – if that was the only thing wrong with it, it would be, say, an unlikely non-S&S violation versus I've got nine items, I can't just, like I say, pick out one and base my whole citation on it.

Tr. 129.

Thus, the inspector conceded that, taken alone, the wiper blade issue was unlikely in terms of the gravity. *Id.* Foreman Harper conceded that the foot glass wiper was not present.

Obviously, this missing lower wiper blade was a violation. However, taken by itself, as the inspector acknowledged, it was not S&S nor unwarrantable.

Loose handrail, left side of the cab access

This involved a cab access handrail which had a loose top bolt and the inspector believed that, to abate the condition, the Respondent welded the lower portion of it back around to where it was supposed to be. The Order states “the handrail on the left side of the cab access is loose.” Sec’y Ex. 1. The cited condition is depicted in Sec’y Ex. 3H. This is the handrail used to mount the cab portion of the machine to facilitate the operator’s access to the cab seat. The issue involved the lower mount, which the inspector described as “pretty much tore [] all loose except for [a] little piece [] that’s attached to the rail still yet.” Tr. 64.

The inspector stated that the condition could cause fall-type injuries. He noted that he weighs some 230 pounds and stated that, in climbing to the three foot level of the cab, it was “real shaky and loose to mount the cab of the machine. The Secretary’s brief repeats the inspector’s claim, stating that “[t]he handrail on the left side used to access the cab was loose and the bottom mount was damaged.” Sec’y Br. at 4.

The Court agrees it does appear that a portion of the rail is not completely secured to the machine. However, the Court notes that the Respondent’s video refutes the inspector’s conclusion that the rail presently constituted an unsafe condition. The testimony from the Secretary regarding this condition was quite brief and when considered along with the Respondent’s videos of the condition, the condition was not established as being unsafe.

Importantly, when assessing the legitimacy of the order, the same testimony reinforces what the Court has already noted – the inspector’s findings in support of his order were arrived at cumulatively. Though the following pertains to the same issue, but as it relates to the order for an inadequate pre-op, the inspector revealed his thought process again in this exchange: Asked if he “[w]ould [] issue an inadequate examination for a pre-op examiner who missed a loose bolt,” he responded, “I wouldn’t think so.” Tr. 142. Pursuing that line of questioning, the inspector was

then asked, “How many loose bolts would you have to have before you;d issue an inadequate pre-op exam?” He replied, he didn’t know how to answer such a broad question, but he then added that he “questioned [Foreman Harper] if he done a pre-op for the morning because of *all the conditions that was on the machine.*” Tr. 145. The foreman replied that he had done a pre-op and that no conditions were listed because he believed that “[i]t didn’t look that bad to [him].” *Id.*

In the Court’s estimation, Respondent’s videos, numbers 633 and 635, demonstrate that the handrail, again while not in pristine condition, were still in safe operating condition. Foreman Harper established this to be the case in the videos, which show him safely ascending the cab, while using the handrail. Foreman Harper is not a slight man. The handrail was able to accommodate his ascending to the cab. This condition did not reflect an unsafe operating condition. However, while the evidence did not establish a present violation, the Court acknowledges that, at some point in the future, the lower rail could become further detached and at that point it would become an unsafe condition.

Engine compartment oil leaks on the turbo and valve cover gaskets

As listed in the Order, this item stated that “there are engine oil leaks in the engine compartment on the turbo and valve cover gaskets. Oil is running down the sides of the block and onto the exhaust manifolds.”

Sec’y Ex. 3I was introduced for the purpose of showing oil leaking next to the turbo and running down the bottom portion of it. Both the turbo and the oil leak were circled in the photo. The Court did not view the photo as particularly helpful to establishing the cited condition. The inspector considered it

. . . a fire-related hazard with the engine oil leaking around this turbo, and the – which, you know, leaks things get, you know, pretty hot temperatures if they’re worked under a load for an extended period of time, [adding that] . . . in some literature that I’ve looked at and read, you know, operating temperatures, 1,000, 1,200 degrees, and I’ve seen noted where some turbos can get up to 1,800 degrees.

Tr. 65.

The inspector could only speculate as to the source of the oil leak. Tr. 66. Sec’y Ex. 3L depicts the top portion of the engine’s valve cover area, and, according to the inspector, also shows a “coating of oil,” though he admitted it was “really not a good view.” Tr. 71. Still, he maintained that oils were “running all the way down the side of the head, down to these exhaust manifolds, and it’s starting to accumulate on the flanges of this exhaust manifold.” Tr. 71. The photo was taken atop the equipment where the previously discussed deck lids were located. The Court noted however, that per the photo, the area looked “pretty clean.” Tr. 73. It is also noted that the oil coating was not to a degree that one was unable to read the truck brand name “CAT” on that valve cover. Tr. 82-83. The inspector clarified that the area of concern had engine oil on

it, and he circled the area on Sec’y Ex. 3L. Tr. 75-76. The essence of his issue was “a film of oil on [the] whole valve cover.” Tr. 76. His concern was:

[j]ust left uncorrected with the leaks continuing to leak and continuing to run down, and it would continue to build and accumulate, and go on down to even below the engine and accumulate, you get into your fire-related hazards, you know, in the engine compartment.

Tr. 78.

Sec’y Ex. 3M is another photo of the same area. The inspector believed that the photo more completely depicted the oil on the valve cover and showed that it was leaking down towards the manifold too. Tr. 78. The areas of his concern were similarly circled on Sec’y Ex. 3M. Because this condition and the next cited condition both deal with oil-type accumulations, the Court will discuss them together *infra*.

Hydraulic pump covered with oil due to broken filter housing

Sec’y Ex. 3J, another photograph, depicts, according to the inspector

. . . the area of where that – that hydraulic fuel was kind of on over to the right . . . – you open up a lid into this what I’m going to call little hydraulic area, here, and this just shows, you know, where some of these components like this hose, and this big hose down here, this – where this has got the oil that’s been spraying and leaking down from the crack in that filter housing.

Tr. 67.

The inspector stated that the area was “wet” from the hydraulic oil from the leaky filter housing. Tr. 67. The hazard identified by the inspector was

[t]he machine function, you know, with the loss of oil related type hazards, and also, you know, with this oil continuing to run out and spray out, and as it accumulates more, you get into your fire hazard-type conditions.

Tr. 67.

Sec’y Ex. 3K, the inspector stated, shows a close-up view of the oil inside the compartment, though he conceded it was “kind of hard to tell from being back out of that panel that that stuff is, you know, getting sprayed with that oil.” Tr. 69. He stated that it shows “where the hoses and components are wet inside of there.” Tr. 69. The inspector circled the area, essentially the whole photo, which he identified as being wet. Although the inspector contended that everything in the photo had hydraulic oil on it, at least in terms of the photos, the Court did not find the inspector’s assertions to be supportive. Tr. 70. He was unable to state how long the hydraulic oil had been leaking, though he expressed his opinion that, at least while the equipment was running, the condition had existed probably for more than a shift. Tr. 70-71.

Further discussion of the oil leaks, alleged defects 8 and 9, as listed in Order No. 8302707

The Court did inquire of the inspector, regarding the oil leaks and oil accumulations, whether those subjects had been part of his training at the Mine Safety Academy as safety issues and whether he was trained to be wary of such issues. The inspector affirmed that those subjects were part of his training and that such leaks and accumulations are deemed to be violations. Tr. 149. Further, addressing a subject raised during cross-examination, the inspector stated that he was never instructed that combustion points must first be determined before issuing such violations. Reinforcing that point, the inspector affirmed that accumulations of hydraulic oil, or engine oil, are a concern in and of itself, without any concern about determining the temperature at which a given fluid might combust. Tr. 150.

Though the photographs did not particularly aid the Secretary's case, at least in terms of presenting an obvious or extensive oil leak problem, the Court accepts that there were some accumulations of oil from engine and hydraulic sources. The Court also accepts that in establishing the presence of oil accumulations, it is not part of the Secretary's case to show that such accumulations present a hazard and therefore the Secretary is not obligated to produce testimony about the point at which such oils become combustible, or auto-ignite.

Accordingly, the Court rejects the contention that hydraulic oil or engine oil are not combustible materials. However, that determination does not end the inquiry in terms of whether the orders were justified. For example, the inspector agreed that most such accumulations are issued as non-S&S violations: "Yeah. Most of them are unlikely, if it's dealing with oils. Yes, sir." Tr. 129. Nor did he detect any evidence of misting of such oils. *Id.*

The inspector maintained that the accumulation of the engine oil is a hazard in itself. However, he distinguished that hazard, expressing that such accumulations did not create an unsafe operating condition. Tr. 133. Instead, the inspector expressed that hydraulic leaks pose a machine function hazard, in that, with oil loss, one starts losing machine function and if such oil sprays onto a hot engine component, it could vaporize and become a flame. Tr. 67-68, 135. However, it was fire, not machine function issues, cited by the inspector. The inspector affirmed his belief that the turbo and the exhaust manifolds temperatures are definitely high enough to ignite an oil mixture getting sprayed onto them, asserting that he has seen that happen "several times." Tr. 136. Thus, the Respondent's points about automatic machine shut-down when oil levels drop, are beside the point. Of greater significance, is the appropriate characterization of the gravity presented by these oils, especially given the generally unresponsive photographs, which again, do not evidence extensive accumulation conditions.

The inspector admitted that on the same day at the Beech Creek Surface Mine, he issued other citations for oil accumulations on equipment involving a truck and another excavator. For

both, he listed the gravity as unlikely. Tr. 139. Yet the inspector did not find this to be inconsistent, stating:

Again, with the accumulations being part of the not maintained, safe to operate violation, you know, I can't just, say, single out the one item and say, well, it's going to be unlikely because of this one, and look over the other things that were more reasonably likely to happen, so that's where you get your difference at between the three.

Tr. 139.

Thus, this is a further example to show that the inspector's evaluation of the gravity and negligence was a determination made collectively upon *all* nine cited conditions.

Conclusions about Order No. 8302707

As per the discussion above, the Court has found that at least some of nine items (four of nine) listed in Order No. 8302707 constituted unsafe operating conditions. Therefore, the 30 C.F.R. §77.404 violation is affirmed. More significant to this case is whether a section 104(d)(1) order was justified, a finding which requires establishing that the violation was the result of an unwarrantable failure. The Court finds that there was no unwarrantable failure.

The Commission has spoken definitively on the subject of unwarrantable failure. In *ICG Hazard, LLC*, 36 FMSHRC 2635 (Oct. 2014), it modified a judge's finding of unwarrantable failure to a section 104(a) citation, holding that such a finding must be based on an examination of specific criteria. Noting that it has "defined 'unwarrantable failure' as 'aggravated conduct constituting more than ordinary negligence,'" *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987)), it reviewed that the criteria for determining whether conduct is "aggravated," includes

(1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. See *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999).

Id. at * 2637. Though the Commission acknowledged that "not all factors may be relevant to every case, all relevant factors must be examined." *Id.*

Similarly, in *Mach Mining, LLC*, 34 FMSHRC 1769 (Aug. 2012), the Commission earlier noted that

. . . the ‘unwarrantable failure’ terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence, and we characterized it in such terms as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04. The Commission has further recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Factors relevant to that consideration include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev’d on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). **6 The Commission has repeatedly made clear that it is necessary for a judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Id. at 1775.

The Commission found the judge’s assessment of unwarrantability to be insufficient. It noted that while the judge considered three of the factors—obviousness, the operator’s knowledge of the existence of the violation, and the length of time the violation existed—in considering the operator’s knowledge of the violation, and by adopting the Secretary’s argument that the violative act itself outweighed the short period of time between action and discovery, the judge failed to adequately consider and address mitigating evidence relevant to that factor. *Id.* at 1775-76.

Determination of unwarrantability issue for Order No. 8302707

Applying the Commission's test for determining unwarrantability, a recap of the nine alleged defects is useful. They were: the loose handrail, the deformed lower step, the deck lid, the loose fuel tank mounting bolts, the safety latch to secure engine hood, the missing bottom wiper blade, the loose handrail on the left side of the cab access, the engine compartment oil leaks on the turbo and valve cover gaskets, and the hydraulic pump covered with oil due to a broken filter housing.

As referenced several times in the discussion above, the issuing inspector's determination that this matter was an unwarrantable failure was predicated on *all* of the violations together. In the Court's estimation, by virtue of the fact that it has found that several of the nine conditions were not established as violations, the unwarrantability determination collapses. Despite that finding, the Court will proceed to examine each of the conditions to determine if any were individually unwarrantable failures.

Again, those considerations are: (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. In addition, while there is some overlap, whether reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were involved are to be discussed in the analysis.

To avoid utterly wearing out the reader, the discussion of unwarrantability for each of the cited conditions will be brief.

The loose handrail

As noted, the Court found that this did not constitute an unsafe condition. However, even if the Commission were to disagree, it was not unwarrantable, because the extent was limited, had not existed for more than a shift, definitely did not pose a high degree of danger, (as the video demonstrates) was not obvious in the sense that the foreman used the handrail to ascend without a problem, was not known to the foreman prior to the day the condition was cited, as the foreman was filling in for the usual equipment operator, was abated to more securely attach the handrail, though it was previously secure enough to perform its function, and there was no notice to the operator that greater efforts were necessary for compliance. Thus, terms such as reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were totally inapplicable. Further, as a significant mitigating factor, the foreman performed the pre-check in pre-dawn hours.

The deformed lower step

The Court determined that this also did not constitute an unsafe condition. As discussed earlier, the Respondent's video shows this to be the case. Even if the Commission were to

disagree with the Court's finding, in the Court's estimation it was not unwarrantable. After all, the step, while compressed, fully accommodated the foreman's use of it, so the extent of the step's insufficiency must be considered minimal. It still functioned, fully, as a step, albeit with a reduced surface step area. There was no evidence of record that the deformed step had so existed for a prolonged period of time. It did not pose any high degree of danger by any stretch. If accepted to be a violative condition, it was obvious, but again still fully functional. The foreman did, after all, use the step without incident in the pre-dawn hour that day. There was no evidence that the foreman knew of the condition prior to spelling the usual equipment operator that morning. The step was returned to its uncompressed state promptly. No evidence of greater efforts for compliance was presented. It cannot be fairly claimed that reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, were involved. The same mitigation factor, as described next above and which applies to each of the cited conditions, was present. On these grounds the Court finds that there was no unwarrantable failure associated with the step deformity.

The deck lid

As noted above, the Court accepted as credible the foreman's testimony that the deck lid was in place at the time he conducted his pre-shift exam. This conclusion is bolstered by the fact that a bungee cord had been employed to secure the lid. While true that the bungee was a sub-optimal method to hold the deck lid, it is not unreasonable to conclude that use of the excavator prior to the inspection could've dislodged the lid. Along the continuum of unsafe conditions however, it was deemed to be have only a *de minimus* effect on safety. The equipment operator would not be on the deck while operating the machine, the plate was present, not absent, and it could be secured, insufficiently, by the bungee cord. The foregoing describes the extent of the condition. The length of time the lid was out of place was not established to be longer than the period of time following the foreman's pre-op inspection until the inspector performed his review of the machine. Given that the plate was in place at the time of the pre-op and that no one would be on top of the deck during machine operation, it did constitute a high degree of danger. It was not obvious either, if one accepts, as the Court did, that the foreman was credible in his assertion that the lid was in place when he performed his pre-op. The foreman's knowledge is the same as for the previous conditions – he did not operate the machine as part of his duties – he was filling in for the customary machine operator that morning. The condition was promptly corrected and the inadequate bungee cord arrangement abandoned in favor of a more secure method to keep the lid in place. No notice of greater efforts for compliance to maintain safe operating conditions for equipment is part of this record. The fact that a bungee cord was employed is viewed as a mitigating factor, when compared with a hypothetical arrangement where no method of securing was present at all. There was no unwarrantable failure associated with the deck lid.

The loose fuel tank mounting bolts, causing the tank to wobble

This cited condition was found by the Court as in safe operating condition. As the video demonstrates it was clearly safe. Taken as a whole, the Court viewed some of the conditions cited, this being one, as larding up the alleged unsafe conditions on the equipment, the next cited condition is another such example.

The safety latch to secure engine hood out of its bracket

The problem with this cited condition was that the latch and bracket were present and functional. The shortcoming was that it did not automatically engage. That being said, it is hard for the Court to conclude that the manual activation method, a method which completely served the function of keeping the engine hood secured in an upright position, was a violation. The corrective action was to reinsert one end of the latch into the bracket, an effort which can barely be described as “abatement.” However, if the Commission were to disagree and find that the inoperative automatic engagement feature of the safety latch constitutes an unsafe operating condition, the Court still finds that it was not an unwarrantable failure. The extent of the condition was the automatic engagement of the latch, as the latch could be secured manually. Given that, it did not present a high degree of danger. There was no evidence as to the length of time the automatic feature was not engaged. If the automatic feature itself constitutes an unsafe condition, then it was obvious to anyone who tried to secure the hood upon raising it. If, as the evidence suggests, raising the hood of the equipment is essentially no different than raising the hood of the typical car, one realizes immediately that the hood will not stay up until the support arm is locked into the bracket. Given the real world application that the task of raising an engine hood requires a support to keep it up, it is additionally hard to conclude that a high degree of danger was present. There was no evidence about the length of time the latch had been out of the bracket and, as is obvious, abating the problem took seconds to reinsert the latch into the bracket. No notice of greater needed abatement efforts was presented for this, or for that matter, for any of the nine conditions listed. Words like reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care cannot be employed with respect to this condition. Mitigation, if it need be mentioned at all, again is that the foreman was using this equipment on the day the order was issued to spell the usual driver. Using the equipment was not part of his customary duties.

The bottom wiper blade missing on lower glass

This was an unsafe operating condition violation, as the Court so found. However, the inspector admitted that taken by itself, as the inspector acknowledged, it was neither S&S nor unwarrantable. Thus, standing alone, the Secretary relinquished the claim that this was an unwarrantable violation. The Court finds that the evidence is in line with the inspector’s admission. The testimony of record was that the foreman only needed to use the forward, eye-level view that morning for the equipment and that the bottom glass was sufficiently clear in its own right on that day. Under those circumstances, no “high degree of danger” was present. There was no evidence about the length of time of the violative condition. However, it was an obvious deficiency. The foreman’s knowledge about the condition, at most, began in the pre-dawn hour when he did his pre-op and apparently overlooked seeing the missing lower wiper blade. No notice that greater efforts were necessary for compliance was part of this record. Again, the terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care are foreign to the facts here. The mitigation, as discussed above, remains. Accordingly, the Court finds that there was no unwarrantable failure associated with this condition.

The loose handrail, on the left side of the cab access

The Court found that, at the time the loose cab access handrail was cited, it remained functional and not in an unsafe operating condition. The Respondent's video establishes this, supporting the foreman's view about its safety. However, should the Commission take a different view of the findings about the functionality and then-present safety of the handrail, the Court would still find that the condition did not constitute an unwarrantable failure on the mine's part. The extent of the condition has been described above, and even the inspector conceded that the lower mount still was attached, though he described it as "that little piece . . . that's still attached to the rail yet." Tr. 64. There was no evidence about the length of time the loose lower mount had been in that condition. Given the foreman's demonstration using the handrail, the condition did not pose a high degree of danger. The looseness of the rail was obvious; that it created a present hazard was not. Evidence of operator knowledge was limited to the morning that the foreman used the rail to ascend to the cab access, a task he performed successfully at least twice that morning—when he did his pre-op check and later when he demonstrated its safe function in the video. The condition was abated promptly. No notice was given to the operator that greater efforts at compliance were necessary. The terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care, do not fit with the facts. The mitigating circumstances, as described above, apply equally to this alleged unsafe condition.

The engine compartment oil leaks on the turbo and valve cover gaskets and the hydraulic pump covered with oil due to broken filter housing

As these two conditions involved similar concerns—accumulations of combustible materials—and because the Court discussed them together in the findings of fact section, concluding that both constituted unsafe conditions, the unwarrantability issue is similarly discussed jointly here. The essential problem with the inspector's testimony and the photographic evidence in support of that testimony is that the former did not particularly support the later. The Respondent's testimony and its own video were more consistent with the Secretary's photographic evidence.

The extent, but only in terms of the extent of time of the two violative conditions, has been described above. In contrast the degree of the violative condition was far less than the inspector contended. The inspector's testimony that the "extent" was present for more than a shift is accepted. Given the degree found by the Court based on the record evidence, it cannot be concluded that the accumulations posed a high degree of danger. Based on the photos and video, the Court cannot conclude that the conditions, in terms of a reasonable conclusion that the accumulations presented a high degree of danger, were present. The most serious shortcoming was the cracked filter housing which had to be repaired. The breather for the blow-by gases needed to be replaced, but beyond that apparently only a good steam cleaning of the engine compartment was needed, hardly an indication of a serious leakage issue. In terms of obviousness, it must be recalled that the pre-op, performed in the pre-dawn hours, is not akin to the "160 point safety checks" advertised for *pre-owned*, (formerly known as "used") car sales. The foreman, based on his credible testimony, did perform an adequate, although imperfect, check of the excavator prior to beginning its use during the shift. The factors of knowledge of the existence of the violation, the operator's efforts in abating the violative condition, and whether

the operator had been placed on notice that greater efforts were necessary for compliance, remain as described above for the other cited conditions. The terms reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care have no descriptive applicability to the cited conditions. The place overarching mitigation element, also as discussed above, remain applicable here.

Assessment of a civil penalty for Order 8302707, now determined as, and modified to be, a section 104(a) citation

In *Brody Mining, Inc.*, 37 FMSHRC 1687 (Aug. 2015), the Commission, while remanding the matter to the presiding judge to reexamine the degree of negligence involved, took pains to note that

. . . the Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings [and that] [i]n light of the Commission holding that Commission judges are not required to apply the definitions of Part 100, judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act.

Id. at 1701.

Elaborating, the Commission added:

[i]n 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.” It also stated that “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.

Id. at 1703.

Similarly, in *Wade Sand & Gravel Co.*, 37 FMSHRC 1874 (Sept. 2015), citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), the Commission noted that:

‘neither the ALJ nor the Commission is bound by the Secretary’s proposed penalties;’ also, ‘neither the Act nor the Commission’s regulations require the

Commission to apply the formula for determining penalty proposals that is set forth in section 100.3'

Id. at 1877.

Of course, the authority is not unfettered. As fellow Administrative Law Judge Zane Gill took note:

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) [and that although] [a] judge need not make exhaustive findings [the court] must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Oil Dri Production, 2016 WL 2619895, at *4 (May 3, 2016) (ALJ).

Had it not been for the special assessment calculation, the violation identified in Order No. 8302707, would have been assessed at \$9,122.00. Tr. 19. This, not the \$41,500.00 special assessment figure, represents an appropriate starting point. In using that phrase, "starting point," the Court does not imply that \$9,122.00 represents a penalty floor.

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).

As to the demonstrated good faith in abatement of the violative condition, the Secretary concedes such good faith was present. Sec'y Br. at 16. Speaking to the history of previous violations, the Beech Creek Surface violation history is reflected in Ex. 4, known as the "R 17." Tr. 13. The Secretary states, without elaboration, that the Respondent "had received violations for the standards violated in this case." Sec'y Br. at 16; Sec'y Ex. 4. The Part 100 table offers no basis or information as to how to translate the number of repeat violations for the 15 months covered (November 1, 2013 through February 1, 2015) by Ex. 4. The Court can only note that nine violations are in that history for 30 C.F.R. §77.404(a) and no violations for the same period of history for 30 C.F.R. §77.1606(a).

Regarding the size of the Beech Creek Surface Mine, the mine produced 148,741 tons of coal in 2014. Parties' Stip. No. 5. That tonnage places the mine in the upper mid-range, with nine (9) points assessed under Part 100 out of a possible 15 points for that category. According to the Special Assessment Narrative Form, the controller size points, mine size points, violation history points and repeat violation history points are the same under the regular and special assessment points. While admittedly only a partial analysis, the combined point total for those categories is

44 points for the section 77.404(a) violation and 29 points for the 77.1606(a) violation. A point total of 60 points or less yields a penalty of \$112.00. Of course, here such a total must then evaluate the gravity and negligence criteria. The point of this discussion is not to inferentially heel to the Secretary's Part 100 penalty calculation but to highlight that the other factors, that is factors other than the negligence and gravity, even under the Secretary's system, have only a minor influence on the appropriate penalty. Restated, at least with regard to the Beech Creek Mine, the attendant negligence and gravity are the dominant, but not exclusive, penalty elements. These factors have largely been discussed above but a few additional remarks are here made.

For item 1, the loose handrail, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 2, the deformed lower step, as with item 1, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 3, the deck lid, the same analysis for gravity and negligence applies as for items 1 and 2: the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 4, the fuel tank mounting bolts, yet again the previous analyses apply.

For item 5, the safety latch to secure engine hood out of bracket, yet again, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 6, the bottom wiper blade missing on lower glass the Court did find this to be a violation of the standard as it constituted an unsafe operating condition. Still, per the evidence, as described above, there were mitigating circumstances. Assessing the evidence for this violative condition, the gravity was unlikely, no lost workdays would be likely, and the negligence was low.

For item 7, the loose handrail, left side of the cab access, the Court found that it did not then constitute an unsafe condition. Nevertheless, even if the Commission were to find that it constituted a safety defect, the gravity would be unlikely with, at most, lost workdays or restricted duty, and the negligence low.

For item 8, the engine compartment oil leaks on the turbo and valve cover gaskets, the condition was found to be an unsafe operating condition, but even the issuing inspector conceded that, viewed as singular condition (that is not premised on the inspector's theory that one may total up a number of alleged safety issues and have that total number, as opposed to the underlying facts for each condition, determine the gravity and negligence), he would have viewed the gravity as unlikely. The Court agrees that the gravity was unlikely and, as discussed above, the negligence on the foreman's part was, at most, low.

For item 9, the hydraulic pump covered with oil due to broken filter housing, the same analysis applies as for item 8. The Court's earlier described findings about this and the other accumulation condition, next above, stand.

In summary, the Court upheld only four of the nine cited conditions: the deck lid, the lower wiper and the two oil accumulations conditions. Given those determinations, upon consideration of the statutory penalty criteria, **the Court finds that a civil penalty of \$2,000.00 is appropriate.**⁷

Conclusions about Order No. 8302708

The analysis for this Order, a claim of an inadequate pre-operational inspection, being so completely related to and predicated upon the inspector's conclusions about nine claims made in the unsafe operating conditions Order, may be briefly discussed. The inadequate pre-op claim arose following the inspector's determination of those purportedly unsafe operating conditions. With five of those determinations found by this Court to be unsupported, obviously the inadequate pre-op claim collapses, because the claim was built upon the premise that, collectively, those nine conditions demonstrated an inadequate exam. However, since four of the conditions were upheld, (though the two fuel accumulations were affirmed on a technical basis), the violation of 30 C.F.R. §77.1606(a) was established. As mentioned, when the subject involves the pre-op exam, the Court finds that three, *not four*, of the conditions should have been detected, as it has been found that the lid was in place at the time of the pre-op and either came loose or was not fully re-secured by the bungee cord, following the pre-op. It is important to note however that even if the Commission were to conclude that some of the others, or even all, of the remaining six conditions should have been noted in the pre-op, unwarrantability, per the Commission's test for such a finding, would not be established.

The second order, inadequate pre-shift, would have been assessed at \$2,748.00 under a Part 100 regular assessment. Tr. 19. As with the equipment defects violation, that figure also represents an appropriate starting point, not the \$12,500.00 under the special assessment. Given the marginal amount of oil established by the record as being present and because those conditions were difficult to discern during the pre-op, leaving only the missing lower wiper blade as the only readily apparent defect, **a penalty of \$1,000.00 is imposed for this non-unwarrantable violation.**

⁷ If the Commission were to find that *all nine* conditions constituted unsafe operating conditions, based on the evidence of record, the Court would impose a \$4,000.00 civil penalty.

ORDER

Wherefore, it is **ORDERED** that Kentucky Fuel Corporation pay a total civil penalty of **\$3,000.00** (three thousand dollars) within 30 (thirty) days of the filing of this Decision. It is further **ORDERED** that Order No. 8302707 and Order No. 8302708 each be modified from section 104(d)(1) orders to section 104(a) citations.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 2, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEREMY COOTS,
Complainant,

v.

YELLOW ROSE COAL CO., LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2016-320-D
MSHA Case No.: BARB-CD-2016-06

Mine: No. 3
Mine ID: 15-18277

**ORDER GRANTING TEMPORARY REINSTATEMENT
OF JEREMY COOTS**

Before: Judge Steele

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 April 13, 2016, filed an Application for Temporary Reinstatement of miner Jeremy Coots (“Complainant”) to his former position with Yellow Rose Coal Co. (“Respondent”) at Mine No. 3 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(b). By email, the Respondent’s counsel notified the court that they would not be requesting a hearing. The Respondent has not filed a timely Request for Hearing. For the following reasons, the temporary reinstatement of Jeremy Coots is hereby **GRANTED**.

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(b). 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, 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= 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).

The Declaration of Special Investigator Kenneth McClung was filed with the Complainant's Application for Temporary Reinstatement asserting the following:

1. Prior to his discharge on February 23, 2016, Jeromy Coots (Coots) was employed by Yellow Rose Coal Co., LLC (Yellow Rose). Yellow Rose operates the No. 3 mine. The No. 3 mine is a "coal or other mine" as defined by Section 3(h) of the Mine Act, 30 U.S.C. § 802(h). The No. 3 mine is located in Lejunior, Harlan County, Kentucky.
2. Coots began working for Yellow Rose on February 22, 2016. Coots worked as roof bolter operator at the No. 3 mine.
3. On February 22, 2016, Coots spoke with Yellow Rose mine owner Randall Fleming (Fleming) about a job at Yellow Rose. Fleming told Coots he had an opening for a roof bolter and that he would observe Coots operate the roof bolting machine before he would be hired. Fleming observed Coots operate the roof bolter and stated that Coots was the best bolt machine operator he had seen. Coots was left underground to work the 10 hour shift. On February 23, 2016, Fleming received two phone calls regarding Coots. Both callers informed Fleming that Coots was represented by attorney Tony Oppgard and that Coots had filed a lawsuit against his previous employer, Lone Mountain. Fleming was warned to be careful around Coots.

¹ ASubstantial evidence@ means Asuch 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)).

4. Coots was terminated on February 23, 2016 by Fleming. Fleming stated that he could not continue to employ Coots for fear that Coots would file a complaint against Yellow Rose.
5. On October 7, 2014, the Secretary filed a Discrimination Complaint against Lone Mountain Processing on behalf of Jeromy Coots. An order was issued settling the case on August 17, 2015.
6. Based upon my investigation of these matters, I have concluded that Coots' complaint of discrimination was not frivolously brought. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Based upon the affidavit of the Special Investigator and the asserted facts therein, I find that the Secretary's complaint was not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Jeremy Coots be immediately **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime, and benefits pending final decision on the complaint.

/s/ William Steele
William Steele
Administrative Law Judge

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May 9, 2016

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

v.

WEST ALABAMA SAND & GRAVEL,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2009-870-M
A.C. No. 01-02738-194100

Mine: West Alabama Sand & Gravel

ORDER TO SHOW CAUSE

Before: Judge Feldman

The single citation at issue is 104(d)(1) Citation No. 6511548, issued to West Alabama Sand & Gravel, Inc., (“West Alabama”), alleging a violation of 30 C.F.R. § 56.15005, which provides that “[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . .” The violation concerns the failure of a contract haul truck driver to wear a restraining device while securing his truck’s load. The Secretary proposes a civil penalty of \$15,971.00 for the cited violation in 104(d)(1) Citation No. 6511548. The Commission, in its remand in this matter, has vacated the initial decision’s deletion of the unwarrantable failure designation and directed that I reconsider the issues of negligence and unwarrantable failure consistent with their decision. 37 FMSHRC 1884, 1891 (Sept. 2015).

Following a series of conference calls, on December 15, 2015, West Alabama stipulated that the subject section 56.15005 violation was attributable to an unwarrantable failure. Specifically:

1. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of unwarrantable failure under 30 U.S.C. § 814(d)(1).
2. West Alabama stipulates to such facts as are necessary and sufficient to permit the Court to make a designation of “high” negligence level.

West Alabama’s Stipulation of Material Facts, at 1 (Dec. 15, 2015).

Thus, the only remaining issue is the appropriate civil penalty to be assessed for 104(d)(1) Citation No. 6511548. Consequently, on February 17, 2016, the parties were requested to specifically identify any aggravating or mitigating factors with respect to the civil penalty criteria in 30 U.S.C. § 820(i). The parties' responses to the February 17 Order are under consideration.

The Secretary's response to the Order asserted, in part:

It is also notable that Respondent continues to consistently violate safety standards and essentially stopped paying assessed penalties in approximately January 2010, according to the Mine Data Retrieval System ["MDRS"].

Sec'y Resp., at 12 (Mar. 9, 2016).

Consistent with the above assertion, the MDRS reflects that of the \$27,890.00 civil penalties assessed for the 59 citations and orders issued to West Alabama during the period June 2010 to November 2015, West Alabama has paid \$200.00 in satisfaction of two citations. The MDRS further reflects that West Alabama is delinquent in its payment of the \$27,690.00 total civil penalty for the remaining 57 citations and orders. Thus, with the exception of two citations, West Alabama has been delinquent in its payment of assessed civil penalties for approximately six years.

With respect to delinquency as it relates to the imposition of civil penalties, in the past, the Commission has narrowly construed the civil penalty criteria in section 110(i). In *Sec'y o/b/o Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 841 (June 1996), the Commission stated: "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Id.* at 850.

However, in *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012), the Commission departed from its narrow interpretation of section 110(i) by emphasizing the role of deterrence as a proper consideration in assessing civil penalties.¹ In this regard, the Commission noted:

Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, and it explicitly called for consideration of the protection of the "public interest" - which includes such compliance - before a [penalty is assessed]. Consequently, it is eminently appropriate for a Judge to acknowledge the need for deterrence in [considering the appropriate civil penalty], with the understanding that the [ultimate civil penalty], consistent with fundamental principles underlying the penalty provisions of the

¹ Although *Black Beauty* concerned the propriety of considering deterrence in the context of approving settlements of civil penalties, it is clear that deterrence is also an appropriate consideration in determining civil penalties in contested cases. *See Black Beauty*, 34 FMSHRC at 1865-66.

Mine Act, discourage operators from violating health and safety regulations and laws in the future.

Id. at 1866. In sum, the Commission stated:

Simply put, we refuse to require our Judges to apply blinders . . . and to ignore the central and most obvious purpose of civil penalties - to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties.

Id. at 1869.

In the final analysis, the imposition *and* payment of civil penalties is the statute's principal means of achieving the deterrence necessary to further the Mine Act's goal of promoting health and safety.

ORDER

In view of the above, West Alabama **IS ORDERED TO SHOW CAUSE on or before May 31, 2016**, why its delinquent payment history should not be considered an aggravating factor in determining the appropriate civil penalty to be assessed in this matter. If the Secretary elects to file a written response to West Alabama's submission, such response should be filed **on or before June 14, 2016**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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May 10, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of GEORGE M. SCOLES,
Complainant,

v.

HARRISON COUNTY COAL CO.,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEVA 2016-274-D
MSHA Case No.: MORG-CD-2016-13

Mine: Harrison County
Mine ID: 46-01318

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. '801, *et. seq.*, and 29 C.F.R. '2700.45, the Secretary of Labor (ASecretary@) on March 14, 2016, filed a Complaint on behalf of miner George M. Scoles (“Complainant”), alleging that Scoles was discriminated against in violation of his rights under the Mine Act.

On April 13, 2016, Respondent filed a Motion to Dismiss Complaint based on the miner’s untimely filing of his discrimination complaint. Respondent argues that the Mine Act contains a 60-day statute of limitations, after which a miner may not file a discrimination complaint, unless there are justifiable circumstances. In the instant case, the miner filed his discrimination complaint 80 days after the alleged discrimination occurred, and the Respondent argues that the miner knew of his rights under the Mine Act, but chose to pursue relief through a grievance procedure instead.

The Secretary responded by arguing that Scoles was unaware of his rights under the Mine Act, as well as the time constraints contained in the Act. Furthermore, the delay was relatively short, and Respondent has alleged no prejudice. Therefore, the Secretary argues that the matter should not be dismissed.

The relevant facts in this matter are that Scoles was suspended with intent to discharge on September 15, 2015. Scoles grieved the matter, and on November 8, 2015, following an arbitration hearing, the suspension with intent to discharge was modified to a 40-day suspension. Scoles filed the instant discrimination complaint with MSHA on December 4, 2015—80 days after his initial suspension and 26 days after the arbitration decision.

The Mine Act allows any miner who believes that he or she has been discharged, interfered with, or otherwise discriminated against due to his or her protected activity to file a discrimination complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. §815(c)(2). The Commission has consistently held that “the time limits in sections 105(c)(2) and (3) ‘are not jurisdictional’ and that the failure to meet them should not result in dismissal, absent a showing of ‘material legal prejudice.’” *Sec’y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994) (citing *Sec’y of Labor obo Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986)). Indeed, the legislative history stated this point explicitly.¹ The Commission has excused a miner’s late filing on the basis of “justifiable circumstances.” *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). In determining if such circumstances exist, a judge is required to review the facts ““on a case-by-case basis, taking into account the unique circumstances of each situation.”” *Id.* (citations omitted). Justifiable circumstances include, “a case where the miner within the 60–day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.” *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), citing legislative history, S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

The example cited in the Senate Report accompanying the Mine Act appears to describe Scoles’ situation. Scoles has stated in his Declaration that he does not fully understand his rights under the Mine Act. *Scoles Declaration* ¶¶ 18-24. Specifically, he did not understand what type of violation “‘triggers’ the time-filing requirement under the Act,” and believed that the arbitrator’s decision on November 8 was part of the discriminatory conduct. *Id.* at ¶¶ 18, 22. Furthermore, Scoles believed that prior to filing a §105(c) complaint he had to first exhaust other remedies, including arbitration. *Id.* at ¶ 20. Scoles brought the matter to his employer’s attention and proceeded through a grievance proceeding.

Respondent argues that Scoles was aware of his rights under the Mine Act and failed to proceed in a timely fashion. It grounds this argument in the fact that Scoles was “vocal” about safety issues at the mine, was a miner’s representative, and had made previous §105(c) complaints. Respondent relies almost exclusively on the 1984 Commission case of *Hollis v. Consolidation Coal*, 6 FMSHRC 21, where the Commission affirmed the ALJ’s findings that the miner’s discrimination complaint was time-barred.

¹ Referring to discrimination cases, the Senate Committee stated:

It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 181, 95th Cong., 1st Sess. 24 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 3401, 2436 (1978).

Despite Respondent's almost complete reliance on *Hollis*, it fails to note the important procedural distinction between *Hollis* and the instant case. In *Hollis*, an evidentiary hearing had been held, and based on the evidence and testimony admitted at hearing, the ALJ determined that the miner's testimony concerning ignorance of his rights under the Mine Act was not credible. *David Hollis v. Consolidation Coal Co.*, 4 FMSHRC 1974 (Nov. 12, 1982) (ALJ Melick) ("*Hollis I*"). Noting its limited role in reviewing a judge's credibility determinations, the Commission found that the judge's conclusions were appropriate because the miner filed his complaint 133 days late, despite his assertions that he was knowledgeable about the Mine Act, that he was a militant chairman of the Safety Committee, and that he had written notice in his arbitration decision of remedies available under the Mine Act. *Hollis*, 6 FMSHRC at 24-25.

In the instant case, there is no credible evidence that the miner knew of the time limitations or his specific rights under §105(c) of the Act. Scoles's delay in filing was quite short—only 20 days. Had Respondent reviewed more recent caselaw beyond *Hollis*, it would have found that discrimination complaints by miners who alleged ignorance of their rights under the Act, filed shortly after the 60-day time-limit had run, where the Respondent has shown no actual prejudice, are rarely held to be time-barred. *See e.g. Daniel C. Howell v. Capitol Cement Corp.*, 23 FMSHRC 901 (Aug. 6, 2001) (ALJ Bulluck) (4 month delay in filing permitted where miner claimed he lacked knowledge of discrimination procedure); *Sec'y of Labor obo Smith v. Jim Walters Resources, Inc.*, 21 FMSHRC 359 (March 23, 1999) (ALJ Melick) (10 month delay excused by filing within 61 days of first learning of section 105(c) and no claim of prejudice by Respondent); *Sec'y of Labor obo Roccoe Ray Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 1233 (Oct. 27, 1998) (ALJ Melick) (permitting complaint filed 21 days late); *Sec'y of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (Feb. 15, 1996) (ALJ Manning) (delay of 107 days justified by prompt filing after Complainant first became aware of his rights under the Act).

The miner's justifications for filing his complaint 20 days late appear reasonable. Respondent has not alleged that it has been prejudiced by the delay in filing. Accordingly, the Motion to Dismiss is **DENIED**.

Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004

May 11, 2016

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

v.

DOMINION COAL CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2015-285

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER APPROVING SETTLEMENT
AND
ORDER TO PAY

Before: Judge Feldman

This proceeding is before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). 30 U.S.C. § 815(d). The Secretary proposed a civil penalty of \$12,500.00 on July 24, 2015, following a determination in Docket No. VA 2014-233 that Dominion Coal Corp. (“Dominion”) violated the anti-discrimination provisions of section 105(c) of the Act. This finding of liability was predicated on Dominion’s reduction in the pay of Scott G. McGlothlin after he had initiated the application process for Part 90 protection available to miners suffering from pneumoconiosis. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). The Commission, in essence, affirmed the finding of Dominion’s liability for violation of section 105(c) of the Act. 38 FMSHRC ___, slip op. (Mar. 30, 2016). Dominion now represents that it has agreed to withdraw its contest of the proposed penalty and pay the \$12,500.00 civil penalty proposed by the Secretary.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement terms are appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, Dominion Coal Corp. **IS ORDERED** to pay the proposed \$12,500.00 civil penalty within 30 days of the date of this Order.¹ Upon receipt of timely payment, the captioned civil penalty matter **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

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May 16, 2016

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on
behalf of MICHAEL MURRAY,
Complainants,

v.

MACH MINING, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. LAKE 2016-186-D
MSHA Case No. VINC-CD-2016-02

Mine ID: 11-03141
Mine: Mach #1 Mine

ORDER DENYING MOTION TO DISSOLVE

This case is before me upon an application for temporary reinstatement filed by the Secretary of Labor on behalf of Michael Murray (“the Complainant”) against Mach Mining, LLC (“the Respondent”) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(c).

The Complainant filed a discrimination complaint with the Secretary of Labor on January 12, 2016, and the Secretary subsequently initiated this temporary reinstatement proceeding. Before the matter could proceed to hearing, the parties reached a settlement whereby the Respondent agreed to economically reinstate the Complainant. The parties agreed that the period of reinstatement would begin retroactively on March 7, 2016 and reinstatement would remain in effect until the entry of a final order of the Commission regarding the Complainant’s underlying discrimination complaint or until the dissolution of my order approving the settlement, whichever should occur first. I approved the settlement on April 26, 2016. On May 6, 2016, the Respondent filed a motion requesting that I dissolve my order approving the settlement and release the Respondent from its reinstatement obligation.

Parties’ Positions

The Respondent argues that its temporary reinstatement obligation should be terminated because the Secretary has failed to comply with the requirements of section 105(c)(3) of the Mine Act. Section 105(c)(3) sets a deadline of 90 days after receipt of a discrimination complaint for the Secretary to make a determination as to whether to initiate a discrimination proceeding on the merits. *See* 30 U.S.C. § 815(c). In this case, the deadline passed on or about April 11, 2016, but the Secretary has yet to decide whether to pursue the case on the merits. The Respondent contends that requiring the company to provide reinstatement beyond the 90-day timeframe is unfair and results in unjust enrichment to the Complainant.

The Secretary responds that the motion should be denied because the Commission has made clear that the deadline set forth in section 105(c)(3) is non-jurisdictional. The Secretary further asserts that despite Department of Labor’s failure to meet the deadline, the delay has not

legally prejudiced the Respondent and should not be found to trigger an outcome that will prejudice the Complainant.

Counsel for the Complainant joins in the Secretary's opposition to the motion to dissolve.

Discussion

Section 105(c)(2) of the Mine Act provides that after the Secretary receives a discrimination complaint and initiates an investigation, "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).

Aside from the entry of a final order on the complaint, the Mine Act does not explicitly identify any conditions that interrupt the mine operator's reinstatement obligation. However, precedent has established that the obligation may be tolled or dissolved in several situations. The Commission has recognized that a subsequent change in the operator's economic status, such as closure of the mine or a mass layoff, may toll the reinstatement obligation. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). In addition, the federal appellate courts have held that an order of temporary reinstatement must be dissolved if and when the Secretary concludes, after investigating the underlying complaint, that no discrimination has occurred. *Vulcan Constr. Materials v. FMSHRC*, 700 F.3d 297 (7th Cir. 2012); *N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Cir. 2012).

This case does not present either of the situations described above, and the Respondent has cited no other legal authority that would support releasing it from its obligation to comply with the settlement agreement. The Secretary's failure to meet the 90-day deadline under 105(c)(3) does not provide a basis upon which to dissolve a temporary reinstatement order. The Commission has long recognized, as is noted in one of the cases cited in the Respondent's motion, that the deadlines imposed on the Secretary under 105(c) "are not intended to be jurisdictional" and that "the complainant should not be prejudiced because of the failure of the Government to meet its time obligations." *Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1337 (Aug. 1987) (quoting pertinent legislative history). Rather, the Commission has emphasized that the intent of 105(c) is to make the miner whole until his case can be decided on the merits. *See Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997). It would be contrary to the spirit of 105(c) to cut off the Complainant's relief due to the Secretary's delay, and it would be premature for me to accept the Respondent's contention that the Complainant is being "unjustly" enriched when no determination has been made yet on the merits of his complaint.

Accordingly, it is **ORDERED** that the Respondent's motion to dissolve is **DENIED**.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 2016

SANDRA G. MCDONALD,
Complainant,

v.

GEORGE KING, MARK TOLER,
GUARDCO SECURITY, LLC, and
NEW TRINITY COAL, INC.,
as successor-in-interest to
FRASURE CREEK MINING, LLC,

Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D
HOPE-CD 2013-10

Mine ID 46-07014 5G1

ORDER GRANTING MOTION TO AMEND COMPLAINT

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). Sandra G. McDonald seeks to recover relief under Section 105(c) of the Mine Act,¹ based on her alleged September 2013 termination of employment by George King and Mark Toler,² who were providing contract security guard

¹ Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act

30 U.S.C. § 815(c)(1).

² McDonald's initial complaint identified her employer as TMK Enterprise Security Services, Inc. ("TMK"). However, the evidence of record reflects that TMK's corporate status was terminated by the state of West Virginia on June 12, 2009. As McDonald began working for TMK in May 2011, McDonald was never employed by TMK, but rather was employed by King and Toler, the former principals of TMK, who were apparently operating their security services business as a non-corporate entity.

services at a mine site operated by Frasure Creek Mining, LLC (“Frasure Creek”). McDonald’s discrimination complaint alleges, in essence, that her employment was terminated following safety complaints concerning the wearing of hardhats by employees on Frasure Creek property, as well as King and Toler’s failure to provide timely security guard refresher training.

On December 31, 2015, McDonald filed an amended complaint, which I construe as a motion to amend, seeking to add, for the first time in this proceeding, Guardco Security, LLC (“Guardco”) and Frasure Creek as parties.³ Consequently, on February 26, 2016, the parties were ordered to address the propriety of adding Guardco and Frasure Creek in this proceeding. 38 FMSHRC 389 (Feb. 2016) (ALJ). Briefs submitted in this matter reflect that Guardco has provided contract security services at the Frasure Creek mine site since November 2014, which were previously provided by King and Toler. *Guardco Resp.*, at 2 (Apr. 12, 2016). The briefs further reflect that Frasure Creek was the subject of a Chapter 11 bankruptcy proceeding, which terminated on January 31, 2014, that identified New Trinity Coal, Inc. (“New Trinity”), *inter alia*, as “reorganized debtors.” The bankruptcy proceeding provided that, as a reorganized debtor, New Trinity acquired the property of Frasure Creek “free and clear of all Liens, Claims, charges, Causes of Action, or other encumbrances.” *New Trinity’s Mot. to Dismiss Frasure Creek*, at 3-4 (Apr. 7, 2016). Both New Trinity, identifying itself as a successor-in-interest to Frasure Creek, and Guardco oppose McDonald’s motion to include them as Respondents. *New Trinity’s Opp’n to Adding Frasure Creek*, at 4 (Apr. 20, 2016).

I. Guardco as a proper party

McDonald asserts that Guardco is a proper party as a successor-in-interest to King and Toler’s business operation. The Commission has determined that a successor-in-interest may be found liable for its predecessor’s discriminatory conduct. *See Meek v. Essroc Corp.*, 15 FMSHRC 606, 609-10 (Apr. 1993). To determine whether an entity is a proper successor-in-interest in a discrimination proceeding, the Commission traditionally considers nine 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 operation, (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.

Sec’y of Labor o/b/o Keene v. S&M Coal Co., 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff’d sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)).

³ McDonald’s December 31, 2015, amended complaint, also for the first time, identified King and Toler in their individual capacities as Respondents.

Arguing that Guardco is a proper party as a successor-in-interest to King and Toler, McDonald asserts:

Upon information and belief, Guardco conducts the same security activities at the same mine sites, employing the same Site Supervisor Karen Payne who was previously employed by Respondents King and Toler.

McDonald's Memo. in Support of Adding Guardco and Frasure Creek, at 5 (Mar. 30, 2016).

In response, Guardco asserts:

In this matter the Defendant Guardco had absolutely no knowledge of and did not know Ms. McDonald existed on this earth, nor did it have any knowledge that she had a claim against her employer and Frasure Creek at the time they signed a contract to provide security services for Frasure Creek. No representations were made by Frasure Creek concerning this case whatsoever and Guardco had no reason to suspect any claims were pending.

Guardco Resp., at 3 (Apr. 12, 2016).

In addressing whether Guardco should be included as a party as a successor-in-interest to King and Toler, it is not necessary that all of the successorship criteria identified above be satisfied. Resolution of whether a party is a proper successor-in-interest requires an equitable determination in the context of the successorship criteria with respect to whether there is a substantial continuity of business operations. The undisputed fact that Guardco has employed Karen Payne as site supervisor for their operations, who was previously employed in the same capacity by King and Toler, for the purpose of performing, essentially, the identical security services performed by King and Toler, provides a *colorable claim* of successorship to include Guardco as a party *at this stage of the proceeding*.

However, unresolved issues of fact may remain with respect to the continuity of business of operations between King and Toler and Guardco, and other successorship criteria. Consequently, Guardco will have the opportunity to demonstrate that it is not, in fact, a successor-in-interest and a proper party at the forthcoming evidentiary hearing. As such, **McDonald's motion to include Guardco as a Respondent in this matter at this stage of the proceeding shall be granted.**

II. New Trinity, as a successor-in-interest to Frasure Creek, as a proper party

McDonald's initial section 105(c)(3) complaint was not docketed to include Frasure Creek as a Respondent. On this basis, McDonald's initial motion to amend her complaint by adding Frasure Creek as a party, filed on February 18, 2015, was denied on March 12, 2015, based on the Commission's holding in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 Apr. 1991). *See Order Denying Mot. to Amend*, 37 FMSHRC 683 (Mar. 2015) (ALJ). In *Hatfield*, the Commission held:

If the Secretary's . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546; *see also Pontiki Coal Corp.*, 19 FMSHRC 1009, 1018 (Jun. 1997). Following the March 12, 2015, denial of McDonald's request to include Frasure Creek as a party based on the Commission's holding in *Hatfield*, on October 23, 2015, the Commission, upon review, granted broad leave for McDonald to "amend the complaint to add [all] other relevant parties...." 37 FMSHRC 2239, 2243 (Oct. 2015).

Currently before me is McDonald's second motion to amend her complaint, filed on December 31, 2015, to add Frasure Creek as a party. New Trinity, as a successor-in-interest to Frasure Creek, opposes McDonald's motion for three reasons. Namely: 1) that McDonald's initial 105(c)(3) complaint failed to assert any allegations against Frasure Creek; 2) that Frasure Creek was never properly served with McDonald's initial 105(c)(3) complaint; and 3) that McDonald's claims against Frasure Creek were discharged in bankruptcy.

With respect to New Trinity's first two objections, it is true that my March 12, 2015, dismissal order initially denied McDonald's motion to add Frasure Creek based on the Commission's holding in *Hatfield*. 37 FMSHRC 683 (Mar. 2015) (ALJ). However, upon revisiting this issue subsequent to the Commission's remand, I find it significant that the caption of the Mine Safety and Health Administration's ("MSHA") December 5, 2013, letter declining to pursue McDonald's discrimination complaint noted both TMK (King and Toler) and Frasure Creek. Shortly thereafter, McDonald's January 7, 2014, 105(c)(3) complaint, filed with the Commission, identified both TMK (King and Toler) and Frasure Creek in its caption. Significantly, McDonald's 105(c)(3) complaint reflects that copies were sent to: "USDOL, MSHA Mt. Hope; TMK Enterprise Security; Frasure Creek."

Additionally, the evidence further reflects that Frasure Creek communicated its dissatisfaction with McDonald's performance as a security guard to King and Toler at or about the time McDonald was allegedly terminated. *Letter from Vedat Ozsever, Director of Coal Processing, to Karen Payne* (Sept. 9, 2013). Thus, when viewed in its entirety, the evidence of record demonstrates that McDonald, acting *pro se* at the time, adequately named Frasure Creek as a relevant party in her discrimination complaint.

I am cognizant that McDonald has not formally sought to include New Trinity as a party to this matter. However, by their own admission New Trinity has identified itself as a successor-in-interest to Frasure Creek. Thus, I construe McDonald's motion to add Frasure Creek as a motion to add New Trinity as Frasure Creek's successor.

Regarding New Trinity's argument that McDonald's claims against Frasure Creek were discharged in bankruptcy, it is well-settled that the fundamental purpose of section 105(c) is to ensure, where discrimination has occurred, that "discriminatees are made whole." *See, e.g., McGlothlin v. Dominion Coal Corp.*, 38 FMSHRC ___, slip op. at 2 (Mar. 30, 2016). The Mine Act's goal would be thwarted if miners who are the victims of discrimination were left without a remedy when a successor steps into the shoes of a predecessor as a result of a bankruptcy proceeding. The issue of whether discrimination claims are not dischargeable in bankruptcy has been thoroughly addressed by Judge Moran in ongoing litigation before him. *See Lowe v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC ___, slip op. at 6-11 (Mar. 14, 2016) (ALJ); *Varady v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC ___, slip op. at 6-11 (Mar. 4, 2016) (ALJ). While I find it doubtful that discrimination claims can be discharged in bankruptcy, I need not definitively address this matter until such time as it is determined that McDonald has a meritorious claim against Frasure Creek. Thus, New Trinity's motion to dismiss based on its assertion that Frasure Creek's bankruptcy precludes any liability in this matter shall be denied as premature.

Consequently, **New Trinity, as a successor-in-interest to Frasure Creek, shall be included as a party at this stage of the proceeding.** Inclusion of New Trinity at this point does not prejudice New Trinity's opportunity to demonstrate that it is not, in fact, a proper party at the forthcoming evidentiary hearing.

Given that testimony in an evidentiary hearing is necessary to ultimately resolve the issue of the proper parties to be included in this matter, in the interest of judicial economy, the hearing on this issue shall be consolidated with the hearing on the merits of McDonald's discrimination complaint.

ORDER

In view of the above, **IT IS ORDERED** that McDonald's December 31, 2015, motion to amend her complaint to include George King, Mark Toler, Guardco Security, LLC, and New Trinity Coal, Inc., as a successor-in-interest to Frasure Creek Mining, LLC, **IS GRANTED**.

IT IS FURTHER ORDERED that New Trinity's motion to dismiss its participation in this matter as a successor-in-interest to Frasure Creek **IS DENIED** as premature.

IT IS FURTHER ORDERED that the parties contact my law clerk, Avery Peechatka, at apeechatka@fmshrc.gov **within 10 days of the date of this Order** to provide their availability to schedule this matter for a hearing to commence no later than September 27, 2016.

Finally, nothing herein should be construed as either, an ultimate finding with respect to the proper parties to be included in this matter, or a finding with regard to the merits of McDonald's discrimination complaint.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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May 25, 2016

SECRETARY OF LABOR, MSHA,
on behalf of **JENNIFER MORREALE**,
Complainant,

v.

VERIS GOLD USA, INC.,
JERRITT CANYON GOLD, LLC,
WHITEBOX MANAGEMENT, &
ERIC SPROTT,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-793-DM
MSHA Case No.: WE MD 14-13

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER OF DISMISSAL

Before: Judge Simonton

This case is before me upon a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) by Ms. Jennifer Morreale (Complainant) against Veris Gold USA, Inc. (Respondent).

On May 20, 2016, this court issued an Order Conditionally Approving Joint Withdrawal Motion stating that this matter would be dismissed with prejudice after confirmation of full satisfaction of the parties' private settlement agreement. May 20, 2016 Order. On May 23, 2016, Complainant and counsel for the Respondent both represented that the terms of the settlement agreement had been completed and satisfied.

Accordingly, this matter is **DISMISSED** with prejudice.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 26, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of KELLY RAWLEY,
Complainant,

v.

J.L. SHERMAN EXCAVATION,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING:

Docket No. WEST 2016-467-DM
MSHA Case No. WE MD 16-07

Mine ID: 45-03100

Mine: J.L. Sherman Excavation

APPROVAL OF SETTLEMENT AND ORDERS TO COMPLY

Before: Judge Barbour

Pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), the Secretary of Labor (“the Secretary”) has filed an application for the temporary reinstatement of Kelly Rawley to the position of crusher supervisor at a portable crushing plant owned and operated by J.L. Sherman Excavation (“the company”). The Secretary seeks Mr. Rawley’s reinstatement pending a final disposition of Mr. Rawley’s complaint of discrimination in which Mr. Rawley asserts he was illegally laid off by the company in October 2015 and then illegally denied re-employment in April 2016 when other company employees were called back to work. Upon the company’s failure to offer re-employment, Mr. Rawley filed the previously mentioned discrimination complaint with the Secretary’s Mine Safety and Health Administration (“MSHA”). A copy of the complaint is attached to the Secretary’s application. In the complaint, Mr. Rawley states:

I was the crusher supervisor . . . until October 6, 2015[.]
I had an ongoing argument about the brakes on the [No. 51]
980 front end loader An MSHA Inspector showed up
that day and I was told by the owner[,] Jeff Sherman[,]
do not talk to that inspector because I talk to[o] much[.]
We argued and I was fired[.]
On [November 24, 2015, I withdrew my [previous]
discrimination complaint based on my return as

crusher supervisor in the spring which will apparently not happen.^[1].

Application, Exh. A.

In April 2016, Mr. Rawley filed a second discrimination complaint with MSHA. The agency assigned Owens to investigate the complaint. Owens concluded evidence exists that Mr. Rawley was prevented from speaking with an MSHA inspector and was permanently let go in part because he complained about safe working conditions with regard to the No. 51 980 front end loader. Therefore, Owens found that Mr. Rawley's complaint was not frivolously brought. Upon learning of this determination, the Secretary, through counsel, filed the subject application to temporarily reinstate Mr. Rawley pending a final resolution of Mr. Rawley's April 2016 complaint.

The Commission's Chief Judge assigned the case to the court, and the court, through its law clerk, contacted counsels to schedule a conference call. The court intended to propose an expedited date for hearing the application. However, before the call was made, counsels advised the court's law clerk that they agreed to settle the application by economically reinstating Mr. Rawley until a determination can be made by MSHA if Mr. Rawley's complaint has merit and, if so, until a hearing on Mr. Rawley's discrimination complaint can be held and the matter can be finally decided. On May 23, 2016, the court received the parties Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. The pertinent terms of the agreement are as follows:

- 4.) [The company] agrees to economically reinstate Mr. Rawley to his position as a crusher supervisor, effective upon the approval of this Settlement and Order [The company] agrees to pay Mr. Rawley at his regular rate of pay for \$19 per hour for the first 40 hours per week and \$28 per hour over 40 [hours] per work week subject to normal deductions. [The company] agrees to pay Mr. Rawley for 44 hours per week.
- 5.) [The company] shall provide benefits (if any, including but not limited to health insurance, retirement plan, and seniority accrual) associated with Mr. Rawley's employment and consistent with those provided pre-termination. [The company] may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees.

¹ According to MSHA's investigator, Corey Owens, Mr. Rawley's original discrimination complaint was filed on November 12, 2015. Application, Exh. B 3. Owens states that after Mr. Rawley filed the complaint he was told by a company representative that he had not been fired. Instead, the representative described his work hiatus as a "layoff" and told Mr. Rawley that he would be brought back to work in 2016 when the mine's seasonal closure ended. *Id.* However, on April 12, 2016, Mr. Rawley learned that he would not be brought back to work. *Id.*

- 6.) The first payment shall be due to Mr. Rawley on [the company's] first regular weekly pay day after the date of approval of this Settlement Agreement an administrative law judge. All subsequent payments shall be due on [the company's] regular weekly pay days. All payments shall be made by regular payroll or certified check to "Kelly Rawley" and sent to the following address:

Kelly Rawley
P.O. Box 0045
Laclede, ID 83841

Proof of each payment shall be forwarded by email within five days to brown.bruce.1@dol.gov.

- 7.) [The company] agrees to provide a neutral job reference for Mr. Rawley if contacted by potential employers.
- 8.) If [the company] fails to provide payment and benefits as required by this Settlement Agreement and Motion . . . the Commission may sanction [the company].
- 9.) Mr. Rawley's economic temporary reinstatement shall terminate upon a finding by the Secretary that Section 105(c)(1) has not been violated. Alternatively, if the Secretary finds that the discrimination complaint has merit and the Secretary files a Complaint of Discrimination pursuant to Section 105(c)(2) with the Commission, Mr. Rawley's economic temporary reinstatement shall expire only after entry of a final order on the Complaint.

APPROVAL OF THE SETTLEMENT

The settlement protects the economic interest of Mr. Rawley while the merits of his discrimination complaint are determined. At the same time, it recognizes the limits of Mr. Rawley's proposed economic reinstatement. For these reasons, the court concludes the settlement faithfully reflects the purpose of section 105(c)(2), and the agreement **IS APPROVED**.

ORDER **THE COMPANY'S REQUIREMENTS UNDER THE ORDER**

Given the court's approval of the settlement the company **SHALL** comply in full with the terms of the settlement agreement. In particular it **SHALL**:

- (1) Economically reinstate Mr. Rawley to his position as a crusher supervisor, effective the date of this Order and it **SHALL** pay Mr. Rawley at his regular rate of pay of \$19 per hour for the first 40 hours per week and \$28 per hour over hours over 40 hours per week, subject to normal deductions, and it **SHALL PAY** Mr. Rawley for 44 hours per week each week that he is economically reinstated;

- (2) Provide benefits (if any, including but not limited to health insurance, retirement plan, and seniority accrual) associated with Mr. Rawley's employment and consistent with those provided pre-termination. [The company] may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees;
- (3) Pay Mr. Rawley his first payment on [the company's] first regular weekly pay day after the date of this Approval and Order. All subsequent payments **SHALL** be due on [the company's] regular weekly pay days. All payments **SHALL** be made by regular payroll or certified check to "Kelly Rawley" and **SHALL** be sent to the address specified in the agreement. The company **SHALL** forward proof of each payment by email to brown.bruce.1@dol.gov within five days of each payment;
- (4) Provide a neutral job reference for Mr. Rawley to any potential employer.

THE SECRETARY'S REQUIREMENTS UNDER THE ORDER

To expedite the Secretary's consideration of Mr. Rawley's complaint, the Secretary **SHALL** no later than 60 days from the date of this Order, advise Mr. Rawley, the company, and the court as to its determination whether section 105(c)(1) has been violated. If the conclusion of the Secretary is that the company did not violate section 105(c)(1), Mr. Rawley's temporary economic reinstatement **SHALL** end and from that time forward the company will be under no obligation to pay Mr. Rawley or to comply with any other provisions of the agreement. If the Secretary concludes Mr. Rawley's discrimination complaint has merit and that the company violated section 105(c)(1), the Secretary **SHALL** forthwith file a discrimination complaint with the Federal Mine Safety and Health Review Commission on Mr. Rawley's behalf.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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Kelly Rawley, P.O. Box 0045, Laclede, ID 83841
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