**January 2014**

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### ADMINISTRATIVE LAW JUDGE DECISIONS

## ADMINISTRATIVE LAW JUDGE ORDERS

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Review was denied in the following case during the month of January 2014:

Secretary of Labor, MSHA, v. Solar Sources, Inc. (Judge Manning, December 10, 2013)

# COMMISSION ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 23, 2014

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEST 2013-1081-M |
| v. | : | A.C. No. 02-02977-287801 |
| GILA ROCK PRODUCTS, LLC | : | |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 27, 2013, the Commission received from Gila Rock Products, LLC ("Gila Rock") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 8, 2012, signed for by C. Montgomery, and became a final order of the Commission on June 7, 2012. Gila Rock asserts that its counsel mailed a pre-penalty notice of contest to MSHA, which was not received. This contest was not filed with the Commission and was not assigned a docket number. Gila Rock further states that its owner, Norman Montgomery, was not served with the proposed assessment. Gila Rock's counsel asserts that he discovered this delinquency on July 22, 2013 after contacting MSHA.

The Secretary opposes the request to reopen and notes that the delinquency notice mailed to the operator on July 24, 2012, was returned undelivered, and the case was referred to the U.S. Department of Treasury for collection on November 8, 2012. The Secretary notes that Cheryl Montgomery is listed on Gila Rock's Mine ID Report as one of its owners, and it is the operator's responsibility to adequately communicate with its counsel.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

This motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Gila Rock's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Gila Rock's motion with prejudice.

/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
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/s/ William I. Althen
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1331 PENNSYLVANIA AVENUE, NW, SUITE 520N**

**WASHINGTON, D.C. 20004-1710**

January 23, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. CENT 2013-461-M |
| v. | : | A.C. No. 41-04413-269654 |
| E & G MASONRY STONE #2 | : | |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 9, 2013, the Commission received from E & G Masonry Stone #2 ("E&G") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 18, 2011, and became a final order of the Commission on November 17, 2011. E&G asserts that it was unaware that there were multiple penalty assessments stemming from the same inspection. E&G discovered its error after receiving a delinquency notice dated January 3, 2012. The Secretary opposes the request to reopen and states that the delinquency was referred to the U.S. Department of Treasury for collection on April 19, 2012, and was paid by check dated March 22, 2013. The Secretary further notes that on March 20, 2012, counsel for E&G filed a motion to reopen a penalty assessment stemming from the same inspection, but did not request to reopen the matter before us. *See E&G*, 34 FMSHRC 3044 (Dec. 2012).

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

This motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), E&G's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny E&G's motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ William I. Althen
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 23, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. SE 2013-420-M |
| v. | : | A.C. No. 40-03223-266215 |
| ROCKY POINT ROCK, INC. | : | |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 30, 2013, the Commission received from Rocky Point Rock, Inc. ("Rocky Point") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 14, 2011, and became a final order of the Commission on October 14, 2011. Rocky Point asserts that it mistakenly thought it had contested the citations in this assessment and never contacted counsel to verify the contest. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on November 29, 2011, and the case was referred to the U.S. Department of Treasury for collection on March 22, 2012.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

This motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Rocky Point's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Rocky Point's motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. CENT 2011-372-M |
| v. | : | A.C. No. 39-01328-243566 |
| BOB BAK CONSTRUCTION | : | |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 10, 2014, the Commission received from Bob Bak Construction ("Bob Bak") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On December 14, 2011, the Chief Administrative Law Judge issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Bob Bak's perceived failure to answer the Secretary's March 11, 2011 Petition for Assessment of Civil Penalty.

Bob Bak asserts that it answered the penalty petition and encloses a copy mailed to MSHA and the Commission on April 19, 2011. Bob Bak further states that it was unrepresented by counsel at the time it received the Show Cause Order and thought no further action was necessary after responding to the penalty petition. The Secretary of Labor does not oppose the request to reopen, and notes that the documentary record indicates that an answer to the penalty petition was properly filed and served on the Secretary.

Having reviewed Bob Bak's request and the Secretary's response, we conclude that the Show Cause Order did not effectively become a Default Order because the operator had filed a response to the penalty petition. Accordingly, because this case was assigned to Administrative Law Judge William B. Moran, we are remanding it to him 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

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Administrative Law Judge William B. Moran
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# ADMINISTRATIVE LAW JUDGE DECISIONS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9933/ Fax: (202) 434-9949

January 2, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | : | **CIVIL PENALTY PROCEEDING** |
| | : | DOCKET NO. KENT 2012-1214 |
| | : | A.C. No. 15-18854-291171 |
| v. | : | |
| LIGGETT MINING, LLC, Respondent. | : | Mine: Liggett #3 |

# DECISION

Appearances: Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

James F. Bowman, Midway, West Virginia, for the Respondent

Before: Judge Moran

## Introduction

On May 24, 2011, Respondent's Liggett No. 3 mine experienced a significant roof fall at the intersection of a crosscut and an entry. The roof fall dimensions were approximately 25 feet by 25 feet, with a depth, or thickness, of some 8 feet. Following an investigation by MSHA, Liggett was cited, on May 25, 2011, for an alleged violation of 30 CFR § 75.202(a), the safety standard requiring, as pertinent here, that where persons work or travel, roof must be supported or otherwise controlled to protect persons from hazards related to such roof falls. The Citation in issue, No. 8350111, also asserted that the violation was significant and substantial ("S&S") and the result of moderate negligence. Liggett challenged the violation itself, the attendant gravity and negligence claims and the penalty sought by MSHA. For the reasons which follow, the Court affirms the citation and the associated special findings, and imposes a $10,000.00 (ten thousand dollar) civil penalty.

## Findings of Fact

### Testimony of Inspector Hensley

MSHA Inspector Jerry Hensley has over 30 years of mining experience, as well as six years' experience as a coal inspector with MSHA. Tr. 12, 18-20. On May 24, 2011, around 1:30 p.m., Respondent Liggett Mining called in a roof fall accident. Tr. 23. The fall occurred in the intersection of the mine's No. 5 entry with the No. 4 right crosscut. Tr. 21-22. Inspector Hensley arrived at the mine at around 4:30 p.m. that day to conduct an E08 accident inspection at the location of the roof fall, which was in the mine's active 003 mechanized mining unit (MMU) section. Tr. 23-24. Argus Brock, the Inspector's acting supervisor, and trainee Tommy Wright accompanied Inspector Hensley on this investigation. Tr. 23-24.

Upon arriving at the mine, Inspector Hensley went to the mine office, where he spoke with Dayshift Superintendent Jack Calloway and Safety Director Gene Fisher. Tr. 24. Following their conversation, he entered the mine and went directly to the 003 section where the roof fall had occurred. Tr. 24-25. Mr. Hensley recalled that Gene Fisher and John Simpson accompanied him into the mine. Tr. 25. Once they arrived at the 003 MMU, the Inspector conducted an imminent danger run and found no dangers present. Tr. 25. He then went to the rock fall area itself, which had occurred "in the intersection where the No. 4 right crosscut had been cut into the No. 5 heading." Tr. 26. Due to the potential dangers in the area, the Inspector was not able to get an exact measurement of the rock fall, but he recorded his estimates of its size both in his notes and in the citation he later issued. At the hearing he recalled those estimates, stating that the fall "appeared to be about 25-feet long and 25-feet wide and it may have been about 8-feet high the best that we could tell." *Id.*[1]; *See also* Ex. P-1; Ex. P-2, p. 4.

The area around the roof fall was dangered off by the time Inspector Hensley reached the area as he approached through the No. 4 right crosscut. Tr. 34.[2] He noted the presence of draw rock which he would later learn from Liggett roof bolter Joey Brock had fallen prior to the roof fall and was next to the spot of the roof fall at the intersection in the No. 4 crosscut. Tr. 35, 91. He also noticed two 8-foot rope bolts in the same area where cribbing was installed. Tr. 35. Inspector Hensley could not determine whether the rope bolts were installed before or after the roof fall. Tr. 36. To the Inspector's knowledge, the mine's roof control plan did not require the installation of these rope bolts at the time of the fall. *Id.*

[1] Due to some ambiguity as to what the 8 feet *high* measurement was describing, at the Court's urging, and without objection from the Respondent, the Secretary obtained a post-hearing affidavit from Inspector Hensley, further explaining the measurement. In that affidavit Inspector Hensley stated that he was describing that "the thickness of the rock that fell out was approximately 8 feet." Therefore, the "8-feet high" reference did not describe the distance from the floor to the roof after the fall. Roof bolter Joey Brock estimated the *height of the roof* in this area prior to the fall was between 6 and 7 feet from the ground. Tr. 145. Roof bolter Brock's testimony, as it referred to the roof *height* does not conflict with the Inspector's testimony about the thickness of the material which fell. The Court, upon consideration of the testimony, finds that the thickness of the roof fall material was approximately 8 feet.

[2] The only two means of accessing the roof fall area were to travel in from the No. 4 right crosscut or from the No. 5 entry. Tr. 47-48.

After checking the roof fall area, the Inspector checked "the roof and really all over the section for about five crosscuts outby the section, from the section face outby the section about five crosscuts," finding that, except for the area of the roof fall, the roof and ribs otherwise "were in good shape." Tr. 26. Upon reaching the surface, Inspector Hensley called aside roof bolter Joey Brock,[3] for a private conversation. Brock had bolted the intersection and No. 4 crosscut in the days before the roof fall. Tr. 27. As it unfolded at the hearing, what was discussed during their conversation is in dispute, with Mr. Brock and Inspector Hensley offering different accounts. Inspector Hensley recalled: "[Joey Brock] informed me that when they had taken the roof bolt machine into the 4 right crosscut that from 18 to 24-inches of draw rock had fell in that crosscut, and that they actually had to push the draw rock over into the No. 5 heading so that they could bolt that, cut a culvert, cut into that No. 5 heading." *Id.*; *See also* Tr. 91.

According to the Inspector, in addition to encountering this draw rock prior to the fall and needing to push it aside,[4] Joey Brock also told him that while he was bolting the roof in the days prior to the roof fall "they encountered cracks in the roof up to 8-feet." Tr. 27. Inspector Hensley recorded this account in his notes from May 24 concerning his interview with Joey Brock about the roof fall. Ex. P-2 [5/24/2011], at p.6. The contents of Inspector Hensley's conversation with roof bolter Brock, as reflected in his notes from May 25th record:

> Roof bolter, Joey Brock, stated that 18 inches to 2 feet of draw rock had fallen from the roof when the 4 right crosscut was cut into the No. 5 entry before the cut was bolted. Mr. Brock stated the rock had been pushed through the unbolted cut into the No. 5 entry, so that it could be bolted. He said, during the bolting process, he encountered cracks in the roof at least 8 feet in the roof. Ex. P-2 [5/25/2011], p. 3.

Inspector Hensley was sure about the accuracy of his conversation with Joey Brock: "I had the conversation with him the evening of the 24th, and I wrote these notes on the morning of the 25th. I had an accurate recollection of what was said…What is in my notes is exactly what occurred." Tr. 75.

The Inspector explained that the presence of draw rock prior to the May 24 roof fall was significant, as it indicated that "there's something going on in that top, especially when you've got 18 to 24-inches. A lot of times you'll just have a small scale; but in this instance Mr. Brock said they had 18 to 24-inches, so that's going to signify that you do have a problem in that roof in that area." Tr. 29. The cracks Joey Brock located in the roof signified that the layers of rock had separated, which was "going to weaken that roof in that entire intersection." *Id.*

The Inspector acknowledged that the mine had followed its MSHA-approved roof control plan, but he believed that they should have done more to prevent the roof fall:

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[3] To avoid any potential confusion for the reader, the Court notes that, as it happens, there were two "Brocks" referenced in the transcript. Only one, Joey Brock, a roof bolter for Liggett, testified at the proceeding. Roof Bolter Brock, as noted above, was the miner who bolted the area where the roof fall occurred. The other Brock referenced in the transcript is MSHA supervisor Argus Brock, who was present at Liggett No. 3 the day following the May 24th roof fall, but did not testify. The testimony does not disclose if the Brocks are related.

[4] Draw rock is loose rock that occurs in a mine's immediate roof and is either subject to fall, or, as in this case according to Inspector Hensley's testimony, has already fallen. Tr. 55.

> They took no precautions to prevent that roof fall other than their normal bolting. They did install two rope bolts to the approach from the 4 right crosscut and two roof bolts to the approach in No. 5 heading, but they did nothing in that intersection, which is an area where you would have had the greatest present danger, you've got the most exposure because it's a more wide open space. Tr. 50.

The Inspector explained that the 20 by 20 foot intersection is an area that requires particular attention because it is the greatest area that is not supported by coal and therefore the best support is needed. Tr. 50-51. In the Inspector's opinion, the 18 to 24-inches of draw rock,[5] which Joey Brock saw fall while he was roof bolting in the No. 4 right crosscut on or around May 23,[6] should have alerted the mine that there was a problem with the roof in this area. Tr. 51-52. Brock was the only person with whom Inspector Hensley spoke who mentioned the 8-foot crack in the immediate roof. Tr. 58.

After his conversation with Joey Brock around 6:30 or 7:00 p.m. on May 24, Inspector Hensley spoke with Jack Calloway before exiting the property.[7] He notified Mr. Calloway that "we would probably be issuing some citations on that fall." Tr. 61. The following morning, after consulting with his supervisor, Argus Brock, he issued Citation No. 8350111 for the mine's failure to properly support the roof under 30 CFR § 75.202(a). Tr. 63, 103. The Inspector marked the negligence as "Moderate" and, under the "Gravity" section of the citation, the likelihood of an injury was listed as "reasonably likely," with such an injury, were it to occur, marked as fatal. The gravity section also identified the violation as "Significant and Substantial."

Inspector Hensley offered examples of the additional steps Liggett should have taken to avoid this violation:

> When they encountered the draw rock and pushed it through that cut and then [Joey Brock] started to bolt that cut and he also encountered the cracks in the roof of up to 8-feet—remember at this time they are just installing 5-foot grouted bolts—you

[5] While the 18 to 24-inch measurement referred to the thickness of the draw rock, Joey Brock did not specify the length or width of this rock when he spoke with Inspector Hensley. Tr. 55. Inspector Hensley explained that "[Joey Brock] didn't give me any measurements on [the length and width], but it was big enough to where they couldn't get the roof bolting machine into place. They had to have another machine come in and push that draw rock over into the No. 5 heading so they could get their roof bolter in the unbolted cut, so that they could bolt that cut." *Id.*

[6] Inspector Hensley estimated that, given the amount of progress miners had made in other entries, Joey Brock would have discovered the fallen draw rock around May 23, about one day prior to the roof fall. Tr. 52-53. While he was not sure that the progress made in the Nos. 1, 2, 3, and 4 entries had been made after Mr. Brock encountered the draw rock, he explained that "normally you try to keep all entries pretty much even across normally." Tr. 54.

[7] At this time, the 103(j) order that Argus Brock issued around 3:30 p.m. was still in effect. Tr. 60. Inspector Hensley modified this to a 103(k) order after conducting his accident assessment. *Id.*

immediately have got to go to either longer bolts, rope bolts is what most people go to; or you may install jacks and cribs or collars or something like that. Tr. 56.[8]

Despite these options for additional roof support, Inspector Hensley noted that instead "the only thing that I could see that they had done, which didn't actually [a]ffect the fall early itself, is they had put two rope bolts in that No. 4 right entry and two rope bolts in the No. 5 heading." Tr. 58. He found these efforts to support the roof to be insufficient because "in that greater potential danger area, there was actually nothing done except the normal bolting." Tr. 59.[9] Aside from those four rope bolts, Inspector Hensley could not establish that the roof in the area of the fall had been supported by cribbing or any other supplemental support. Tr. 63. He added that the rope bolts were "incorrectly placed to actually [a]ffect that intersection where the fall was." *Id.*

Regarding the S&S designation, for Inspector Hensley in his view the condition created a roof fall hazard that could result in serious injury to the people traveling through the area. Tr. 64. The Inspector referenced both the high volume of miners and the frequency of their travel through this intersection as contributing to the hazard:

> [Y]ou have people traveling and working through there all the time during the day. That's where the majority of your activity in your mines is [] on the section, itself, and that's normally where most of your people are at. So you've got the people going in and out of there all the time, and you're subject to crushing injuries from the roof fall especially of that magnitude. *Id.*

The amount of mining activity, the number of people who would normally travel through that area as part of that activity, and the inadequate roof support informed the Inspector's opinion that a roof fall that would crush or even kill people was reasonably likely to occur. Tr. 64-65. He stated that "this amount of rock is probably almost always going to be fatal." Tr. 67.[10] The Inspector added that, given the exposure, "it was reasonably likely that that accident was going to involve an injury; and it was reasonably likely to me that…the injury expected would be of a serious nature . . . ." *Id.* The Inspector opined that when Joey Brock encountered the draw rock and 8-foot cracks while roof bolting, those conditions brought about a reasonable likelihood that the roof would fall. Tr. 68-69. He further believed that the condition had existed for at least one day "[b]ecause of the extent of mining that had taken place and . . . [the time] when…the actual call came in." Tr. 69. He agreed that the condition was obvious because the bolters would have had to move the draw rock in order to bolt the crosscut. *Id.*

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[8] A roof bolter will know whether he has hit a crack in the roof while roof bolting if the steel bolt jumps slightly or hangs in the crack. Tr. 57. Mine examiners will take a tape measure and insert it in the crack to determine the size of the crack. *Id.*

[9] Inspector Hensley opined that those rope bolts "probably…would have been done before they cut the 4 right crosscut into that 5 heading." Tr. 59.

[10] The Inspector also recalled that, while working as a mine foreman, a "small piece" of draw rock "probably about 4-foot thick and a couple feet wide, maybe 2 of 3-feet in length" fell and hit his coworker on the ankle, to the point where he could not walk correctly or work after that incident. Tr. 62. Compared to this, the Inspector concluded that the injuries that could be expected from the May 24 rock fall were such that "if you get this much rock on you, you're probably and almost definitely not going to survive it." Tr. 62-63.

The Inspector marked that, due to the extent of the rock fall, two people would be affected by this condition. Ex. P-1; Tr. 67.[11] His notes indicated that, based on the number of miners working in the area, 10 persons could be affected by traveling through the area. Ex. P-2 [10/25/2011], p.6; Tr. 108. He elaborated that "most of the time when you're mining coal, you're going to have at least two people at the miner, maybe three, maybe four. And when you've got roof bolters in that area, you're going to have at least two." Tr. 67. In this area of the mine, miners would be traveling through both on foot and on machinery. Tr. 65. During the mining process, both the miner operator and the shuttle car operators would be in the area. *Id.* After the mining process had finished, roof bolters would work in the area, two of whom would operate the double head roof bolter machine. *Id*. Given the noise that roof bolting machines produce while running, Inspector Hensley noted that miners might not be alerted to any warning sounds from the roof before it falls. Tr. 65-66. Pre- and on-shift examiners would also be exposed to this hazard. Tr. 66.

Regarding the moderate negligence designation, the Inspector believed that the draw rock and cracks indicated problems with the roof that should have alerted the operator to take more steps to prevent the accident from occurring. Tr. 69-70. When Joey Brock encountered the draw rock, Inspector Hensley noted that he would have had to bring another machine into the area "to push that draw rock through this intersection so it can be bolted." Tr. 63-64. The Inspector concluded that under such circumstances "there's no way the foreman could not have known that that rock was in the intersection. It had to be moved." Tr. 64. The Court agrees with this observation. Inspector Hensley further expressed that, from his own mining experience, if a roof bolter encounters cracks in the roof, he informs his foreman. *Id.*[12] Inspector Hensley therefore could not envision a situation in which the foreman would have been unaware of the bad roof conditions in the area. *Id.* Since the cracks were present before the cut was bolted, the operator should have taken further steps to examine the roof more closely and then added more support to the area. Tr. 70. Aside from complying with its MSHA-approved roof control plan, the only other mitigating circumstance Inspector Hensley could recall was that two rope bolts were installed on each approach to the area. Tr. 72. He was unsure, however, whether these additional rope bolts were installed before or after the roof fall. Tr. 72-73.

On cross-examination, Inspector Hensley conceded that he found no violations of the mine's approved roof control plan when he conducted his nonfatal roof fall accident investigation on May 24, 2011. Tr. 76. When he arrived at the location of the roof fall, the cribs and timbers were in place, although it was his belief that both had been set after the fall. Tr. 79-

[11] At hearing, Inspector Hensley drew a sketch detailing the location of the roof fall and the placement of the cribs and timbers, which were erected next to the roof fall along both the No. 4 right crosscut and then along the No. 5 heading. Ex. P-4; Tr. 33.[11] He stressed that the location of the roof fall was in an area where miners were actively mining at the time of the fall. Tr. 37. During the normal mining process, miners would be in the entry doing dusting, clean-up, and conducting examinations. Tr. 38. In addition, if miners decided to cut the No. 5 heading, there would also be people cutting the coal, hauling the coal, and hanging the curtains, and if a cut was removed, then roof bolters would also be in that area. *Id.* Management would also travel through this area. Tr. 50. Given the number of people who would be passing through or working in this section, Inspector Hensley felt that this condition created a significant potential exposure to miners. *Id.*

[12] The Inspector did not believe Respondent conducted an adequate examination of the area. Tr. 71. He explained, "I don't believe that they would have left that top like that and exposed those people to that type of danger without taking some sort of steps to prevent it." *Id.* He did not issue a citation for a failure to conduct an adequate examination, however, because he did not think he could substantiate it. *Id.*

80. No one told Inspector Hensley during his pre-inspection meeting before entering the mine that the rock fall had been timbered, cribbed, and dangered off[13] prior to the rock fall. Tr. 88. The Inspector concluded that the cribbing had been installed after the roof fall and based this conclusion on his experience that normally when cribbing is installed before a roof fall, this "would have been the first thing you would have been informing the inspector." Tr. 120.

**Testimony of Dayshift Superintendent Jack Calloway**

Jack Calloway has worked at Liggett Mine No. 3 for about 12 years, where he has held the position of dayshift superintendent for the past 6 to 7 years. Tr. 124. Testifying about this matter, he stated that at around 6:30 a.m. on May 24, 2011, underground foreman Lonnie Couch contacted him about "some roof working or inadequate roof in the No. 5 entry, [which] he wanted [Calloway] to come look at it. [Calloway] told him to danger it off until [he] got there to look at it." Tr. 125. While checking test holes, Couch had located a shift in the test hole that prevented him from running a tapeline into the hole. Tr. 126, 134.

Thereafter, at around 8:00 a.m., a state inspector arrived at the mine and Calloway went with the state inspector to check the roof. Tr. 127. Around 8:30 a.m., Calloway directed that the area be dangered off and timbers were set on both ends of the intersection, on the No. 4 right side and No. 5 entry side. *Id.* At this time, the roof was "dribbling" pieces of rock from a quarter to a half-dollar size. Tr. 128. The state inspector was satisfied with the mine's actions and he did not issue any citations. Tr. 128, 169.

When the roof fall then occurred, at around 11 a.m., Mr. Calloway noted that the area had been tagged off, coal production had halted, and "[e]veryone was aware of what was going on." Tr. 129. Because of those actions, he did not believe there was any likelihood of a miner being injured from the conditions he observed during that shift because all miners were warned to stay out of the area. *Id.* He stated that the intersection of the No. 5 entry was supported by 5-foot blue bolts fully grouted and 10-foot rope bolts. *Id.*[14] He further recalled that the No. 5 intersection had been roof bolted three to four shifts prior to the fall. Tr. 130. Contrary to Inspector Hensley's testimony that Mr. Calloway was present at the pre-inspection conference, Mr. Calloway contended that as he had been in the midst of a shift change he had no opportunity to inform the Inspector about what had occurred in the section. Tr. 131. Accordingly, Mr. Calloway testified that he was unaware of any problem with the roof in the No. 5 entry until the morning of the fall. Tr. 131, 135. He also noted that nothing in the pre-shift or on-shift examination reports indicated any problem with this area of the roof. Tr. 131. Thus, it was his view that this condition could not have caused an injury to any miner because they located the problem and addressed it before anything could happen. *Id*.

Mr. Calloway acknowledged that he did not take notes on May 24 or May 25, 2011. Tr. 134. When asked if there were any more measures he could have taken prior to the roof fall, he

[13] To danger off or crib off an area does not necessarily prevent a roof fall, as these measures are only used to prevent people from going into the area. Tr. 120. Furthermore, a roof control plan is a minimum requirement; if an operator encounters adverse roof conditions that require additional support, the operator "is required to put additional support in those areas to prevent accidents from happening." Tr. 120-121.

[14] While confident in his notes reflection that the rope bolts measured 8 feet, Inspector Hensley also acknowledged that he could be mistaken and they could have in fact measured 10 feet. Tr. 102.

responded that they could have "cribbed the center of it all the way through the break and up the heading" in order to preserve the airway. Tr. 132. Aside from those measures, Mr. Calloway could think of no other safe and prudent measures he could have taken prior to the roof fall on May 24. Tr. 135-136.

**Testimony of Roof Bolter Joey Brock**

Mr. Joey Brock has 12 years of mining experience and has worked as a roof bolter for Liggett Mining for the past four years. Tr. 138. He testified that, on May 22, 2011, he bolted the No. 5 entry on the No. 3 MMU in the face area where the No. 4 right crosscut intersects to the No. 5 entry but noticed no problems with the roof at that time. Tr. 143, 149.[15] The following day, May 23, he bolted the No. 4 crosscut leading into the intersection and again saw no cracking or other adverse problems with the roof in this area while drilling on that day. Tr. 141-143, 149-151. He did not observe any cribbing installed in this area of the mine prior to the roof fall. Tr. 151.

Although he recalled talking to inspectors after the roof fall on the evening of May 24, there is a direct conflict in the testimony between Mr. Brock's recounting of the conversation and that provided by Inspector Hensley. Mr. Brock denied discussing roof problems with the Inspector. Tr. 152. When asked about how he responded to questions about whether he noticed adverse roof conditions or cracking prior to the roof fall, Mr. Brock stated that he "told them, no, while [he] was bolting the punch through and the intersection that [he] had not observed any roof conditions." Tr. 144. In addition, Brock stated that he "told [Inspector Hensley] that while [he] was bolting the place where the fall was, that [he] observed no cracks, no problem with it at all. [He] had all of [his] bolts anchored, and [he] didn't see no problems with it." Tr. 152.

On cross-examination, Mr. Brock agreed that he installed cable bolts[16] in the intersection and in the entire No. 5 entryway. When asked whether the installation of these bolts was part of the mine's roof control plan, Mr. Brock responded that he was "told by my supervisor that we were going through a place that had low—not a lot of coverage over the top of us, so we were just taking extra precaution[s] …" Tr. 146. He did not take notes concerning bolting either the intersection or the crosscuts prior to the roof fall, nor did he take notes from his conversation with Inspector Hensley on May 24. Tr. 147. Thus, his testimony was based on his recollections of the events.

[15] When drilling the mine roof, roof bolter Brock explained that he will check for cracks and loose rock. Tr. 139. Similar to Inspector Hensley's testimony, Brock also stated that the steel drill will jump or one will otherwise feel a crack in the roof when encountered while drilling. *Id.* When installing 5-foot fully grouted resin bolts, Mr. Brock will drill a 7-foot test hole; when installing 8-foot cable bolts, he drills 10-foot test holes. *Id.* During May 2011, Mr. Brock asserted that he only used 10-foot cable bolts, which he also used prior to the May 24 roof fall. Tr. 140. Safety Director Gene Fisher also asserted that 10-foot cable bolts were the shortest bolts present on the mine site. Tr. 162.

[16] Roof bolter Brock also referred to cable bolts as rope bolts. Tr. 146. The witnesses used these two terms interchangeably throughout the transcript.

**Testimony of Safety Director Gene Fisher**

With 25 years' experience in the mining industry, Gene Fisher has worked as a safety director for 12 of these years. Tr. 155-156. He has been employed by Liggett Mining and its parent company, Southern Coal Corporation, for over three years. Tr. 155. Fisher was present at the Liggett Mine on the evening of May 24, following Inspector Hensley's investigation. Tr. 157. Contrary to Inspector Hensley's testimony, Mr. Fisher stated that he did not speak with Inspector Hensley before the accident investigation, but he did converse with MSHA supervisor Argus Brock. *Id.* It was his testimony that he traveled with Argus Brock down to the area of the fall, and that he told Brock that the area was timbered off prior to the fall, but that the cribs were set after the fall. Tr. 157-158. Aside from the roof fall, Fisher did not find any adverse roof or rib conditions in the area. Tr. 158.[17]

At the time of the roof fall, the Liggett Mine had been in operation for between 6 to 7 years and 9.2 miles of mining had been performed. Tr. 160. The roof fall on May 24, 2011 was the only roof fall occurrence Mr. Fisher could recall in his three years at Liggett. *Id.* In the two years preceding the roof fall, MSHA had issued five roof control citations at the mine, two of which were S&S. Tr. 168. Aside from section foreman Lonnie Couch's reports of adverse roof conditions on the morning of the fall, Mr. Fisher received no prior notifications from the pre- or on-shift records of problems with the roof. Tr. 161, 166. Fisher stated that the purpose of an approved roof control plan is to control adverse roof conditions and otherwise provide safe mining operations. Tr. 156. However, he noted that roof control plans cannot prevent roof falls, and adverse roof conditions can occur even when a mine exceeds its roof control plan. *Id.*

Contrary to his testimony at the hearing, Mr. Fisher also sent a signed letter to FMSHRC,[18] dated August 23, 2012, regarding the May 24, 2011 roof fall, which stated that "[t]he roof was discovered to be deteriorating approximately 18 hours prior to the fall. At that time this area was timbered off and danger ribbon hung." Ex. P-6, p.3; Tr. 191. Mr. Fisher agreed that he wrote and signed the letter, but at the hearing took the position that his notes were wrong: "I'm assuming my notes are incorrect. If I wrote this at a later date or the first date, this could be incorrect versus this (indicating), but now I'm not sure. I can't say either one of them are correct now." Tr. 192.

**The Secretary's Arguments**

The Secretary asserted at hearing that not only did Respondent encounter faulty roof conditions and not take proper steps to address the area, but also contended that, had the roof fall not occurred, Respondent would have continued mining in these areas despite encountering hazards in the roof. Tr. 45. The Secretary contends that the Respondent violated Section 75.202(a) when it failed to address the roof conditions encountered, by failing to meet the

[17] Mr. Fisher provided typed, undated notes that articulated his objections to this Citation and Respondent's representative repeated those same objections during the hearing. Ex. RX-1; Tr. 166. He first drafted the notes in handwritten form. Ex. RX-7; Tr. 179. He testified that he wrote out these notes on or about May 25, 2011, and then cleaned them up and typed them out before submitting them to MSHA. Tr. 180-81.

[18] At the hearing, the Secretary referenced the letter that Gene Fisher wrote to MSHA. Tr. 191. Exhibit P-6, however, indicates that this letter was in fact addressed to the Federal Mine Safety and Health Review Commission. While this discrepancy in the intended recipient does not alter the substance of Mr. Fisher's letter, the Court notes that it was addressed to the Commission.

requirements of the "reasonably prudent person" test, as articulated in *Canon Coal*, 9 FMSHRC 667, 668 (April 1987). Sec Br. 6. Although roof bolter Brock denied encountering adverse roof conditions in or near the intersection prior to the May 24 roof fall, he did testify that he bolted in that area around May 22 and again on May 23. *Id.*; Tr. 148-51. The Secretary urges the Court to credit Inspector Hensley's testimony over that of roof bolter Brock. In this regard it points to the Inspector's conversation with roof bolter Brock in which he learned that Brock had encountered draw rock and cracking in the roof in the days before the fall. Sec. Br. 6-7. In addition to this admission, the Secretary also asserts that the intersection's proximity to the outcrop line notified the mine of weakening roof conditions. The Secretary presented this as an additional basis for employing close scrutiny to those conditions, noting that roof bolter Brock testified that his supervisor advised him of the need for extra precautions to be taken in the area. *Id.*; Tr. 146. Given the geological factors that the roof bolters encountered, a reasonably prudent miner would have installed additional roof support, such as cribbing, jacks with beams across the entry, and/or longer bolts in the area. Sec. Br. 9. The Court does not adopt this second basis advanced by the Secretary because the testimony of Inspector Hensley does not support it.

Regarding the Inspector's evaluation of the violation, per his citation, the Secretary urges upholding Inspector Hensley's S&S determination, maintaining that there was a reasonable likelihood that the hazard contributed to -- a roof fall -- would result in a serious injury to at least two miners. Sec. Br. 14. The mine's use of insufficient roof support in the areas where draw rock and cracks were observed increased the likelihood of a roof fall, while the proximity of this area to the working face posed a significant risk to workers there. *Id.*

Finally, the Secretary contends that Inspector Hensley's moderate negligence designation is proper as the mine should have known that more support was needed in the right crosscut connecting to the No. 5 entry, given the conditions encountered. Sec. Br. 15. It is reasonable to presume that the foreman would have been alerted to the draw rock that had fallen in the intersection. *Id.* As noted, as a separate argument, the Secretary also maintains that the Respondent should have been on notice that the roof needed more support as the mining was reaching the outcrop area. *Id.* In this regard, it notes that roof bolter Brock testified that his supervisor instructed him to take extra precautions in the area. *Id.* As also noted, the Court finds that the evidence of record does not support the claim that the proximity to the outcrop area was a factor.

**Respondent's Arguments**

Respondent argues that Liggett's compliance with its approved roof control plan evidences its ability to control the hazard. Liggett not only followed, but exceeded its roof control plan by installing one extra roof bolt in each row of roof bolts. Resp. Br. 3, 10; Tr. 84. It maintains that the roof was adequately supported in the No. 5 entry from May 22, when the area was first roof bolted, and remained so, through May 24 at 7:00 a.m. when the roof began to show signs of deterioration. Resp. Br. 10. Regarding the gravity of the violation, Respondent argues that the area was dangered off, timbered, and cribbed to prevent exposure to miners. Resp. Br. 8. The examiner discovered the hazardous roof conditions prior to the shift, and this early discovery meant that miners were not exposed to the hazard. Resp. Br. at 11. Respondent notes that anomalies in the roof can be unexpected and even uncontrollable, but the mine's compliance with its roof control plan, its discovery of the adverse condition prior to a mining

shift, and its protection of miners by warning them of the danger and dangering off and setting timbers and cribbing in the area, effectively controlled the hazard. Resp. Br. at 11.

**Discussion**

The Court finds that the Secretary established a violation of Section 75.202(a), and also upholds Inspector Hensley's gravity determinations regarding the injury being reasonably likely to occur, that the evidence supports the significant and substantial characterization, and that the negligence involved was moderate. However, upon applying the six statutory criteria set forth in Section 110(i) of the Mine Act, for the reasons set forth herein, the Court has reduced the civil penalty to $10,000.00.

**Violation of 30 C.F.R. § 75.202(a)**

Section 75.200, which is derived from Section 302(a) of the Mine Act, 30 U.S.C. § 862(a), and the related standards within Subpart C – Roof Support – are all part of the mandatory safety standards of central importance in the crucial regulatory area of roof control in underground coal mines. *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). With respect to the particular requirements in Section 75.202, that roof and ribs "be supported or otherwise controlled," this standard is expressed in general terms so that it is adaptable to myriad roof condition and control situations. *Id. See*, *generally Kerr–McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981).

As expressed above, the Commission evaluates alleged violations of roof standards under Subpart C, Roof Support, Section 75.200 *et seq*, such as the Citation at issue here under Section 75.202(a), by employing the "reasonably prudent person" test, articulated in *Canon Coal Co.*, 9 FMSHRC at 668. In *Canon Coal,* the Commission stated that "[q]uestions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent." *Id.* (citations omitted). "Specifically, the adequacy of particular roof support or other control *must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard*." *Id.* (emphasis added). The Commission stated that "the reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Id.* (*citing Great Western Electric Co.*, 5 FMSHRC 840, 842–43 (May 1983); *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)).[19]

The Commission has recognized that the various factors, bearing upon what a reasonably prudent person would know and conclude, include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

[19] The Commission reiterated this interpretation in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), wherein it stated that "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

*BHP Minerals Int'l*, *Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. *U.S. Steel Mining Co. L.L.C*, 27 FMSHRC 435, 439 (May 2005) (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5 (1983)). It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based on the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *Id.* (quoting *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992)).

Inspector Hensley recorded in his investigation detailed and timely-made notes of the events that transpired after the roof fall on May 24, 2011. His May 24 notes relate that he spoke privately with Liggett roof bolter Joey Brock, who had bolted the intersection and surrounding area in the days preceding the fall. Ex. P-2 [5/24/2011], p.6. Inspector Hensley's notes made the next morning, May 25, elaborate upon Brock's statements to the Inspector the day before. These notes disclose that Brock saw cracking in the roof and that 18 to 24 inches of draw rock had fallen from the roof in the No. 4 crosscut. The draw rock was of an amount that it first had to be pushed aside before additional cutting could occur in the No. 5 heading. Ex. P-2 [5/25/11] p. 3; Tr. 27. Inspector Hensley recorded the substance of his conversation with roof bolter Brock while the events were still fresh in his mind. In contrast, neither Joey Brock nor Jack Calloway took notes in the aftermath of the roof fall; rather, in their testimony at the hearing, they relied solely on their memories to recall events that occurred two years earlier. Tr. 147; Tr. 134. Under the circumstances, and considering the Inspector's notes about his conversation with roof bolter Brock taken very near to the time at which he spoke with the roof bolter about the roof support issues, Brock's denial of the conversation is not viewed to be as credible as Inspector Hensley's recounting.

Although Safety Director Gene Fisher took notes after the roof fall, these notes were not dated and they do not provide a substantive counterpoint to the information Inspector Hensley gathered. *See* Ex. RX-1, RX-7. Furthermore, Mr. Fisher wrote in his letter addressed to FMSHRC on August 23, 2012 that the roof conditions began to deteriorate approximately *18 hours prior* to the fall. Ex. P-6; Tr. 191. As that 18-hour time frame, establishing Liggett's awareness of the deteriorating conditions, supports Inspector Hensley's investigatory conclusions, Fisher was left in an awkward position, having to deny the accuracy of his own notes. Tr. 192. Mr. Fisher's letter thus presents a major problem for the Respondent's contentions about the time the adverse conditions were first discovered in the mine. *See* Sec. Br. 11. Given the sequence of events, the Court cannot credit Mr. Fisher's subsequent testimony regarding the moment that management first became aware of the roof problem nor accept his effort to divorce himself from his notes.

Based upon the Inspector's more reliable testimony, the Court agrees with the Inspector's opinion and Secretary's position that the mine should have taken additional measures to support the roof prior to the fall. When a miner is confronted with cracking and draw rock, such as roof bolter Brock encountered around May 22, Inspector Hensley stressed that "you immediately have got to go to either longer bolts, rope bolts is what most people go to; or you may install jacks and cribs or collars or something like that." Tr. 56. He elaborated upon the additional precautions that Liggett could have taken to prevent a roof fall: "They should have installed either the cribbing. They could have installed jacks with beams across the entry. They could have put in longer bolts. Normally that would be rope bolts, and they did none of those things." Tr. 58. Instead of taking any of these extra precautions, the only thing the Inspector noticed was

that they had placed two rope bolts in the No. 4 right entry and two rope bolts in the No. 5 heading. *Id*. He noted that these efforts were insufficient because the placement of these bolts was not in the intersection itself, and "in that greater potential danger area, there was actually nothing done except the normal bolting." Tr. 58-59.

The Respondent has pointed out that the mine installed an additional roof bolt to each row of bolts, and also installed four 10-foot cable roof bolts, and that neither of these actions were required by the roof control plan. With those actions, Liggett maintains that the roof was adequately supported until May 24th when, at 7:00 a.m., the roof first showed signs of deterioration. While acknowledging that the roof fell four hours later, at 11:00 a.m., Liggett asserts that its additional bolting, as described above, and its recognition of the roof hazard and the dangering off of the area, translates into compliance with standard. Resp. Br. 10-11. However, as set forth in this decision, the Court does not agree with Liggett's contention about the time frame of the discovery of the problem, nor that it had done all it could to address it.

The Court further concludes that both the cribbing and the timbers were installed after the roof fall. The witnesses each tended to agree that the cribbing was set after the roof fall. Tr. 63, 120 (Inspector Hensley); Tr. 132, 135 (Jack Calloway acknowledged that they could have installed additional cribbing in the intersection "all the way through the break and up the heading"); Tr. 150-151 (Joey Brock did not observe any cribbing installed in that area at any time prior to the fall); Tr. 158 (Gene Fisher told MSHA Supervisor Argus Brock that the cribs were set *after* the fall). There is, however, a dispute as to when the timbers were set in the area. Inspector Hensley opined that the timbers were set after the fall, while Safety Director Fisher asserted that they were set prior to the fall. Tr. 79-80 (Hensley); Tr. 157-58 (Fisher). Jack Calloway testified that they timbered the area and then dangered it off prior to the fall, around 8 a.m., after the state inspector arrived. Tr. 127. The Court credits Inspector Hensley's determination, which is also supplemented by the state inspector's notes that the cribs *and* timbers were both set after the fall: "During inspection on 5-24[,] roof fall occurred in 5 heading intersection last open cross cut area was checked *then* cribbed and timbered out by fall and dangered off." Ex. RX-2, p. 3 (emphasis added).[20]

Accordingly, for the foregoing reasons, the Court credits Inspector Hensley's testimony regarding the events of May 24, 2011. Given the weight of this testimony, the Court holds that the Secretary has met its burden in establishing Respondent's violation of Section 75.202(a) per the requirements of the reasonably prudent person test.

In its brief, Respondent proposes a test for determining whether a violation occurred that does not fully coincide with Commission precedent. As noted, for violations of roof control standards, the Commission applies the reasonably prudent person test, as articulated in *Canon Coal*. However, the Respondent argues that the test in this case "should be was the approved roof control plan followed [;] if so were there any adverse roof conditions that indicated

[20] The size of the cable bolts installed in the area was also disputed. Inspector Hensley recorded that the mine used 8-foot cable bolts, while the Respondent's witnesses each asserted that the mine uses 10-foot bolts, thereby indicating additional roof support. Tr. 139-40. The Court views this dispute between the claim that 8-foot cable bolts were installed versus 10-foot bolts to be a distraction which is not critical to resolving whether the standard was violated. The outcrop issue is another distraction, because the impact of this geological location is merely speculative. The mine was not mining in the no-mining zone, nor did this event occur in the no-mining zone. This decision is focused on the conditions encountered prior to the fall and must be limited to that area.

additional supplemental roof supports were needed when the initial roof supports were installed [; and finally], how effective has the approved roof control plan been in protecting miners?" Resp. Br. 12. Respondent's interpretation would alter the *Canon Coal* test to coincide with its own argument that the mine followed its approved roof control plan and is therefore shielded from liability. The applicable test, however, does not hinge upon whether an MSHA-approved plan was adequately followed, but whether a reasonably prudent person familiar with the mining industry would have taken additional measures beyond those in the plan. Roof control plans are minimum requirements; a mine's compliance with its approved roof control plan does not necessarily insulate it from liability in the event of a hazardous roof condition or roof fall. Additional steps must be employed where, as here, the evidence of the roof conditions so demonstrated their need. The hazardous conditions, as identified by Inspector Hensley, and as conceded to him as having been present, as per his interview of the roof bolter who had firsthand knowledge of those conditions, were encountered. Given those encounters, Respondent failed to take the efforts that a reasonably prudent person familiar with the mining industry would have taken when faced with such circumstances.

As Inspector Hensley was the more credible of the witnesses, the Court finds that Respondent violated Section 75.202(a). The draw rock preceding the fall was significant and the mine therefore should have reacted sooner than it did. The activity in the roof presented a very hazardous condition and a reasonably prudent person familiar with the mining industry would have taken additional measures to control this problem prior to the fall.

**Significant and Substantial**

The 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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

*Id.* at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The absence of an injury-producing event when a cited practice has occurred does not preclude the determination of S&S. *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (citing *Musser Engingeering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

The Court sustains Inspector Hensley's S&S finding. The first two elements under *Mathies* were plainly established. For the reasons discussed above, the roof fall that occurred in the Liggett No. 3 Mine on May 24, 2011 constituted a violation of Section 75.202(a), a

mandatory safety standard. Second, the discrete safety hazard is a roof fall, which, in this instance, occurred.

Respondent's primary challenge to the S&S determination involves whether the Secretary established the third prong of the *Mathies* test. Although it was fortunate that no injury resulted from this roof fall, such a sequence of events does not prevent the Court from upholding Inspector Hensley's S&S designation. Given the intersection's proximity to active mining, coupled with the ongoing miner presence in the area, it was reasonably likely that the inadequately supported roof would result in an injury. The enormity of the fall, which measured about 25 feet by 25 feet by 8 feet high in debris, is another significant factor. The roof area in this intersection, which showed signs of deterioration prior to the time the area was dangered off, could have injured individuals such as the roof bolters, miner operators, or shuttle car operators. Tr. 65. That no one was in fact injured speaks more to a matter of good fortune, not to the assessment of the reasonable likelihood of its occurrence.

As noted, Respondent has contended that Jack Calloway dangered off the area shortly after section foreman Lonnie Couch noticed problems with the roof on the morning of May 24 and therefore no Liggett miners were at risk of injury from this hazardous condition. These efforts, however, do not negate the credible testimony which establishes that this hazardous condition existed prior to the morning of May 24. Miners such as Joey Brock were exposed to the reasonable likelihood of a roof fall that could have resulted in a very serious injury at a time before the area was dangered off and while active mining was still in process.

Finally, given the significant amount of rock that fell from the roof, which Inspector Hensley estimated at 25 feet by 25 feet by 8 feet high, it was reasonably likely that any injury sustained from the roof fall clearly would have been of a reasonably serious nature. As Inspector Hensley remarked, it would be unlikely that a miner caught in a roof fall of this size would survive such an event. Tr. 63. Accordingly the Court sustains the Inspector's S&S finding.

**Negligence**

Negligence is defined as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d) (2011). Under the Mine Act, "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent previous hazardous conditions or practices." *Id.* Moderate negligence exists when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* (emphasis added).

The Court subscribes to the Secretary's contention that moderate negligence was present, based upon the draw rock and the imputation that the foreman would have known about that condition once it was discovered by the roof bolters. Sec. Br. 5. As the Secretary points out, the roof bolter would have followed standard protocol upon locating draw rock and would have reported the condition to the foreman. Sec. Br. 15. Inspector Hensley drew from his experience as a foreman when he concluded that a foreman would have been alerted about the draw rock which was in the intersection because it needed to be removed. Tr. 64. Here, the roof bolters had to remove the draw rock in order to continue mining, and Inspector Hensley noted that Joey Brock informed him that they moved the rock over into the No. 5 heading so they could continue

to cut coal. Tr. 27. Even if Joey Brock, who was not a part of management, did not inform management of the draw rock issue, his supervisor's instructions to install additional cable bolts as extra precautionary measures demonstrate management's awareness of this adverse roof condition. Tr. 146. Furthermore, Gene Fisher's letter noting that "The roof was discovered to be deteriorating *approximately 18 hours prior to the fall*" supports the Court's conclusion that the mine either knew or should have known about this condition. Ex. P-6; Tr. 191 (emphasis added).

Also noteworthy is that, despite Joey Brock's denial of any prior knowledge about this roof condition, Respondent did not dispute the Secretary's contention that the draw rock was pushed aside. If anything, in its brief, Respondent concedes the presence of the draw rock: "The draw rock had already fallen in the unsupported area of the crosscut and was not a hazard … The theory that anytime you have draw rock a major roof fall is imminent is inconsistent with MSHA's approved roof control plans and overall scheme of supporting the roof." Resp. Br. 12. Although Respondent attempts to diminish the draw rock issue as an incidental event, the Court considers the draw rock and its extent, along with the cracking, as twin-warnings, demonstrating that they had come against a hazardous roof condition which needed to be addressed. The Court concludes that Respondent either knew or should have known of this hazardous roof condition prior to the fall. As such, the Court sustains Inspector Hensley's moderate negligence designation.

**Penalty Assessment** [21]

Section 110(i) of the Mine Act confers upon the Commission the authority to assess civil penalties provided in this Act. The Court has considered the six penalty criteria set forth in Section 110(i), and concludes that a civil penalty of $10,000.00 is appropriate upon application of those criteria. In assessing civil monetary penalties, the Commission shall consider (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of violation.

It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1288-89 (Oct. 2010) (citing *Cantera Green*, 22 FMSHRC 616, 620 (May 2000)). In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in Section 110(i) and the deterrent purposes of the Act. *Cantera Green*, 22 FMSHRC at 620.

The Court finds mitigating factors were present in this case. The Liggett Mine employed an MSHA-approved roof control plan at the time of the roof fall. Inspector Hensley recalled that

[21] Although a special assessment was proposed, the penalty in this decision is based strictly upon the evidence presented at hearing. The findings of fact derived from this evidence are then applied to the statutory penalty factors. Respondent's attempt to litigate the propriety of MSHA's decision to issue a special assessment is not cognizable in the hearing setting. Therefore, Respondent's contentions regarding MSHA's alleged motive for issuing its special assessment are not material to this proceeding. *See* Tr. 111-112.

the mine had installed 5-foot resin grouted bolts, as well as two 8-foot rope bolts in the intersection close to the area where cribs were built. Tr. 30. He also recalled that two additional roof bolts were installed in the No. 5 heading near the cribbed area. *Id.* Inspector Hensley did not dispute that the Liggett Mine took efforts to secure the roof in that area, which efforts exceeded its approved roof control plan. Tr. 36. For example, the rope bolts that were installed near the cribbing were not required under the mine's roof control plan. Tr. 35-36. The mine also employed an additional bolt in each row of roof bolts. Tr. 84. Furthermore, no other roof control violations were discovered in the 420-foot area around the intersection where Inspector Hensley conducted his accident investigation. Tr. 81.

After investigating the fall area, Inspector Hensley and Argus Brock examined the working section for five crosscuts outby the working section, which covered a distance of about 420-feet. Tr. 80. They found that the roof was adequately supported with no adverse roof conditions for that 420-foot span in the five entries. Tr. 81. As just noted, Inspector Hensley acknowledged that the mine exceeded its minimum roof control plan by placing five roof bolts in a row rather than the four bolts required by the plan, at least in the section he observed. Tr. 84.

The Liggett Mine's history of previous violations and its good faith efforts to achieve rapid compliance after notification of the violation also afford grounds to support a penalty reduction. The roof fall on May 24, 2011 was the only roof fall Gene Fisher could recall occurring in his three years at Liggett. Tr. 160. MSHA had issued five roof control citations at the mine, two of which were marked S&S, in the two years preceding the roof fall. Tr. 168. Inspector Hensley noted that its history of violations is about average for a mine of Liggett's size. Tr. 117. This record indicates the Respondent's history of compliance with roof control safety measures. Furthermore, the mine ultimately made good faith efforts on the morning of May 24, 2011 to control the hazardous condition, albeit those efforts should have been initiated sooner. The area was dangered off so that no miners came into contact with the intersection in the hours leading up to the roof fall. Additionally, although this condition itself was quite serious, it was isolated. Inspector Hensley did not locate pervasive roof control issues during his accident inspection; in fact, he found that the roof was adequately supported with no adverse roof conditions for the 420-foot span in the five entries outby the working section. Tr. 80-81. Given Liggett's history of compliance with roof control standards and its good faith efforts to control the hazard, as described above, a reduction in penalty is justified and the Court therefore imposes the $10,000.00 civil penalty.

Within 40 days of this decision, Liggett Mining is **ORDERED** to pay a civil penalty in the total amount of $10,000.00 for the violation identified above. Upon payment of the civil penalty imposed, this proceeding is **DISMISSED**.

**SO ORDERED**.

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

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January 7, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. CENT 2012-199<br>A.C. No. 29-00097-271526 |
| v. | : | |
| BHP NAVAJO COAL COMPANY, Respondent. | : | Navajo Mine |

## DECISION

Appearances: Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Sherman & Howard LLC, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against BHP Navajo Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Durango, Colorado and submitted post-hearing briefs.

BHP Navajo operates a large surface coal mine in San Juan County, New Mexico. A total of seven section 104(a) citations were adjudicated at the hearing. Two section 104(a) citations were settled immediately before the hearing and therefore were not adjudicated. The Secretary proposed a total penalty of $103,037.00 for the adjudicated citations.

## I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Citation No. 8141178

On September 20, 2011, Inspector Danny Craig Cerise issued Citation No. 8141178 under section 104(a) of the Mine Act, alleging a violation of section 77.202 of the Secretary's safety standards. (Ex. G-2). At hearing, the Secretary amended the citation to allege a violation of section 77.1607(i). The citation states that float coal dust enveloped two front end loaders that were loading coal from a stockpile into a train. The dust made it "difficult to see rail cars." *Id*. Inspector Cerise determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he

determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was moderate, and that two persons would be affected. Section 77.1607(i) of the Secretary's safety standards requires that during the operation of loading equipment "[d]ust control measures shall be taken where dust significantly reduces visibility of equipment operators." 30 C.F.R. § 77.1607(i). The Secretary proposed a penalty of $1,304.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8141178.

**Discussion and Analysis**

I find that the Secretary did not fulfill his burden to show that Respondent violated section 77.1607(i). The Secretary must prove the existence of a violation by a preponderance of the evidence. *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Based upon the inspector's testimony and photographs, the dust reduced the visibility of the loader operators. (Tr. 19-22; Ex. R-A). The Secretary did not show, however, that the dust *significantly* reduced visibility of the equipment operators in question. The photos in Respondent's Exhibit A and the Secretary's Exhibit 2 do not conclusively show that the dust significantly reduced the visibility to the loader operators such that a safety hazard was created. Although the dust is thick in some places, those sections are generally below the cab of the loaders, which would not significantly reduce the operators' visibility. The dust dissipated as soon as the loaders moved. Other than the two loaders, there were no obstructions or other equipment in the loading area. (Exs. G-2, R-A). The inspector, furthermore, did not have a view from inside the cab during operation and he observed the cited conditions from a distance. (Tr. 37; Ex. G-2). The operators of the vehicles told the inspector that their visibility was unaffected by the dust clouds. (Tr. 37). Respondent, moreover, watered the roadways in the cited area to combat dust. (Tr. 42, 60). The Secretary did not present sufficient evidence to show that the cited condition significantly obscured the visibility of the operators of the equipment in question. I hereby **VACATE** Citation No. 8141178.

**B. Citation No. 8567301**

On September 20, 2011, Inspector Jeff D. (Bill) Scott issued Citation No. 8567301 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(b) of the Secretary's safety standards. (Ex. G-5). The citation states that the operator "failed to install flexible connections to prevent adverse effects from the tank settling." Tank movement possibly pushed the conduit clamps off and damaged a steel pipe and union, creating a constant drip of gasoline. The condition existed for more than a shift to weeks; large paint blister developed from the leaking gasoline and a large vapor ball existed. *Id*. Inspector Scott determined that an injury was highly likely to occur and that such an injury could reasonably be expected to result in a fatal injury. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that nine persons would be affected. Section 77.1103(b) of the Secretary's safety standards mandates that "[o]utlet piping shall be provided with flexible connections or other special fittings to prevent adverse effects from tank settling." 30 C.F.R. § 77.1103(b). The Secretary proposed a penalty of $32,810.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567301. I find that the cited conditions were reasonably, not highly likely, to cause a serious injury and I find that fewer than nine persons would be affected.

**Discussion and Analysis**

Inspector Scott issued Citation Nos. 8567301, 8567302, 8567303, and 8567304 at the North Plant of the mine. The North Plant was a large open area that contained maintenance facilities and a laboratory. (Ex. R-D). Along the south side of this plant there were bulk storage tanks containing diesel fuel and gasoline. These tanks were on a concrete pad that was a few feet below ground level and there was a concrete retaining wall around the tanks. (Ex. R-B). The roadway entrance to the North Plant was on the north side. A fueling station was located to the west of the storage tanks. There was a chain-link fence along the south side of the North Plant behind the fuel tanks but there was at least one opening in the fence that constituted a principal means of access because miners could use that opening to enter the area on foot from a parking lot. (Tr. 177; Ex. R-D). There was no roadway entering the North Plant from the south.

I find that the conditions cited in Citation No. 8567301 violated section 77.1103(b). The cited fuel tank lacked a flexible connection to prevent adverse effects caused by the tank settling. Although one end of the cited fuel line had a flexible connection, the end attached to the fuel tank did not. (Tr. 101-02). As a result, a conduit clamp was missing from one section of the fuel line and the fuel tank leaked gasoline. (Ex. G-5 at 4). I find that this damage was most likely caused by the lack of a flexible connection between the fuel tank and the fuel line. Respondent argues that the Secretary did not show that the cited tank settled and also asserts that the fuel line had numerous and sufficient flexible connections. I credit the inspector's testimony that the settling of the tank combined with the lack of the specific flexible connection between the fuel tank and line caused the broken conduit clamp and leak. (Tr. 111-12). Although the cited fuel line did have flexible connections, it lacked a flexible connection at the vital juncture where the tank and fuel line met. The fact that the leak occurred at that point suggests that the leak was caused by movement of the tank itself and not of the fuel lines. The lack of a flexible connection between the tank and fuel line caused the adverse effect of a fuel leak when the tank settled.

Citation No. 8567301 was S&S.[1] The missing flexible connection contributed to the gasoline leak at the union between the fuel tank and fuel line, which caused the hazard of fire or

[1] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995).

explosion. Fires and explosions can cause injuries including burns and smoke inhalation that could be fatal. I credit the inspector's testimony that potential ignition sources existed. (Tr. 134-36). These ignition sources included damaged electrical conductors, a static charge, and welding equipment. I recognize that these ignition sources were not always present, but it appears that the gasoline leak existed for a considerable length of time and there is no indication that it would have been corrected in the near future. Both the inspector and Leonard Palmer, who dealt with injuries and escorted inspectors for Respondent, smelled gasoline as they approached the fuel tanks and saw the gas actively leaking from the tank. (Tr. 90, 115, 285-87). They differed as to the strength of the odor. The inspector also averred that the gas leak could create a dangerous "vapor ball" that could be ignited. (Tr. 90-91). I find that, assuming continuing mining operations, the leaking gasoline would have contributed to the cause and effect of a significant hazard of a fire or explosion that would reasonably likely injure a miner.

Although the facts presented by the Secretary convince me that a serious injury was reasonably likely, I find that the Secretary did not fulfill his burden to prove that an injury was highly likely. The testimony of the inspector and other evidence presented by the Secretary fails to show the cited condition was highly likely to lead to an injury or even to quantify how likely the cited conditions were to contribute to an injury. Despite numerous and specific questions pertaining to the likelihood of an injury occurring, the inspector would only testify that injuries caused by the cited condition would be serious in nature and should have been obvious to miners. (Tr. 137-38). The inspector stated the conclusion that the cited condition was highly likely to contribute to an injury, but did not provide an explanation why it was highly likely to do so. (Tr. 139).

The inspector's testimony concerning possible ignition sources focuses on the contact of those sources with the vapor ball. I do not credit the inspector's testimony that the leaking gasoline could have created a vapor ball capable of being ignited from as far away as the laboratory to the east of the tanks or the employee parking lot to the south. The leak was simply a drip that occurred every few seconds. Palmer testified that the smell was not much stronger than what motorists would encounter at a gasoline service station. (Tr. 284). Most importantly, this bulk fuel storage facility was located outside, away from any buildings in an open area on the high plains where breezes are almost always present. Any vapors would quickly dissipate to a level that would be neither explosive nor flammable. My S&S finding is based upon the contribution of the violation to a fire or explosion if an ignition source came within a few feet of the leak. I find it was not highly likely that flammable vapor would come into contact with ignition sources that were not directly adjacent to the fuel tanks. (134-35). Citation No. 8567301 was S&S because it was reasonably likely to cause a serious injury with continued operations.

Respondent's moderate negligence caused the violation cited in Citation No. 8567301. Both the inspector and Palmer smelled the gasoline leaking from the fuel line from a distance and saw the leak once they approached it. (Tr. 285, 287, 115-17). Respondent should have known of the cited condition.

I modify Citation No. 8567301 from highly likely to reasonably likely to cause an injury. I also find that fewer than nine persons would be affected by the violation. The inspector's testimony concerning the number of persons affected was vague, unconvincing, and seemed to

include every miner who approached him out of curiosity. (Tr. 139-40). I find it more likely that only one or two miners would be in the area at the same time in the event of a fire. Firefighting personnel and first responders were less likely to be injured especially considering the open area around the fuels tanks. The gravity was serious. A penalty of $10,000.00 is appropriate for Citation No. 8567301.

### C. Citation No. 8567302

On September 21, 2011, Inspector Scott issued Citation No. 8567302 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(c) of the Secretary's safety standards. (Ex. G-5). The citation did not specify how the standard was violated, but the inspector testified that the cited fuel lines lacked shutoff valves. (Ex. G-6; Tr. 104). Inspector Scott determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that nine persons would be affected. Section 77.1103(c) of the Secretary's safety standards mandates that "[f]uel lines shall be equipped with valves to cut off fuel at the source and shall be located and maintained to minimize fire hazards." 30 C.F.R. § 77.1103(c). The Secretary proposed a penalty of $32,810.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8567302.

#### Discussion and Analysis

The condition cited in Citation No. 8567302 did not violate section 77.1103(c) and I therefore vacate Citation No. 8567302. The cited gasoline tank was equipped with valves that cut off the fuel at the source. Ned Begay, a safety specialist for Respondent, testified that an electric emergency cut off switch was 68 feet from the fuel tanks and could cut off the fuel from all three tanks. (Tr. 246-47; Ex. R-B at 11). The solenoid for the electric cut off switch was located a few inches from the tanks and would shut off the fuel at that location when the switch was activated. (Tr. 317, 330-31; Ex. G-6 at 3). George Kelly, a business process data coach for Respondent, corroborated Begay's testimony, but also testified that there was a manual shutoff valve on the discharge side of each of the tanks. (Tr. 314). The inspector also testified that manual shut off valves existed. (Tr. 187-88). Based upon the cited testimony, I reject the Secretary's argument that the fuel shut off valves would not cut off fuel at the source; the solenoid switch was only inches from the cited tank, which was the source of the fuel. The switch to operate that solenoid was 68 feet from the tank and could be accessed safely in the event of an emergency. I hereby **VACATE** Citation No. 8567302.

### D. Citation No. 8567303

On September 20, 2011, Inspector Scott issued Citation No. 8567303 under section 104(a) of the Mine Act, alleging a violation of section 77.1103(a) of the Secretary's safety standards. (Ex. G-7). The citation states that the operator did not post required placards upon the south and east sides of fuel tanks. *Id*. Inspector Scott determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that nine

persons would be affected. Section 77.1103(a) of the Secretary's safety standards mandates that "[f]lammable liquids shall be stored in accordance with standards of the National Fire Protection Association." 30 C.F.R. § 77.1103(a). The Secretary proposed a penalty of $32,810.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567303. I find that the cited condition was a violation of section 77.1103(a) and the result of Respondent's moderate negligence, but was unlikely to lead to a serious injury and would not affect nine people.

**Discussion and Analysis**

I find that Respondent violated section 77.1103(a). The National Fire Protection Association ("NFPA") requires that, at a minimum, warning placards must be posted at "[e]ach principal means of access to an exterior storage area" of flammable liquids. (Ex. G-16). Respondent did not have placards upon the south and east sides of the cited fuel tank. (Tr. 151).

I find, however, that Citation No. 8567303 was not S&S. The cited absence of warning placards was not reasonably likely to lead to a serious injury in the event of a fire. Violations involving safety during an emergency should be evaluated in the context of the contemplated emergency. *Cumberland Coal Resources LP*, 33 FMSHRC 2357 (Oct. 2011), 2366 *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). The NFPA placards serve to provide information about flammable materials to firefighters and other responders in the event of a fire. The main entrance to the fueling area was on the north side of the plant and that entrance was the only entrance for vehicles. (Tr. 176). Placards were posted upon the fuel tanks in a position visible from the north. (Tr. 178; Ex. R-B). I credit Val Lynch's testimony that access from the main gate of the mine to fueling area was via the haul road to the north of the plant and that firefighters were unlikely to approach the fire from the south or east. (Tr. 351, 359, 362). Even if the wind blew from the south or east, the approach would be from the north and west. The tanks were clearly marked from those directions. In addition, firefighters would be unlikely to fight a fire with a fence to their backs. The missing placards were not reasonably likely to contribute to a serious injury because firefighters would see the placards upon the north and west sides of the tanks.

I find that Citation No. 8567303 was the result of Respondent's moderate negligence. The fuel tanks formerly had placards upon the south and east sides and Jay Arnold, an electrician at the mine, testified that he had requested that these placards be replaced. (Tr. 214). Respondent should have known of the cited condition. For the reasons discussed in reference to Citation No. 8567301, I find that fewer than nine persons would be affected by the cited condition. The gravity was low. A penalty of $2,000.00 is appropriate for Citation No. 8567303.

**E. Citation No. 8567304**

On September 21, 2011, Inspector Scott issued Citation No. 8567304 under section 104(a) of the Mine Act, alleging a violation of section 77.1713(a) of the Secretary's safety standards. (Ex. G-8). The citation stated that the "[r]equired on Shift Examination Record Book reflects an inadequate examination and/or no examination of the fuel Tanks and Fuel Island." *Id*. Inspector Scott determined that an injury was unlikely to occur and that any injury could

reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that nine persons would be affected. Section 77.1713(a) of the Secretary's safety standards mandates that "[a]t least once during each working shift…each active working area and each active surface installation shall be examined by a certified person…any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator." 30 C.F.R. § 77.1713(a). The Secretary proposed a penalty of $897.00 for this citation.

For the reasons set forth below, I modify Citation No. 8567304 to reflect that fewer than nine persons would be affected by the cited condition.

**Discussion and Analysis**

I find that Respondent violated section 77.1713(a). I credit the inspector's testimony that the examinations were not performed. None of Respondent's examination books show that the cited fuel tank was examined, no foreman could tell the inspector who was responsible for the examinations, and Respondent did not produce a witness with personal knowledge of the actual performance of the examinations.[2] (Tr. 158). Respondent argues that it examined the tanks, but did not record the examination in the books because no hazards were found and that Kelly's testimony proves this argument because it establishes the "usual procedure" of the examinations. (Respondent's Br. at 11; Tr. 311-12). I reject Respondent's argument because Kelly did not have actual knowledge that the examinations were performed. He could only testify that the examinations of the fuel tanks should have been performed based upon procedure. Kelly testified, furthermore, that if examinations of the fuel tanks were performed, procedures insured that the area would be listed in the books under "active surface installation/work area examined." (Tr. 332-33; Ex. G-14). The records show no such entry. The examination records and testimony by both Kelly and Inspector Scott show that Respondent performed no examinations in September. For the reasons discussed concerning Citation No. 8567301, I find that fewer than nine persons would be affected by the cited condition. This violation was particularly serious because on-shift examinations are crucial to the maintenance of a safe workplace. Respondent's negligence was high given the importance that should be placed upon pre-shift and on-shift examinations. An increased penalty of $5,000.00 is appropriate for Citation No. 8567304 taking into consideration the serious nature of the violation and Respondent's negligence.

**F. Citation No. 8466798**

On September 20, 2011, Inspector Scott issued Citation No. 8466798 under section 104(a) of the Mine Act, alleging a violation of section 77.202 of the Secretary's safety standards. (Ex. G-3). The citation stated that the operator allowed dangerous amounts of coal dust and moisture residue to accumulate in the energized digger wheel control cabinet, creating a fire hazard. The door seals were cracked and damaged, coal dust was upon the walls, wires, contactors, and the floor of the box and evidence of water movement was present. *Id*. Inspector

[2] Much like the foremen interviewed by Inspector Scott, Palmer testified that the examinations occurred, but his testimony was inconclusive concerning who performed them. (Tr. 297-300).

Scott determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 77.202 mandates that "[c]oal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts." 30 C.F.R. § 77.202. The Secretary proposed a penalty of $1,203.00 for this citation.

For the reasons set forth below, I modify Citation No. 8466798; the cited condition was unlikely to cause a serious injury and was non-S&S.

**Discussion and Analysis**

I find that the conditions cited in Citation No. 8466798 violated section 77.202. Respondent argues that the Inspector did not prove that a dangerous amount of coal dust accumulated in the cited area. The Commission has held, with reference to electric control boxes cited under section 77.202, that "if a 'potential' ignition source is present in the vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard." *Pittsburg & Midway Coal Mining Co.*, 8 FMSHRC 4, 6 (Jan. 1986). The inspector testified that the cited accumulations were exposed to the control contacts that could arc, leading to ignition or explosion, just as in *Pittsburg & Midway Coal*. (Tr. 378). Although the inspector's testimony and some of the photos show minimal amounts of accumulations, the inspector testified that the largest amount of accumulations occurred at the bottom of the control box. The picture depicting the top of the cited box also reveals a significant amount of coal accumulations that could easily fall into the box through the unsealed edge of the door. (Ex. G-5 at 5; Tr. 377). I find that Respondent allowed coal dust to exist or accumulate in dangerous amounts upon and within the cited box in violation of section 77.202.

I find that Citation No. 8466798 was not S&S. Respondent's violation of 77.202 contributed to the safety hazard of a fire or explosion, which could cause a variety of serious injuries, but was not reasonably likely to do so. The Secretary argues that moisture could cause a direct short or the contactors could go phase-to-phase, either of which would cause an explosion. Although the cited conditions were dangerous, they are not reasonably likely to cause a serious injury because the ignition sources were unlikely to ignite a fire. The contacts and components in the control box described by the inspector were undamaged. To ignite the coal fines the electrical components in the control box must first malfunction. The Secretary did not provide any evidence that a malfunction was at all likely. In addition, I find that it was not established that it was reasonably likely the moisture detected by the inspector would be sufficient to create an arc that would ignite the coal dust. The conditions cited in Citation No. 8466798 were not reasonably likely to contribute to an injury. Respondent's negligence was moderate.

A penalty of $800.00 is appropriate for Citation No. 8466798.

**G. Citation No. 8466799**

On September 20, 2011, Inspector Scott issued Citation No. 8466799 under section 104(a) of the Mine Act, alleging a violation of section 77.400(a) of the Secretary's safety

standards. (Ex. G-4). The citation stated that a guard on the No. 5162 belt had "broken loose and was flopping around," creating an opening that was 12 by 1.5 inches. *Id*. The guard contacted the moving parts. The condition existed for multiple shifts or days and created a cutting or smashing hazard. *Id*. Inspector Scott determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 77.400(a) of the Secretary's safety standards mandates that "exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a). The Secretary proposed a penalty of $1,203.00 for this citation.

For the reasons set forth below, I modify Citation No. 8466799 to be unlikely and non-S&S.

**Discussion and Analysis**

I find that the conditions cited in Citation No. 8466799 violated section 77.400(a). The Commission has held that a violation of section 77.400(a) requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered, emphasizing that "the vagaries of human conduct" cannot be ignored. *Id*. Respondent argues that its policy prohibited entry into the area of the cited guard while the piece of equipment operated and a yellow cable surrounded the area. (Tr. 434-35). Neither the policy nor the rope, however, provided a physical barrier that would surely stop a miner from entering the area due to human carelessness or the vagaries of human conduct. Respondent also argues that the unguarded area was too small for a miner to contact unless they did so advertently. I credit the inspector's testimony that a miner could use the guard for stability when moving through the area from platform to platform. (Tr. 412-15). While grabbing the guard, a miner could inadvertently place his hand or fingers through the hole in the guarding.[3] The condition cited in Citation No. 8466799 violated section 77.400(a).

I find that Citation No. 8466799 was not S&S; although it was possible for a miner to contact the pulley due to the cited guard, it was not reasonably likely. Respondent's policy that miners could not approach the area of the cited guard while the machine operated was buttressed by the yellow cord, a clear indication to miners to avoid the area, which makes miners entering the area unlikely. The inspector also testified that miners would enter the area while the machine operated to examine the machine if they suspected an operational problem. (Tr. 430-31). This testimony was speculative and, even if it were correct, a miner searching for a problem would be wary of safety issues, making that miner less likely to contact an unguarded area. Miners were unlikely to enter the area of the cited condition and therefore not reasonably likely to sustain a

[3] The standard is not limited to inadvertent or accidental conduct. *See Mainline Rock and Ballast, Inc.*, 693 F.3d 1181, 1185 (10th Cir. 2012).

serious injury. The inspector's statement in the citation that the guard "was flopping around" is pure speculation because he admitted that the equipment was not operating at the time of his inspection. (Tr. 424).

Citation No. 8466799 was the result of Respondent's moderate negligence because Respondent should have known of the cited condition. I credit the inspector's testimony that condition existed for multiple shifts or even days. I find that a penalty of $800.00 is appropriate for Citation No. 8466799.

## II. SETTLED CITATIONS

The parties settled two of the citations in this case. (Tr. 8). Respondent agreed to withdraw its contest of Citation No. 8466796. The Secretary agreed to modify Citation No. 8467305 to delete the S&S determination because an injury was unlikely. The penalty is reduced to $2,000.

## III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which demonstrate that during the 15 months preceding the issuance of the citations in this case, Respondent was issued 121 citations and 52 of these citations were S&S. (Ex. G-15). At all pertinent times, Respondent was a large coal mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of BHP Navajo Coal Company to continue in business. The gravity and negligence findings are set forth above. In those instances in which I reduced the penalty from that proposed by the Secretary, I did so because, based upon the evidence presented at the hearing, I found that the likelihood of an injury was not as great as the Secretary believed and the number of people who would reasonably be affected by the violation was not as great as the Secretary assumed.

## IV. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

| Citation No. | 30 C.F.R. § | Penalty |
|---|---|---|
| 8466796 | 77.504 | 807.00 |
| 8141178 | 77.1607(i) | VACATED |
| 8466798 | 77.202 | 800.00 |
| 8466799 | 77.400(a) | 800.00 |
| 8467301 | 77.1103(b) | 10,000.00 |
| 8467302 | 77.1103(c) | VACATED |
| 8467303 | 77.1103(a) | 2,000.00 |
| 8467304 | 77.1713(a) | 5,000.00 |
| 8467305 | 77.1104 | 2,000.00 |
| | TOTAL PENALTY | $21,407.00 |

For the reasons set forth above, I **VACATE** Citation Nos. 8141178 and 8567302 and **MODIFY** Citation Nos. 8567301, 8567303, 8567304, 8466798, and 8466799. BHP Navajo Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $21,407.00 within 30 days of the date of this decision.[4]

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

Distribution:

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[4] 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.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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January 8, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner, | :<br>:<br>:<br>: | CIVIL PENALTY PROCEEDING:<br><br>Docket No. SE 2013-91-M<br>A.C. No. 01-00027-305686 |
| v. | : | |
| NATIONAL CEMENT COMPANY OF ALABAMA, INC.,<br>Respondent. | :<br>: | Mine: National Cement Co. |

## DECISION[1]

Appearances:

Robert Hendrix, CLR, U. S. Department of Labor, Birmingham, Alabama on behalf of the Secretary

Jay St. Clair, Esq., Littler Mendelson, Birmingham, Alabama on behalf of National Cement Company, Inc.

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against National Cement Company of Alabama, Inc. ("National Cement" or "the Company"). The case is brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815, 820 (the "Mine Act"). The Secretary petitions for the imposition of a $540 penalty for one purported violation of 30 C.F.R. § 56.11001. The violation

[1] At the close of the hearing, I issued a bench decision in this matter. As I stated during the hearing, a bench decision is not final and is subject to change until a written decision is issued. Tr. 81. In this formal written decision, I retain my determination that the violation was not "significant and substantial" since any injuries that occurred would not be reasonably serious. However, as opposed to the bench decision, I conclude that there was a reasonable likelihood that the hazard would result in some form of injury. I also now conclude regarding the issue of gravity that the violation was not serious. These changes have been incorporated into the reproduction of the bench decision.

is alleged in Citation No. 8723305, issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), at National Cement's cement plant in St Clair County, Alabama. Tr. 6-10.

This docket originally involved civil penalty assessments for five alleged violations at the plant at issue. Four of the violations were settled prior to the hearing. I approved these settlements in a Decision Approving Partial Settlement, issued on November 7, 2013. However, the parties were unable to settle the last remaining violation. The hearing on this single citation was held on November 13, 2013, in Birmingham, Alabama. Tr. 6-9.

Citation No. 8723305 reads as follows:

> Safe access is not being maintained to the access door in the chute between the cement coolers. Access was provided by laying an unsecured board that is approximately 1 foot wide over a 2 to 4 foot drop off [to the pit floor]. Miners travel to the access door approximately once every 3 months to clean out the chute. This condition exposes [a] miner to a slip and fall hazard likely to cause sprains, strains, bruises, and contusions.
>
> Standard [30 C.F.R. §] 56.11001 was cited 1 time in two years at [the] mine ([once] to the operator, [never] to a contractor).

Ex. P-1.

The parties do not dispute that the cited area consisted of two cement coolers, a chute between the coolers, a pit beneath the coolers, and a board that traversed the pit. Since the cement coolers cooled cement using water, the cited area was often wet. Cement had spilled from the cement coolers onto the board and the pit below. The pit was approximately 15 feet wide, and the chute was positioned roughly over the center of the pit. Therefore, the distance between an edge of the pit and the chute was approximately eight to ten feet. Handrails surrounded the edges of the pit. Exs. P-1, P-6; Tr. 24-30, 34-35.

The board was used as a temporary walkway to cross the top of the pit. The vertical distance between the board and the pit floor ranged from two to four feet. In this regard, cement had spilled onto some areas of the pit and hardened, causing varying depths in the pit floor. The areas of the floor which contained spilled cement were higher than other areas of the floor. The board was unsecured and lacked any railings or handrails. A few times a year, miners would walk eight to ten feet on the board to the chute, open the chute door, and clean the chute of clogged material. Exs. P-1, P-6; Tr. 24-30, 34-35.

On September 15, 2012, Timothy S. Schmidt, an MSHA inspector who was conducting an inspection of the mine, issued Citation No. 8723305. Ex. P-1; Tr. 23. The citation alleges a violation of 30 C.F.R. § 56.11001 which requires that "safe means of access shall be provided and maintained to all working places." The Secretary asserts that miners climbed over the handrails surrounding the pit and walked across the unsecured board to access the chute door

once every three months. Given that the board was narrow, unsecured, and wet (due to cement which had fallen on the board), the Secretary argues that using the board to access the chute constituted unsafe access to a working place, the chute door. Tr. 24-30. Specifically, the Secretary argues that the miner assigned to clean the chute could fall off the board onto the floor below, and this hazard, falling onto the pit floor, was reasonably likely to result in reasonably serious injuries such as a strain, sprain, bruises or contusions. Ex. P-1; Tr. 30-31, 36-37. The Secretary therefore asserts that the operator violated the safe access standard, and that the violation was "significant and substantial." Ex. P-1; Tr. 38-39.

The Secretary does not dispute that miners were provided and used fall protection when walking on the board across the pit. The Secretary concedes that the fall protection consisted of a harness and a backbiter lanyard, *i.e.* a lanyard that expands to provide shock absorption when the person using it slips and falls from an elevated position. According to the Secretary, typically such lanyards expand between three to six feet. However, since the pit was so shallow, the Secretary argues that the lanyard would be ineffective to prevent miners from hitting the pit floor. In other words, since the drop-off from the board to the pit floor varied from two to four feet, and since the lanyard expanded from three to six feet, the Secretary argues that it was reasonably likely that the lanyard would expand to the pit floor. Tr. 30-31, 56-58, 62-63.

The Secretary also argues that even if the lanyard prevented a falling miner from hitting the floor, the miner would still be likely to suffer serious injury. In this regard, the Secretary argues that the miner could sprain his ankle while slipping and falling from the board, or suffer blood clotting as he was suspended in mid-air. Tr. 30-31, 61-63.

The Respondent asserts that it did not violate the safe access standard since miners used fall protection that was fully effective, *i.e.* the miners' lanyards arrested their fall from the board, and prevented them from hitting the pit floor. In this regard, the Respondent points out that the Secretary's claim that miners who fell from the board would hit the pit floor despite using fall protection, was based on Inspector Schmidt's understanding of typical lanyards. However, as Inspector Schmidt testified, he was not aware of how the lanyard at issue was configured or anchored since he did not test the effectiveness of the lanyard. Inspector Schmidt also testified that he was not aware of the expansion length of the particular backbiter lanyard used by Respondent. Tr. 56-60.

The Respondent questions whether, even if miners hit the pit floor, the violation would be significant and substantial. In this regard, the Respondent questions whether it was reasonably likely that unsafe access would result in an injury given that there is no evidence any miner has ever fallen from the board, and given that miners need not use the board to access the chute; miners can also access the chute door through the ground floor of the mill room. Tr. 60, 67. The Respondent argues that even if miners hit the pit floor, their fall would be partially cushioned by the lanyards, and the resulting injuries would not be reasonably serious. Tr. 56-62.

Before calling his first witness, the Secretary read the following stipulations into the record:

> 1. The lanyard was provided by the Respondent[.]
>
> 2. [T]he distance between the board at issue and the floor below was less than six feet.
>
> Tr. 16-17.

The parties then presented their respective cases, and at the close of the testimony, I entered the following bench decision:

> The Secretary originally petitioned for an assessment of civil penalties for five alleged violations, four of which were settled. And I previously approved . . . the partial settlements, in a . . . Decision Approving Partial Settlement, which was issued by me on November 7[], 2013. The remaining issues are whether National Cement violated 30 C.F.R. [§] 56.11001 as alleged in Citation [No.] 8723305[,] issued on September [] 15[], 2012.
>
> [Tr. 85.]
>
> If so, was the violation ["significant and substantial", *i.e.* was the hazard contributed to by the violation reasonably likely to result in reasonably serious injury?] If so, was the violation . . . caused by the operator's moderate negligence as found by [MSHA] Inspector [Timothy S.] Schmidt?
>
> [Tr. 85.]
>
> First, was there a violation? I have no trouble finding [that] the Secretary proved a violation. Section 56.11001 requires two things. First, the operator must afford safe access to worksites, and two, [the operator] must make sure safe access is utilized. These principles are set forth in *Lopke Quarries,* 23 FMSHRC 705, [] 708 [(July 2001)] . . . . Here, Inspector Schmidt's testimony was compelling. I accept as a fact that to clean the clogged chute, miners accessed the work area via a foot-wide board. I do not dispute, as [Jeff] Golden[,] [National Cement's safety manager] testified, that [miners] could have accessed [the chute] from the ground floor of the mill room, but because their job would be more easily performed from the board, I find this is the way they usually accessed the site.

[Tr. 85-86.]

I further find [that] the board was not safe for the following reasons. First, it was only a foot wide. Second, when [Inspector] Schmidt saw [the board,] it was partially covered with debris . . . [Third], the board itself was wet and could be slippery. I accept [Inspector] Schmidt's un-refuted testimony in this regard. [Fourth], the board was reached by climbing over a handrail, an act that in itself posed [a] hazard[,] as [Inspector] Schmidt testified. And [fifth], because the board extended over a two-foot to four-foot deep pit, the floor of which was . . . in some areas covered with accumulations of lumpy cement . . . . Inspector Schmidt [testified to all of the above] and all of it I accept.

[Exs. P-5, P-6; Tr. 86-87.]

Use of an effective lanyard might have provided miners with safe access, but I need not reach the issue of whether, in fact, [an effective lanyard did provide safe access] because I accept the essentially unrefuted testimony of the inspector [that the lanyard provided to the miners was not fully effective]. [T]he lanyard used at the mine by miners walking on and working from the board would not[,] in all instances[,] [prevent] a miner who lost his balance from falling to the floor of the pit . . . . Because the record confirms that in all instances the lanyards [which were] used were not effective to prevent an injury-causing accident, I find [that] safe access was neither provided nor maintained by National Cement. And for these reasons[,] I conclude that there was a violation.

[Tr. 87-88.]

[The next issue is] [n]egligence. The [I]nspector found [that] the Company was moderately negligent, and I agree. The degree of danger posed by the violation was moderate, and the Company failed to meet its commensurate duty of care when it allowed the board to be used without fully effective fall protection. The Company tried to provide effective protection [but] [t]he protection just wasn't effective enough.

[Tr. 88.]

[The next issue is] S & S and gravity. Here lies the crux of the case . . . . The Commission has explained that in order to . . . establish

that a violation of a mandatory safety standard is S & S, the Secretary must prove [that four criteria have been met]. First, [the Secretary must prove] the underlying violation. Second, [the Secretary must prove] a [discrete] safety hazard[,] . . . a measure of danger to safety contributed to by the violation. Third, [the Secretary must prove] a reasonable likelihood [that] the hazard will result in an injury . . . And [fourth], [the Secretary must prove] a reasonable likelihood [that] the injury will be of a reasonably serious nature. [These criteria were] first enunciated in *Mathies Coal Company,* 6 FMSHRC 1, [3-4 (Jan. 1984).] And a host of progeny cases have reiterated and amplified the principles [underlying the four criteria].

[Tr. 88-89.]

Here[,] the Secretary proved the underlying violation and the discrete safety hazard, that is, the danger of falling and not being stopped short of hitting the concrete below. In this regard, I accept Inspector Schmidt's testimony that the board was wet and could be slippery. So I find that [the hazard at issue was] likely [to result in injury]. [Therefore, I find that the third *Mathies* criterion was satisfied.]

[Tr. 89-90.]

[However,] [a]lthough it is a close question, and although reasonabl[e] min[ds] certainly can differ [on the following issue], I find [that] the Secretary did not prove a reasonable likelihood that the fall would result in an injury of a reasonably serious nature . . . .

* * *

[Tr. 90.]

[First,] when [miners accessed the cited area], the record supports finding miners wore lanyards. Mr. Schmidt was told and did not dispute this [fact] . . . . The lanyards were not fully effective in that they would not, in all instances, perhaps even in most instances, prevent a miner from hitting the pit floor. But I find [that] they

provided some protection and that in some instances[,] they would prevent or lessen the impact [of] an expected injury.[2]

[Tr. 90-91].

[Second], the distance a miner could fall from two to four feet was not conducive to producing a reasonably likely injury of a reasonably serious nature.[3] [While] I agree [that] falls from under four feet can result in [fatalities] . . . . such circumstances are highly unusual. Here there was no contention [] by the [Secretary] that the expected falls of two to four feet, some of which could have been "cushioned" by fall protection[,] were reasonably likely to be fatal . . . . Inspector Schmidt [stated that] if an injury occurred, it was likely to lead to sprains, strains, bruises[,] cuts, or scrapes. I find that . . . bruises, cuts and scrapes . . . the inspector actually used the word contusions, but I translate that to cuts and scrapes, are not injuries of a reasonably serious nature in the context of this violation. And . . . while [strains or sprains] might be [reasonably serious injuries], [such injuries are not reasonably likely] to result from a fall [of] two to four feet.

[Tr. 91-92.]

Accordingly, I find that the violation is not S & S. [In making this finding] I recognize the experience and expertise of the inspector . . . . [His opinion is] entitled to great weight. But as I said, reasonable minds can differ and I conclude that under all the circumstances present here, an S & S finding is not warranted. Had the pit been uniformly deeper, had no lanyards been provided, or had the provided lanyards been totally ineffective . . . I might have found otherwise. But those are not the facts . . . before me . . . .

---

[2] While it is unclear whether the lanyards, in most instances, would prevent miners from hitting the pit floor, I find that the lanyards, at a minimum, would lessen the impact of the fall. In this regard, Inspector Schmidt testified that backbiter lanyards typically expand three to six feet in order to provide shock absorption and lessen the impact of the fall. Inspector Schmidt failed to show that the lanyards at issue were configured such that miners would hit the pit floor before the lanyards began to expand. Tr. 30, 56-57. Therefore, I find that if miners slipped and fell from the board, the lanyards at issue would generally expand during the fall, and lessen the impact of the fall.

[3] In this regard, I find that since the pit was so shallow, even if the miner hit the floor, he would not suffer reasonably serious injuries.

[Tr. 92.]

I find [that] the violation was [not] serious . . . . [H]ere, as I've indicated, the evidence established that . . . the worst that was likely to happen would be a [bruise, cut or scrape that would result in no lost workdays to one person].

[Tr. 93.]

Having found a violation, I must assess a penalty. The penalty criteria mandate[] that I consider the operator's history of prior violation[s]. [The evidence] shows that the Company had 105 total violations at the plant in the two years prior to the violation at issue. Included in these violations were four violations of Section 56.11001. This is a significant history. I also must consider the appropriateness of the penalty to the size of the Company's business. And here the parties agree that the operator is of a medium size. I have found that National Cement was moderately negligent and [that] the violation was [not] serious. The parties agree that any penalty assessed will not affect National Cement's ability to continue with business, and that the Company demonstrated its good faith in abating the violation.

[Ex. P-8; Tr. 93-94].

Based on all the penalty criteria, I find that a penalty of $450 is warranted. I note that this penalty is consistent with other non-S & S penalties assessed and paid by the Company in the two years prior to the violation in question.

[Ex. P-8; Tr. 94.][4]

[4] Editorial changes correcting syntax, grammar, spelling and typographical errors have been made in reproducing the bench decision.

## ORDER

Within 30 days of the date of this decision, National Cement Company of Alabama, Inc., **IS ORDERED** to pay a penalty of $450 for the violation of 30 C.F.R. § 56.11001 set forth in Citation No. 8723305. Upon payment of the penalty, this proceeding **IS DISMISSED.**

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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/DM

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January 9, 2014

| | | |
|---|---|---|
| MANALAPAN MINING COMPANY, INC., | : | CONTEST PROCEEDINGS: |
| Contestant, | : | Docket No. KENT 2009-1048-R |
| | : | Citation No. 8335778; 04/10/2009 |
| | : | |
| | : | Docket No. KENT 2009-1049-R |
| | : | Citation No. 8335779; 04/10/2009 |
| | : | |
| | : | Docket No. KENT 2009-1050-R |
| | : | Citation No. 8335780; 04/10/2009 |
| v. | : | |
| | : | Mine: RB #5 |
| SECRETARY OF LABOR, | : | Mine ID 15-17077 |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. KENT 2010-1037-R |
| Respondent, | : | Citation No. 8362509; 04/19/2009 |
| | : | |
| | : | Mine: RB #12 |
| | : | Mine ID 15-18771 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS: |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. KENT 2009-1097 |
| Petitioner, | : | A.C. No. 15-17077-185348 |
| | : | |
| | : | Mine: RB #5 |
| | : | |
| v. | : | Docket No. KENT 2010-1363 |
| | : | A.C. No. 15-17077-225937-01 |
| | : | |
| | : | Mine: RB #12 |
| MANALAPAN MINING COMPANY, | : | |
| INC., | : | Docket No. KENT 2012-727 |
| Respondent. | : | A.C. No. 15-19102-281035 |
| | : | |
| | : | |
| | : | Docket No. KENT 2012-1133 |
| | : | A.C. No. 15-19102-289726-02 |
| | : | |
| | : | Mine: P-1 |

## DECISION

Appearances: Amanda K. Slater, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor

Schean G. Belton, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor

Benjamin Bennett, Pineville, Kentucky, on behalf of Manalapan Mining Company

Before: Judge David F. Barbour

These cases are before me upon notices of contest and petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties disposed of 137 cases in a global settlement. The remaining cases, consisting of 12 alleged violations, were scheduled for hearing between June 4 and June 6, 2013. The Secretary alleges that Manalapan Mining Company ("Manalapan") is liable for 12 violations of the Secretary's mandatory safety standards for underground coal mines, and proposes penalties in the total amount of $452,165.00. The parties presented testimony and documentary evidence at a hearing in Pineville, Kentucky. The sole alleged violation in KENT 2010-1363 was settled on the last day of the hearing. Both parties submitted post-hearing briefs. For the reasons that follow, I find that Manalapan committed the violations and impose civil penalties in the total amount of $396,254.00.

## STIPULATIONS

Before presenting testimony, the parties stipulated as follows:

1. Docket No. KENT 2009-1097 involves an underground coal mine, known as RB #5, that is owned and operated by Manalapan.

2. Docket Nos. KENT 2012-727 and KENT 2012-1133 involve an underground coal mine, known as P-1, that is owned and operated by Manalapan.

3. The RB #5 mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. The Administrative Law Judge has jurisdiction over the above-mentioned cases pursuant to section 105 of the Act.

5. Manalapan is the operator, as defined in section 3(d) of the Act, at the coal mines in which the citations and orders subject to this proceeding were issued.

6. Manalapan's operations affect interstate commerce.

7. The individuals whose signatures appear in block 22 of the citations and orders at issue in this proceeding were acting in their official capacity as authorized representatives of the Secretary of Labor.

8. Manalapan has waived the argument that the proposed penalty would affect its ability to remain in business.

9. Jefferson Davis was the mine operations manager at the P-1 mine.

10. Joseph Miniard is the superintendent of the P-1 mine.

11. Bryant Massingale was the foreman on second shift at the P-1 mine.

12. Davis, Miniard, and Massingale were agents of the P-1 mine as defined in 30 U.S.C. §§ 802(a), 820(c).

13. Manalapan's approved roof control plan states that in the event the automated temporary roof support ("ATRS") becomes inoperative, roof bolting operations will cease until the ATRS is fully operational again.

14. Manalapan pled guilty, in the United States District Court for the Eastern District of Kentucky, to willfully violating the mandatory safety standard set forth in 30 C.F.R. § 75.1710-1. Manalapan allowed miners to operate electrical mobile bridge carriers and/or section scoops in the 002 section of the P-1 mine without substantially constructed canopies or cabs to protect the miners.

15. Massingale pled guilty, in the United States District Court for the Eastern District of Kentucky, to knowingly making and certifying false statements and representations in the pre-shift, on-shift, and daily report records for the P-1 mine. He knowingly failed to report hazardous conditions, including that the ATRS for the Fletcher roof bolting machine did not reach the mine roof and the mobile bridge carriers did not have protective canopies over the operators. Massingale also pled guilty to knowingly violating the mandatory safety standard set forth in 30 C.F.R. § 75.211(c). He failed to correct hazardous roof conditions in the 002 section of the P-1 mine before allowing miners to travel and work in the affected area.

16. The last row of roof bolts in the No. 3 heading measured approximately 123 inches high around June 2011.

17. The cuts at the No. 3 and No. 4 headings were unsupported around June 2011.

18. The ATRS tag on the roof bolter states that the maximum height reached by the ATRS is 82 inches.

19. If the court finds that a violation occurred as alleged in Citation No. 8353912, the violation would be [a] significant and substantial [contribution to a mine safety hazard] ("S&S").

20. Respondent violated 30 C.F.R. § 75.1710-1, in that the Long Airdox No. 2 MBC was being operated without a canopy or cap.

21. The mining height in the 002 section was over 42 inches around June 2011.

22. The measured heights ranged from 5.5 feet four crosscuts outby the 002 MMU in the No. 1 Entry to 10 feet in the No. 3 and No. 4 headings around June 2011.

23. The operator of the Long Airdox No. 2 MBC was not protected from falls of roof, face or rib, or from rib and face rolls.

24. Manalapan knew about the requirements for canopies or caps on mobile bridge carriers in the 002 section and was aware that it was lacking them.

25. Respondent violated 30 C.F.R. § 75.1710-1, in that the Long Airdox No. 3 MBC was being operated without a canopy or cap around June 2011.

26. Respondent violated 30 C.F.R. § 75.1710-1, in that the Long Airdox No. 4 MBC was being operated without a canopy or cap around June 2011.

27. If the Court finds a violation occurred as alleged in Citation No. 8353916, the violation would be S&S.

*See* Tr. 20-27; Ex. J-1.

## KENT 2009-1097

## BACKGROUND

The RB #5 mine is a coal mine located in the Harlan County community of Pathfork, Kentucky. Tr. 43. The mine's purpose is not to produce coal but to accept and store coal from the P-1 mine in Smith, Kentucky. Tr. 43, 316-17. The two mines are approximately 15 miles apart. The coal is trucked to the RB #5 mine, where it is loaded onto one of three conveyor belts at the back of the mine, and is conveyed to the front. Tr. 43, 44.

John Sizemore, a MSHA coal mine inspector, performed a regular quarterly inspection at the RB #5 mine on April 10, 2009.[1] Tr. 45. Before entering the mine, he reviewed, *inter alia*, the mine's safeguard notices, map, and the mine's pre-shift and belt examination books. Tr. 45-46. Sizemore then proceeded underground where he followed the No. 3 beltline. Tr. 45, 46, 163.

| **ORDER NO.** | **DATE** | **30 C.F.R §** |
|---|---|---|
| 8335779 | 04/10/2009 | 75.400[2] |

> Combustible material, including loose coal (damp in some areas of the belt, and wet in other areas) measuring from 1 inch to 6 inches in depth, was present on the floor of the mine along the entire length of the #3 belt conveyor, and float coal dust black in color, dry and powdery, was observed deposited on the mine floor under the belt, on the ribs, in the crosscuts between the #3 belt and the permanent stoppings, and on the belt structure along the entire length of the #3 belt conveyor.

Note: The belt was observed riding on the belt structure "hot to the touch" providing an ignition source, and was a consideration in the S&S classification of this order. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.[3]

Ex. S-40.

As Sizemore proceeded into the mine along the No. 3 beltline, he noticed accumulations of loose coal and dry float coal dust along the entire belt line. Tr. 48-49; Ex. S-42 at 3. The loose coal accumulations were located mostly under the belt. Tr. 50. Using a tape measure, Sizemore discovered that the accumulations ranged from 1 to 6 inches deep. Tr. 50, 51. He also viewed float coal dust, a powdery coal that has a tendency to become suspended, in the belt entry, on the belt structure, and on the entry's roof and ribs. Tr. 50, 53. There is no test to

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[1] Sizemore received an Associate's Degree in mining technology. Tr. 40. He first worked as a general laborer at Sandy Fork Mine Company. Tr. 40. He then worked for the engineering and safety departments. Tr. 39. He also worked on beltlines and acquired his foreman papers which allowed him to become a section foreman. Tr. 39. In addition to being a certified foreman, Sizemore is a certified belt examiner. Tr. 41. He has been a coal mine inspector at MSHA's Barbourville, Kentucky office for 22 years. Tr. 37-38.

[2] Section 75.400 states, "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

[3] Grammatical errors in the descriptions from the "Condition or Practice" sections of the subject citations and orders have been corrected, and subsequent modifications to the citations and orders have been included.

determine whether dust is float coal dust, but two indicators that differentiate it from rock dust include its ability to become suspended and its black color. Tr. 52-53. When Sizemore moved around the belt structure, coal dust flew up and became suspended. Tr. 53. The roof and ribs were black in color. Tr. 53. Sizemore was 100 percent certain that the dust was float coal dust. Tr. 62, 178.

David Partin, former general manager at Manalapan, asserted that what Sizemore observed was not float coal dust but rock dust covered with dirt and mud.[4] Tr. 182-83, 212. Samuel Burns, the mine's safety director at the time of the inspection, also dismissed Sizemore's observations, stating that he, Burns, did not see any float coal dust or accumulations measuring 1-6 inches deep, nor did he see Sizemore use a tape measure to measure accumulations.[5] Tr. 240, 244, 246.

## THE VIOLATION

Statements made by Respondent's witnesses directly contradict the testimony of Inspector Sizemore. However, Sizemore's testimony is supported by detailed notes that he took during his inspection at the mine, and I find him to be a credible witness.[6] Ex. S-42. It is also unlikely that dirt and mud on rock dust would become suspended when agitated by motion, as described above. Therefore, I find that accumulations of loose coal and float coal dust existed as described by Sizemore and were present along the No. 3 beltline. Respondent violated section 75.400.

Sizemore determined that the violation was highly likely to result in a permanently disabling injury, that it was S&S, that four people were affected, and that it was due to Manalapan's high negligence and unwarrantable failure to comply with the cited standard. Ex. S-40.

## S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the

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[4] Partin has been in the coal mine industry for 30 years and has worked for Manalapan 28 years. Tr. 183. He has been a mine foreman and safety director since 1993. Tr. 183.

[5] Burns has 18 years of experience in underground mining and is a certified foreman. Tr. 240.

[6] Respondent requested MSHA to send a different inspector to the mine for a second opinion. Tr. 227. The second inspector let the order stand after visiting the mine on the same day as Sizemore. Tr. 127. The fact that the other inspector let the order stand as issued, provides additional credibility to Sizemore's testimony. Resp. Br. I at 13; Tr. 129-30.

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). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

I have found that the violation existed as charged. The Secretary charges that accumulations of loose coal and float coal dust contributed to the discrete safety hazard of the loose coal and float coal dust being ignited and resulting in a belt fire or explosion. Tr. 65, 66; Sec'y Br. at 11-12. The validity of Sizemore's S&S finding turns on whether the components for an ignition or explosion were established by the Secretary and, if so, whether the hazards were reasonably likely to cause an injury or injuries of a reasonably serious nature.

The Commission has noted:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHCR 965, 970-71 (May 1990) ("*UP&L*"); *Texasgulf*, 10 FMSHRC at 500-03.

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

It has been established that accumulations of loose coal and coal dust existed along the entire belt line. Sizemore contended that while much of the coal was wet from being sprayed by water, the coal was still a fire hazard because there were areas of dry coal, and if the water sprays failed, additional areas of loose coal could become dry. Tr. 51-52, 56; Ex. S-42 at 4. He also

noted that the float coal dust appeared dry and powdery. Tr. 58; Ex. S-42 at 4. Ignition sources were present as well. According to Sizemore, the belt was rubbing into the belt structure and in at least one area, the friction caused the structure to be hot to the touch. Tr. 70-71; Ex. 42 at 4. Sizemore also asserted that the frayed edges of the belt, no longer having a flame-resistant coating, was also an ignition source. Tr. 71. But, he conceded that the moisture held by the frayed edges would affect its flammability. Tr. 168.

I find the friction caused by the belt rubbing on the belt structure would have been an ignition source that could have ignited the frayed edges of the belt and/or the coal dust and loose coal. The frayed edges that became ignited could have acted as a second ignition source to the surrounding coal dust and loose coal that remained unaffected by the frictional heat.

The Secretary also addressed the reasonable likelihood of a fire and/or explosion through the MSHA Policy Program Manual ("PPM"), which states that "accumulations of coal dust, loose coal, or the combination of the two offer serious fire and explosion hazards . . . . [F]loat coal dust, loose coal . . . near working faces and in active haulage entries, where ignition sources are likely to be, are more hazardous . . . ." Ex. S-46 at 2.

Based on the circumstances discussed above, Sizemore determined that the accumulated loose coal and coal dust was highly likely to cause a serious injury. Tr. 76. The accumulations were in a haulage entry, and could have lead to the intensification or spreading of a fire, or to an explosion because of the nearby ignition sources. Tr. 65, 68-69. This could reasonably have been expected to cause permanently disabling injuries from smoke inhalation and/or burns, or in the event of an explosion, the conditions would have reasonably been expected to cause permanently disabling, concussive-type, injuries. Tr. 77.

Tim Napier, mine superintendent at the time of the inspection, believed that a "skim", or very small amount, of float coal dust was a problem and used water to keep the dust down and dampen it to mitigate the fire hazard.[7] Tr. 290. He stated that he would have a little dust in the mornings and would combat it by spraying water on the belt before it was loaded. Tr. 289. The top of the coal and belt would then be sprayed when the belt was loaded to prevent coal dust accumulation. Tr. 268-69, 280-81. There were mud holes and big water accumulations along the belt as well, thereby decreasing the amount of dry loose coal and dust and the likelihood of a fire. Tr. 287. Burns, the mine's safety director, maintained that there were no breaks in the water line used to spray the coal and that it was functioning properly. Tr. 247.

In regards to a discrete safety hazard contributed to by the violation, I credit Sizemore's testimony that ignition of loose coal or float coal dust could have caused a fire or explosion, resulting in serious permanently disabling injuries from smoke inhalation and/or burns, and concussive-type injuries.

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[7] Napier worked in the mining industry for 13-15 years prior to joining Manalapan. Tr. 297. At the time of the inspection, he had been the superintendent for 7 months. Tr. 269.

With respect to the third element of *Mathies*, a reasonable likelihood that the hazard contributed to will result in an injury, I turn to previous Commission decisions. In *Utah Power & Light*, the operator argued that accumulations that were damp were not S&S. *Utah Power & Light*, 12 FMSHRC 965, 967 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991). In assessing whether the ALJ's finding that the accumulations violation was S&S was correct, the Commission stated, "[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*, at 969; *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985). In its analysis of the third *Mathies* element, reasonable likelihood, the Commission went on to say, "the fact that some of the coal accumulations were damp was not determinative because, as noted above, damp coal dries in the presence of fire." *Utah Power & Light* at 971. In this case, because there was dry float coal dust near ignition sources, it was reasonably likely that an initial fire or explosion would cause the above mentioned serious injuries. In addition, the fire could have dried out and ignited the damp loose coal, propagating the fire.

Therefore, I find that Sizemore properly determined that the violation was S&S.

## GRAVITY

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). Here, the accumulations of float coal dust could have resulted in a belt fire or explosion, exposing four miners to injuries such as smoke inhalation, burns, and concussive-type injuries. These injuries would have been reasonably likely to result in lost workdays or restricted duty, permanent disabilities, and even death. Tr. 76, 249. The violation was serious.

## UNWARRANTABLE FAILURE

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

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

facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *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); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

*Lopke Quarries* at 711.

**Obviousness**

I credit Sizemore's testimony that the accumulations were along the entire belt line and in plain view. Tr. 77. Moreover, I agree with Sizemore's logical assertion that a person did not have to be a trained inspector to see the accumulations. Tr. 77. The violation was obvious.

**Degree of Danger**

The PPM discussed above states that loose coal and float coal dust can be serious fire and explosion hazards. Ex. S-46 at 2. While the majority of loose coal was wet, the float coal dust was dry and in the presence of an ignition source, the heat from the belt rubbing into the belt structure. Tr. 70-71; Ex. 42 at 4. In addition, the wet loose coal could have dried out in a fire and ignited. A fire or explosion was reasonably likely to expose four miners working in the area to injuries such as smoke inhalation, burns, or concussive-type injuries. The degree of danger was reasonably high.

**Length of Time**

Based on Sizemore's experience, he posited that the accumulations did not occur over a normal mining cycle and that they increased over a period of time, probably a week or more. Tr. 52, 69-70. Both Partin and Burns stated that they did not see any float coal dust and Burns further testified that he did not see any accumulations that were 1-6 inches deep. Tr. 212, 244, 246. As stated above, Sizemore's testimony was supported with detailed field notes and I found him a credible witness. The Court finds that the accumulations were present for at least a week or more.

## Extent of the Violation

The extensiveness factor involves consideration of the scope or magnitude of a violation. *Eastern Associated Coal Corp*., 32 FMSHRC 1189, 1195 (Oct. 2010).

Sizemore maintained that the accumulations were extensive, as loose coal was along the entire belt line and float coal dust was on the roof and ribs. Tr. 77. The belt was 3,592 feet long. Ex. R-A. While Napier argued that rock dust changes to a gray color when it is exposed to moisture, the float coal dust was described as black, indicating that there was build-up. Tr. 53-54, 288. Sizemore also credibly testified that the accumulations spread into crosscuts. Tr. 48-49. It is also clear, that at a minimum, the four miners assigned to work on the beltline the day of inspection were affected. Tr. 76, 249.

The violation was extensive.

## Operator's Knowledge of the Existence of the Violation

A pre-shift examination of the cited area was completed on the day of the inspection, but no hazards were reported. Tr. 78. The mine foreman would have observed the conditions and been responsible for directing clean-up. Tr. 81. He did not direct clean-up. The operator should have known about the existence of the violation.

## Operator Placed on Notice that Greater Efforts at Compliance were Necessary

Neither party introduced evidence that the operator was placed on notice that greater efforts at compliance were necessary. As such, this factor will not be considered in the overall unwarrantable failure determination.

## Operator's Efforts in Abating the Violation

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of a violation. In general, the factor measures an operator's response to violative conditions that were known to it or that should have been known to it. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). It must then be determined whether the efforts "were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." *Windsor Coal Co.*, 21 FMSHRC 997, 1005 n.9 (Sept. 1999).

Sizemore asserted that in order to prevent float coal dust, an operator must rock dust. Tr. 50. Rock dust is white and when it gets wet, it becomes a gray color. Tr. 147. The roof and ribs were described as black, indicating a build-up of coal dust and a lack of recent rock dusting. Tr. 53-54. The pre-shift exam had been completed and no hazards were reported. Tr. 78. Sizemore did not think that spraying water was sufficient to counteract the dangers of the accumulations. Tr. 85.

Burns maintained that there was rock dust on the roof, ribs, and under the belt. Tr. 247. Napier stated that water was used to keep float coal dust down and that rock dusting was done on a daily basis "on one belt or the other." Tr. 290.

Respondent was attempting to keep the float coal dust at bay by spraying water on the coal and belt. However, there were still areas of dry black dust. If rock dusting was done on a daily basis, or every three days, the color of the roof and ribs should have been lighter. In addition, there is no indication that miners were shoveling the belt line to reduce the loose coal accumulations. I find that the operator's efforts in abating the violation were minimal.

**Conclusion and Negligence Finding**

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are obviousness, degree of danger, extent of the violation, length of time, and operator's knowledge. Manalapan's effort in abating the violation was only a slightly mitigating factor. The combined factors indicate to me that a finding of unwarrantable failure is appropriate, as the mitigating factor does not outweigh the most significant factors. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.400.

Sizemore found the company's level of negligence to be high. A finding of high negligence is appropriate 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. The record is void of evidence explaining why the Respondent did not detect and correct the obvious violation, and I find that the company's negligence was properly found to be high.

| ORDER NO. | DATE | 30 C.F.R § |
|---|---|---|
| 8335780 | 04/10/2009 | 75.1731[8] |

The operator has failed to maintain the #3 belt conveyor in safe operating condition. The following conditions were observed in plain view.

[8] Section 75.1731 provides:

(a) Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components must be repaired or replaced.
(b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.
(c) Materials shall not be allowed in the belt conveyor entry where the material may contribute to a frictional heating hazard.
(d) Splicing or any approved conveyor belt must maintain flame-resistant properties of the belt.

1. Six bottom rollers were observed stuck. Two were worn into with the sharp edges coming into contact with the bottom belt. Two top rollers were worn into, with the sharp edges coming in contact with the bottom of the top belt.

2. The belt was observed running out of line and cutting into the structure. In approximately the 7th crosscut inby the portal the bottom roller was worn into and the belt was riding on the metal crossbat of the structure (hot to the touch). Evidence showed (the top of the structure where the belt was riding on the structure was worn flat) this condition has existed for an extended period of time. This condition was observed again in approximately the 35th crosscut.

3. The fire resistant material on the edges of the #3 belt conveyor is depleted. The edges of the belt conveyor are worn and frayed exposing over an inch of strings of frayed cloth like material.

4. The #3 belt was observed running "out of line" and cutting into the belt structure stands. Cuts measuring up to 1½ inches in depth were measured in the 2 inch wide belt stands as a result of the belt running out of line. This condition exists in approximately 50% of the belt structure stands and has depleted the integrity of the belt structure and the ability of the conveyor belt to be aligned.

5. Discarded combustible material, including boxes and discarded belt conveyor, is present in different locations along the #3 belt conveyor.

Ex. S-41.

As Sizemore walked the entire length of the No. 3 belt, he noted five conditions that lead him to write Order No. 8335780: stuck rollers, the belt running out of line and cutting into the belt structure, depletion of fire-resistant material on the edges of the belt, and discarded combustible material. Thus, there are five separate, but closely related, alleged conditions that caused Sizemore to issue the order. I will describe them in the order reported by the inspector.

1. A conveyor belt consists of a top and a bottom loop. Tr. 92. Belt rollers, located underneath the top and bottom loops, are used to guide the belt and help to keep it within the confines of the belt structure. Tr. 92. Sizemore found that eight rollers were stuck, two on the top and six on the bottom. Tr. 94, 95. Two of the six rollers on the bottom were cracked in two from being worn by the pressure of the belt, and the sharp edges of the cracked parts of the rollers were in contact with the bottom belt. Tr. 92, 93-94. The sharp edges from the broken rollers, and the other rollers that were stuck, caused friction and heat as they rubbed against the belt. Tr. 95-96. The friction also depleted the fire-resistant material on the belt. Tr. 95. Heat created by the friction was a potential ignition source. Tr. 97. Sizemore asserted that because the rollers posed a fire hazard, they should have been replaced immediately. Tr. 101, 102.

Partin observed one or two rollers that were cracked in two but the whole roller had not completely split apart. Tr. 228-29. As far as the rollers that were allegedly stuck, Partin stated that Sizemore had the belt shut down early on in the inspection and Sizemore could not have known other rollers were stuck unless he tried to turn them himself. Tr. 229-30. Burns testified that after he met Sizemore, Burns did not see him turn any rollers. Tr. 241-42. Burns did see the two cracked rollers. Tr. 249.

2 & 4. Sizemore observed the belt running out of line and cutting into the metal crossbar of the structure at the 7th and 35th crosscuts. Tr. 98, 101. When the belt rubs on a crossbar, it creates friction and eventually flattens the top of the bar. Tr. 99. When Sizemore reached out and touched the crossbar at both crosscuts, it was hot to the touch. Tr. 98, 100; Ex. S-42 at 4. Sizemore considered these two areas to be ignition sources, and a fire hazard, because of the float coal dust on the crossbars. Tr. 100.

Burns asserted that the cuts in the structure had been there for a long time, probably years. Tr. 245. Rodney Tipton, electrician and foreman, agreed with this statement. Tr. 258, 261. After the belt had been turned off, Burns stated that he did not see it cutting into the structure and maintained that the problem would have been easily observed. Tr. 250. Respondent had replaced parts of the old belt with wider new belt. Tr. 202, 203. Tipton stated that a wider and newer belt would rub the belt structure, but he did not go as far as to say that the newer belt installed by Respondent was rubbing the belt structure. Tr. 263.

3. The edges of the belt were worn and frayed, some frays measuring up to 1 inch. Tr. 103. Sizemore maintained that the fraying was a result of the belt cutting into the belt structure. Tr. 103. He stated that a belt is made with fire-resistant material, but when the edges get worn, the material is depleted and the frayed part of the belt becomes combustible. Tr. 104.

Partin described the frayed areas of the belt as wet and not necessarily combustible rags. Tr. 201. Manalapan was in the process of replacing the belt and had spliced new material into the belt. Tr. 150, 203. Burns stated that the frayed edges were on parts of the older belt. Tr. 250.

5. Sizemore noted a discarded belt and boxes in several entries and into the crosscuts along the No. 3 beltline. Tr. 110. He testified that the paper boxes were combustible and could have promulgated a fire, especially since they were in the same area as coal accumulations. Tr. 110-11.

Burns testified that he saw belt splices and nails on the ground at one spot along the beltline, confined to a crosscut by the head drive. Tr. 252-53. However, Burns agreed that he did not walk the entire No. 3 belt. Tr. 256. Napier testified that there was a small amount of trash where splices were made, a few boxes, pans, and jumper cases of belt splicing. Tr. 282-83, 295. The area where the trash was located measured about 16 by 20 feet. Tr. 295. The area was known as a "splice hole." Tr. 295. Napier maintained that usually, 10 to 15 splices and about three empty boxes were kept in the hole. Tr. 295.

## THE VIOLATION

Section 75.1731 requires that belt conveyors and belt conveyor entries be maintained in specific ways. Having given due consideration to the testimony of the witnesses, I find that Manalapan violated the standard as follows:

1. Respondent's witnesses confirmed the presence of two rollers that were cracked in two. In addition, Sizemore discovered at least six other rollers that were stuck. Friction caused by the sharp edges of the cracked rollers and the stuck rollers rubbing on the belt generated heat. The heat was an ignition source, and because it was produced in the presence of float coal dust, it constituted a fire hazard. Section 75.1731(a) requires that damaged rollers be immediately repaired or replaced if they pose a fire hazard. I have found that the cracked and stuck rollers existed as described by Sizemore. There was no testimony that efforts were underway to repair or replace the defective rollers. I find that the cited rollers were damaged, posed a fire hazard, and were not immediately repaired or replaced. It is clear to me that the cited rollers constituted one part of an extensive violation of section 75.1731(a) as charged by Sizemore.

2 & 4. Burns asserted that the belt was not rubbing against the structure, a statement that was contradictory to Sizemore's testimony. Tr. 98, 101, 250. However, Burns was not present when the belt was running, nor did he walk the entire beltline as Sizemore had. As previously stated, Sizemore was a credible witness. I therefore find that, as charged by Sizemore, the belt was out of line, rubbing on the crossbar, and cutting into the belt structure. The friction caused by the rubbing produced heat and created an ignition source and fire hazard because it was in the presence of float coal dust. These conditions constituted a violation of section 75.1731(b).

3. Partin and Burns both confirmed Sizemore's testimony regarding the belt being frayed. Tr. 103, 104, 201, 250. Since the belt was frayed and worn on the edges, it ceased to maintain its flame-resistant properties and became combustible. The fact that the fraying may have only been on the older belt is not a legitimate defense. I find that the belt was frayed and worn as described by Sizemore. Tr. 103, 104. Section 75.1731(a) and section 75.1731(d) require that damaged belt components that pose a safety hazard be repaired or replaced immediately, and the belt must maintain flame-resistant properties. The flame resistant material was worn off of the frayed portions of the belt. As the belt rubbed against the structure and heat was generated from the friction, the frayed portions of the belt could have been ignited. Therefore, the frayed portions of the belt posed a fire hazard and should have repaired or replaced immediately. These conditions constituted a violation of section 75.1731(a) and section 75.1731(d).

5. In regards to the discarded materials, the only part of section 75.1731 that may be applicable is (c). Under section 75.1731(c), the discarded material must not only be located in the belt conveyor entry, it also has to be in a place where it may contribute to a frictional heating hazard. While the discarded materials may have been combustible and in the same area as the coal accumulations, the Secretary did not present evidence that the belt was rubbing against any

of the materials, and as a result, contributed to a frictional heating hazard. For this reason, I find that this particular condition was not a violation of section 75.1731.[9]

Sizemore determined that the violation was highly likely to result in a permanently disabling injury, that it was S&S, that four persons were affected, and that it was due to Manalapan's high negligence and unwarrantable failure to comply with the cited standard. Ex. S-41.

**S&S**

I have found that the violation existed as charged. The Secretary charges that the belt cutting into the belt structure and the stuck rollers rubbing on the belt, contributed to the discrete safety hazard of loose coal and float coal dust ignition that could have resulted in a belt fire or explosion. Tr. 65, 66; Sec'y Br. at 23. The violation being S&S turns on whether the components for an ignition or explosion were established by the Secretary and, if so, whether the hazards were reasonably likely to cause an injury or injuries of a reasonably serious nature. *Mathies Coal Co.* at 3-4.

Sizemore determined that the violation was S&S because if conditions continued to exist, there would have been a fire, and resulting serious injuries. Tr. 111. He marked the likelihood of injuries as highly likely because the same exact conditions were present in other mines that had fires. Tr. 111-12. A fire would have resulted in permanently disabling injuries from smoke inhalation or burns to the four men who were assigned to work on the No. 3 belt. Tr. 112.

The accumulations of dry float coal dust on the belt structure and the belt rubbing on the crossbar of the structure, generating heat, was a serious fire hazard. As stated in the previous S&S section for Order No. 8335779, most of the loose coal and coal dust on the belt was sprayed with water and was wet. However, the dry black coal dust's ignition could have dried out and ignited the damp coal. As a result, I find that Sizemore was correct and that serious injuries from burns or smoke inhalation were reasonably likely to result from the violation. The violation was S&S.

**GRAVITY**

The accumulations of float coal dust, along with the ignition sources of the belt rubbing on the structure and the stuck rollers rubbing on the belt, could have resulted in a belt fire or explosion which would have been reasonably likely to injure up to four miners. Tr. 76, 95-96, 98, 249. The violation was serious.

[9] This condition, discarded material, will not be taken into consideration in the S&S and unwarrantable failure analyses. It may, however, be considered a mitigating factor in the consideration of the penalty assessment.

## UNWARRANTABLE FAILURE

### Obviousness

Sizemore discovered the conditions discussed above as soon as he entered the belt entry. Tr. 113, 114. He credibly testified that the conditions were obvious. Tr. 113, 114. I credit Sizemore's testimony and find that the two cracked rollers, frayed edges on the belt, and the belt cutting into the structure, were obvious conditions.

### Degree of Danger

Sizemore maintained that the conditions were very dangerous and that he ordered the belt to be shut off immediately and taken out of service until they were corrected. Tr. 116. As determined above, a belt fire or explosion was reasonably likely to cause a permanently disabling injury to four miners from burns or smoke inhalation. The degree of danger was relatively high.

### Length of Time

Sizemore determined that the conditions listed lasted for different periods of time. Based on his beltline experience, he stated that the stuck and cracked rollers were present for at least a week. Tr. 97. The flat part of the metal crossbar indicated that the belt had been rubbing against the structure for "quite a while." Tr. 99-100. The belt was out of line for more than a week. Tr. 109. It would have taken several weeks for the belt to reach the level of fraying it displayed. Tr. 104.

The Court finds Sizemore's testimony to be credible, and therefore, finds that the conditions existed for at least a week.

### Extent of the Violation

Sizemore contended that the problems were very extensive. Tr. 116. It took Respondent four days to abate the order. Tr. 113.

Of all of the conditions, the most time consuming was removing the frayed pieces from the edge of the belt, which took a few days. Tr. 227. Also notable is Sizemore's estimate that approximately 50 percent of the 3,592 foot long, 2 inch-wide, belt structure had cuts in it, some of the cuts measuring up to 1.5 inches wide. Tr. 106. In regards to the stuck rollers, it is slightly mitigating that out of possibly hundreds of rollers, only eight were found to be stuck. Tr. 159. Though, two of the eight had extensive damage.

Overall, the conditions were extensive.

## Operator's Knowledge of the Existence of the Violation

Sizemore was adamant that the mine foreman would have seen the conditions while doing an examination. Tr. 112-13. Based on his experience, he was 100 percent positive that the conditions were present the day before, April 9, when the last on-shift examination was conducted. Tr. 115-16. He also explained that a roller gradually becomes stuck and that it squeaks and clanks as it has more difficulty turning. Tr. 159-60. The audible warnings should have triggered corrective action by mine management. In regards to the belt, when the conveyor was shut down, Sizemore noticed that the belt was bowed, an indication that it was exposed to a large amount of pressure. Tr. 108-09. Mine management, specifically Napier, the superintendent, would have been able to see this condition when he arrived in the morning and the belt was off. Tr. 272.

Partin did not think that the belt structure was compromised because it was hauling coal and it did not break down. Tr. 215. He also asserted that stuck rollers cannot be found on a pre-shift exam because the belt is not running. Tr. 292-93. Sizemore conceded that rollers can stop working between a pre-shift and an on-shift exam. Tr. 160.

If the condition of the rollers was only present for a short period of time, missing them on a pre-shift or on-shift exam would have been a mitigating factor. However, the conditions lasted for at least a week, providing many chances to address the issues. That period would have also provided Respondent with several opportunities to see that the belt was bowed and cutting into the belt structure. In addition, Respondent was aware that the belt was frayed, as it was in the process of replacing the belt. Tr. 203, 250.

The conditions discussed above were either obvious or should have been seen by mine management on the pre-shift and/or on-shift examinations conducted during, at least, the week prior to the inspection. The operator should have known of the existence of the stuck rollers, the belt being out of line, and the belt cutting into the structure. The operator knew about the fraying on the belt.

## Operator Placed on Notice that Greater Efforts at Compliance were Necessary

Neither party introduced evidence that the operator was placed on notice that greater efforts at compliance were necessary. As such, this factor will not be considered in the overall unwarrantable failure determination.

## Operator's Efforts in Abating the Violation

Respondent had spliced a new belt to part of an old one and was in the process of eventually replacing the entire belt. Tr. 150, 203. No other evidence was presented that it tried to address the rollers, fraying, or belt being out of line. The pre-shift and on-shift examination books for April 9 did not list any of the conditions. Tr. 114-15.

I find that the operator demonstrated minimal effort in abating the violation.

## Conclusion and Negligence Finding

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the operator's knowledge, extent of the violation, length of time, degree of danger, and obviousness. Manalapan's effort in abating the violation is only a slightly and minimally mitigating factor. The combined factors indicate that a finding of unwarrantable failure is appropriate, as the mitigating factors do not outweigh the significant factors. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.1731, and based on the facts above, I find that the company's negligence was properly determined as high.

| CITATION NO. | DATE | 30 C.F.R § |
|---|---|---|
| 8335778 | 04/10/2009 | 75.362(b)[10] |

The operator has failed to conduct an adequate on-shift examination of the #3 belt conveyor. The following conditions were observed in plain view but were not recorded in the last examination conducted on 3-09-2009 by the belt examiner.

1. Combustible material including loose coal (damp in some areas of the belt, and wet in other areas) measuring from 1 inch to 6 inches in depth was present on the floor of the mine along the entire length of the #3 belt conveyor, and float coal dust black in color, dry and powdery, was observed deposited on the mine floor under the belt, on the ribs, in the crosscuts between the #3 belt and the permanent stoppings, and on the belt structure along the entire length of the #3 belt conveyor.

2. Six bottom rollers were observed stuck. Two were worn into with the sharp edges coming into contact with the bottom belt. Two top rollers were worn into, with the sharp edges coming in contact with the bottom of the top belt.

3. The belt was observed running out of line and cutting into the structure. In approximately the 7th crosscut inby the portal, the bottom roller was worn into and the belt was riding on the metal crossbat of the structure (hot to the touch). Evidence showed (the top of the structure where the belt was riding on the structure was worn flat) this condition has existed for an extended period of time. This condition was observed again in approximately the 35th crosscut.

[10] Section 75.362(b) states, "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated . . . ."

4. The fire resistant material on the edges of the #3 belt conveyor is depleted. The edges of the belt conveyor are worn and frayed exposing over an inch of strings of frayed cloth like material.

5. The #3 belt was observed running "out of line" and cutting into the belt structure stands. Cuts measuring up to 1½ inches in depth were measured in the 2 inch wide belt stands as a result of the belt running out of line. This condition exists in approximately 50% of the belt structure stands and has depleted the integrity of the belt structure and the ability of the conveyor belt to be aligned.

6. Discarded combustible material, including boxes and discarded belt conveyor, is present in different locations along the #3 belt conveyor. . . .

The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-39.

Sizemore viewed the belt examination record presented to him by the belt examiner on the day of his inspection. Tr. 123-24; Ex. S-47. An on-shift examination of the No. 3 belt was performed by the on-shift examiner, Napier, on April 9, the day before the alleged violation was cited. Tr. 121-22. Sizemore found the examination to be inadequate because none of the allegedly obvious conditions discussed above were recorded. Tr. 125. He asserted that the comment regarding a spill at the take-up was insufficient because it was marked as being cleaned.[11] Tr. 126; Ex. S-47 at 2. Based on his experience, Sizemore testified that he was 100 percent certain that the conditions he observed on April 10 were present on April 9. Tr. 115-16.

Napier testified that it was his practice to arrive at the mine early in the morning and check for hazards by traveling on a buggy along the beltline. Tr. 269, 306. On April 9, he listed three conditions, all of which were marked as either changed or cleaned.[12] Tr. 272; Ex. S-47 at 2. On April 10, Napier did not list any conditions regarding the No. 3 belt. Ex. S-47 at 2. Napier asserted that rollers can become stuck between a pre-shift and on-shift exam, or overnight. Tr. 273. He stated that in the past, he had ordered 50-100 replacement rollers a week because he noticed belt rollers that were either beginning to wear out or that were worn out. Tr. 276.

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[11] The second entry in the on-shift examination record for April 9, 2009, states under the "Hazardous Condition" column, "spill @ take up" and states under the "Corrections" column, "cleaned."

[12] The three conditions listed on April 9, 2009 were "stuck roller[,] spill in squeeze[, and] spill @ take up." The stuck roller was marked "changed" while the other two were marked as "cleaned."

## THE VIOLATION

The on-shift examination mandated by section 75.362(b) requires an on-shift examiner to inspect for hazards, every part of a belt from its surface head drive to its underground tailpiece. Tr. 122. The conditions listed in the "Condition or Practice" section of Order No. 8335778 that were not noted in the on-shift exam record on April 9 are the same conditions listed in the "Conditions or Practice" sections of Orders No. 8335779 and 8335780. I have found that the conditions existed and that the conditions violated sections 75.400 and 75.1731, with the exception of the discarded materials, which did not violate either standard. I credit Sizemore's testimony regarding the existence of each of the violative conditions, as well as his testimony that the conditions were obvious and easily visible. I further find that the violative conditions existed on April 9 when Napier conducted his on-shift examination. While it may be true, as Napier testified, that rollers can become stuck between examinations and overnight, it is highly unlikely that six rollers would have suddenly stuck. The rest of the conditions were, as Sizemore maintained, those that happen over time. I find that on April 9, 2009, Respondent failed to adequately examine the No. 3 beltline for hazardous conditions and, therefore, violated section 75.362(b).

Sizemore determined that the violation was highly likely to result in a permanently disabling injury, that it was S&S, that four people were affected, and that it was due to Manalapan's high negligence and unwarrantable failure to comply with the cited standard. Ex. S-39.

## S&S

I have found that the violation existed as charged. The Secretary asserts that an inadequate on-shift examination contributed to the discrete safety hazard of loose coal and float coal dust ignition that could have resulted in a belt fire or explosion. Tr. 65, 66; Sec'y Br. at 29. The violation being S&S turns on whether the hazardous conditions that were present, but not noted by the on-shift examiner, were reasonably likely to cause an injury or injuries of a reasonably serious nature.

Sizemore determined that the violation was S&S because if inadequate examinations continued, and hazardous conditions were not posted, the conditions would have continued to exist, and there could have been a fire, accident, or serious injury. Tr. 128. He marked the likelihood of injury as highly likely because all of the components for a belt fire were present including dust, combustible materials, and ignition sources. Tr. 127. A fire would have resulted in a permanently disabling injury from smoke inhalation or burns, and the four men who were assigned to work on the No. 3 belt would have been affected. Tr. 112, 128.

Napier's inadequate examination allowed the hazardous conditions discussed above to remain present and unaddressed. I found Orders No. 8335779 and 8335780 to be reasonably likely to result in permanently disabling injuries from smoke inhalation or burns and that the injuries would be reasonably serious in nature. For the same reasons, I find that the failure to

adequately check for and identify the hazards cited in the subject order was reasonably likely to result in permanently disabling injuries that were reasonably serious in nature. The violation was S&S.

## GRAVITY

The failure to conduct an adequate on-shift examination by Napier on April 9 meant that the hazardous conditions listed by Sizemore were neither posted or eliminated. The accumulations of float coal dust, along with the ignition sources of the belt rubbing on the structure and the rollers rubbing on the belt, could have resulted in a belt fire or explosion which would have been reasonably likely to injure up to four miners. Tr. 76, 95-96, 98, 249. The violation was serious.

## UNWARRANTABLE FAILURE

### Obviousness

Because the conditions in the previous orders were obvious, it should have been obvious to Manalapan that the on-shift examination was inadequate when the conditions were not listed.

### Degree of Danger

As discussed in detail in the previous two orders, the conditions had a reasonably high degree of danger, and had existed for at least several shifts. The inadequate on-shift examination resulted in these hazardous conditions going unaddressed. There was a reasonably high degree of danger.

### Length of Time

Sizemore specified that the on-shift examination conducted by Napier on April 9 was inadequate. One day is a relatively short period of time.

### Extent of the Violation

An on-shift examination was inadequately conducted on April 9 and as a result, five hazardous conditions, loose coal and float coal dust accumulations, stuck rollers, the belt cutting into the structure, a large number of cuts in the belt structure, and frayed edges of the belt, went unaddressed. The violation was extensive.

**Operator's Knowledge of the Existence of the Violation**

Napier conducted an on-shift examination on April 9. Tr. 272. Given that the on-shift examiner is an agent of the operator, Manalapan is deemed to know of the inadequacy of Napier's examination.

**Operator Placed on Notice that Greater Efforts at Compliance were Necessary**

Neither party introduced evidence that the operator was placed on notice that greater efforts at compliance were necessary. As such, this factor will not be considered in the overall unwarrantable failure determination.

**Operator's Efforts in Abating the Violation**

Based on Napier's testimony regarding his daily routine and the measures he took to enhance safety, the court has no doubt that Napier was genuinely concerned about the safety of his men and the fitness of the mine. He also conducted an on-shift examination on April 9 and wrote down three different conditions. However, since the cited conditions likely lasted for a week or more, Napier had a number of opportunities to address them. I find that the operator made only a modest effort to abate the violation.

**Conclusion and Negligence Finding**

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the operator's knowledge, extent of the violation, degree of danger, and obviousness. The fact that Manalapan made some effort to abate the violation was a slightly mitigating factor. The combined factors indicate to me that a finding of unwarrantable failure is appropriate, as the mitigating factor does not outweigh the more significant factors. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.362(b), and based on the facts above, I also find that the company's negligence was properly determined as high.

**DOCKETS NO. KENT 2012-727 & KENT 2012-1133**

**BACKGROUND**

Tom Middleton, an MSHA coal mine inspector, conducted an inspection of the P-1 mine, an underground coal mine located near Smith, Kentucky, on July 6 and 7, 2011.[13] Tr. 311, 316-17,

[13] Middleton entered the mining industry between 1989 and 1990. Tr. 312. During his time in the private sector, he drove shuttle cars, performed roof bolting, became a certified foreman, and ran mobile bridge carriers and other equipment for 6 years. Tr. 313-14. Middleton (continued...)

318. The inspection was associated with a fatal accident, but none of the citations or orders discussed below contributed to the fatality. Tr. 317. At the time of the inspection, the mine was not producing coal, pursuant to a 103(k) order.[14] Tr. 317.

Middleton had been to the P-1 mine and gone underground several times prior to this inspection. Tr. 316. During the inspection, he was accompanied by Harry Hoff, an MSHA electrical inspector. Tr. 319. Before entering the mine on July 6, Middleton looked at the company's examination books and spoke with mine management. Tr. 319-320. After completing his inspection, Middleton was advised by his supervisors to draft citations and orders for their review prior to issuing them. Tr. 323. As a result, although the inspection took place on July 6 and 7, 2011, the citations and orders below were not issued until August 15, 2011.[15] Tr. 323.

**KENT 2012-727**

| **CITATION NO.** | **DATE** | **30 C.F.R §** |
|---|---|---|
| 8353912 | 08/15/2011 | 75.209(a)[16] |

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The ATRS system installed on the Fletcher dual head S/N 2008044 in use on the 002 MMU will not reach the mine roof. This was determined by having an operator fully extend the ATRS. The top of the ATRS extensions

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[13](...continued)
joined MSHA in 2007, and has been a health specialist for almost 1 year. Tr. 311, 312. He has spent 95 percent of his time at MSHA inspecting underground coal mines. Tr. 316.

[14] Section 103(k) states in part, "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary" may issue orders as he deems appropriate, under 103(k) of the Act, "to insure the safety of any person in the coal or other mine . . . ." 30 U.S.C. § 813(k).

[15] Respondent references the delayed issuance of the citations and orders in its brief, but it is unclear what the company's argument is. Resp. Br. II at 6. In any case, Middleton testified that nothing in the citations and orders changed as a result of his supervisors' review. Tr. 323. There is also no indication that the integrity of the contemporaneous field notes, which he made during the course of the inspection, was compromised.

[16] Section 75.209(a) states,

. . . an ATRS system shall be used with roof bolting machines and continuous mining machines with integral roof bolters operated in a working section. The requirements of this paragraph shall be met according to the following schedule:
(1) All new machines ordered after March 28, 1988. . . .

measured approximately 2 feet from the mine roof while fully extended in the #3 heading. The #3 heading measured 123 inches high at the last row of bolts and the #4 heading measured 122 inches high at the last row of bolts; both of these cuts are unsupported. The ATRS tag on the roof bolter says ATRS maximum height reach is 82 inches and the ATRS had 18 inch extensions installed making a total ATRS reach of 100 inches. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-10.

When Middleton entered the 002 section of the mine, he observed a roof bolting machine ("roof bolter") and noticed that its automatic temporary roof support ("ATRS") system was not in contact with the mine roof. Tr. 323-25. An ATRS system is a piece of equipment that is attached to the front of a roof bolting machine. Tr. 326. The system has two pillar type metal pieces, and each pillar has a contact pad at its top. Tr. 326; Ex. S-37 at 21. The pad is supposed to touch and put pressure on the roof while the roof bolter operator is roof bolting. Tr. 325-26. The ATRS provides roof support that protects the roof bolter operator from roof falls. Tr. 325-26. The roof bolting machine moves into a cut once the continuous miner is done removing the coal in that cut. Tr. 331.

A tag on the roof bolting machine indicated the height at which the manufacturer recommended the machine operate was 82 inches. Tr. 322; Ex. S-38 at 4. However, extensions measuring 18 inches in height were added to the ATRS system to increase the total height that the system could reach to 100 inches. Tr. 329. A photograph with two small white stickers depicts where the extensions were located on the ATRS system of the roof bolter, the top of which should have been in contact with the roof. Tr. 328-29; Ex. S-37 at 21.

Middleton measured the roof height at the last row of permanent roof bolts in the Nos. 3 and 4 headings as 123 and 122 inches respectively. Tr. 332, 333. He obtained a modified 103(k) order for July 7 so that the roof bolting machine could be turned on and extended upward to its highest height. Tr. 335, 338. Even at its highest height, the ATRS system was unable to reach the roof, falling at least 2 feet short and appearing unbalanced. Tr. 339.

Timothy Fugate,[17] the deputy chief accident investigator at the Kentucky Office of Mine Safety and Licensing, created a schematic drawing that included measurements of the roof height in all five headings of the 002 section. Tr. 441, 449; Ex. S-23 at 1. A majority of the measurements were over 100 inches. Ex. S-23 at 1. Fugate testified that he observed the same

[17] Fugate has 26 years of mining experience, and is very familiar with roof bolting machines that have ATRS systems through running the machines and supervising men who operated them. Tr. 444. He was a safety director and mine superintendent before leaving to work for the State of Kentucky as an underground safety analyst, inspector, and finally, a deputy chief of accident investigations. Tr. 441, 443, 445.

ATRS conditions as Middleton during his fatal accident investigation a week prior. Tr. 462-63; Ex. S-38 at 2. During the investigation, Fugate interviewed the roof bolting machine operators and foreman of the section who admitted in sworn testimony that they bolted prior to installing the extensions and that even after getting the extensions, the ATRS system did not reach the roof in several places. Tr. 458, 459. The operators also testified that they walked out from under the drill canopies on the ATRS system in order to install the bolts. Tr. 465. Larry Norris, the previous 002 section foreman at the P-1 mine, confirmed Fugate's testimony, stating that the ATRS system did not reach the roof in some of the areas that bolting had taken place. Tr. 399-400.

## THE VIOLATION

The Commission requires "what common sense dictates -- that if a regulation requires a piece of equipment, such as brakes, then it follows that the equipment must be functional at all times . . . ." *Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 863 (Aug. 1999) (Comm'r Marks, concurring) (writing separately to emphasize the safety aspects of the case and highlight certain facts in evidence that were not part of the majority opinion).

In order for an ATRS system to function properly, the contact pads must reach the mine roof. It is apparent from the testimony provided that the system could not reach the roof in several places, even after the installation of extensions. While there are exceptions to the cited standard, Middleton explained that because the P-1 mine was not an anthracite mine (30 C.F.R. § 75.209(a), the mine roof did not measure less than 30 inches (§ 75.209(b), and temporary support was not installed (§ 75.209(c), no exception to the cited standard applied. Tr. 325. I agree and find that Respondent violated section 75.209(a).

Middleton also determined that the violation was highly likely to result in a fatality, that it was S&S, that two persons were affected, that the negligence level was reckless disregard, and that the violation was the result of Manalapan's unwarrantable failure to comply with a mandatory standard. Ex. S-10.

## S&S

Middleton testified that the ATRS system is important because it helps protect the roof bolting machine operator from death in the event of a roof fall. Tr. 326. Using an ATRS system that does not touch the roof is an unsafe practice. Tr. 331. Without a properly working ATRS system, the machine operator is open to injury caused by falling rock from the roof.

Middleton stated the injury was highly likely to result in a fatality because if mining continued, a roof fall or rib roll could have occurred. Tr. 345-46. The two people affected would have been the left and right side machine operators. Tr. 346.

The parties stipulated that, if the court found Manalapan violated section 75.209(a) as alleged, the violation was S&S. Stip. 19; Tr. 25. Therefore, I find that the violation was S&S. Middleton estimated that the inadequate ATRS system was in use for at least 3 weeks based on

the pre-shift reports, during which time the roof bolt operators were in danger of being struck by falling rock from the roof. Tr. 363. I credit Middleton's testimony and find that he properly determined the likelihood of injury to be highly likely and the injury reasonably expected was fatal.

## GRAVITY

It was highly likely that a roof bolting machine operator, using an ATRS system that did not touch the mine roof, would have been fatally struck or seriously injured by falling rock from a roof fall or rib roll. There was nothing between the unsupported roof and the operator when the operator stepped out from under the drill canopy on the ATRS system. Tr. 325 The violation was serious.

## UNWARRANTABLE FAILURE

### Obviousness

Middleton asserted that the ATRS condition should have been discovered by an examiner. Tr. 365. Norris observed the condition during his time as the 002 section foreman. Tr. 399-400. He had been a section foreman for Manalapan starting January 2011 and had been the 002 section foreman for 3-4 weeks as of June 2011. Tr. 398-99. The violation was obvious.

### Degree of Danger

The ATRS system provides roof support and is used to protect the roof bolting machine operator by breaking a roof fall if one occurs. Tr. 325-26. Roof bolting machine operators were put in serious danger when the ATRS system did not reach the roof. While extensions were added to increase the height of the ATRS system, the machine operators were still not safe in areas where the system's contact pads reached the roof, because the equipment was not properly modified when extensions were installed. Tr. 336.[18] When equipment is modified, the engineer's certification is voided and the equipment is not considered reliable without an engineer's re-certification, something that did not happen here. Tr. 337.[19]

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[18] Usually, a certain set of extensions are made for a particular roof bolting machine, and the holes in which the extensions are bolted to the machine align with the holes in the ATRS system. Tr. 336. In this instance, because the extensions installed were not specifically made for Manalapan's roof bolter, the holes did not align. Tr. 336. This required the miners to cut holes into the main ATRS system in order to bolt down the extensions. Tr. 336.

[19] While Fletcher, the roof bolt machine manufacturer, provided a letter to Manalapan stating that its representative "deemed the repair [i.e., the extensions] proper by Fletcher standards[,]" the letter is dated approximately 4 months after the inspection and Fletcher does

(continued...)

The degree of danger was very high when the ATRS system did not have the extensions, and it remained almost as high after the extensions were installed.

**Length of Time**

Middleton posited that Manalapan had probably been mining with an inadequate ATRS system for 3 weeks based on the pre-shift reports. Tr. 363. He did not think the extensions were a mitigating factor because they still did not allow the system to come in contact with the roof at all times. Tr. 363.

Based on Middleton's credible testimony, the Court concludes that the violation existed for at least 3 weeks.

**Extent of the Violation**

The contact pads on the ATRS system, without the extensions, were short of the mine roof by approximately 40 inches in the Nos. 3 and 4 headings. Ex. S-23 at 2. With the extensions, the contact pads were short of the mine roof by over 20 inches in the Nos. 3 and 4 headings. Tr. 329; Ex. S-23 at 2. Roof bolting was conducted in both of these conditions. Tr. 460. The violation was extensive.

**Operator's Knowledge of the Existence of the Violation**

Bryant Massingale, the foreman of the second shift in the 002 section, pled guilty in the U.S. District Court for the Eastern District of Kentucky to knowingly failing to report hazardous conditions, including that the ATRS system for the Fletcher roof bolting machine did not reach the mine roof. Stip. 11, 15; Ex. S-34. Norris, also a foreman, knew the ATRS system did not reach the roof and told Joseph Miniard, his boss and the superintendent of the P-1 mine. Stip. 10; Tr. 22.

The operator had knowledge of the existence of the violation.

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[19](...continued)
not provide specifics as to when the repair work was done and as to exactly what was done. Ex. R-R; Resp. Br. II at 12. The Court finds the letter to be too vague to be given much weight, and the court declines to find that the machine was reliable after the extensions were installed.

## Operator Placed on Notice that Greater Efforts at Compliance were Necessary

Besides the fact that mine management was aware that the ATRS system had to touch the roof and did not, Manalapan's roof control plan required that the ATRS system sit firmly against the mine roof while bolting was being done. Tr. 356; Ex. S-24 at 7.

The operator was on notice that greater efforts at compliance were necessary.

## Operator's Efforts in Abating the Violation

The extensions to the ATRS may have, at one point, been considered an effort to abate the violation. However, the extensions did not allow the ATRS system to reach the roof in the Nos. 3 and 4 headings. Tr. 329; Ex. S-23 at 2. In addition, the modifications to the system itself during installation, rendered the roof bolting machine and ATRS system unreliable until it was re-certified.[20] These factors negate the effort.

Norris, the foreman of 002 section in June 2011, testified that he tried to "ramp up"[21] in the No. 3 and 4 headings so that the ATRS system would reach the roof. Tr. 401. However, Middleton did not see any evidence of ramping up in the No. 4 heading. Tr. 344. Fugate stated that even with the ramping up in the No. 3 heading, the ATRS was still 2-3 feet from the mine roof on July 1. Tr. 455. Norris confirmed that the ramping up did not work in certain areas, mostly the Nos. 3 and 4 headings, yet mining continued. Tr. 401. The court credits this testimony and concludes that in those areas where ramping up actually occurred, it was ineffective.

Therefore, the Court finds that Manalapan's efforts at abating the violation did not mitigate its lack of care.

## Conclusion and Negligence Finding

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the degree of danger, the operator's knowledge of the violation, the extent of the violation, the length of time, the obviousness of the violation, and notice to the operator of the violation's existence. Manalapan's effort in abating the violation is not a mitigating factor. The combined factors indicate to me that Middleton's finding of unwarrantable failure was appropriate. Therefore, I affirm it and find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.209(a).

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[20] Manalapan did not obtain the Fletcher letter to ensure reliability of the machine until after the order was issued as stated above. Tr. 514; Ex. R-R.

[21] "Ramping up" is the process by which the roof bolting machine climbs on top of material to allow it to reach areas of higher roof. Tr. 341.

Middleton determined that Manalapan's level of negligence reached reckless disregard. Under section 100.3 of the Secretary's regulations, reckless disregard is defined as "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3.

Mine management was acutely aware of the ATRS system condition. They tried to ramp up and install extensions. However, the extensions were installed with disregard for their reliability. In addition, Norris, a generally credible witness, testified that he spoke to Miniard, the mine's superintendent, about his discomfort in bolting without the ATRS system reaching the roof and Miniard told him to "keep going." Tr. 402, 427. According to Norris, Miniard also prevented him from filling out the pre-shift and on-shift examination reports properly. Tr. 402; Ex. S-33. All of these actions show a blatant disregard for safe roof bolting practices.

I find that the violation was the result of a total lack of care on Manalapan's part and that Middleton properly determined the level of negligence to be reckless disregard.

**DOCKET NO.**
KENT 2012-727

| **ORDER NO.** | **DATE** | **30 C.F.R §** |
|---|---|---|
| 8353916 | 08/15/2011 | 75.202(b)[22] |

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. Evidence shows that the Fletcher dual head bolter operators on the 002 MMU have worked under unsupported roof while bolting the #3 and #4 headings. This was determined by having an operator fully extend the ATRS. The top of the ATRS extensions measured approximately 2 feet from the mine roof while fully extended in the #3 heading. The unsupported #3 heading measured 123 inches high at the last row of bolts and the #4 heading measured 122 inches high at the last row of bolts, both of these cuts are unsupported. The ATRS tag on the roof bolter says ATRS maximum height reach is 82 inches and the ATRS had 18 inch extensions installed making a total ATRS reach of 100 inches. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-14.

According to Middleton, unsupported roof means no support at all, including not using the ATRS system. Tr. 365. He contended that in a situation where an ATRS system did not reach the mine roof, a miner would have to travel out from underneath the roof bolter canopy and ATRS in

[22] Section 75.202(b) states, "[n]o person shall work or travel under unsupported roof unless in accordance with this subpart. Part (a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

order to insert the glue into the bolt hole and install the roof bolt. Tr. 366, 372-73. The miner would thus expose himself to unsupported roof. While a roof bolting machine operator is installing the bolts, the ATRS system is the only roof support available him. Tr. 373. Middleton's contention was confirmed by Fugate, who testified that when interviewed, the machine operators stated that they went out from underneath the drill canopies and the ATRS in order to put resin in the bolt hole and install the bolt. Tr. 465. At the very minimum, the roof bolting machine operators bolted three rows. Tr. 363, 377. The parties stipulated that the cuts in the Nos. 3 and 4 headings were unsupported. Stip. 17. Norris also mentioned that roof bolting machine operators on his shift were working under unsupported roofs in some areas. Tr. 400, 401.

## THE VIOLATION

It is apparent that the roof bolting machine operators left the protected areas of the drill canopies in order to install the roof bolts when the ATRS system did not reach the mine roof. This action exposed them to unsupported roof, a violation of 75.202(b).

Middleton also determined that the violation was highly likely to result in a fatality, that it was S&S, that two persons were affected, that the negligence level was reckless disregard, and that the violation was the result of Manalapan's unwarrantable failure to comply with a mandatory standard. Ex. S-14.

## S&S

Middleton stated that injury was highly likely to cause a fatality because the two roof bolting machine operators were continuously exposed to unsupported roof. Tr. 373-75.

The parties stipulated that, if the court found Manalapan violated section 75.202(b) as alleged, the violation was S&S. Stip. 27; Tr. 27. Therefore, I find that the violation was S&S.

Because of the frequency with which the machine operators were exposed to unsupported roof and in danger of a roof fall or rib roll, and the fact that the ribs could be loose (Tr. 548), I also find that Middleton properly determined the likelihood of injury to be highly likely and the injury reasonably expected to occur to be fatal.

## GRAVITY

It was highly likely that without an effective ATRS system, a roof bolting machine could have been fatally struck by falling rock from a roof fall. The violation was serious.

## UNWARRANTABLE FAILURE

### Obviousness

The violation was obvious. At the very least, it should have been seen during the foreman's on-shift examinations.

### Degree of Danger

Middleton testified to the widely known fact that many fatalities have occurred due to miners working under unsupported roofs. Tr. 378. There was no additional roof support in the area where the violation was observed. This could have resulted not only in a roof fall but also a rib fall or roll as a result of the additional pressure by the roof. Tr. 374-75. Since the roof bolters had to bolt every 20 feet in the No. 3 headgate and there was at least 60 feet of roof bolts installed, the roof bolters were repeatedly exposed to unsupported roof. Tr. 377. The degree of danger was very high.

### Length of Time and Extent of the Violation

The Court credits the unrefuted testimony of Middleton that the ATRS system had likely been in operation for 3 weeks without touching the mine roof, and that at the very minimum, the roof bolting machine operators bolted three rows during this time in the No. 3 headgate and were exposed to unsupported roof each time. Tr. 363, 377. The lack of an effective ATRS system had been present for a long period of time and was extensive.

### Operator's Knowledge of the Existence of the Violation

Norris, as a foreman with the responsibility to supervise miners, was an agent of Manalapan at the time of the inspection pursuant to 30 U.S.C. § 802(e). He knew that the bolters were working under unsupported roof. The operator had knowledge of the existence of the violation.

### Operator Placed on Notice that Greater Efforts at Compliance were Necessary

Neither party introduced evidence that the operator was placed on notice that greater efforts at compliance were necessary. As such, this factor will not be considered in the overall unwarrantable failure determination.

### Operator's Efforts in Abating the Violation

Neither party introduced evidence to show that Manalapan made an effort to protect miners from working under unsupported roof when the ATRS system failed to reach the roof.

## Conclusion and Negligence Finding

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the degree of danger, operator's knowledge, extent of the violation, length of time, obviousness, and efforts to abate the violation. The combined factors indicate to me that a finding of unwarrantable failure is appropriate. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.202(b).

Middleton determined that Manalapan's level of negligence reached reckless disregard because the operator knowingly ignored safety hazards and repeatedly exposed miners to very dangerous conditions. Tr. 379.

Mine management was aware that miners were working under unsupported roof. The same analysis as in the ATRS order above is applicable because in order to prevent the miners from working under unsupported roof, the ATRS system needed to reach the mine roof. No additional steps were taken to ensure the safety of the bolter operators when the ATRS system did not reach the roof. The actions of Respondent showed a blatant disregard for the safety of the bolting machine operators, and I find that Middleton properly determined that the level of negligence was reckless disregard.

## Mobile Bridge Carrier Violations

Orders No. 8353918, 8353913, 8353914, and 8353915 were issued pursuant to 104(d)(1) of the Act for lack of a substantially constructed canopy or cab on the Long Airdox #1, #2, #3, and #4 mobile bridge carriers ("MBCs"). In each order, Middleton determined that injury was highly likely to occur and that the injury could reasonably have been expected to result in a fatality, that the violation was S&S, that one person was affected, and that the level of negligence was reckless disregard. Ex. S-11, 12, 13, 16. Middleton also found that each violation was the result of an unwarrantable failure to comply with a safety standard. *Id.* The testimony regarding the mobile bridge carriers, given by Middleton, Norris, Fugate, and Terry Mills, pertains to each order. As such, the findings of fact, analysis, and conclusions of law, apply to each order. The descriptions of these four alleged violations are below, and the discussion begins after Order No. 8353915.

| **DOCKET NO.** |
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| KENT 2012-1133 |

| **ORDER NO.** | **DATE** | **30 C.F.R §** |
|---|---|---|
| 8353918 | 08/15/2011 | 75.1710-1[23] |

[23] During the hearing, the Secretary's motion to amend the standard in Orders No. 8353913, 8353914, 8353915, 8353918, and 8353921 from section 75.1710 to 75.1710-1 was (continued...)

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The Long Airdox #1 MBC was being operated without a substantially constructed canopy or cab. The mining height on the 002 section is over 42 inches. The measured heights ranged from 5.5 feet 4 crosscuts outby the MMU in the #1 entry to 10 feet high in the #3 and #4 headings. There were agents of the operator present on the MMU during the operation of the equipment and during examinations of electrical equipment. This condition is obvious to the casual observer. When asked about the canopy for the MBC, the mine superintendent stated that the company had no canopy for the MBC. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-16.

| **DOCKET NO.** |
|---|
| KENT 2012-727 |

| **ORDER NO.** | **DATE** | **30 C.F.R §** |
|---|---|---|
| 8353913 | 08/15/2011 | 75.1710-1 |

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The Long Airdox #2 MBC was being operated without a substantially constructed canopy or cab. The mining height on the 002 section is over 42 inches. The measured heights ranged from 5.5 feet 4 crosscuts outby the MMU in the #1 entry to 10 feet high in the #3 and #4 headings. There were agents of the operator present on the MMU during the operation of the equipment and during examinations of electrical equipment. This condition is obvious to the casual observer. When asked about the canopy for the MBC, the mine superintendent stated that the company had no canopy for the MBC. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-11.

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[23](...continued)
granted. Tr. 16-18. Section 75.1710-1(a) provides in part:

> Except as provided in paragraph (f) of this section, all self-propelled diesel-powered and electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall . . . be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls . . . .

| ORDER NO. | DATE | 30 C.F.R § |
|---|---|---|
| 8353914 | 08/15/2011 | 75.1710-1 |

During the fatal accident investigation event number 4451857 the following non contributing violation was observed on 7/6/2011. The Long Airdox #3 MBC was being operated without a substantially constructed canopy or cab. The mining height on the 002 section is over 42 inches. The measured heights ranged from 5.5 feet 4 crosscuts outby the MMU in the #1 entry to 10 feet high in the #3 and #4 headings. There were agents of the operator present on the MMU during the operation of the equipment and during the examinations of electrical equipment. This condition is obvious to the casual observer. When asked about the canopy for the MBC, the mine superintendent stated that the company had no canopy for the MBC. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-12.

| ORDER NO. | DATE | 30 C.F.R § |
|---|---|---|
| 8353915 | 08/15/2011 | 75.1710-1 |

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The Long Airdox #4 MBC was being operated without a substantially constructed canopy or cab. The mining height on the 002 section is over 42 inches. The measured heights ranged from 5.5 feet 4 crosscuts outby the MMU in the #1 entry to 10 feet high in the #3 and #4 headings. There were agents of the operator present on the MMU during the operation of the equipment and during the examinations of electrical equipment. This condition is obvious to the casual observer. When asked about the canopy for the MBC, the mine superintendent stated that the company had no canopy for the MBC. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-13.

Manalapan had four MBCs on the 002 section and none of them had canopies or cabs over the operator's seat. Tr. 470-71. An MBC is a self-propelled piece of electrical equipment with a cable that connects to the section power center. Tr. 535-36. It also has tracks like a bulldozer. Tr. 469. The four MBCs are interconnected and the bridges, or conveyors, on the carriers transfer coal from the continuous miners to the section belt. Tr. 532-33. The operator of the carrier sits in a compartment, located in the same place on each, and uses levers to run the machine. Tr. 469, 460, 471; Ex. S-38 at 3. All of the operators must be present to move the interconnected carrier. Tr. 535. The MBCs are operated in an active working area and are considered face equipment because they are used in or inby the last open crosscut. Tr. 536-37.

Middleton issued four separate orders, one for each MBC, because none of carriers had canopies or cabs over the operator's seat and each MBC operator needs to be protected. Tr. 531-33, 535.

## THE VIOLATION

The parties stipulated that Manalapan violated section 75.1710-1 as charged, in Orders No. 8353913, 8353914, and 8353915, and I so find. Stips. 20, 25, 26; Tr. 26; Ex. S-31. They did not stipulate to violating section 75.1710-1 for the Long Airdox #1 MBC, Order No. 8353918. However, during the hearing, Manalapan's representative stated that the company was not contesting any of the alleged violations for failure to have canopies on MBCs. Tr. 510. Therefore, I find that Manalapan also violated section 75.1710-1 in regards to Order No. 8353918.[24]

## S&S

I have found that the violations existed as charged. The Secretary charges that the absence of a canopy over the operator's seat of the four MBCs contributed to the discrete safety hazard of the MBC operators being struck by falling rock from a roof fall or rib roll. 471, 544-45; Sec'y Br. at 54. This is indeed the hazard to which the violations contributed. The violations being S&S in each instance turns on whether it was reasonably likely that the MBC operators would be struck and injured by falling rock and, if so, whether their resulting injuries would be of a reasonably serious nature.

Middleton explained that it was important to have a canopy on a MBC in roof heights of over 42 inches because at such heights, if rock falls, there is a greater chance of injury to a miner. Tr. 544-45. Fugate stated that when the cabs of the MBCs do not have canopies, the MBC operators have no protection from rib rolls or roof falls. Tr. 471. There were several signs that the roof and ribs in the areas where the MBCs were located were weak. Middleton had issued a citation for two kettle bottoms in the area,[25] based on his inspection on July 6 and 7. Tr. 545-46, 601; Ex. S-19. The kettle bottoms were located in the same section as the MBCs and operators would have had to travel underneath them. Tr. 548. In addition, Fugate testified that in

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[24] Respondent argues in its post hearing brief that since all four of the carriers create a bridge system, they should be considered "a single entity and therefore only a single citation/order at most, should have been issued." Resp. Br. II at 2. While the company makes a well articulated duplication argument, the argument comes too late. Respondent not only stipulated to the multiple carrier violations in three instances, but stated during the hearing that it was not contesting the alleged violations. Tr. 510-11; Stips. 20, 25, 26. I hold that Manalapan essentially waived its right to contest the violations.

[25] A kettle bottom is a piece of rock that has fossilized and can fall or drop from the mine roof without warning. Tr. 546.

the No. 3 entry, longer bolts were being used to mitigate problems with the roof. Tr. 472. There were also "noticeable loose rib conditions all over" the adjoining 002 section on June 29, 2011, the day of the fatality that triggered Middleton's inspection. Tr. 548.

Middleton designated the likelihood of injury as highly likely to be fatal because the miners would have been continuously passing by loose ribs or underneath unstable roof that could have fallen on them. Tr. 549. He explained that while a miner's lower torso and back may be slightly protected by the operator compartment, his or her upper torso and head would still be exposed to falling rock. Tr. 549. One person per bridge carrier was affected. Tr. 549.

I credit Middleton's and Fugate's testimony regarding the unstable roof conditions and loose ribs. Based on the frequency with which the MBC operators traveled under unsupported roof that was high and unstable, as well as traveled past ribs that could be loose, I find that fatal or very serious injuries were highly likely to result from the violations. The violations were S&S.

## GRAVITY

Because fatal or disabling injuries were likely to result from the violations, I find that they were serious.

## UNWARRANTABLE FAILURE

### Obviousness

Middleton stated that it was obvious the MBCs did not have canopies. Tr. 551. Manalapan knew the carriers did not have canopies. Stip. 24; Ex. S-31. Further, an MBC operator's compartment can be easily seen. Ex. S-38 at 3. The Court, therefore, agrees with Middleton.

### Degree of Danger

The roof and ribs in the 002 section were weak. Tr. 548, 472. MBC operators were frequently traveling in or inby the last open crosscut with no protection from roof falls or rib rolls. There was a high degree of danger.

### Length of Time

Based on the examination reports, Middleton believed that the canopies on the MBCs had been missing for at least 3 weeks. Tr. 551. I credit Middleton's testimony and find that the violative conditions were present for an extended period of time.

**Extent of the Violations**

One canopy was missing from each MBC. The MBC operators would have been frequently subjected to hazardous conditions when operating the machines. I find that the violations were very extensive.

**Operator's Knowledge of the Existence of the Violations**

Manalapan knew that it was required to have canopies or cabs on the MBCs in the 002 section and was aware that the carriers did not have canopies or cabs. Stip. 24; Ex. S-31. The operator had knowledge of the existence of the violation.

**Operator Placed on Notice that Greater Efforts at Compliance were Necessary**

Manalapan knew that canopies were required on the MBCs and that the MBCs did not have them. Stip. 24. However, in the months leading up to July 2011, no citations were issued at the mine for missing canopies on the MBCs. Tr. 628, 630. Nonetheless, because Manalapan stipulated to knowing that it was required to have canopies on the carriers, the Court finds that Manalapan was placed on notice that greater efforts at compliance were necessary.

**Operator's Efforts in Abating the Violation**

Pre-shift and on-shift examinations were required to be conducted every shift and there were multiple shifts per day. Tr. 552. Middleton checked the examination books before going into the mine and did not see any mention of canopies being needed. Tr. 566-67. However, the electrical equipment exam record for July 6 states that canopies were needed on all four carriers. Ex. S-48. Middleton, who looked at the electrical exam records before going underground, asserted that he would not have issued section 104(d) orders if he saw the notes before going underground.[26] Middleton contended that the notes were added to the exam record after he conducted his inspection. Tr. 565.

It seems highly unlikely that the notes were written to address the canopy issues on the day of the inspection, before Middleton's arrival, and the Court credits Middleton's belief that they were written on July 6, after he went underground. Further, there is no evidence that Manalapan had ordered the missing canopies nor that Manalapan provided any alternative protection to the MBC operators. Therefore, the Court finds that Manalapan did not make any effort to abate the violations.

[26] The Court finds Middleton's testimony credible. Proving that the violations were the result of unwarrantable failures would have been difficult if Middleton saw that the canopy issues were addressed in the examination records before going underground.

**Conclusion and Negligence Finding**

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the degree of danger, operator's knowledge, length of time, obviousness, and efforts to abate the violations. The combined factors indicate to me that a finding of unwarrantable failure is appropriate, as there are no mitigating factors. Therefore, I find that the violations were caused by Respondent's unwarrantable failure to comply with section 75.1710-1.[27]

Middleton determined that Manalapan's level of negligence reached reckless disregard because the operator did not stop mining to provide adequate safety equipment for the carriers, examinations were conducted on a daily basis, and mine management was aware of the conditions. Tr. 550. Norris, the mine foreman of the 002 section at the time of inspection, had requested canopies for the carriers in a production report to Miniard, the mine superintendent, prior to the inspection. Tr. 403-04. Norris testified that Miniard told him that the canopies did not need to be in the report and made Norris tear the report up and re-write it. Tr. 404. As stated previously, I find Norris to be a credible witness and I believe his testimony.

Miniard's actions alone exhibit not the slightest degree of care towards the lack of canopies and the carrier operators' safety. There was no mitigating evidence presented by Respondent to support a finding of a lower negligence level, and I conclude that the level of negligence was reckless disregard.

| **DOCKET NO.** | | |
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| **ORDER NO.** | **DATE** | **30 C.F.R §** |
| 8353917 | 08/15/2011 | 75.512[28] |

[27] Respondent argues that because MSHA and state inspectors had previously inspected the section and did not issue citations for the lack of canopies on the carriers, "how can it be 'obvious to the casual observer,' for it to be 'aggravated conduct,' and an 'unwarrantable failure to comply with a mandatory safety standard.'" Resp. Br. II at 7. Obviousness and notice are only two of the factors that may be taken into account in determining whether a violation is an unwarrantable failure. Even if I found that the violation was not obvious and that Manalapan was without notice, I might still have found that the other factors more than justified the inspector's unwarrantable findings.

[28] Section 75.512 provides

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is

(continued...)

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The Long Airdox MBC's electrical face equipment on the 002 MMU is not being properly maintained to assure saf operating condition. The 4 MBCs on the 002 MMU did not have a substantially constructed cab or canopy over the operator's compartment. This face equipment has been advancing the 002 headings for 3 weeks with exams on the equipment completed weekly. There is no mention in the weekly equipment checks about the equipment having no canopies. Upon further examination, the trailing cable for the MBCs was found to have the monitor circuit circumvented outby where the monitoring circuit was broken in 3 places. This evidence shows that the operator is not conducting adequate exams required by 75.512. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-15.

At the P-1 Mine, an examiner was required to conduct pre-shift and on-shift examinations, including electrical examinations, every shift. Tr. 552. Before traveling underground on July 6, Middleton reviewed the electrical examination books. Tr. 562.

As Middleton was making his way from the 001 section to the 002 section, he spoke with an electrical inspector and an MSHA investigator who informed him about a broken trailing cable they had found. Tr. 562. When Middleton reached the 002 section, he inspected the cable and found that it had "three or four places broken into the monitor circuit." Tr. 321, 569. Middleton contended that the purpose of the breaks was to "jumper out those conditions[,]" and circumvent safety. He believed that a miner could have gotten shocked as a result of contacting the part of the cable where the breaks were located. Tr. 574.

Middleton did not recall seeing any notes in the electrical examination book about the broken cable or lack of canopies on the MBCs as discussed above. Tr. 565, 569, 573.

Royal Bargo, Jr.,[29] an electrician repairman, was responsible for conducting the weekly electrical examinations in the 002 section at the time of the inspection. Tr. 603, 604. He stated that he was subject to re-training every year by federal authorities and the issue of canopies on carriers was never covered in his electrical training and re-training. Tr. 604-05.

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[28](...continued)
found on electric equipment, such equipment shall be removed from service until such condition is corrected . . . .

[29] Bargo has held his electrical certification since 1986 and has worked for Manalapan for 6 years. Tr. 603.

## THE VIOLATION

The broken cable was part of the #2 MBC which is a piece of electrical equipment subject to examination. Ex. S-48. The multiple breaks in the cable indicate that this part of the electrical equipment was not properly maintained. The MBC was being operated, through the use of electricity, with this condition present, and in areas that were damp, wet, and muddy. Tr. 535-36, 549, 574. I credit Middleton's testimony that a miner could have been shocked where the breaks were located, a potentially dangerous condition. The lack of required canopies on the MBCs also indicates that the they were not being properly maintained. As discussed above, because the canopies were missing, the MBC operators were at risk of being caught and severely injured in a roof fall or rib roll. The electrical examiner should have taken the carriers out of service until canopies were added and the cable was repaired.

The electrical examination records provided by the Secretary show that there was no mention of MBCs needing canopies or a cable on MBC #2 needing repair between May 30, 2011 and July 5, 2011. Ex. S-48. The record for July 6, the date of the inspection, states that a cable on the #2 carrier needed repair and all carriers needed canopies and were locked out. Ex. S-48. However, as stated in the analysis of the canopy violations and abatement efforts, the Court determined that the description was added after Middleton reviewed the books and traveled underground. Therefore, I find that Respondent violated section 75.512.

Middleton determined that the violation was highly likely to result in a fatality, that it was S&S, that one person was affected, that the negligence level was reckless disregard, and that it was an unwarrantable failure to comply with a mandatory standard. Ex. S-15.

## S&S

I have found that the violation existed as charged. The Secretary charges that the failure to properly conduct an electrical examination and check for hazards contributed to the discrete safety hazard of the four MBC operators being struck by falling rock from a roof fall or rib roll in addition to the #2 MBC operator also being shocked. 471, 544-45, 575; Sec'y Br. at 67. The violation being S&S turns on whether the possibility of a MBC operator being struck by falling rock, or shocked, was established by the Secretary and, if so, whether the hazards were reasonably likely to cause an injury or injuries of a reasonably serious nature.

Middleton stressed the importance of weekly electrical exams, stating that they ensure equipment is operating correctly and safely. Tr. 574-75. He posited that a miner could have been shocked from handling the broken cable since the area was wet, even muddy in some places, and that the MBC operators could have been struck by falling rock from a roof fall or rib roll. Tr. 574, 575. Middleton determined that whether the MBC #2 operator was shocked, or the four MBC operators were struck by pieces of the roof or rib, the miner's' resulting injuries were highly likely to be fatal and that one person was affected because it was not likely that one rock fall would affect all four carrier operators. Tr. 577.

The Secretary did not provide any evidentiary support for its argument that a shock from the MBC cable would have been fatal.[30] However, it is reasonable to assume that an electrical shock from the cable could have resulted in at least lost workdays or restricted duty. Further, the fact that the area was wet and even muddy in some places, means that the electrical current could have easily passed into the wet area around the broken cable and increased the likelihood of injury. However, frequency with which the cable was handled is unknown, as is the frequency of miners traveling in the vicinity of the broken cable, which means that there is no basis to conclude an injury or injuries due to the broken cable was reasonably likely.

In regards to the lack of canopies on the carriers, it has already been established that the roof and rib conditions were loose and unsafe, making it highly likely that a miner would be fatally struck by falling rock. Middleton correctly determined the number of persons affected as one. The analysis is based on how many persons were potentially affected if an event were to occur, and there was no indication from the Secretary that a widespread roof fall was a possibility. 30 C.F.R. § 100.3. Being shocked by the cable or suffering fatal injuries from falling rock are injuries that are reasonably serious in nature.

The violated standard requires that equipment with potentially dangerous conditions be removed from service until corrected. Here, the electrical shock and rock fall hazards remained dangerous to miners operating the MBCs because Manalapan's agent failed in his inspection duties. The Court does not doubt that the inspector's failure to find and record the dangerous conditions was highly likely to result in serious roof fall injuries to at least one miner on the section. The violation was S&S.

## GRAVITY

As a result of the electrical examiner failing to conduct an adequate examination, missing canopies on MBCs and a broken cable went unaddressed by Manalapan. These conditions could have resulted in an MBC operator being fatally struck by falling rock, or being shocked. The violation was serious.

## UNWARRANTABLE FAILURE

### Degree of Danger

As determined in the mobile carrier violations, the lack of canopies and frequency with which the carrier operators were exposed to loose and unsupported roof and ribs posed a high degree of danger, a danger that would not have been present had the electrical examiner

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[30] During Middleton's testimony about the lack of canopies on the MBCs, he stated, "the system may be 995 volts, I think. I'm not certain." Tr. 472. Neither the voltage, nor the result of being shocked from a piece of equipment running that current, were mentioned when Middleton testified about the resulting injuries of an inadequate electrical exam being fatal.

conducted an adequate inspection. There was no testimony provided as to how dangerous a shock to a miner handling the cable would have been or how often the cable was handled. However, it is reasonable to assume that the presence of the broken cable in the wet and muddy area presented at least some degree of danger to miners on the 002 section, danger that would not have been present had the electrical examiner conducted an adequate inspection.

**Length of Time**

Based on Middleton's experience, he believed that the cable must have been broken for "a while because it was broke in several locations." Tr. 569. His estimate was that the condition was present for at least the prior electrical exam. Tr. 570. The canopies were likely missing for approximately 3 weeks. Tr. 551.

The cable was not noted in the examination record for the week prior to July 6, 2011, the date of the inspection. Ex. S-48. The missing canopies on the four MBCs were not noted in the examinations records for the three weeks prior to July 6, 2011. Ex. S-48. The examination records support Middleton's estimates and therefore, I find that inadequate electrical examinations were being conducted for at least 3 weeks.

**Extent of the Violation**

The electrical examiner failed to note that the cable was broken in at least two examinations and failed to note that the canopies were missing on all four MBCs in at least 3 examinations. The violation was extensive.

**Obviousness and Operator's Knowledge of the Existence of the Violation**

It has been established that the operator had knowledge of the missing canopies and the Court has found that it was obvious the canopies were missing. Stip. 24; Ex. S-31. Middleton asserted that the condition of the cable would have been obvious to anyone examining the MBC, and Manalapan did not provide any evidence to the contrary. Tr. 580. Therefore, I agree with Middleton that the condition was obvious. The existence of the open and obvious dangerous hazards, through two to three electrical examinations, should have alerted Manalapan to the existence of the conditions.

The examination records are also required to be countersigned to make sure that people in higher positions than the examiner become aware of conditions observed during the exam. Tr. 578-79. Not all of the electrical exam records were countersigned. Tr. 579. However, some of the records were countersigned. Ex. S-48. Since Manalapan knew that the MBCs did not have canopies and should have known about the cable, it would have been obvious that the exam was inadequate, and Manalapan should have known that the exam was inadequate, if the canopy and cable issues were not noted.

**Operator Placed on Notice that Greater Efforts at Compliance were Necessary**

Though the operator was not placed on notice by MSHA, it stipulated to knowing that it was required to have canopies on the carriers, and yet no comments were made in the electrical exam record. The operator had been placed on notice that greater efforts at compliance with the canopy requirement were necessary. There is no indication that the operator was placed on notice about the cable condition.

**Operator's Efforts in Abating the Violation**

The electrical exam record for July 6 stated that a cable on the #2 carrier needed to be repaired and canopies needed to be installed. Tr. 565; Ex. S-48. As noted previously, the Court determined that the notes were made after Middleton inspected the examination books and traveled underground. Therefore, the July 6 exam record cannot be considered in determining Manalapan's efforts to abate the violation.

The operator made no effort to abate the violation.

**Conclusion and Negligence Finding**

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, all of them are fairly significant. The combined factors indicate to me that a finding of unwarrantable failure is appropriate, as there are no mitigating factors. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.512.

Middleton determined that Manalapan's level of negligence reached reckless disregard because the conditions were obvious enough that they should have been observed, several exams were conducted, and no action was taken. Tr. 577.

While the operator knew about the missing canopies, it seems that Bargo was unaware that those conditions needed to be addressed in the electrical exam because the issue was never covered in the re-training. The Secretary also did not present substantive evidence that Bargo knew about the cable and ignored it, or that upper management was aware of the cable. Manalapan's actions did not rise to the level of reckless disregard. However, the failure of its electrical examiner to know that a missing canopy is a dangerous condition requiring withdrawal of the equipment from service, correction of the defect, and reporting in the electrical examination report, reflects an elevated lack of care on Manalapan's part, and the Court concludes that the violation was due to the company's high negligence.

| **DOCKET NO.** |
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| KENT 2012-1133 |

| **ORDER NO.** | **DATE** | **30 C.F.R §** |
| --- | --- | --- |
| 8353921 | 08/15/2011 | 75.1710-1 |

During the fatal accident investigation event number 4451857, the following non-contributing violation was observed on 7/6/2011. The 002 section scoop was being operated without a substantially constructed canopy or cab. The mining height in the 002 section is over 42 inches. The measured heights ranged from 5.5 feet 4 crosscuts outby the MMU in the #1 entry to 10 feet high in the #3 and #4 headings for a total mining advancement of 270 feet in the headings. The operator has a dedicated outby scoop for hauling supplies to the 002 MMU and the outby return is only dusted once per month with a section scoop with heights of the 002 #1 and #2 returns at 42 inches or above, to less than 42 inches along the #1 and #2 main line return. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-17.

In addition to the missing canopies on the MBCs, Middleton also observed a section scoop without a canopy or cab while inspecting the 002 section. Tr. 554, 558. Based on his experience, Middleton testified that a section scoop enters a cut after the roof bolting machine has bolted the roof. The scoop cleans the area by scooping up loose coal. Tr. 555. Middleton also testified that Miniard told him the section scoop rock dusted the return, where portions of the roof were under 42 inches, once a month. Tr. 554, 558; Ex. S-18 at 18. The scoop in question was self-propelled, electric, and employed in active working areas of the section, specifically in or inby the last open crosscut. Tr. 555.

The area in the 002 section where the section scoop traveled had mining heights that were consistently over 42 inches. Tr. 540, 554; Ex. S-18 at 18. Bargo asserted that the section scoop traveled to the surface more than once a month, if the other scoop on the section, the outby scoop, broke down or was at another station and supplies were needed. Tr. 609-10.

## THE VIOLATION

Manalapan pled guilty in the United States District Court for the Eastern District of Kentucky, to willfully violating the mandatory safety standard of section 75.1710-1 by allowing miners to operate a section scoop in the 002 Section of the P-1 Mine without a substantially constructed canopy or cab. Stip. 14; Ex. S-31. While the MSHA program policy manual states that a citation should not be issued where the minimum height of the mine roof fluctuates below and above 42 inches, necessitating the frequent removal of the canopy or cab, the scoop only traveled in these conditions once a month according to the superintendent. Ex. S-26 at 3.[31] Even

[31] Respondent questions why the Secretary did not call Miniard as a witness to corroborate Middleton's testimony and meet his burden of proof. Resp. Br. II at 8. Pursuant to Rule 63(a) of the Commission's Procedural Rules, "[r]elevant evidence, including hearsay evidence, . . . is admissible." 29 C.F.R. §2700.63(a). I found Middleton to be a credible witness. If Respondent wished to rebut Middleton's testimony, it could have called Miniard as a witness.
(continued...)

if it traveled more than once a month, it was still a section scoop, not an outby scoop, and spent a majority of its time in the 002 section, meaning it operated in heights over 5 feet for the majority of the time and required a canopy or cab. It did not have either, and I find that Manalapan violated section 75.1710-1.

Middleton determined that the violation was highly likely to result in a fatality, that it was S&S, that one person was affected, that the negligence level was reckless disregard, and that it was the result of an unwarrantable failure to comply with a mandatory standard. Ex. S-17.

**S&S**

I have found that the violation existed as charged. The Secretary charges that the absence of a canopy over the operator's seat of the scoop contributed to the discrete safety hazard of the scoop operator being struck by falling rock from a roof fall or rib roll. 556, 559; Sec'y Br. at 54. The violation being S&S turns on whether the possibility of a scoop operator being struck by falling rock was established by the Secretary and, if so, whether the hazard was reasonably likely to cause an injury or injuries of a reasonably serious nature.

Middleton determined that an injury was highly likely to occur and be fatal because of the loose ribs and roof, the kettle bottoms in the roof, and the recent fatality on the 002 section from a rib roll. Tr. 559-60.[32] He also stated that when using a scoop to clean up, the operator contacts the rib with the bucket in order to scrape all of the loose material up, and a piece of loose rib could easily fall on the scoop operator. Tr. 559. A canopy would have protected the scoop operator, the one person affected, from a rib roll or roof fall. Tr. 556, 560.

Based on the fact that the roof and rib conditions were loose and unsafe, and the scoop operator was frequently scraping the bucket up against the ribs to gather loose coal, it was highly likely that the scoop operator would have been fatally struck by falling rock. Suffering fatal injuries from falling rock are injuries that are reasonably serious in nature. The violation was S&S.

**GRAVITY**

The lack of a canopy on the scoop, along with the weak roof and rib conditions, could have resulted in a scoop operator being struck by falling rock, which would have been high likely to cause a fatality. The violation was serious.

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[31](...continued)
29 C.F.R. §2700.63(b).

[32] As noted above, there were two kettle bottoms found by Middleton in the roof of the 002 section and his inspection on July 6 was triggered by a fatality that occurred on June 29, 2011 in the 002 section, where there were noticeable loose rib conditions. Tr. 546, 548.

## UNWARRANTABLE FAILURE

### Obviousness

Middleton maintained that it was obvious that the scoop needed a canopy. Tr. 560-61. In addition, Manalapan pled guilty in the United States District Court for the Eastern District of Kentucky to willfully violating section 75.1710-1 by allowing miners to operate electrical section scoops in the 002 section of the P-1 Mine without substantially constructed canopies. Stip. 14. The violation was obvious.

### Degree of Danger

The roof and ribs in the 002 section were weak. Tr. 548, 472. The scoop operator was frequently traveling in or inby the last open crosscut, scraping against the ribs, and traveling under kettle bottoms with no protection from roof falls or rib rolls. Tr. 559-60. There was a high degree of danger.

### Length of Time

Middleton believed that the canopy on the scoop had been missing for at least 3 weeks. Tr. 551. Because the electrical equipment examination records do not note a missing canopy on the section scoop for at least 3 weeks prior to the date of Middleton's inspection, the Court believes that Middleton's belief is correct. The violative condition was present for at least 3 weeks.

### Extent of the Violation

A canopy was missing from one scoop. The scoop operator would have been frequently subjected to hazardous conditions when operating the machine. I find that the violation was moderately extensive.

### Operator's Knowledge of the Existence of the Violation

Manalapan was aware that the section scoop did not have a canopy, and Norris, an agent, was aware that a canopy was required for the scoop. Tr. 404; Stip. 14. The operator had knowledge of the existence of the violation.

### Operator Placed on Notice that Greater Efforts at Compliance were Necessary

MSHA's Program Policy Manual ("PPM") states the guidelines for canopies and cabs under section 75.1710-1. Ex. S-26 at 2-3. Specifically, 1.c. addresses the 42 inch requirement, noting that a citation should not be issued when fluctuations in the roof below 42 inches would "routinely create the necessity to remove cabs or canopies." Ex. S-26 at 3. Manalapan had been placed on notice that greater efforts at compliance were necessary.

## Operator's Efforts in Abating the Violation

Pre-shift and on-shift examinations were required to be conducted every shift and there were multiple shifts per day. Tr. 552. Middleton checked the books before going into the mine and did not see any mention of a canopy being needed for the scoop. Tr. 566-67; Ex. S-48. The operator made no effort to abate the violation.

## Conclusion and Negligence Finding

Of the factors considered in determining the alleged unwarrantable failure of Manalapan, the most significant are the degree of danger, operator's knowledge, length of time, obviousness, and efforts to abate the violation. The combined factors indicate to me that a finding of unwarrantable failure is appropriate, as there are no mitigating factors. Therefore, I find that the violation was caused by Respondent's unwarrantable failure to comply with section 75.1710-1.

Middleton determined that Manalapan's level of negligence reached reckless disregard. Ex. S-17. Examinations were conducted on a daily basis, and mine management was aware of the situation. Tr. 550. Norris had requested a canopy for the scoop in a production report to Miniard. Tr. 403-04. Norris testified that Miniard told him that the canopy did not need to be in the report and made Norris tear the report up and re-write it. Tr. 404. As stated previously, I found Norris to be a credible witness. The validity of Norris' statement is also corroborated by the fact that Miniard pled guilty in the United States District Court for the Eastern District of Kentucky to knowingly violating the mandatory safety standard by allowing miners to operate section scoops without canopies. Ex. S-33.

Miniard's actions alone exhibit not the slightest degree of care towards the lack of a canopy for the scoop and the scoop operator's safety. There was no mitigating evidence presented by Respondent to support a finding of a lower negligence level, and I conclude that the level of negligence was reckless disregard.

## CIVIL PENALTY CRITERIA

Section 110(i) of the Act grants the Commission the authority to assess all civil penalties provided in the Act.

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I).

I have made findings regarding Manalapan's negligence and the gravity of each violation. I now make findings regarding the other civil penalty criteria.

## History of Previous Violations

The P-1 and RB #5 mines' history of violations is reflected in a report from MSHA's database. Ex. S-44, 45. The first report lists violations issued at the P-1 mine and reflects that 167 violations became final between May 2010 and August 2011. The second report lists violations issued at the RB #5 mine and reflects that 181 violations became final between January 2008 and April 2009. I accept the figures in the reports as accurate, but there is no way to determine whether the numbers are high, moderate, or low. *See Cantera Green,* 22 FMSHRC 616, 623-24 (May 2000). The Secretary's forms reflecting the originally assessed penalty amounts for the litigated violations (Secretary's Exhibit A), do however, give some qualitative information by assigning points for the number of violations. 30 C.F.R. § 100.3(c). For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment form for the litigated violations at the RB #5 mine reflect an assessment of 16 points for overall violation history. I find the history of violations for the RB #5 mine to be moderately high. The assessment forms for the litigated violations at the P-1 mine reflect an assessment of 10 points for overall violation history. I find the history of violations for the P-1 mine to be moderate.

## Size of the Operator

The parties did not stipulate to the size of the operator, however, the forms reflecting calculations of the proposed penalties provide the size of the mine operator. The size is calculated "by using both the size of the mine cited and the size of the mine's controlling entity." 30 C.F.R. § 100.3(b). The RB #5 mine does not mine coal, so it has an annual tonnage of 0, and as a result, was assigned 1 point out of a possible 15 points. The P-1 mine was assigned 9 points. I find that the RB #5 mine is small and the P-1 mine is medium-sized. For the size of the mine's controlling entity, all of Manalapan, 7 points out of a possible 10 points were assigned. I find the size of the mine's controlling entity to be fairly large.

## Ability to Continue in Business

Manalapan chose to waive the issue of whether the penalties assessed would affect the company's ability to continue in business. Stip. 8; Tr. 12. Therefore, I find that the penalties assessed below will have no impact on the company's ability to continue in business.

## Good Faith Abatement

The parties did not stipulate to Manalapan's good faith efforts in abating the citations and orders above. There was no testimony at the hearing regarding Manalapan's good faith abatement. Therefore, I find that Manalapan's show of good faith in abating the violation warrants neither increasing nor decreasing the assessed penalties.

## CIVIL PENALTY ASSESSMENTS[33]

## KENT 2009-1097

| CITATION NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8335778 | 04/10/2009 | 75.362(b) | $8,209.00 | $4,200.00 |

I have found that the violation was S&S, and was caused by Manalapan's high negligence and unwarrantable failure to comply with the cited standard. In all, four miners were reasonably likely, not highly likely, to suffer permanently disabling injuries as a result of the violation. Given these findings, Manalapan's large size and moderate history of previous violations, I find that a civil penalty of $4,200.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8335779 | 04/10/2009 | 75.400 | $21,993.00 | 9,000.00 |

I have found that the violation was S&S, and was caused by Manalapan's high negligence and unwarrantable failure to comply with the cited standard. In all, four miners were reasonably likely, not highly likely, to suffer permanently disabling injuries as a result of the violation. Given these findings, Manalapan's large size and moderate history of previous violations, I find that a civil penalty of $9,000.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8335780 | 04/10/2009 | 75.1731 | $9,122.00 | $4,000.00 |

I have found that the violation was S&S, and was caused by Manalapan's high negligence and unwarrantable failure to comply with the cited standard. In all, four miners were reasonably likely, not highly likely, to suffer permanently disabling injuries as a result of the

[33] Respondent respectfully requests that the court offset the penalties in the canopy violations because a $150,000.00 fine has already been levied against it by Judge Tatenhove for federal criminal violations. Resp. Br. II at 10. However, it recognizes the distinction between the civil and criminal systems. Resp. Br. II at 10. There is no basis to grant Respondent's request. Section 110(a)(3)(A) of the Act provides for a minimum penalty of $2,000.00 for 104(d)(1) citations and orders. 30 U.S.C. § 820(a)(3)(A). In a recent case, the Commission found that Congress intended for it to adhere to the minimum penalty amounts. *Stansley Mineral Resources, Inc.*, 35 FMSHRC 1177, 1180 (May 2013). Further, while I am required to consider all of the factors discussed above in assessing the penalties pursuant to section 110(i) of the Act, previously assessed fines for criminal conduct is not such a factor. To reduce, or do away with penalties because the Respondent has been held criminally liable for the same, grave violations at issue in these matters, would be inconsistent with the requirements of the Act.

violation. Given these findings, Manalapan's large size and moderate history of previous violations, I find that a civil penalty of $4,000.00 is appropriate.

**KENT 2012-727**

| CITATION NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353912 | 08/15/2011 | 75.209(a) | $53,858.00 | $53,858.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, two miners were highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $53,858.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353913 | 08/15/2011 | 75.1710-1 | $50,787.00 | $50,787.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $50,787.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353914 | 08/15/2011 | 75.1710-1 | $50,787.00 | $50,787.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $50,787.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353915 | 08/15/2011 | 75.1710-1 | $50,787.00 | $50,787.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $50,787.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353916 | 08/15/2011 | 75.202(b) | $53,858.00 | $53,858.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, two miners were highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $53,858.00 is appropriate.

**KENT 2012-1133**

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353917 | 08/15/2011 | 75.512 | $50,787.00 | $17,000.00 |

I have found that the violation was S&S, and was caused by Manalapan's high negligence, not reckless disregard, and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings Manalapan's large size and moderate history of previous violations, I find that a civil penalty of $17,000.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353918 | 08/15/2011 | 75.1710-1 | $50,787.00 | $50,787.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $50,787.00 is appropriate.

| ORDER NO. | DATE | 30 CFR § | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|---|
| 8353921 | 08/15/2011 | 75.1710-1 | $50,787.00 | $50,787.00 |

I have found that the violation was S&S, and was caused by Manalapan's reckless disregard and unwarrantable failure to comply with the cited standard. In all, one miner was highly likely to suffer fatal injuries as a result of the violation. Given these findings, Manalapan's large size, and moderate history of previous violations, I find that the Secretary's proposed civil penalty of $50,787.00 is appropriate.

**SETTLED VIOLATION**

As stated at the outset, the parties settled the one contested violation in KENT 2010-1363. Tr. 644. Respondent agreed to accept Citation No. 8362509 as written and pay the proposed penalty of $403.00. *Id.* The Court concurred and approved the settlement. *Id.*

| ORDER NO. | DATE | PROPOSED PENALTY | ASSESSMENT |
|---|---|---|---|
| 8362509 | 04/19/2010 | $403.00 | $403.00 |

## ORDER

It is **ORDERED** that Orders No. 8353913, 8353914, 8353915, 8353918, and 8353921 be **MODIFIED** to change the cited standard from section "75.1710" to "75.1710-1."

It is **ORDERED** that Citation No. 8335778 and Orders No. 8335779 and 8335780 be **MODIFIED** to reduce the likelihood of injury from "highly likely" to "reasonably likely." It is **ORDERED** that Order No. 8353917 be **MODIFIED** to reduce the level of negligence from "reckless disregard" to "high."

It is further **ORDERED** that within 30 days of the date of this decision, Manalapan **SHALL PAY** a total penalty of $396,254.00.[34]

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution (Certified Mail)

Amanda K. Slater, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

Schean G. Belton, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Benjamin Bennett, P.O. Box 313, Pineville, KY 40977

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

January 9, 2014

| | | |
|---|---|---|
| BOART LONGYEAR COMPANY,<br>Contestant | : | CONTEST PROCEEDINGS |
| | : | Docket No. WEST 2012-248-RM |
| | : | Order No. 8605604; 10/25/2011 |
| v. | : | |
| | : | Docket No. WEST 2012-249-RM |
| | : | Citation No. 8605605; 10/25/2011 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | |
| | : | Docket No. WEST 2012-250-RM |
| | : | Order No. 8605606; 10/25/2011 |
| | : | |
| | : | Docket No. WEST 2012-251-RM |
| | : | Citation No. 8605607; 10/25/2011 |
| | : | |
| | : | Mine: Durkee Cement Plant |
| | : | Mine ID: 35-02970 Y12 |
| | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. WEST 2012-422-M |
| | : | A.C. No. 35-02970-275832 Y12 |
| | : | |
| v. | : | Docket No. WEST 2012-891-M |
| | : | A.C. No. 35-02970-287135 Y12 |
| BOART LONGYEAR COMPANY,<br>Respondent | : | Mine: Durkee Cement Plant |

## AMENDED DECISION[1]

Appearances: Bryan Kaufman, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary

[1] This decision, originally dated December 17, 2013, has been amended to correct clerical errors. In the discussion of Order No. 8605606, the quote referencing 30 C.F.R. § 56.11001 will change "[s]are means of access" to "[s]afe means of access." In the paragraph immediately preceding my Order, the civil penalty I assessed for Order No. 8605606 is changed from 1330.00 to $13,300.00, and the subsequent violation is changed from Citation No. 8650607 to Citation No. 8605607. In my Order, Citation No. 8605607 will be characterized as a 104(a) citation rather than as a 104(d) citation. Moreover, in my Order, the total civil penalty that Boart must pay is changed from $33,900.00 to $45,600.00, and the subsequent phrase "in satisfaction of the four remaining citations" is changed to "in satisfaction of the four remaining violations."

Dana Svendsen, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of Boart Longyear Company

Before: Judge David F. Barbour

These proceedings are before me based upon four notices of contest and two petitions 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).

These matters concern the disposition of three orders and two citations issued by the Secretary of Labor ("the Secretary") against Boart Longyear Company ("Boart"), for which the Secretary seeks a total civil penalty of $200,984.00.

Order No. 8605604, contested in Docket No. WEST 2012-248-RM, was issued pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), which requires miners to be withdrawn from areas where imminent dangers exist. Civil Penalty Docket No. WEST 2012-891-M involves two alleged violations of the Secretary's mandatory safety standards for surface metal and nonmetal mines, as found in 30 C.F.R. §§ 56 *et al*. Citation No. 8605605 (contested in WEST 2012-249-RM) alleges a violation of section 56.15005, which requires that safety belts and lines be worn where there is a danger of falling. Order No. 8605606 (contested in WEST 2012-250-RM) alleges a violation of section 56.11001, which requires safe means of access to working places. Civil Penalty Docket No. WEST 2012-422-M also involves two alleged violations. Citation No. 8605607 (contested in WEST 2012-251-RM) alleges that a truck backup alarm was inoperative, in violation of section 56. 14132(a). Order No. 8605608 alleges a violation of the Secretary's mandatory training and retraining standards for miners employed at surface mines, as found in 30 C.F.R. §§ 46 *et al.* Specifically, the order charges that a newly hired experienced miner had not been provided with the training required by section 46.6(a).

A hearing on these matters was held on July 30-31, 2013, in Salt Lake City, Utah. The parties filed post-hearing briefs on September 20, 2013.

## Background

Boart Longyear Company is an independent contractor drilling company with both a Mining and Energy Section (M&E) and an Environment and Infrastructure Section (E&I). The E&I section is further divided into a Rotary Division and a Drilling Division. Generally, M&E supports mineral exploration, obtaining core samples to determine the viability of new mine sites, while E&I does environmental work such as locating the source of ground contamination or checking the integrity of underground water systems. Tr. 344-45. However, the E&I division also occasionally drills for samples on mine sites. Tr. 358. In October 2011 Boart was hired by Ash Grove Cement West, Inc. ("Ash Grove") to explore for areas with low mercury content at Ash Grove's Durkee Cement Plant, a limestone quarry and processing center, in order to address the Environmental Protection Agency's concerns regarding the cement plant's mercury emissions. Tr. 29, 31.

Though Boart does not now contest that the drilling operation at the cement plant was subject to MSHA regulations, Tr. 197-98, at the time, Boart believed the project was scientific, and therefore not subject to MSHA regulations. Tr. 165, 232. The project supervisors and the drill team for the cement plant project were members of Boart's E&I Section. Robert Stadeli,

zone manager for the E&I Rotary Division, was involved in the proposal stage, then Kristian Thordarson, zone manager for the Drilling Division, took over as the project manager. Tr. 178. Thordarson allegedly was on site for the first few days, and about once a week thereafter. Tr. 234-35. Doug Tucker of the Drilling Division was the on-site driller for the project; he has been a driller since 2000, and started with Boart's E&I Section in December 2010. Tr. 224. Prior to the Durkee Cement Plant project, Tucker had no experience on mine sites. Tr. 231. Allen Headman, also of the Drilling Division, was the driller's assistant for the project. Tr. 327. The parties disagree as to whether Thordarson or Tucker was the senior on-site supervisor. Sec'y Br. at 11; Resp Br. at 20.

Tucker explained that in a typical drilling operation, two pieces of equipment are involved, a drill rig and a flatbed truck. First, the drill rig is moved into position and set up to drill. Then, the flatbed truck is backed toward the drill rig until the catwalk of the drill rig and the back of the truck provide "porch steps" for access to the flatbed of the truck and the drill rig. Tr. 241-244. When drilling is finished and the drill team is ready to move to a new on-site location, the drill rig (a largely self-contained mobile unit) is moved first, then the tools and drill steel (large pipes) are loaded and strapped onto the flatbed of the truck. Tr. 249-50. In order to load the drill steel, a member of the drill team will climb up onto the flatbed, pull each drill steel toward the cab and roll it toward the edge of the truck, then repeat, alternating between the left and right edge of the truck so that the person on the flatbed continues to have a flat working surface. Tr. 319-20. Once the truck is loaded, it is taken to the new location and backed up to the drill rig using a spotter. Tr. 250. For the Durkee Cement Plant project, the drill rig and truck were being relocated every one or two days. Tr. 327.

The bed of the truck in use at the cement plant was approximately five feet high and eight feet wide. Resp. Br. at 18-19. Boart's M&E trucks generally have some built-in fall protection, such as overhead cables with retractable lanyards, and built in ladders. Tr. 194. However, those features are not present on Boart's E&I trucks, including the one in use at the plant. Tr. 56. It is company policy to conduct a preoperational inspection of the trucks every day, Tr. 247, though according to Headman, the inspections are less thorough if the rig is already on site. Tr. 336-37.

On October 25, 2011, Boart had been on site for approximately 12-15 days. Sec'y Br. at 18. MSHA Inspector Scott Amos contends the drill was set up approximately 150 yards uphill from active drilling and blasting, Tr. 33, though Tucker recalls the distance as ¼ to ½ mile, Tr. 238. When Amos arrived, the drill rig and flatbed truck had been separated, and Tucker was on the flatbed moving materials on the flatbed so that they could be strapped down in preparation for driving the truck to a new location. Tr. 47-48. He was wearing a hard hat, but no fall protection. Tr. 47. Amos testified that he observed Tucker standing two to three feet from the edge of the truck's flatbed, on an uneven, slippery surface, surrounded by tripping hazards. Amos felt that Tucker was in imminent danger of tripping and falling off the flatbed and severely injuring himself; Amos therefore asked Tucker to come down from the flatbed, which he did. Tr. 36-41. Amos and Tucker then discussed Tucker's responsibilities at the mine site, and upon Tucker's representation that he was in charge of the on-site operation, the inspector issued a section 107(a) imminent danger order of withdrawal to Boart. Tr. 43-44, 37.

Amos and Tucker also discussed Tucker's method of climbing onto the flatbed, which involved using the door of a toolbox on the side of the truck as a step. Tr. 256. Amos then continued the inspection, and found that the truck's backup alarm was not in functional condition, Tr. 75, though Tucker testified that the alarm was working during that morning's preoperational inspection. Tr. 269. As a final matter, Amos made some calls after leaving the mine site to determine whether Tucker had received the required miner training, and confirmed with both Boart and Ash Grove officials that he had not. Tr. 135-38.

As a result of his observations during the inspection, his discussion with Tucker, and his calls regarding Tucker's training, Amos issued to Boart, in addition to the imminent danger order, the following enforcement actions: a section 104(d)(1) citation for Tucker's failure to wear a safety belt where there was a danger of falling; a section 104(d)(1) order for failing to provide Tucker with a safe means to access the truck's flatbed; a section 104(a) citation for the Truck's inoperative backup alarm; and a section 104(g)(1) order of withdrawal for failure to provide Tucker with the required training.

**107(a) Order No. 8605604 (Docket No. WEST 2012-248-RM)**

Order No. 8605604 alleges the following:

> The foreman was observed working on top of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP 281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order was issued to the foreman working on the bed of the truck at 11:45 PST this date. The bed of the Kenworth Truck #2268 is hereby ordered withdrawn from service.

Gov. Ex. 1.

Section 107(a) of the Act, 30 U.S.C. § 817(a), authorizes inspectors to order persons to be withdrawn from an area where an imminent danger exists. An imminent danger is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Although the Commission has cautioned against narrowly construing the term to only include immediate threats, the Commission has also recognized the obvious tenet that there must be some degree of imminence to support an imminent danger order; a hazard must be impending for immediate withdrawal to be required. *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). An inspector's finding of an imminent danger should be given strong consideration, but a judge "is not required to accept an inspector's subjective 'perception' that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed."

*Id.* at 346 (finding the inspector's anticipation of ignition and explosion as a result of a methane accumulation 'speculative,' such that it was not reasonable to expect the accumulation to result in death or serious bodily harm).

Imminent danger orders have been upheld where there was danger of a person falling from a truck. In *Lime Mountain Co.*, 20 FMSHRC 1192, 1192-95 (Oct. 21, 1998) (ALJ), the judge affirmed the inspector's determination that there was an imminent danger of a fall resulting in serious injury where a miner was standing on an eleven foot high trailer coated in lime dust, using a compressed hair hose to clean the trailer with the hose coiled behind him, without wearing a safety line. In *Nelson Brothers Inc.*, 18 FMSHRC 618, 624 (April 12, 1996) (ALJ), the judge found an imminent danger where a driver was standing near the edge of a nine foot high tanker truck (i.e. a rounded surface) with no guard rails or safety line. Here, however, I do not find it reasonable for Amos to have concluded that there was an impending threat of a fall resulting in serious harm where Tucker was working five feet off the ground without a safety line, on a flatbed which was dry, level, and stationary, which contained some loose materials but allowed moderate room to maneuver, and which was parked on packed dirt.

The picture that Inspector Amos painted with his testimony was one in which the flatbed was covered in trip and fall hazards such that Tucker was likely to lose his footing at any minute. Amos testified that the flatbed contained loosely or totally unsecured drill steel (round, smooth pipes) which could shift or roll, that the drill steel and flatbed floor were covered in mud and bentonite (lubrication), and that 'garbage cans and some smaller items and hoses' were stacked against the truck cab. In Amos' opinion the flatbed floor presented a slippery, unstable, uneven surface without a clear path for movement. Tr. 37-48. Amos further testified that Tucker was moving two to three feet from the edge of the truck, standing on and climbing over the drill steel, and was doing these things while not wearing fall protection. *Id.*; Tr. 57. In the inspector's view, given these circumstances, it was highly likely that Tucker would fall off the truck if these work practices were allowed to continue. Tr. 86-87; Sec'y Br. at 14.

Inspector Amos also testified that such a fall could easily have been fatal. In this regard, Amos stated that MSHA has determined that falls from machinery are a major cause of fatalities in the nation's metal and non-metal mines. Tr. 38. Amos also noted that a 200 pound person who falls six feet will hit the ground with 5,000 pounds of force, Tr. 49, and commented that fatalities have occurred at heights lower than six feet, particularly where an individual fell backwards and hit his head. Tr. 50-51. Amos listed numerous scenarios in which Tucker could have been fatally injured if he were to fall: Tucker could have landed on a rock; he could have landed on one of the two sideboards;[2] he could have landed on the sharp edge of the toolbox and broken his neck. Tr. 55. In sum, the imminent danger order is premised on a determination that Tucker could have fallen off the side of the truck and landed on his head or neck with fatal force,

[2] In this context, sideboards are metal rectangles which are placed along the edge of a flatbed to prevent pipes from rolling off the truck. The cited truck appears to have had two sideboards, approximately eight inches high by two inches deep by two inches wide, near the front right edge of the flatbed. Tr. 53; Gov. Ex. 7; Resp. Ex. A (circled in green).

Sec'y Br. at 13, and that given the frequency and history of that type of falling injury, Amos wanted Tucker off the truck before a similar accident occurred. Tr. 41.

Boart presents a much less dramatic, and ultimately more convincing, picture. With regard to the impending threat of a fall, Boart contends that the drill steel was largely tied down and orderly, no mud or bentonite was present, and Tucker was standing on a wide, flat, dry, secure surface. Resp. Br. at 18. Tucker testified that the weather was dry, and the drilling process in use at the time did not involve drilling mud because the company was drilling reverse rotary air holes.[3] Tr. 259-60. Significantly, a photograph taken at the time of the citation supports this version of the conditions; though there are some odds and ends piled near the cab, as well as two or three unsecured sections of pipe and some loose straps, there is clear space for movement, and no sign of mud, either for drilling purposes or due to the weather. Gov. Ex. 7; Resp. Ex. A. Furthermore, Tucker testified that strapping materials down on the flatbed takes about fifteen minutes, and he had already been doing so for about five minutes when Amos arrived, thus limiting the time within which he was most likely to trip. Tr. 280. While it is certainly conceivable that a person could trip on one of the objects on the flatbed and fall to the ground below, or take a misstep and fall off the side of the flatbed, such an event on the flatbed as it then existed – level, clear of mud, with room for Tucker to position himself – within the few remaining minutes that Tucker would have been up on the truck, would have been rare rather than likely.

Boart further contends that, assuming a fall was to occur, serious injury was theoretically possible, but highly unlikely. Boart argues that the circumstances required for serious injury to occur, specifically that Tucker would fall backwards, be unable to catch himself, lose his hard hat (which Amos admits he was wearing), and land on his head or something sharp, are simply too speculative. Resp. Br. at 18. Boart adds that the Secretary has not provided any evidence that serious injury commonly results from a five foot fall. Resp. Br. at 20.

Again, I find Boart's argument persuasive. Most of Inspector Amos' testimony is indeed speculative; Tucker could land on a rock (although the evidence does not indicate any large rocks close to the truck), he could trip in just the right spot to land on a sideboard or toolbox, or in just the right way to land on his head, and fatalities have occurred at lower heights. Tr. 55. Amos references MSHA's 'Rules to Live By' report, Tr. 38, which indicates that falls from elevation accounted for 23 of the 589 mining fatalities between 2000 and 2008. Rules to Live By Program Priority 24 Standards Report, http://www.msha.gov/focuson/RulestoLiveBy/Reports/priority24.asp. However, such generalized information does not support a finding that the specific conditions at issue here constitute an imminent danger. For these reasons, I conclude

[3] Drilling mud is a fluid that commonly consists of bentonite and polymers. Mud Rotary Drilling uses drilling mud to cool the drill bit, remove cuttings, and stabilize the borehole. Reverse Circulation Rotary Drilling, on the other hand, uses air flow rather than drilling mud to collect cuttings. Boart Longyear, Rotary Drilling Services page, http://www.boartlongyear.com/drilling-services/surface/rotary/ (last visited Dec. 3, 2013).

that while Inspector Amos' testimony indicates that a fatal fall from the truck in issue is possible, the Secretary has not established that it is likely.

An imminent danger order requires something more than a generalized danger, it requires a reasonable determination that a given condition creates an impending threat of serious harm. *See, Island Creek Coal Co.*, 15 FMSHRC at 345-46. I find that the inspector's determination regarding the condition at issue was not reasonable. First, the photographic evidence does not support the inspector's determination that Tucker was in imminent danger of tripping and falling, as the surface of the flatbed at that time was dry, flat, and relatively unencumbered. Secondly, the inspector's determination that a fall would be fatal was overly speculative given the relatively low height of the flatbed, the very small amount of surface area presented by the sideboards, and the absence of rocks of any notable size on the ground below. Tucker falling *and* seriously injuring himself in the few minutes it would take to finish his work would simply be too much of a fluke to consider the risk imminent. Accordingly, the imminent danger order will be vacated.

**104(d) Citation No. 8605605 (WEST 2012-249-RM, WEST 2012-891M)**

104(d) Citation No. 8605605 alleges the following:

> The foreman was observed working on top of the bed of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, foreman engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of fall protection but actively chose not to use it.

Gov Ex. 2. Inspector Amos found the cited condition was a significant and substantial contribution to a mine safety hazard (an S&S violation), was highly likely to result in a fatality to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure to comply with the standard. For the reasons discussed below, I find that the cited condition was only reasonably likely to result in lost workdays or restricted duty, rather than being highly likely to result in a fatality, but I otherwise affirm the citation.[4]

[4] An S&S finding is not inconsistent with vacating an imminent danger order. The finding of no imminent danger is primarily based on the fact that Tucker was not likely to fall in the next few minutes, the time it would have taken him to finish his work. Unlike an imminent danger order, which accounts for conditions as they will exist only until the hazardous condition can be abated, an S&S determination allows for normal changes over time, such as weather and truck location.

Fact of the Violation

Section 56.15005 requires that safety belts and lines be worn when persons work where there is a danger of falling.[5] Boart in effect concedes that Tucker was not wearing a safety belt or line. Therefore the determination as to whether Boart violated the standard rests on whether there was a danger of falling. As indicated in the text of the citation, Citation No. 8605605 was issued as a result of the same conditions as Order No. 8605604, *supra*. However, the Secretary's burden is lower. While I do not credit inspector Amos' interpretation of the cited condition as resulting in an imminent danger, I find that the uncontested facts reflect that there was a danger of falling, and consequently that Amos properly cited the company for a violation.

Boart does not contest that the flatbed was approximately five feet high, or that there were some loose materials on the flatbed; rather, Boart contends that working at an elevation of five feet, on a dry, flat, surface, does not create a danger of falling. Resp. Br. at 19. Respondent looks for support to a Program Policy Letter issued by MSHA giving weight to a determination by OSHA that a danger of falling begins at elevations of six feet. Tr. 20; Resp. Ex. H; PPL No. P12-IV-01. However, the policy letter was issued after Citation No. 8605605, and more important, it leaves room for site specific evaluation. P12-IV-01 at 1. In other words, a five foot elevation is neither inherently safe nor inherently unsafe; site specific conditions must be taken into account. While the danger of falling was not as extreme as Amos' testimony indicated, the photographic evidence supports the inspector's observations insofar as confirming that some trip hazards were present. It is also telling that Boart's Mining and Energy trucks, also with five feet of elevation, have built in fall protection; it is reasonable to assume that this would not be the case unless, as the Secretary notes, a reasonable person would recognize that there is at least some danger of falling while standing on a flat, five foot high surface. Sec'y Br. at 15. Accordingly, I conclude the Secretary has proved the violation.

S&S and Gravity

As a general proposition, a violation is properly found to be S&S if 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 Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (approving *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation, and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

[5] Specifically, section 56.15005 states that "safety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

The Secretary has established the fact of the violation, and the presence of a discrete safety hazard, namely a danger of falling, is inherent in that violation. As for the third and fourth factors, the Secretary contends, for the reasons discussed above in the context of the imminent danger order, *supra*, that the cited conditions were highly likely to result in a fatal injury. Relying on Inspector Amos' testimony, the Secretary notes that drillers have job related tasks that would likely compromise their balance, namely rolling drill steel toward the edges of the truck, that the flatbed did and would continue to contain obstacles and trip hazards, and that if a driller were to fall off the side of the truck, especially backward, the driller could land on his head or neck with thousands of pounds of force. Sec'y Br. at 16-17, *citing* Tr. 45-55, 319-20. The Secretary notes that miners have been killed falling from less than half the height of the flatbed. *Id.* Respondent contends that the Secretary has not provided any evidence that a serious injury resulting from a five foot fall is reasonable, rather than just possible. Resp. Br. at 19-20.

With regard to the likelihood of a fall, the Secretary's allegation that injury is highly likely to occur is largely theoretical; the Secretary has assumed the presence of significant slip and trip hazards, such as mud, rolling drill steel, and a lack of any clear pathway, which the photographic evidence does not support. Gov. Ex. 7. However, the presence of some trip hazards, such as some unsecured pipes, some loose straps, and a garbage can, have been established. Gov. Ex 7; Resp. Ex A. Furthermore, the inspector raised a valid concern that bad weather would create an increased risk of falling, Tr. 46, and it could also be reasonably expected that any unsecured pipes would roll if the truck were parked at an incline at any point during the project. Therefore, I find that a driller working on the flatbed could reasonably be expected to fall, given continued mining operations. With respect to the expected severity of any resulting injury, while I credit Amos' factual and anecdotal testimony regarding the ways in which a five foot fall *can* result in a fatal injury, I do not credit his conclusion that such a fall is *likely* to result in a fatality. However, Amos' testimony that a miner falling from five feet lands with thousands of pounds of force, Tr. 49, is sufficiently convincing to indicate that if Tucker were to fall from the flatbed, he could reasonably be expected to sustain injuries resulting in lost workdays or restricted duty, such as severe bruising or a twisted ankle.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of a violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The evidence supports a finding that the effect of a five foot fall from the flatbed was reasonably likely to result in lost workdays or restricted duty, and I conclude that the violation was serious. Accordingly, I affirm the significant and substantial designation, but reduce the gravity findings from highly likely to reasonably likely, and from fatal to lost workdays or restricted duty.

Unwarrantable Failure and Negligence

The Secretary has attributed the violative condition in Citation No. 8605605 to a high degree of negligence and an unwarrantable failure by the operator. The Commission has summarized the legal principles for determining whether a violative condition is the result of an unwarrantable failure:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*") [further citations omitted]. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

*Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

The parties do not contest the length, extent or obviousness of the violative condition, or the lack of pre-citation abatement. The points of contention are whether Tucker was a supervisor, and whether the operator was on notice and/or had knowledge of the existence of the violation.

With regard to the length of time the violation had existed, Tucker conceded that he did not wear fall protection for the entire time the truck was on-site, Tr. 262, a 12-15 day period. Tr. 90. With respect to the extent and obviousness of the condition, it is uncontested and obvious that no form of fall protection had been provided. Prior to Amos' inspection, Boart made no effort to abate the condition, despite the availability of Boart trucks and/or truck designs with built in fall protection. Sec'y Br. at 18; Tr. 194. Finally, the degree of danger has been established via the S&S and gravity determinations, above. These factors favor upholding the inspector's unwarrantable failure finding.

In further support of the unwarrantable failure finding, the Secretary argues that a supervisor, namely Tucker, was involved in the violation. The Mine Act defines an agent as a person "charged with responsibility for the operation of . . . or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802. Under Commission precedent, the negligence of an agent

is imputable to the operator or contractor for the purposes of unwarrantable failure. *Whayne Supply Co.,* 19 FMSHRC 447, 453 (Mar. 1997); *Southern Ohio Coal Co.,* 4 FMSHRC 1458, 1463-64 (Aug. 1982). To distinguish between agents and rank-and-file miners, the Commission relies upon function rather than job title; an employee is an agent if the employee's function is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the Commission has found that a rank and file miner who is assigned by the operator to carry out required examination duties may be appropriately viewed as an agent of the operator. *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991).

Amos testified that in his experience inspecting Boart drilling operations, although there may be an occasional visit from midlevel management, the driller is the senior on-site representative, the individual responsible for filling out paperwork and arranging deliveries. Tr. 57-58. Specifically, Amos recalled asking Tucker if he was "the foreman, the guy in charge of the operation," to which Tucker said, "Yes, I am." Tr. 44. Amos also recalled Headman confirming that Tucker was the person on site who most represented the company. *Id.* Tucker's memory of his conversation with Amos is hazy, but he conceded that his promotion to driller gave him responsibilities, and that being the driller means if something goes wrong with the drill it "comes down on him." Tr. 306-07. Additionally, Rotary Division zone manager Robert Stadeli testified that pre-shift examinations and filling out forms were Tucker's responsibility, Tr. 219, and that driller's assistant Allen Headman received his day-to-day instructions from Tucker, Tr. 181. All of this supports finding that Tucker was a supervisor.

Boart contends that Drilling Division zone manager Kristian Thordarson, rather than Tucker, was the on-site supervisor. Resp. Br. at 20; Tr. 181, 224, 334. However, Tucker's testimony establishes that work on the project was taking place on a daily basis, Tr. 244-45, and yet, although Tucker spoke with Thordarson daily by phone, after the first few days of the project, Thordarson was only on site once a week. Tr. 234-35. This indicates that Thordarson was not the on-site supervisor. Respondent also notes that Tucker was an hourly rather than salaried employee, and had no authority to hire, fire, or discipline. Resp. Br. at 20; Tr. 182, 231. However, as noted above, it is the supervisory function rather than the trappings of a position that are relevant. As the senior on-site Boart employee (of two!), Tucker carried out certain critical duties that could only be carried out on-site, such as conducting pre-shift examinations and directing the actions of the only other Boart employee present. Accordingly, I concur with the Secretary's finding that, as the individual trusted to handle the on-site aspects of the drilling operation, Tucker was the person "charged with responsibility" for the on-site drilling operation. Sec'y Br. at 11. Thordarson was Tucker's superior, but Tucker was the on-site supervisor. And as Tucker was also the individual working without fall protection, a supervisor was directly involved with the violative condition, supporting a finding of unwarrantable failure. Sec'y Br. at 19.

With regard to the remaining factors, Boart does not deny knowledge of the existence of the *condition*, but denies knowing the condition constituted a *violation*, thereby also claiming it had not been put on notice that greater efforts at compliance were required. Rather, Boart contends that it had a reasonable, good faith belief that the drillers on site at the Durkee Cement Plant were subject to OSHA, rather than MSHA, regulations, and therefore were not required

to use fall protection for elevations under six feet. Resp. Br. at 21. I find that this belief, even if held in good faith, was not reasonable, and therefore Respondent's argument for a mitigating factor is ultimately unconvincing.

The Boart employees involved may indeed have had a good faith belief that MSHA regulations did not apply. Tucker and Stadeli's testimony that when the project started they believed it to be environmental is supported by the fact that the drill team was from Boart's E&I section and was drilling to test for mercury. Tr. 212, 232. Furthermore, Boart claims that Ash Grove's representatives told Boart's representatives at least twice that the drill team was not subject to MSHA regulations. Resp. Br. at 21. According to Stadeli, after Boart received the contract purchase order from Ash Grove, upon noticing that the general terms and conditions referenced MSHA or OSHA regulations "that might apply," Stadeli requested clarification from Ash Grove and was told the drill team would be working solely under OSHA regulations. Tr. 179. Then, at Stadeli's request, Thordarson confirmed with the Ash Grove "safety folks" that the drill team would be working under OSHA regulations. Tr. 180. Thordarson passed this answer to Tucker when Tucker asked if MSHA training was required since they were at a mine site. Tr. 300-01. Although he ultimately characterized all of this as a "breakdown of communication," Ash Grove plant manager Terry Kirby confirmed to Amos that Boart was under the initial impression that its employees were not covered by MSHA regulations. Tr. 165.

However, assuming the project team believed that MSHA regulations did not apply, Boart was negligent in failing to ensure that its E&I employees had the correct information regarding MSHA applicability while working on mine sites. First, the M&E Section was aware of the requirements of section 56.15005: M&E trucks were fitted with fall protection, Tr. 56, the M&E Section would have been aware of MSHA's 'Rules to Live By' Report, and had been recently cited for similar violations. Sec'y Br. at 18. Second, by the very fact that the question was asked, it is clear that those involved in the project suspected that MSHA regulations might be relevant. Contact between the M&E and E&I sections was clearly feasible, given that abatement of the citation consisted of modifying the truck at issue to match M&E truck designs. Tr. 194. And yet, Boart management did not inform the project team that MSHA jurisdiction applied, and the project team did not follow through on their apprehensions by contacting the M&E Section. Boart should have known that the condition was a violation, and been on notice that greater efforts were necessary to comply.

In sum, I find that Boart violated section 56.15005, that the violation was S&S, that the violation was reasonably likely to result in injuries causing lost workdays or restricted duty, that the supervisory involvement of Tucker, the length of time he violated the standard, and the degree of danger posed to Tucker by the violation support affirming the inspector's unwarrantable failure finding, and that Boart was highly negligent.

**104(d) Order No. 8605606 (WEST 2012-250-RM, WEST 2012-891M)**

Order No. 8605606 states the following:

> The foreman was observed working on top of the bed of truck #2268. The foreman was provided with but did not utilize safe access. The foreman stated he climbed up the side of the truck, standing on the toolbox door, then stepping onto the elevated area. No handholds or handrails were provided. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, [the] foreman[,] engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of safe access but actively chose not to use it. The bed of the truck #2268 is hereby ordered out of service until it is provided with safe access and a representative of MSHA has verified a safe means of accessing the truck is implemented by the contractor.

Gov. Ex. 3. The order alleges that the cited condition violated 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." The inspector found the alleged violative condition was S&S, was highly likely to result in a fatal injury to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure. As discussed below, the fact of the violation, S&S determination, negligence, and unwarrantable failure findings will be affirmed, however the gravity will be modified to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

Further Findings of Fact

With regard to Tucker's actual method of access during the Durkee Cement Plant project, it is uncontested that Tucker regularly began his ascent onto the flatbed by stepping onto the horizontal open door of a toolbox attached to the side of the flatbed truck.[6] Tr. 62, 252. Tucker

[6] Rather than a lid which opens upwards, the toolbox attached to the side of the truck had a front panel 'door' which opened downwards and was supported by chains, such that when the toolbox was open, the front panel was parallel to the ground. Gov. Ex. 7; Resp. Ex. A (circled in red).

testified that he would then have placed his left foot on the flatbed, taken hold of either the post or the D-ring above his head with both hands, and pulled himself up into a standing position on the flatbed. Tr. 252, 294-95; Resp. Ex. A (toolbox door and post circled in red). Tucker conceded he probably would have pushed some materials out of the way with his foot to create a space to place his foot. Tr. 299. The Secretary does not credit Tucker's testimony, claiming that a soft drink on the toolbox door, and drill steel and garbage near the truck's edge, would have made it too difficult to step onto the flatbed, use the post as a handhold, and pull himself up. Sec'y Br. at 21-22. The Secretary instead suggests that after stepping on the toolbox door, Tucker pulled himself up onto the truck without using a handhold, and then crawled on his hands and knees over loose pipes until he found a clear space to rise to his feet, also without using a handhold. Sec'y Br. at 21-22. This theory is based on Amos' testimony regarding his conversation with Tucker; Amos did not see Tucker climb onto the flatbed. Tr. 62.

With regard to alternate means of access, Amos testified that he saw a ladder on the flatbed,[7] and when he asked Tucker why he had not used the ladder, Tucker replied he hadn't used it because it was already loaded onto the truck. Tr. 70-71. Tucker testified that he did not recall whether or not a ladder was present. Tr. 283. Amos also testified that using the step at the rear of the truck would have been marginally safer than the toolbox door, because it was at a more appropriate height.[8] Tr. 73. Tucker noted that he used the back step when the flatbed was backed up to the drill rig. Tr. 243-44.

Fact of the Violation

Section 56.11001 requires that a safe means of access be both provided and maintained. Inspector Amos conceded that Boart *provided* safe access in the form of the ladder that was located in the flatbed. Tr. 71. Therefore, the existence of a violation turns on whether Boart properly *maintained* a safe means of access. The Commission has interpreted an operator's duty to "maintain" safe access as "an on-going responsibility . . . to ensure that a means of safe access is utilized." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (quoting *Lopke Quarries,* 23 FMSHRC at 708). The Commission has further elucidated that the duty to maintain a means of safe access "at a minimum . . . mandates that management officials utilize that access, and require other miners to do so." 23 FMSHRC at 709. Tucker conceded that he regularly accessed the flatbed via the toolbox door rather than the ladder, and Tucker himself was a supervisor (*see* page 11, *supra*), therefore I conclude that Boart made no significant efforts

[7] Amos testified that the ladder was visible, though difficult to discern, in the photograph taken of the truck. Tr. 70; Gov. Ex. 7 (circled in blue). I agree that the ladder is difficult to identify, but credit the inspector's testimony that the object circled in the photograph is a ladder.

[8] The back step is a metal grating spanning the width of the rear of the truck. Resp. Ex. A (circled in blue).

to ensure the ladder, an obviously safe means of access, was utilized. Accordingly, the key factual dispute is whether the toolbox door also constituted a safe means of access.[9]

The Secretary contends that the ladder was the only safe means of access, so by failing to ensure that Tucker used the ladder, Boart failed to maintain a safe means of access. Sec'y Br. at 20. The Secretary asserts that using the toolbox door for access was unsafe because the chain holding the door could snap, Tucker could get his foot caught in the door and trip, he could encounter any number of fall hazards while pulling himself up onto the flatbed, and even if he pulled himself up using the posts for handholds, he could lose his grip. Sec'y Br. at 21-22. Amos noted that the toolbox door did not meet the height and depth requirements for steps or ladders, and theorized that the door was not strong enough to bear Tucker's weight. Tr. 63, 66. Respondent contends that the toolbox door was a safe means of access, therefore allowing Tucker to use that method of access does not constitute a violation. Resp Br. at 22. Respondent calls the Secretary's assertion that the chains could snap mere speculation. Resp. Br. at 22. Furthermore, Tucker testified that he would feel safer standing on the toolbox door than a wobbly ladder, Tr. 283, and Stadeli pointed out that by using handholds, Tucker maintained three points of contact. Tr. 200.

While Respondent's arguments may be relevant for determining the likelihood or severity of expected injury, I find that the Secretary has presented sufficient evidence of a trip/fall hazard to deem Tucker's method of access unsafe, especially given Tucker's testimony that he had to push material out of the way to place his foot on the flatbed, Tr. 299, and the fact that a number of Boart trucks have built in ladders.[10] Tr. 194. Because Respondent did not ensure that Tucker used a safe means of access, I find a violation of section 56.11001.

S&S and Gravity

The Secretary alleges that the cited condition was S&S. The Secretary has established a violation which contributes to a fall hazard. With regard to the third and fourth *Mathies* factors, as will be discussed in more detail below, Inspector Amos testified that the dangers presented by Tucker's unsafe method of access as described in Order No. 8605606 were essentially the same as those presented by Tucker's lack of fall protection as described in Citation No. 8605605,

[9] Tucker also accessed the flatbed via the step on the back of the truck. However, whether the back step was a safe means of access is not outcome-determinative, given that Tucker testified that the toolbox door was his usual means of access when the drill rig and flatbed truck were not parked back to back. Even assuming the back step was a safe means of access, which Amos contests, Tr. 73, and even if Tucker used the back step and the toolbox door in equal measure, Boart still allowed Tucker to access the flatbed via the toolbox door as a matter of course. Therefore, if the toolbox door was unsafe, Boart failed to ensure that its on-site supervisor used only safe methods of access.

[10] As for Tucker's assertion that he felt safer using the toolbox than a "wobbly ladder," Tr. 283, if the ladder was indeed wobbly, the proper solution would have been to request a sturdier ladder, rather than to use an alternate but still unsafe method of access. "It was the lesser of two evils" is not a proper defense to a violation.

Tr. 106, and accordingly, he found that the condition was highly likely to result in an injury that could reasonably be expected to be fatal. I agree that the two cited conditions present very similar dangers, and therefore find that, as with Citation No. 8605605, the cited condition in Order No. 8605606 was reasonably likely to result in an injury that could reasonably be expected to result in lost workdays or restricted duty.

The Secretary's allegation that injury is highly likely to occur is again largely speculative, particularly the notion that the chain holding the toolbox door level could snap under Tucker's weight. Sec'y Br. at 21-22. However, as Tucker's means of access involved stepping onto the flatbed, then the same unsecured pipes and loose straps which posed a moderate trip hazard once on the flatbed also presented a trip hazard while stepping onto the flatbed; Tucker admitted that he regularly had to push material out of the way to make space for his foot when stepping onto the flatbed from the toolbox door. Tr. 299. Respondent counters that injury was unlikely because Tucker maintained three points of contact by gripping the post above his head or the edge of the flatbed while pulling himself up. Tr. 200. However, given continued mining operations, a situation would almost certainly arise which could cause Tucker to lose his grip; for example, just as bad weather would increase the chance of falling once Tucker was on the flatbed, Tr. 46, ice or water on the handholds would increase Tucker's risk of falling while pulling himself onto the flatbed. Accordingly, I find it reasonably likely that, given continued mining operations, the cited condition would result in a fall injury.[11]

With regard to the expected severity of the injury, Amos stated that he designated Order No. 8605606 as likely to result in a fatal injury for the same reasons that he designated Citation No. 8605605 as likely to result in a fatal injury. Tr. 106. The finding is therefore again rejected on the basis that Amos' testimony only established that a fatality *could* occur. Based on Amos' testimony regarding the force with which a miner falling from five feet would land, as well as a common sense understanding of the dangers involved with a fall of between three to five feet,[12] I find that, like Citation No. 8605605, any injury resulting from a fall while accessing the flatbed would reasonably be expected to result in lost workdays or restricted duty. Accordingly, I affirm the S&S designation, but reduce the gravity findings to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

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[11] Respondent also contends that injury was unlikely because Tucker had "probably climbed the truck like that a thousand times" without incident. Tr. 206. However, it has long been recognized that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc. and PBS Coals, Inc.*,

32 FMSHRC 1257, 1281 (Oct. 2010) (citation omitted).

[12] It could be argued that injuries sustained from a fall while accessing the flatbed would be less severe than those sustained once on the flatbed, because the miner would be falling from a lower height (the toolbox door). However, the fall could just as easily occur in the final stages of access, once the miner was already at the height of the flatbed.

Unwarrantable Failure and Negligence

The Secretary contends that Boart's failure to ensure that its on-site supervisor and other personnel utilized a safe means of access, particularly in light of the fact that the company owned trucks with built in ladders and guardrails, constitutes aggravated conduct sufficient to establish an unwarrantable failure. Sec'y Br. at 22. I find that the evidence supports the Secretary's unwarrantable failure determination.

The strongest elements in favor of an unwarrantable failure finding are the involvement of a supervisor, and length of time for which the condition existed. Because Tucker was the individual cited as utilizing an unsafe means of access, and Tucker is a supervisor (*see* pg. 11, *supra*), a supervisor was directly involved in causing the violation. This is even more significant because compliance with the cited regulation in essence mandates that supervisors ensure that other miners use safe access by setting a good example; Tucker did the opposite. Additionally, the condition existed for a significant length of time, given that Tucker testified that the toolbox door was a common method of access. Tr. 252.

Boart again claims there was no knowledge of the violative condition or notice that greater efforts were required, because there was a good faith belief that MSHA regulations did not apply. Resp. Br. at 25. For the reasons discussed above in the context of fall protection, I find that Boart should have known that the condition was violative, and been on notice, because the Durkee Cement Plant project team could have consulted with the M&E Division, which was on notice given that there were M&E trucks with built-in ladders. *See* pg. 12, *supra*. [13]

In Respondent's favor, I do note that the condition did not pose an exceedingly high degree of danger. I also find that the condition was potentially non-obvious; Tucker's own willingness to use the toolbox door as a convenient step to access the flatbed, and his lack of any mishaps using the toolbox door, indicate that a person could conclude that it provided a sufficiently safe means of access. However, the balance of factors still falls in favor of an unwarrantable failure determination, particularly given the involvement of a supervisor in a violation.

**104(a) Citation No. 8605607 (WEST 2012-251-RM, WEST 2012-422M)**

Citation No. 8605607 states the following:

> The Kenworth #2268 (Ser# 1FUYYSYBAGP281935) was provided with an automatically activated reverse signal alarm which was not maintained in functional condition. The truck is used on narrow roads where backing occurs as needed for supplying drill steel to the drill rig. The truck has a large blind

[13] Amos suggested more direct knowledge and notice, testifying that Tucker told Amos he "was trained in safe access but chose to ignore it." Tr. 108-09. However, Amos later admitted to paraphrasing what he was told by Tucker. Tr. 166. I therefore choose not to rely on Amos' testimony.

> spot to the rear. Two miners typically work at the drill pad: one driving the truck, and one on foot. The truck is used intermittently as needed. Should the truck back up and a miner on foot be struck, it would likely cause serious or fatal crushing injuries.

Gov. Ex. 4. The citation alleges a violation of 30 C.F.R. § 56.14132(a), which requires that audible warning devices on mobile equipment be maintained in functional condition. The inspector determined that the alleged violation as S&S, reasonably likely to result in a fatal injury to one person, and attributable to a moderate degree of negligence. Respondent admits the fact of the violation, Resp. Br. at 25, but challenges the gravity and negligence findings on grounds that the drill team used spotters when reversing the trucks, and the alarm had been functioning during the pre-operational inspection. For the reasons below, I find that the cited condition was not reasonably likely to result in injury.

S&S and Gravity

The discrete safety hazard contributed to by a malfunctioning backup alarm is inherent in the concept of an audible reverse alarm, namely the hazard of a miner being struck by the reversing vehicle. Boart does not contest that a fatality could be expected if a miner were to be struck by the subject vehicle. Accordingly, the only contested element of the S&S criteria is whether there was a reasonable likelihood of a miner being struck as a result of the nonfunctioning backup alarm. The Secretary contends that, because the normal operation of the flatbed truck involves backing up toward a drill rig with a miner standing on the back, it is reasonably likely that the lack of an audible backup alarm would result in injury. Sec'y Br. at 24. Respondent contends that injury is unlikely because it is company policy to use a spotter when backing the truck into place. Resp. Br. at 26.

The relevant normal mining operations are as follows. The trucks on site were moved approximately every one or two days, and moving the trucks necessarily involves backing one truck up to the other at the new location. Tr. 241-50, 327. The Secretary suggests that the flatbed truck would also occasionally back up to the drill rig with supplies while the drill rig was in operation, such that the driller would be standing at the back of the rig in the truck's blind spot. Sec'y Br. at 23-24; Tr. 80, 114. Respondent counters that the truck would never be reversed into place while the drill was in operation, in part because it would be dangerous, and in part because with a two person drill team, one would be driving and the other would be acting as a spotter, leaving no one to operate the drill. Tr. 248; Resp. Br. at 26. Tucker and Headman both testified that it was company policy to use a spotter, and described the procedure as follows: Headman would get into the cab, honk three times, make eye contact with Tucker through the mirror, and Tucker would guide Headman into the new location via agreed upon hand signals. Tr. 227, 246, 328. Amos testified that Headman told him a spotter had not been used the last time the flatbed was backed into place, Tr. 76, though Headman claimed he did not discuss spotters with Amos, Tr. 329.

In *Qmax Co.*, Administrative Law Judge Michael Zielinski found that where a company had a written policy requiring the use of a spotter, and the miners using the cited truck were in

compliance with that policy, the company's failure to maintain a backup alarm in violation of section 56.14132(a) was a purely technical violation that was unlikely to result in injury. 28 FMSHRC 848, 857-58 (Sept. 29, 2006) (ALJ). The decision noted that the spotter policy was consistent with the intent of the violated standard, which provides that a back-up alarm is not required where there is an "observer to signal when it is safe to back up." *Id.*, *citing* 30 C.F.R. § 56.14132(b)(1)(iv). The finding in *Qmax Co.* is applicable and persuasive. Although Boart did not have a written policy requiring the use of spotters, I credit Tucker and Headman's testimony that it was company policy to use a spotter, especially given the particularity and similarity of their descriptions. With a spotter in place, injury would be unlikely to occur while the flatbed truck was reversing, despite the absence of a back-up alarm. Accordingly, I find that the cited condition is non S&S. However, I find the cited violation to be serious, given that if injury were to occur, it could easily be fatal.

Moderate Negligence

The Secretary has designated this condition as attributable to a moderate degree of negligence. Moderate negligence is attributable where an operator "knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Tucker testified that when he conducted a preoperational check of the truck around 6:45 a.m. on the morning of the citation, the backup alarm was functional. Tr. 304-05. Although the Secretary seems to question the adequacy of the examination because of Headman's testimony that examinations are less thorough if a truck is already on site, Tr. 337, Tucker's contention that the alarm was functional is somewhat supported by a statement made to Amos by Ash Grove's safety director that the equipment was functional before the truck first came on site. Tr. 77-78. In light of the evidence suggesting that the condition may not have existed for any significant length of time, I find the Secretary's determination of moderate negligence appropriate.

**104(g)(1) Order No. 8605608 (WEST 2012-422M)**

Finally, Order No. 8605608 states the following:

> Doug Tucker, foreman[,] had not received any training as required for newly hired experienced miners pursuant to 46.6. The foreman had zero months mining experience but had conducted similar job tasks before working on the mine site. The foreman stated he had worked 15 days at the mine without receiving part 46 mandatory training. The contractor Boart Longyear was aware of the requirements. Doug Tucker, foreman[,] is hereby ordered withdrawn from the mine until he receives the required mandatory training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Gov. Ex. 5. The order alleges a violation of 30 C.F.R. § 46.6(a), which requires that newly hired experienced miners be provided with training as specified in sections 46.6(b) and (c). The order was issued pursuant to section 104(g)(1) of the Mine Act, which states that an inspector who

finds "a miner who has not received the requisite safety training . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from . . . the mine, and be prohibited from entering such mine until . . . such miner has received the training." 30 U.S.C. § 814. The Secretary alleges that the cited condition is S&S, reasonably likely to result in a fatal injury to one person, and attributable to a high degree of negligence. For the reasons below, I affirm the citation with regard to fact of the violation, gravity, and the S&S designation, and reduce the degree of negligence attributable to Respondent from high to moderate.

Fact of the Violation

A newly hired experienced miner is simply an experienced miner who is "beginning employment with a production-operator or independent contractor." 30 C.F.R. § 46.2(j).[14] Alternately, a new miner is one who is "beginning employment as a miner . . . and who is not an experienced miner." §46.2(i). The Secretary issued the above citation on grounds that Tucker was an experienced miner because he had been a driller for over ten years, and had not received the training required for new hires. Sec'y Br. at 26-27. Respondent admits that Tucker had not received the required MSHA training, Tr. 301, and concedes that per MSHA regulations, Tucker was a miner and training was required. Tr. 197-987. However, Respondent contends that because Tucker had never worked on mine sites previous to his work at the Durkee Cement Plant, he was not an experienced miner, and therefore the citation was improperly issued. Resp. Br. at 28.

Given that the Durkee Cement Plant project was Tucker's first experience as a driller on a mine site, Tr. 231, at first glance Tucker may appear to be an individual who was "beginning employment as a miner." However, Inspector Amos' rationale for designating Tucker as an experienced miner is sound; Tucker had over ten years of experience with the same drilling skills he was now employing as a miner. Tr. 62. As an experienced driller (now jurisdictionally a miner) beginning employment with a new operator, Tucker was required to go through the training required by section 46.6.

S&S and Gravity

By requiring an untrained miner to be immediately withdrawn on grounds that the miner constitutes "a hazard to himself and to others," section 104(g) of the Act essentially defines the failure to properly train a miner as a significant and substantial violation; the untrained miner constitutes a hazard sufficiently likely to contribute to a serious injury to himself or others as to require his immediate removal. Respondent contends that the gravity should be reduced,

[14] Section 46.2(j) also notes that "Experienced miners who move from one mine to another, such as drillers and blasters, but who remain employed by the same production-operator or independent contractor are not considered newly hired experienced miners." While one could argue that Tucker was not newly hired because he was a long-term employee of Boart, Tucker was beginning a contract with Ash Grove. Accordingly, his long term employment with Boart does not prohibit Tucker from being considered a new hire.

because Tucker had received OSHA training, had significant experience as a driller, and had received specific on-site training, such that all potential dangers were largely addressed. Resp. Br. at 29-30; Tr. 225, 236, 303. However, as the Secretary notes, familiarity with MSHA regulatory standards, as well as training on Miners Rights, are a crucial component in ensuring a safe working environment, and would likely not have been covered by Tucker's non-MSHA training.[15] Sec'y Br. at 28. The best way to ensure that accidents resulting from insufficient training do not occur is to ensure that all new hires receive the MSHA-required training. Accordingly, the gravity findings and S&S designation for the citation are affirmed.

Negligence

An operator's conduct constitutes high negligence where the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The Secretary suggests that Respondent knew MSHA Part 46 training was required for Tucker, noting that Headman had received that training. Sec'y Br. at 29; Tr. 132. However, it is unclear when and why Headman received the training (it could have been the result of a previous contract through Boart's Mining and Energy Division), therefore actual knowledge cannot be implied. On the other hand, as discussed above, Boart should have known that MSHA regulations applied. *See* pg. 12, *supra.* Respondent's belief that Tucker was a scientific worker and therefore immune from training requirements was not reasonable.

And yet, I conclude there are a number of mitigating circumstances which, when viewed together, are sufficient to reduce the degree of negligence attributable to Respondent. If Amos' conversations with management personnel subsequent to his inspection are any indication, Tucker received very mixed messages from Ash Grove management regarding the necessity of MSHA Part 46 training; Terry Kirby stated that MSHA training was not required for Boart employees, while Chris Hughes stated all contractors are generally told to follow MSHA requirements. Tr. 135-36. Furthermore, as discussed above, Tucker had received OSHA training, and had over ten years of experience and on-the-job training as a driller. Tucker even recalled receiving on-site training on the proper procedure to follow when blasting was taking place. Tr. 303. It is also worth noting that proper Part 46 training is provided to Boart's M&E division employees, and even to E&I employees when the drilling is clearly related to mining. Tr. 358. In other words, Tucker's training was omitted because of a mistaken premise that it was not required for a driller who was on site to test mercury levels, rather than reckless disregard of MSHA requirements, and the lack of training did not drastically increase the level of danger in this particular instance.

Cumulatively, these factors raise strong doubts that Respondent's behavior in not providing Tucker with Part 46 training was highly negligent; it is conceivable that a reasonable person in this situation would believe it had met its duty of care. Accordingly, the negligence attributable to Respondent for the violative condition in Order No. 8605608 shall be reduced from high to moderate.

[15] To provide a relevant example, if Tucker had been provided with MSHA required training, he would likely have been aware that there was no minimum elevation required for a danger of falling to be present.

**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)). 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 Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties 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).

The parties have stipulated to Respondent's good faith in attempting to achieve rapid compliance, and that the assessed penalties would not affect Respondent's ability to continue in business. Jt. Ex. 1, Stips. 7, 8. However, the parties disagree as to the relevant history of violations and size of Respondent's business. The Secretary, relying on Boart's I.D. page on MSHA's data retrieval site, designated Boart as a large contractor with a very high history of past violations. Sec'y Br. at 29-30. Respondent counters that Boart's M&E and E&I sections had separate identification numbers until 2010, and that by looking to the post-2010 combined statistics, the annual work hours and past history of violations have been unfairly inflated such that they do not represent the true safety record of the E&I Section. Resp. Br. at 30; Tr. 349-51, 355. While it is true that the combined statistics do not accurately reflect the safety record of

the E&I Section alone, it seems only fair that if a contract at a mine site is assigned to the E&I Section, it should expect to be treated as a mining division for purposes of violations incurred at that mine site. Accordingly, I find the Secretary to be justified in calculating the past history and size of Respondent based on the combined record.

Although judges have the authority to assess penalties *de novo*, the penalty calculation tables provided in 30 C.F.R. § 100.3 provide a useful guide. In this respect, I find the following reductions in penalty to be justifiable based on reductions in the gravity of the violative condition and/or the negligence attributable to Respondent, as discussed above: The civil penalty for Citation No. 8605605 shall be reduced from $70,000.00 to $13,300.00; the civil penalty for Order No. 8605606 shall be reduced from $70,000.00 to $13,300.00; the civil penalty for Citation No. 8605607 shall be reduced from $13,268.00 to $6,000.00; and the civil penalty for Order No. 8605608 shall be reduced from $47,716.00 to $13,000.00.

## ORDER

Consistent with this Decision, **IT IS ORDERED** that 107(a) Order No. 8605604 in Docket No. WEST 2012-248-RM **IS VACATED**.

**IT IS FURTHER ORDERED** that 104(d) Citation No. 8605605 in Docket Nos. WEST 2012-249-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of $13,300.00 shall be assessed for Citation No. 8605605.

**IT IS FURTHER ORDERED** that 104(d) Order No. 8605606 in Docket Nos. WEST 2012-250-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of $13,300.00 shall be assessed for Order No. 8605606.

**IT IS FURTHER ORDERED** that 104(a) Citation No. 8605607 in Docket Nos. WEST 2012-251-RM and WEST 2012-422M **IS MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely, and to delete the significant and substantial designation. Accordingly, **IT IS ORDERED** that a civil penalty of $6,000.00 shall be assessed for Citation No. 8605607.

**IT IS FURTHER ORDERED** that 104(g) Order No. 8605608 in Docket No. WEST 2012-422M **IS MODIFIED** to reduce the degree of negligence attributable to Boart Longyear from high to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of $13,000.00 shall be assessed for Order No. 8605608.

**IT IS FURTHER ORDERED** that Boart Longyear pay, within 40 days of the date of this decision, a total civil penalty of $45,600.00 in satisfaction of the four remaining violations at issue in these proceedings. Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED.**

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
Office of Administrative Law Judges
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004-1710

January 10, 2014

| | | |
|---|---|---|
| THOMAS E. PEREZ, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2010-1126<br>A.C. No. 15-17497-219607 |
| v. | : | |
| LEECO, INC., Respondent. | : | Mine: Mine No. 68 |

## DECISION

Appearances:

Willow E. Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN - Appearing on behalf of the Petitioner;

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, and Kilpatrick, Lexington, KY - Appearing on behalf of the Respondent.

Before: L. Zane Gill

## Procedural History

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d).

On February 23, 2010, Mine Safety and Health Administration ("MSHA") Inspector Silas Brock ("Brock") and MSHA Staff Assistant Clayton "Eddie" Sparks ("Sparks") were part of an inspection at the Leeco #68 Mine. During this inspection, Brock and Sparks issued Citation No. 8361343 ("the citation") and Order No. 8361345 ("the order"). Respondent Leeco, Inc. ("Leeco") contested the citation and order, and the parties were unable to resolve the matter by settlement. A hearing was held on May 8, 2012 in London, KY.

## Stipulations

1 . During all times relevant to the matters at issue, Leeco was the operator of Mine #68, Mine ID Number 15-17497.

2. Leeco Mine #68 is a "mine" as that term is defined in Section 3(h) of the Federal Mine Safety and Health Act ("The Mine Act"), 30 U.S.C. § 802(h).

3. At all material times involved in this matter, the products of the subject mine entered commerce, or the operations thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

5. Brock, whose signature appears in Block Number 22 of the citation and the order, was citing in the official capacity and as an authorized representative of the Secretary of Labor.

6. True copies of the citation and the order were served on Leeco as required by the Mine Act.

7. The total proposed penalties assessed for the citation and the order will not affect Leeco' s ability to remain in business.

8. The alleged violations were abated in good faith.

9. The R-17 Assessed Violation History is an authentic copy and may be admitted as a business record of MSHA.[1]

## Preliminary Rulings

### Violation History Exhibits Are Admissible

There is a preliminary evidence issue to resolve. MSHA used Exhibits GX-15, 17 and 18 at the trial to show the history of Leeco violations. They were provisionally admitted. (Tr.173:5-12) The Secretary wants to rely on the exhibits to support a higher level of negligence, gravity, and penalty. Leeco wants the court to disregard them.

Commission proceedings operate under simplified evidence rules. Commission Rule 63(a) sets the parameters for admissible evidence in FMSHRC proceedings. 29 CFR § 2700.63(a). The rule states that "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." *Id.* Although the Federal Rules of Evidence do have value by analogy, the Commission is not required to apply them. *Mid-Continent Res., Inc.*,

[1] Counsel for the Secretary requested a 15-month Assessed Violation History for Leeco. Counsel for Leeco noted that exhibit R-17 appeared to contain violations issued outside of this range. Counsel for the Secretary and Counsel for Leeco agreed that the violations outside of the 15-month range should not be considered.

6 FMSHRC 1132, 1135-36 & n.6 (May 1984). Here, they provide useful guidance in resolving the issue raised by Leeco.

According to Fed. R. Evid. 401, "relevant evidence" is evidence having a tendency to make the existence of any fact at issue in the case more or less probable than it would be without the evidence. The rule 401 relevance test requires two things: the evidence must have some probative value, and the fact to which it relates must be of some consequence in the case. These contested exhibits bear on the issues of negligence, gravity, and penalty, which are of obvious consequence. In addition to other possible relevance, their content relates to the issue of whether Leeco was or should have been on heightened notice because of prior and similar enforcement actions, an element of both the S&S characterization and the unwarrantable failure allegation. The contested exhibits are relevant.

Fed. R. Evid. 402 makes all relevant evidence admissible unless it is excluded by another rule or law, e.g., hearsay under Fed. R. Evid. 801, or 803, as argued by Leeco. (Leeco Resp. Br. at 2) In addition, per Fed. R. Evid. 403, the court may exclude evidence of doubtful relevance if it would promote confusion or prejudice, or be a waste of time. Leeco argues that because the exhibits' sponsoring witness could not vouch for the business processes within which the prior violation data was collected and reported, the information in the contested exhibits is misleading because it lacks accuracy and is of doubtful provenance. Leeco also intimates that the court's consideration of the evidence in the contested exhibits might prejudice its case.

As stated above, the Commission Rules allow the court to consider hearsay evidence. Moreover, Fed. R. Evid. 803(8) excludes from the hearsay prohibition public records and reports. The compilation of data relating to the violation and enforcement history of Leeco is a public record, and the contested exhibits are reports of those records. The litigation context of anything falling within the jurisdiction of the Commission and its administrative law judges is quite narrow. We all know enough about the methods and purposes of the violation history data collected and reported by MSHA that in the absence of some foundational evidence of misuse or corruption of that data, there is no legally significant doubt about where it came from, what it pertains to, or whether it is accurate in its collection and reporting.[2] The only question about

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[2] Leeco argues that the contested evidence is not a candidate for judicial notice under Fed. R. Evid. 201 because the information is neither generally known nor able to be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. (Leeco Resp. Br. at 2) However true this may be in the arena of general litigation, it is less true and less needed as a prophylactic in this specialized practice area. Fed. R. Evid. 201 speaks of the "territorial jurisdiction" of the court as being one of the two factors bearing on whether evidence may be admitted by judicial notice. The Commission's ALJs have nationwide territorial jurisdiction, but our subject matter jurisdiction is narrow and specialized. Hence, the rationale supporting judicial notice on the basis of facts uniquely germane to a limited geographic territory is equally applicable where it is the subject matter jurisdiction that is limited and specialized. It

(continued...)

violation history records maintained by MSHA is what weight and focus to give them, which are issues consigned to the discretion of the judge. *See Keystone Coal Mining Corp. v. Secretary of Labor,* 17 FMSHRC 1819, 1853-54 (Nov. 1995) (*citing Phil Crowley Steel Corp. v. Macomber, Inc*., 601 F.2d 342, 344 (8th Cir. 1979)).

From this I conclude that the contested exhibits are relevant and admissible. Leeco's concerns about the use of the evidence are circumscribed by the court's discretion as to how much weight, if any, to give it and to which issues to apply it. The court is aware of the alleged inaccuracies, problematic scope, and questionable value of the contested evidence. The court is capable of filtering it and giving it the appropriate weight.

**The Citation and Order Are Not Duplicative**

Inspector Brock issued the citation under 30 CFR § 75.370(a) (1) and the order under 30 CFR § 75.325(b). The former alleges that ventilation control devices, i.e., ventilation curtains, required by the ventilation control plan were not in place. The latter alleges that air flow was insufficient to clear the area of potentially harmful and dangerous airborne particles and methane. Leeco argues that when it took remedial action and rehung the airflow control curtains, the airflow in the area rose to volumes sufficient to evacuate any bad air. It contends that since a single abatement action remedied both alleged violating conditions, it was duplicative for the inspector to cite under two separate standards, which could potentially increase the fines and result in two violations involving S&S and unwarrantable failure. (Leeco Br. at 4-7)

Related citations are not duplicative if they impose separate and distinct duties on the operator. *Western Fuels-Utah, Inc.,* 19 FMSHRC 994, 1004 (June 1997) (citations omitted).The citation and order here arise from the same factual situation but allege violations of separate and distinct duties. While it may follow that a missing airflow control curtain will cause the volume of ventilation air in a given area to fall, and rehanging the missing curtain may restore airflow volume, the proper question is whether the standards regulating ventilation curtain placement and those specifying airflow minimums create separate duties. I conclude that they do in this case.

Low airflow volume does not arise *a priori* from missing control curtains. It can result from a range of causes. Conversely, a missing curtain does not always result in low airflow volume. The record bears this out. The citation was written because curtains required by the ventilation plan were either missing or mis-hung. (Exhibit GX-1) The order was issued because

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[2](...continued)
would be erroneous to believe that the court cannot take judicial notice of adjudicative facts that, because of the limited subject matter jurisdiction of the forum, are as generally known or as easily determinable within that specialized setting as facts that are generally known or easily determinable as a result of their geographic territorial limitation.

the ventilation plan required a minimum of 9,000 cfm of airflow at the last open crosscut on the No. 10 section and only 7,372 cfm were measured. (Exhibit GX-2) The order's subject is airflow volume only, not the means to attain that airflow. When the curtains were correctly positioned to abate the citation, the result was an increase in airflow to 15,960 cfm, which in turn abated the order. (Tr. 177:19-178:21) If the two events were truly duplicative, there would be no need for the ventilation plan to specify placement of curtains at all. It would suffice to simply require that adequate airflow volumes be maintained at all times.[3]

The fact that a single fix—rehanging the missing curtains—abated both violations could be a determinant fact in another case. However, the *Western Fuels* language cited by Leeco in its brief, that the determination of whether separate duties underlie the allegedly duplicative violations "should be made on a case by case basis, dependent on the particular facts at hand" (Leeco Br. at 6), is advisory and obvious, and does not compel the court to make its determination in this case based only on the fact that a single remedial action abated both violations. The essence of the *Western Fuels* precedent is the existence of separate duties, not the effect of a single remedial step.

These facts describe two distinct duties related to proper placement and function of ventilation curtains. In addition, two distinct hazards could arise from the missing curtains – the possible drop in airflow volume and the possibility that a belt fire could spread. As a result, the citation and the order relate to separate duties and are not duplicative.

## The Violation Allegations

The citation alleges a violation of 30 CFR § 75.370(a) (1), which states, "The operator shall develop and follow a ventilation plan approved by the district manager." (Exhibit GX-1) It alleges that a continuous miner was operating in the No. 3 entry of the No. 10 section (010 MMU) without a line curtain having been installed in the No. 3 entry, and without check curtains having been installed between the No. 2 and No. 3 entries or the No. 3 and No. 4 entries. It also contends that the curtain installed at the back of the conveyor tailpiece ("lo-lo") was only halfway across the entry.

The order alleges a violation of 30 CFR § 75.325(b), which states, "the quantity of air reaching the last open crosscut of each set of entries or rooms on each working section . . . shall be at least 9,000 cubic feet per minute unless a greater quantity is required to be specified in the approved ventilation plan." The order alleges that only 7,372 cubic feet per minute ("cfm") were flowing through the last open crosscut. (Tr. 90:11-24; 97:20-98:2)

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[3] Curtain placement in the ventilation plan responds to a duty beyond mere airflow maintenance. One of the missing curtains—at the conveyor tailpiece or "lo-lo"—was intended to decrease the likelihood of a fire or smoke on the belt line running further up the line than the next stop curtain. (Tr. 72:7-74:21; Sec'y Br. at 15) This describes a duty and a hazard separate and distinct from the mere maintenance of airflow volumes.

The citation and order were designated as highly likely to result in permanently disabling injury or illness to two persons. The inspector concluded, and the Secretary alleges that Leeco committed the alleged violations with high negligence, that they arose from unwarrantable conduct, and constituted significant and substantial ("S&S") violations. (Exhibit GX-1; GX-2)

Leeco concedes that some of the ventilation control curtains were missing (Tr. 12:11-15).

## Decision Summary

For the reasons discussed below, I conclude: that the violations alleged in both the citation and the order occurred; that they arose from moderate negligence; that they were unlikely to occur; if they did occur, they might be permanently disabling; that they would affect two persons; that they are not significant and substantial (S&S); that they do not constitute an unwarrantable failure to comply with the applicable mandatory standards; and that a combined civil penalty of $800.00 is appropriate.

## Analysis

It is clear in the Mine Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and "more" when talking about "significant and substantial" and "unwarrantable failure." The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d), also must prove that the circumstances of the violation satisfy both the "significant and substantial" and "unwarrantable failure" standards. If the Secretary fails to prove both, there can be no enhanced enforcement. The Secretary has to prove four distinct elements[4] when the enhanced enforcement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

[4] The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

**The Underlying Violations**[5]

The inspection that generated the citation and order in this case took place on February 23, 2010. (Exhibit GX-1) Inspectors Brock and Sparks and others (Exhibit GX-3-1) participated in an "impact" or "ventilation blitz" inspection in which an inspector monitors the mine's phone and communications system to assure that miners underground are not warned of MSHA's presence. (Tr. 27:9-16; 124:12-17)

When the inspectors arrived at the 010 MMU ("No. 10 section") of the Leeco mine, they observed that four ventilation curtains required by the ventilation plan were either defective or missing: (1) a check curtain that was supposed to be hung rib-to-rib at the back of the lo-lo was loose and gapped away from the ribs so that a person could walk around it on either side. (Tr. 34:15-35:4; 72:7-73:2; 130:9-17); (2) the line curtain in the No. 3 entry was missing; it was later found tangled around the continuous miner head. (Tr. 255:12-256:4); (3) and (4) check curtains between the No. 2 and 3 and between the No. 3 and 4 entries were on the ground. (Tr. 254:2-255:9)

Victor Colon, Leeco's section foreman, testified that when he did his pre-shift walk-through to check all five of the section headings, all of the ventilation curtains required for mining in the No. 2 entry were in place (Tr. 249:45-252:14), no methane was detected (Tr. 245:14-23), and the airflow at the last open crosscut exceeded the minimum called for in the ventilation plan. (Tr. 246:10-12) He testified that after his walk-through, and unbeknownst to him, the continuous miner was moved from the No. 2 to the No. 3 entry. (Tr. 252:15-18) He stated that moving the continuous miner from one entry to another without the knowledge of the section foreman was not a common occurrence, but that the continuous miner operator was trained to understand and comply with the ventilation plan, implying that management was not aware of the missing or defective curtains in the No. 3 entry. (Tr. 252:15-253:8) Nonetheless, when the MSHA inspectors pointed out the missing curtains, Colon saw that the check curtains between the No. 2 and 3 and No. 3 and 4 entries were lying on the ground or only partially hung (Tr. 254:14-255:1; 255:2-9), and the line curtain that had been in the No. 3 entry was wrapped around the bit head of the continuous miner. (Tr. 255:12-21) This establishes the violation of 30 CFR § 75.370(a) (1) alleged in the citation.

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

With the missing ventilation curtains, the airflow measurements at the face in the No. 3 entry were below what was required by the ventilation plan. Readings taken before the citation was abated showed airflow of 7,372 cfm. (Tr. 81:11-82:21) The ventilation plan required 9,000 cfm. (Exhibit GX-2; Tr. 82:11-21; 89:17-90:10) The missing ventilation curtains were either replaced from a roll of curtain material on hand in the mine (Tr. 83:17-84:1) or simply rehung. (Tr. 298:3-299:10; Ex. R-5) After the curtains were replaced, measured airflow climbed immediately to 15, 960 cfm. (Tr. 87:6-88:4; 92:21-93:9; 166:3-8) and Inspector Brock immediately abated the order. (Exhibit GX-2) This establishes the violation of 30 CFR § 75.325(b) alleged in the order.

**Negligence and Gravity – Citation No. 8361343 and Order No. 8361345**

Concepts of negligence and gravity apply to all citations and orders under the Mine Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors. The concepts of "significant and substantial" and "unwarrantable failure" are applied, primarily to 104(d) orders[6], as part of the enhanced enforcement mechanism set forth in the Mine Act.

The following negligence and gravity discussion pertains to both the citation and the order. Inspector Brock had in mind the same three hazards addressed by Citation No. 8361343 when he wrote Order No. 8361345, i.e., insufficient airflow across the section faces, insufficient airflow at the location where the continuous miner was working, and insufficient airflow to evacuate any dust or methane present where the miners were located. (Tr. 91:10-24) Brock assumed that two miners would be affected by these airflow deficiencies. (Tr. 91:25-92:6) He alleged that the missing curtains were the result of high negligence and were highly likely to result in an injury or illness that would be permanently disabling. (Exhibit GX-1)

**Negligence**

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *A. H. Smith Stone Company*, 5 FMSHRC 13, 15, (Jan.1983)

[6] The Mine Act also contemplates that "any citation given to the operator under this Act" may form the basis for enhanced enforcement if the elements of "significant and substantial" and "unwarrantable failure" can be proved. 30 U.S.C § 814(d) (1).

(*citing Southern Ohio Coal Co.*, 4 FMSHRC 1458,1463-64 (Aug. 1982) and *Nacco Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation)).

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

I am convinced that mitigating circumstances existed that require the negligence assessment for both the citation and the order to be reduced from "high" to "moderate." Leeco management (Colon) did not have actual knowledge that the curtains were down. (Tr. 252:15-21; 301:1-3) However, both Colon and David Lewis, the continuous miner operator, testified that it was Lewis' responsibility to take steps to assure the proper placement and functioning of the ventilation curtain when he moved the continuous miner from entry No. 2 to entry No. 3. (Tr. 252:15-253:8; 267:20-22)[7] The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636. The fact that the curtains were down and the airflow was sub-standard establishes a breach of duty, whether committed by Colon or Lewis. (Tr. 265:15-21)[8]

[7] Lewis was ultimately disciplined for his actions. (Tr. 299:17-25)

[8] Leeco agrees with this point in its post-hearing brief. (Leeco Br. at 13)

Mitigating against a finding of high negligence, however, is the fact that the defective condition lasted only a short time (Tr. 249:21-24; 281:3-6)[9] and was immediately remedied when discovered. (Stipulation 8)[10] The fact that there was no detectable methane at any time is also a mitigating circumstance, and will be discussed further below. The lack of methane militates against an assumption that in the course of continuing mining operations hazardous methane levels were bound to exist at some indeterminate point in time, a point argued by the Secretary (Sec'y Br. at 14) and inadequately justified on the basis of the evidence that the Leeco mine was considered "gassy." I conclude that Leeco's negligence in this case was no more than moderate.

**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. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sep. 1996). 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 analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n. 11 (Sep. 1987).

Inspector Brock focused much of his testimony on his belief that the dust cloud he observed when he arrived on the No. 10 section was at least as great a hazard as the low airflow volume and the missing ventilation curtains. The gravity analysis should weigh the facts in the record against the Inspector's belief that motivated the issuance of the citation and order. The

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[9] The continuous miner had cut 26 ft of coal out of the left side of the No. 3 entry and still had yet to cut on the right side when Inspector Brock arrived. This corroborates that the miner had recently been moved. (Tr. 31:22-25)

[10] I am aware that the Secretary has argued that the fact that these violations were generated several hours into the shift (Tr. 30:8-24; 83:17-84:14; 124:25-125:3; 145:19-146:1) and that the missing curtains were replaced by new curtain material (Tr. 81:11-18; 83:18-84:1; 84:25-85:6; 143:14-144:15) is evidence that the violating conditions existed long enough to amount to wilful disregard and "marked indifference to obvious violations." (Sec'y Br. at 30) I also consider the fact that none of the miners had taken steps to reposition the ventilation curtains before the Inspector noted the violations to be a fact to be weighed against the mitigating factors discussed here. The preponderance of the evidence, however, weighs in favor of Leeco's argument that the curtains were torn down or not put in place when the continuous miner was moved from one entry to the other, and that the move had just happened.

likelihood of an injury or illness arising from the conditions observed by the Inspector will be addressed in detail in relation to the S&S analysis that follows. Here, I consider whether the facts support the Inspector's allegation that these conditions would give rise to an injury or illness that is permanently disabling for two or more miners. (Exhibit GX-1)

The inspector's assumption of a probability is too thin to support his assessment of gravity. First, Leeco's excuse for the missing curtains makes operational sense. There is nothing about tearing down existing curtains and/or failing to adequately reposition them when moving the continuous miner from one entry to another that is hard to believe. The time frame here is from 10 to about 30 minutes[11], a time frame long enough for the curtains to be torn down during the move and short enough that they were not yet repaired. Aside from the suggestive and vague evidence of arguably similar violations in the past (Exhibits GX-15, 16, and 17), there is nothing more to show either that Leeco knew of the missing curtains for any length of time prior to this inspection or that these missing curtains were somehow connected to a larger pattern of sub-standard operations. Brock testified that he felt the missing curtains were evidence that Leeco's management lacked care for the well being of the miners. (Tr. 37:14-38:3; 60:3-14) However, his opinion is based in part on the assumption that the curtains had been down for some time, a point which is convincingly contradicted by Colon's testimony that they were all in place only 20 - 30 minutes earlier, and by his assumption that it would shave ten minutes per cut off the time it took to mine the coal if the miners did not pay due attention to proper placement and maintenance of ventilation curtains. (Tr. 60:3-14) This does not prove lack of care nor does it in any way contradict Colon's testimony about how long the curtains had been down. [12]

Leeco should have known about the missing ventilation curtains. I note also that Leeco would have done better to have undertaken repairs within the short period of time the curtains were misplaced. However, as to gravity, I conclude that it is unlikely that there would be a confluence of missing ventilation curtains and the presence of sufficient methane to result in an explosion or exposure to harmful dust for long enough to affect the health of miners to be permanently disabling. As a result, the hazards described by Inspector Brock are unlikely to occur, but if they did occur, they could result in permanently disabling injuries to two or more miners.

The picture that emerges from these facts is much more in line with Leeco's post-hearing briefing than the Secretary's. This is not to deprecate the potential severity of a methane

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[11] The period during which the curtains were down was between 10 and 30 minutes. Colon testified that he had been away from the face area for about 30 minutes working on a man door in a permanent brattice when the Inspector Brock arrived. (Tr. 249:21-250:3) On cross examination Brock agreed with the proposition that the curtains could have been down for as few as 10 minutes. (Tr. 227:18-229:24)

[12] The length of time the curtains were down is also a factor relevant to assessing whether the violation constitutes an unwarrantable failure, discussed below.

explosion or lung disease. These facts just do not support the inspector's assessment of the likelihood of an injury or illness. It is perhaps somewhat likely that in the course of continuing mining operations this MMU would encounter enough methane to pose a real danger of explosion if it were not properly evacuated, however the evidence fails to convince this fact finder that Leeco would continue to operate in violation of the ventilation plan or that this episode was part of a pattern of bad mining practices. In order to sustain his argument, the Secretary would have to prove both that there was a significant likelihood of encountering sufficient methane to result in an explosion and that as a result of poor mining practices and continuing violations of the ventilation plan, the methane would not be evacuated so that an explosion would result.

**Unwarrantable Failure**

The Secretary argued for a finding of unwarrantable failure and S&S in part on the basis that the Leeco mine was gassy (Sec'y Br. at 25), even though there was no evidence of methane at the site of the citation. (Tr. 69:10-23; 109:1-4) Inspector Brock testified that he was unable to predict when there would be no methane present. (Tr. 69:21-23) However, based on the fact that the Leeco mine was known to liberate enough methane to be considered a gassy mine in general (Tr. 47:13-18), he felt it was reasonably likely that if Leeco continued to mine out of compliance with its ventilation plan, mining could eventually progress into an area where methane was present, thus increasing the likelihood of a methane ignition. (Tr. 69:24-70:6) I am unable to agree with Brock's assessment.

In *Emery Mining Corp*., 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The violations in this case were limited to a discrete and relatively small area of the Leeco mine, the No. 10 MMU. This was not a widespread condition. As mentioned above, the violation existed for a short time. The violation was obvious, but given the short time involved, its being obvious is not a significant additional factor. The degree of danger is discussed in greater detail below. The operator abated the condition immediately. As is discussed further below in the context of the visible dust cloud observed by Inspector Brock, the operator is charged with knowledge of the condition, however the fact that it arose only minutes before being seen by the Inspector and brought to the operator's attention, and that prior dust sampling failed to show any problems ameliorate the severity of this factor. It is also notable that the operator took appropriate disciplinary action against the miners who where tasked by training and normal operating delegation of duties.

We are required to evaluate the evidence relating to negligence and gravity against the backdrop of continuing mining operations, not just the snapshot at the moment of citation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). However, consistent with the general concept of resolving fact disputes on the basis of preponderant evidence, when evaluating what continuing mining operations might entail, it is permissible to extrapolate from evidence of the pattern of mining operations preceding the violation. *Consolidation Coal*, 32 FMSHRC 2326, 2336-37, 2013 WL 4648491 *12 (Aug. 2013).[13]

In order to understand the inspector's rationale, it is necessary to extrapolate future operating conditions from present unabated conditions. However, in order to conclude that future conditions would be identical to the unabated conditions at the time of the violations, there would have to be evidence that the ventilation curtains were either chronically defective or that Leeco's operations in this section were so substandard as to be the norm and not the brief exception. Such evidence is not to be found in the record. Instead, the Secretary argues in essence that because the operating conditions from which these violations arose – which were

[13] On the surface it might appear that *Consolidation Coal* stands for the proposition that continuing operations *presume* a lack of abatement of the conditions present at the time of citation and gives special weight to an assumption that eventually active mining will produce hazardous levels of methane, particularly in a mine that has been determined to be gassy and is subject to spot inspections. This comes very close to being a presumption that any violation of a ventilation plan is *ipso facto* an S&S violation. In finer detail, however, it is clear that the Commission in *Consolidation Coal* based its rather sweeping "continuing mining" assumption on an evaluation of facts pertinent to the time and location of the violation present in the record and not just on the categorical designation of the mine as gassy and the fact that it was on the spot inspection list. The record contained evidence of methane present at the site of the violation and prior methane ignitions, both significant factual points missing in this record. It is important to avoid basing legal conclusions on assumptions lacking factual support, which tend to become presumptions that undercut the requirement that all violations, and related S&S designations, be determined on the basis of preponderant evidence in the record. *Consolidation Coal,* 35 FMSHRC at 2336-37.

shown convincingly to be a momentary aberration – occurred in a gassy mine, further proof of reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care (required to prove unwarrantable failure), or proof of a reasonable likelihood that the defective ventilation curtains would result in an injury of a reasonably serious nature (needed to justify an S&S finding), is not required. In other words, any violation of the ventilation plan in a gassy mine should be treated as *per se* unwarrantable and S&S. This is the hallmark of a presumption, which would shift the burden of proof from the Secretary to the operator.

The Leeco mine was known to be gassy. However, no methane was detected either during Colon's sweep of the working faces (Tr. 245:14-23), or by Brock during his inspection. (Tr. 109:1-4) Nonetheless, Brock explained that his assessment of negligence and gravity was linked to an *assumption of a probability* that miners would eventually encounter methane during continuing mining operations (Tr. 69:14-70:6) and that mining in a methane environment with missing ventilation curtains could eventually result in an explosion and resulting serious injuries. (Tr. 56:5-13)[14]

The Secretary constructs a chain of inference to support the argument that these violations should be characterized as unwarrantable failures and S&S. First, he argues that this mine is known to be gassy and was on a 15-day spot inspection list (Tr. 47:13-18), which results when methane sampling from *the mine as a whole* exceeds a pre-determined limit. (Tr. 49:11-50:1) Then he argues that it is reasonable to assume, contrary to Stipulation No. 8 and other evidence in the record (Tr. 177:12-178:21; 256:9-15; 281:3-9; 298:3-5), that operations would continue unabated as they were when the citations were written. Next, because the mine is gassy, it is reasonable to assume that at some point methane would show up in the course of normal mining operations.[15] Then he asks the court to assume, again contrary to the evidence in the record, that Leeco would not have corrected the problem with the ventilation curtains or would have allowed it to recur.[16] Ultimately, the Secretary asks the court to conclude that, at some indefinite point in the future, there would be inadequate airflow in an area where there is methane and where there is a source of the spark needed to cause an ignition. (Tr. 67:8-20;

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[14] Inspector Brock also testified that his gravity/negligence assessment took into account the presence of a visible dust cloud (Tr. 37:2-5) which he extrapolated to represent a citable risk of lung disease, with continued exposure. (Tr. 52:24-53:17) I deal separately with this aspect of the citations below.

[15] This assumption is called into question by the fact that there is no evidence that the methane readings that led to the Leeco mine being on a "spot" list and its being considered a "gassy" mine were taken from the area in which these violations occurred (Tr. 109:1-4) and by the fact that this mine was very large (Tr. 27:22-28:1; 91:1-6).

[16] Brock testified that he concluded that the violating conditions had existed for "a few hours" because the curtains were missing fairly late in the shift cycle (Tr. 30:14-31:2; 84:25-85:3; 124:25-125:6; 144:7-11) and based on his general mining experience. (Tr. 145:19-146:1)

145:2-18) It is evident that the chain of extrapolation becomes weaker and weaker, step by step, and is not supported by the record.

It may be proper to extrapolate from the conditions existing at the time and in the location of the violation, but it is not proper to extrapolate it in one direction only. Specific evidence pertinent to the place and time of the violation should inform any assumptions about future mining operations. This includes whether methane was present. In addition to being relevant in evaluating the degree of negligence, if methane was present among the violating conditions, it is reasonable to extrapolate that continuing mining operations, in the absence of abatement, would result in methane being present again. This can elevate the assessment of gravity. However, absence of methane, even in a gassy mine, should not be ignored as an element for assessing future risk of continuing mining operations. It is just as reasonable to posit that there will be no methane present if the conditions under which the citation was written are assumed to continue into the future as it would be to assume the continuance of any other condition present at the time and place of the violation. Such is the weakness of assumptions. If the mine is gassy, that is relevant to the issue of whether mine management knew about the overall risk levels in the mine, including the location of the citation, but it should not create a presumption that continuing mining operations will, with reasonable certainty, encounter combustible methane conditions. It is simply improper to make the jump from a mine merely being gassy to the presumption of the presence of combustible methane in the future, without any other evidence in the record. They are separate and distinct factors. There is too great a danger of creating a presumption of unwarrantable failure or S&S *per se* any time there is a violation of the ventilation plan to follow the inspector's logic.

The assessment of whether an event is reasonably likely to happen in the future must be based on preponderant evidence in the record. I cannot find that the mere fact that a mine is considered gassy in total is a sufficient basis to assume that an ignitable methane accumulation is reasonably likely to happen at some indistinct time in the future in an area that despite active coal extraction had zero methane at the time of this violation. Piling assumptions on other assumptions is not a valid means of justifying enhanced enforcement actions.

It should be noted that there is no evidence, other than a possible inference, that the absence of methane was the result of the operator's care or diligence – it appears to be a fortuitous circumstance. The violating condition was the low airflow and defectively deployed curtains. It is appropriate to attribute to Leeco knowledge of the low airflow and how to properly deploy ventilation curtains. It is also clear that Leeco was aware of the gassy mine issue that weighed on the inspector's mind. However, the fact that there was no measurable methane, whether it is attributable to anything Leeco did or not, does act to mitigate, particularly in recognition of the requirement that violations be evaluated in light of continuing operations.

It is apparent that Inspector Brock placed more emphasis on the airflow than the resulting methane level. It is fair to conclude from these facts that Brock was more interested in addressing the potential for an ignition in this gassy mine than the facts relevant to the low

airflows that underlie these violations.[17] Leeco was aware of the gassy nature of this mine, but that is not the appropriate focus of this analysis. The issue is not whether Leeco knew or should have known that this was a gassy mine; it is whether it knew of the low airflows. Brock, on the other hand, placed more emphasis on the form of the regulation (the airflow measurements) and less on the substance (the lack of measurable methane). So, in this regard, the fact that there was no methane must be taken into account when assessing the violation. In sum, there are two additional elements that mitigate negligence and weigh against a finding of unwarrantable failure: (1) Brock's emphasis on airflow rather than the result of the airflow; and (2) the lack of any measurable methane. The fact that there was no measurable methane is relevant and material. The absence of measurable methane is one of the ultimate objectives of requiring adequate airflow at the faces. Although Leeco cannot take direct credit for the fortuitous lack of measurable methane under these facts, it also cannot be penalized by Brock's emphasis on the potential of a methane ignition in a gassy mine.

As pointed out by counsel for Leeco in its post-hearing brief[18], unwarrantable failure can only result from "aggravated conduct, constituting more than ordinary negligence," citing *Virginia Crews Coal Co.,* 15 FMSHRC 2103,2107 (Oct. 1993). A finding that the operator "knew or should have known" of the violating condition is not enough, otherwise "unwarrantable failure [would be] indistinguishable from ordinary negligence." *Id.* at 2107. As a result, I conclude that the lack of detectable methane is a mitigating factor, which when considered in concert with the short period of time the violating conditions existed before being discovered and abated, weighs significantly against a finding of unwarrantable failure. A preponderance of the evidence supports my conclusion that Leeco's actions were closer to mere "inadvertence, thoughtlessness or inattention," *Emery Mining Corp.,* 9 FMSHRC 1997, 2001 (Dec. 1987), than aggravated conduct or a deliberate and conscious failure to act. These are the dominant factors that lead me to conclude that the violations alleged in Citation No. 8361343 and Order No. 8361345 do not arise from reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care and are not unwarrantable failures to comply with mandatory standards.

**Significant and Substantial**

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained that:

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[17] This is not an inappropriate issue for an MSHA inspector to take into account. However, placing emphasis on a "potential" condition when addressing actual events cannot bridge the gap between these facts and the quantity and quality of facts needed to prove unwarrantable failure.

[18] Leeco Br. at 14.

> 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. In *U.S. Steel*, the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."... We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

7 FMSHRC at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC.* 195 F.3d 42 (D.C. Cir. 1999).

The Secretary has proved a predicate violation of a mandatory safety standard for both the citation and the order, the first element needed to prove that they are significant and substantial. It is well established that plan provisions are enforceable as mandatory standards. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy W. Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Airflow measurements below the minimums required by the approved ventilation plan constitute a violation of a mandatory safety standard.

The Secretary also provided the following evidence tending to show that the missing curtains could contribute to the accumulation of coal dust and methane which might increase the likelihood of a mine explosion. This mine was on a 15-day "I-Spot" list due to methane levels. (Tr. 47:14-18) With the right mixture of methane and oxygen, a spark from a mining machine could cause a fireball explosion. (Tr. 48:3-18) A fireball explosion could, under the right conditions, pick up coal dust and become a more lethal explosion. (Tr. 48:19-49:10) Inspector Brock concluded that continued operation with missing ventilation curtains could lead to a methane explosion. (Tr. 50:24-51:9) He also concluded that of the 11 men working on the section at the time, at least two would be exposed to possible burn (or worse) injuries in the event of a methane explosion. (Tr. 54:24-56:4) Missing curtains can cause pockets of dead air to accumulate (Tr. 65:21-66:13), although the record is silent about there being dead air pockets on the date of this inspection. Pockets of dead air can allow methane to accumulate, thus

increasing the likelihood of an explosion. (Tr. 66:14-23) Any piece of mining equipment could cause the spark needed to ignite accumulated methane. (Tr. 66:24-67:20) Inspector Brock did not detect any methane at the face during his inspection, however this mine is known to be historically gassy. (Tr. 69:10-20) Despite the lack of methane, the missing ventilation curtains make it more likely that methane will accumulate to dangerous levels. (Tr. 69:21-70:6)

However, the second element of the *Mathies Coal* S&S test is not satisfied. There is no evidence in the record to make it any more than speculative that a hazard would arise from the low airflow attributable to the missing ventilation curtains. From the catalog of inspector's testimony above one might assume that methane would eventually be present or that some mine dust contains harmful particulates. One might even assume that at some indeterminate time in the future methane might accumulate to a combustible level and that a spark might happen from normal mining activities, or that extended exposure to high enough concentrations of dangerous dust particulates might cause lung disease. But, nothing in the record can even start that chain of assumptions. Without evidence of an actual methane accumulation or evidence of actual deleterious constituents in the dust cloud, there is no more hazard than that recognized by the mere existence of the health standard reflected in the ventilation plan, which without more makes out nothing more than a simple, basic violation. Were it otherwise, some standards would, on their own terms, call for enhanced penalties irrespective of the concept of S&S and its attendant requirement of "something more" than the bare violation. In other words, a bare violation of a ventilation plan provision does not in itself implicate any level of hazard beyond that underlying the existence of the ventilation plan itself. In order to prove a violation is S&S, there must be something more than general assumptions. There must be something concrete and discretely tied to the facts underlying the violation, *viz* "a discrete safety hazard [. . .] contributed to by [the conditions underlying] the violation.'

The *Mathies* analysis in this case also stalls at the third element, i.e., whether the low airflow caused by the deficient ventilation curtains presents a reasonable likelihood that methane would accumulate to ignition levels and/or harmful dust would persist in sufficient concentrations to cause lung disease. Stated otherwise, the deficient ventilation curtains in this case must play a role in causing a hazard that is reasonably likely to result in a serious injury. My conclusion is that, based on the facts of this case, the hazard – the defective curtains – is not reasonably likely to exist long enough or at a level of intensity to result in serious injury. Because the inferential chain, discussed below, is so tenuous, I cannot conclude that a hazard of that nature is reasonably likely to persist or recur.

Evidence Relating to Possible Lung Disease

The Secretary made much of the possibility that bad air caused by the missing ventilation curtains in this mine could cause black lung disease. (Tr. 51:10-57:20) This could be relevant to the second and third elements of the S&S test and possibly to the threshold gravity assessment. The Secretary attempted to show that there was a reasonable likelihood that the lack of required airflow related to these violations was reasonably likely to result in lung disease. To bolster this argument, the Secretary also referred the court to Leeco's violation history which purports to

show that Leeco had a significant number of similar violations in the two-year period prior to these violations. (Tr. 146:2-148:3) Despite the common knowledge that prolonged exposure to mining dust levels above a certain threshold (Tr. 107:16-22) is deleterious to miners' health, the Secretary's presentation on this point was simply unconvincing. This is an additional reason, along with the discussion of the gravity and negligence assessments above, why the Secretary has failed to satisfy the second and third elements of the *Mathies* test, i.e., that the violating conditions observed by the inspector constitute a hazard which has a reasonable likelihood of causing an injury.

The Secretary based his lung disease case on the inspector's observation that the air in the area of the violations was visibly dusty (Tr. 37:2-5; 141:20-142:6; 165:18-23), a point that is vigorously contested by Leeco. (Tr. 296:17-297:13) Beyond the inspector's observation, there is little if any evidence to show either that the atmosphere was contaminated by anything known to lead to lung disease or that the level of contamination was above the threshold levels above which scientific data confirms a *possibility* of causation. (Tr. 210:10-211:1)[19] In a word, the lung disease evidence was a dead end for the Secretary. I am not convinced that the atmosphere contained relevant contaminants at the requisite levels to cause lung disease, quite apart from the necessary and completely missing evidence that the bad air levels lasted long enough to constitute a reasonable likelihood of causing lung disease.

The Secretary also attempted to show that *any* exposure to quartz dust was a sufficiently significant health risk to support a finding of S&S and unwarrantable failure. But, there is no sampling data to show that the No. 10 section of the Leeco mine was exceeding airborne dust levels on the date of these violations. (Tr. 231:15-232:7) The actual dust samples from the No. 10 section show that the mine had been in compliance with dust sampling standards for at least six months prior to these violations. (Tr. 231:19-233:5) Exhibit GX-6 shows that for the two-year period covered by the exhibit, the No. 10 section was never over the dust sampling limit for quartz (Tr. 234:5-13). Mine operator dust sampling data, Exhibit GX-7, shows that the last time the dust sampling data was out of compliance was on August 5, 2009, some six months prior to the date of issuance of these violations (Tr. 235:20-236:8). Finally, there was no evidence that a single exposure to airborne dust causes lung disease. (Tr. 236:17-237:6).

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[19] Inspector Sparks stated in testimony that there was coal dust suspended in the dust cloud he observed, which he considered evidence of high negligence. (Tr. 142:20-143:7) Giving due credit to his experience in the mining industry and as an MSHA inspector, I grant that he may be able to determine whether a dust cloud in a mine contains coal dust based only on his visual assessment, however that is not of sufficient weight to support the Secretary's contention here that *this dust cloud* was likely to cause lung disease. (Tr. 141:20-142:10; 167:6-16; 199:19-200:11)

The testimony of MSHA's expert witness Randy Kline[20] was similarly unconvincing. His opinion about whether the dust conditions on the No. 10 section on February 23, 2010, were bad enough to pose a risk of lung disease is too tenuous to merit serious weight. Aside from the vague and tangential conclusion that the general area in which the Leeco mine is located is known as a "hot spot" for black lung and quartz-related lung disease (silicosis) (Tr. 188:1-6; 195:6-20), and that exposure to quartz dust is potentially worse than exposure to coal dust (Tr. 199:19-200:11), his testimony exposes the following: (1) Exhibit GX-6 (MSHA dust sampling) shows two instances when the dust samples exceeded acceptable limits, September 23, 2008, a year and five months prior to these violations, and April 21, 2009, ten months prior (Tr. 210:10-211:1); (2) Exhibit GX-7 (operator dust sampling) shows seven instances when the sampling was in excess of allowable limits (Tr. 213:2-12); and (3) As a result of a particularly high quartz dust reading on July 22, 2009, some seven months prior to these violations, the Leeco mine was put in a temporary higher-standard status (Tr. 218:6-220:7). Klein's expert opinion was that, based on the few historic instances of out-of-compliance dust samples, Leeco had no good reason not to have all the required ventilation curtains in place, a point which goes without saying in this strict liability setting. (Tr. 220:1-223:16) However, the expert's opinion is of no help to the court. Klein did not have data presented to him from which he or the court could determine what the dust conditions were on the day of these violations. The most he could say, based on his review of the historic dust sampling data, was that there were a few instances (noted above) when Leeco was out of compliance. Otherwise, his view was that the records he reviewed showed that Leeco's operations were "very good" vis-a-vis compliance with dust standards. (Tr. 213:2-12; Ex. GX-7) Klein opined that any time the prescribed ventilation control curtains were not in place, there was an increased risk of exposure to airborne dust. (Tr. 226:12-19) He also speculated that any time the ventilation control curtains were down, airborne dust concentrations would increase. (Tr. 227:18-228:6) In contrast, the evidence showed that lung disease is not caused by a single exposure to dust conditions. The exposure must be extended over a long time. (Tr. 57:13-20)

None of this is sufficient to establish the second, third, or fourth *Mathies* elements, i.e., that there was an identifiable hazard associated with the visible dust cloud; that there was a reasonable likelihood that the hazard contributed to would result in an injury; or that a reasonable likelihood existed that the injury would be of a reasonably serious nature. Mr. Klein's expert evidence does not establish that lung disease is a hazard likely to arise from these violations. The court will not speculate whether, if allowed to continue unabated, the absence of required ventilation curtains in the No. 10 section of the Leeco mine might lead to lung disease.

[20] Randy Klein was MSHA's District 7 Health Supervisor at the time of these violations. (Tr. 180:12-22). He was not present at the Leeco mine on February 23, 2010, when these violations were issued. (Tr. 191:7-9)

## Penalty

The factors to be considered in assessing civil monetary penalties are set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). The court is required to consider six factors: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Commission case law requires that I explain substantial deviations from the Secretary's proposed penalties using these factors. *Mize Granite Quarries*, 34 FMSHRC 1760, 1763 (Aug. 2012) While "exhaustive findings" are unnecessary, I must discuss how 110(i) factors contributed to my penalty assessments. *Id.*, *citing Cantera Green*, 22 FMSHRC 616, 622 (May 2000) and *Martin County Coal Corp*., 28 FMSHRC 247, 261 (May 2006).

I have treated separately Leeco's negligence and its demonstration of good faith in achieving rapid compliance after notification of the violation. The history of previous violations, appropriateness of penalty to the size of the operator's business, and effect of penalty on the operator's ability to continue in business are appropriately factored into the assessment of penalty points as shown in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty.

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables and considering the Secretary's justification, I conclude that a civil penalty of $800.00 is appropriate for both violations combined. Consistent with the criteria set forth in sections 105(b) and 110(i) of the Mine Act, I have made the penalty calculation in consideration of and based on an assessment of the size of the coal mine, the size of the controlling entity, the operator's history of previous violations, the degree of negligence, the degree of gravity, including likelihood, severity, and persons affected, and finally a deduction for prompt abatement. In reducing the penalty amount, I gave particular consideration to the gravity and negligence factors discussed above. The Secretary's failure to prove his proposed levels of gravity and negligence for the violations at issue justifies the reduced penalty.

## Order

It is **ORDERED** that Citation No. 8361343 is **MODIFIED** from a 104(d) (1) citation to a 104(a) citation.

It is further **ORDERED** that Order No. 8361345 is **MODIFIED** from a 104(d) (1) order to a 104(a) citation.

It is further **ORDERED** that Leeco, Inc. pay a penalty of $800.00 within 30 days of this order. Upon receipt of payment, this case will be **DISMISSED**.

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

Distribution: *(Certified Return Receipt)*

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 13, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. SE 2013-259-M |
| Petitioner | : | A.C. No. 08-01183-312347 Q121 |
| | : | |
| v. | : | |
| | : | |
| MJM ELECTRIC CONSTRUCTION, | : | South Fort Meade Mine |
| Respondent | : | |

## DECISION

Appearances: Anthony L. Burke, Conference Litigation Representative, (CLR), Department of Labor, MSHA, Bartow, Florida, for the Secretary.

Mark J. Masur, President, MJM Electric Construction, Tampa, Florida, Pro Se.

Before: Judge Koutras

## STATEMENT OF THE CASE

This simplified proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (2000), hereinafter the "Mine Act" and the Commission's Procedural Rules at 29 C.F.R. 2700.1, et Seq., concerns a Section 104(a) non-S & S citation served on the respondent on November 14, 2012, for an alleged violation of mandatory safety standard 30 C.F.R. 56.14132(b)(2).

After several Email communications and telephone conferences with the parties pursuant to Rule 2700.106 concerning settlement of this matter, the parties were at an impasse and the respondent requested a hearing. Accordingly, a hearing was held in Tampa, Florida, on November 13, 2013, and the parties appeared and participated fully therein.

Stipulations

The parties agreed that the respondent is an independent contractor with an MSHA issued contractor I.D. number and is subject to the Mine Act and MSHA's enforcement jurisdiction (Tr. 8).

The respondent was provided with copies of the Secretary's hearing exhibits P-1 through P-6, and they were admitted for the record without objection (Tr. 8). The parties presented their arguments orally on the record (Tr. 58-58). I have considered their arguments in the course of this decision.

The Alleged Violation

Section 104(a) non – S & S Citation No. 8642576, issued on December 14, 2012, alleges a violation of 30 C.F.R. 56.14132(b)(2), and the cited condition is described as follows:

> The backup alarm on the #8432 F-150 Ford truck could not be heard above the surrounding noise level. The truck was parked at the dragline area.

Leroy Ford, retired MSHA inspector, testified that he retired on August 30, 2013, and previously served as an inspector for sixteen years, including initial training at the Beckley, West Virginia Mine Academy. His prior experience consisted of 26 years with private mines working in various jobs, including a job as a safety director (Tr. 11-13).

The inspector confirmed that he issued the non – S & S citation on November 14, 2012, (Ex. P-4), and identified the notes that he made that day (Ex. P-5). He explained that he issued the citation after inspecting the respondent's truck that was parked at the actively working dragline area of the mine with its foreman John Butts at the wheel (Tr. 16).

The inspector stated that he was standing approximately 12 to 15 feet away from the back of the truck when he asked Mr. Butts to engage the backup alarm as he placed the vehicle in reverse. The inspector stated that although the alarm was "working with a faint beep, it needed to be louder" because he could not hear it over the surrounding noise (Tr. 18).

The inspector confirmed his gravity finding of "unlikely" and "lost workdays" if a person were run over by a vehicle, and his "moderate" negligence finding based on the foreman's belief that the alarm was loud enough. He further stated that one person would be exposed to any injury and he considered the fact that the vehicle had been pre-shifted that same morning (Tr. 16, 19).

The inspector stated that the foreman's records reflected that the truck was pre-shifted the morning of the inspection and that the backup alarm was working. The inspector was of the opinion that from his position behind the truck, when it was put in reverse he could hear it

"beeping", but it was not loud enough to be heard above the traffic up and down the area where he was standing (Tr. 19-21). The inspector stated that Mr. Butts stayed in the truck with the window down and the truck in reverse, and stated that "he didn't hear it that loud either" (Tr. 24).

On Cross-Examination, the inspector confirmed that pursuant to MSHA's standards, the cited pickup truck was not required to be equipped with a back-up alarm because the operator can see behind the vehicle with no problem and can see through the mirrors or back window with no problem. Therefore, no alarm is required. However, once a backup alarm is installed on a truck, such as the one in this case, it has to work properly (Tr. 22-23). He confirmed that the cited truck had a clear and unobstructed view of the rear (Tr. 35). The inspector confirmed his belief that the alarm should have been louder. He stated that the cited safety standard does not reflect how far someone has to be in order to be able to hear the alarm (Tr. 23I).

In response to further questions, the inspector confirmed that the violation was abated the next day after a new alarm was purchased and installed (Tr. 25). I accept the respondent's credible and undisputed testimony that the original alarm was not broken or otherwise malfunctioning, other than the inspector's opinion that it was not loud enough, and that in order to remain compliant the new one was louder and equipped with decibel readers (Tr. 26).

The inspector stated that the cited standard provides no regulatory requirement for sound testing such as decibel readings other than "you just have to be able to listen to hear the backup" (Tr. 27). He confirmed that when he inspected the truck it was parked on the side of the road with the engine running, and he described the surrounding noise as the noise from the truck engine itself once it was started and "revved up", and that there was traffic back and forth on the road (Tr. 29).

The inspector stated that his normal practice in testing a backup alarm is to ask the driver to "put the gas on a little bit so we can see if the engine noise itself" is such as to prevent anyone from hearing the alarm. He agreed that although increasing or decreasing the engine speed would increase or decrease the ability of someone to hear the alarm, his practice is to test the vehicle while it is normally put in reverse and that in this case he could only hear "a faint beep" (Tr. 38).

The inspector further explained that assuming Mr. Butts had backed up at a slower pace, with a resulting slight beep, he would still issue a citation because it would still be not loud enough to be heard at other work areas where employees would be exposed to a backup hazard, and he wanted to insure that "nothing would happen anyplace else" (Tr. 39). He confirmed that when he returned to the mine the next day to terminate the citation, the new alarm was sufficient, and stated "I could hear it without even trying to get close or anything" (Tr. 40). He confirmed that he has his hearing tested by MSHA annually (Tr. 41).

The inspector stated that although Section 56.14132(a) does not specifically mention a truck, MSHA's policy explanation with respect to self-propelled mobile equipment reference in this subsection includes any rubber wheeled equipment capable of moving itself, including the

cited truck. The policy further provides that subsection (b)(2) is cited if an alarm is operating as designed (functional) but is not audible above the surrounding noise level (Ex. P-6, (Tr. 31-37).

The Secretary's Arguments

The Secretary's arguments in support of the citation are reflected by the inspector's following statement to the respondent's foreman who was in the cited truck (Tr. 47):

> I told him you didn't have to have an alarm on this because you could see, but since you have an alarm on this piece of equipment, it has to work properly, and that's basically what I told Mr. Butts, and I proceeded to write the violation because it wasn't loud enough.

The Secretary asserted that despite the fact that the cited standard does not specifically include a truck, the cited pickup truck with rubberized wheels was a piece of self-propelled mobile equipment requiring the provided back-up alarm to be audible above the surrounding noise level as explained in MSHA's policy guidelines. In this regard, I take note of the fact that the respondent agreed that the cited standard applied to the cited pickup truck in this case (Tr. 51-52).

The Secretary characterized the respondent as a "stellar company" based on the absence of any prior violations or any reportable accidents, and the Secretary commended the respondent's compliance record as a "great feat" (Tr. 54). However, when an operator decides to provide a piece of equipment with an alarm the standard unambiguously requires that it be maintained in an operative working condition in order that it is able to be heard above the surrounding noise environment. In this case, the Secretary argues that the inspector's testimony in this case clearly establishes a violation and that the citation should be affirmed (Tr. 54-55).

The Respondent's Arguments

The respondent called no witnesses to testify in this case, including the foreman who was operating the cited pickup truck. Further, the respondent did not dispute the inspector's qualifications and clearly understood that the inspector did not believe that the truck backup alarm was loud enough (Tr. 22). The thrust of the respondent's defense is that it acted responsibly and proactively, and together with the company safety committee, voluntarily equipped every vehicle in its inventory with backup alarms to insure the safety of anyone who may be exposed to any potential hazard or injury as the result of the operation of any of its vehicles, including vehicles that do not require alarms (Tr. 43-45).

The respondent argued that the cited standard does not provide for testing sound levels by decibel readings, nor does it provide any distance parameters from a vehicle to determine whether or not it is loud enough to be heard (Tr. 44-45). The respondent strongly suggested that it may be forced to remove the alarms from all of its vehicles that do not require them and that any decision in this regard would be a business decision to avoid future citations (Tr. 52).

The respondent further believed that the cited standard is "very ambiguous" and that the "functional condition" requirement infers nothing about the sound level of that device. He cited the inspector's statement that he heard the alarm from a couple of feet behind the truck as an indication that it was functional, but there is "nothing to tell us what the distance is where that has to be audible" (Tr. 57).

## Findings and Conclusions

### Fact of Violation

The respondent is charged with a violation of 30 C.F.R. 56.141.32(b)(2) that provides in relevant part as follows:

> Section 56.14132 Horns and Backup Alarms
>
> (a) Manually-operated horns or other audible warning devices provided On self-propelled mobile equipment as a safety feature shall be maintained in functional condition.
>
> (2) Alarms shall be audible above the surrounding noise level.
>
> The evidence establishes that the cited truck was not provided with a backup alarm and none was required. However, pursuant to subsection (a) if an alarm is provided, it must be maintained in a functional condition, and pursuant to subsection (b)(2), it must be audible above the surrounding noise level.

Although there is an inference that an audible alarm that cannot be heard above the surrounding noise is not maintained in a functional condition, and may require repairs, in this case the credible evidence establishes that the cited alarm was replaced by a new one and was not repaired. Further, the inspector agreed that the alarm was working when he inspected the truck and heard a "faint beep" when the truck was backed up in reverse (Tr. 18).

Although the respondent expressed his disagreement with the Secretary's interpretation and application of the standard, as well as his frustration for being cited after equipping all of his company vehicles with alarms even though they were not required, he nonetheless did not disagree with the inspector's decision to issue the violation (Tr. 56), and did not question the inspector's explanation that he did so because he did not believe the backup alarm was loud enough (Tr. 47). Further, the respondent called no witnesses, including the foreman who was in the truck when it was inspected, to rebut the testimony of the inspector who I find was credible. He also agreed that the standard relied on by the inspector applied to the cited truck (Tr. 51-52).

In the course of the hearing, I expressed concern that the absence of any regulatory standard language providing objective procedures for testing alarm noise or surrounding noise levels, may result in differences of opinions inviting litigation (Tr. 27, 31). However, I conclude and find that there is a reasonable expectation that a backup alarm that is provided on a piece of

rubbered tired mobile equipment such as the cited truck, be loud enough to be heard by anyone exposed to any hazards presented by the truck operating in reverse. Further, any credibility determinations regarding whether or not the audible alarm is loud enough to be heard above the surrounding noise is best resolved by the Court.

I further find that the Secretary's policy of citing a violation of subsection (b)(2) "if a backup system is provided and is operating as designed (functional) but is not audible above the surrounding noise level" is reasonable and deserving of deference. Further, I find that the function of a backup alarm that is provided and installed on a vehicle as required by the cited standard and policy is to emit and sound an audible warning loud enough to be heard above the vehicle surrounding environment. I conclude and find that the Secretary has established by a preponderance of the credible evidence that the cited alarm that was on the truck in question was not loud enough to be heard over the surrounding noise level of the truck engine as it was placed in reverse.

After careful consideration of the arguments presented by the parties, I conclude and find that the Secretary's position is supportable and correct based on the credible and unrebutted testimony of the inspector in support of his citation and the absence of any credible rebuttable evidence produced by the respondent. Accordingly, the disputed violation IS AFFIRMED.

History of Prior Violations

The respondent's compliance record (Ex. P-1, P-2, P-3) reflects no prior civil penalty assessments or any accidents. Further, The Secretary acknowledged that the respondent has a stellar safety record and commended the respondent (Tr. 53). I agree and find that this is the case. I have also considered the fact that working together with the company Safety Committee, the respondent voluntarily equipped all of its vehicles with alarms in order to insure the safety of miners at the mine sites where work was performed.

Good Faith Compliance

The inspector terminated the citation the next day after it was issued and his notes, as well as the termination notice, reflect that the alarm was repaired (Ex. P-4, P-5). However, I find credible the testimony of the respondent that no repairs were made and that a new alarm with a louder audible sound capability was installed. Accordingly, I find that the cited condition was rapidly abated in good faith out of an abundance of caution to insure safety and to preclude future citations.

Gravity

The inspector based his non – S & S determination on his belief that any injury was unlikely and the fact that the foreman was sitting alone in the truck on the side of the road with nothing around him at that time (Tr. 16-17). Under the circumstances, I conclude and find that the violation was minor.

Negligence

The inspector testified that he based his moderate negligence finding on the statement made by the foreman who was in the truck that he thought the backup alarm was loud enough (Tr. 16). He further confirmed that the pre-shift truck inspection records for that morning reflected that the backup alarm was working, and that the foreman told him it was working when he checked it (Tr. 19). Under these circumstances, and based on the fact that the truck was parked on the side of the road with no evidence to suggest that the foreman was aware that the alarm was not loud enough, I modify the negligence level from moderate to low.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Remain in Business

In the absence of any evidence to the contrary, I conclude and find that the respondent is a small electrical construction contractor covered by the Mine Act and that the penalty assessed in this case will not adversely affect its ability to remain in business.

ORDER

Based on the foregoing findings and conclusions in this case, and in consideration of the civil penalty criteria set forth in Section 110(I) of the Mine Act, the Court assesses a civil penalty of $75.00 for the Section 104(a) non – S & S Citation No. 8642576, December 13, 2012, citing a violation of 30 C.F.R. 56.14132(b)(2), that has been AFFIRMED. Further, the Court MODIFIES the negligence level from moderate to low.

The respondent is ORDERED to pay a civil penalty assessment of $75.00, satisfaction of the aforesaid violation. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 631790390. Upon receipt of payment, this matter IS DISMISSED.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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January 16, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. KENT 2011-1557<br>A.C. No. 15-19475-265136-01 |
| v. | : | Docket No. KENT 2011-1558<br>A.C. No. 15-19475-265136-02 |
| KENTUCKY FUEL CORPORATION, Respondent. | : | Mine: Beech Creek Surface Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2013-698<br>A.C. No. 15-19475-317227 A |
| v. | : | |
| LLOYD K. BRANHAM, employed by, KENTUCKY FUEL CORPORATION, Respondent. | : | Mine: Beech Creek Surface Mine |

## DECISION

Appearances: Latasha Thomas, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Allen Dudley, James C. Justice Companies, Roanoke, VA for Respondents.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against Kentucky Fuel Corporation and Lloyd Keith Branham as an agent of Kentucky Fuel, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve one 104(d) citation, two 104(d) orders, one 104(a) citation and an agent penalty assessed pursuant to section 110(c) of the Mine Act at Kentucky Fuel's Beech Creek Surface

Mine, located in Phelps, Kentucky.[1] The parties presented testimony and evidence at a hearing held on November 13, 2013 in Lexington, Kentucky.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Beech Creek Surface Mine is a surface coal mine, owned and operated by Kentucky Fuel Corporation. Beech Creek is a mine within the meaning of the Mine Act. Kentucky Fuel is a large operator and the penalties proposed in this case will not affect the company's ability to continue in business. The parties' stipulations, Jt. Ex. 1, indicate that there are no issues of jurisdiction. Moreover, the parties have stipulated to many of the penalty criteria as they relate to the citations and orders issued to the mine. Finally, the parties agree that Sec'y Ex. 9 accurately reflects the mine's history of assessed violations and that Branham has not been charged as an agent in the past. Sec'y Ex. 8.

MSHA Inspector Wanda McComas has been a surface mine inspector since 1997. On April 8, 2011 McComas traveled to Beech Creek to conduct an inspection after the local MSHA office received a complaint about defective equipment. As McComas approached the mine, a miner operating a dozer was told that an inspector was on the hill and that he was to bring the dozer to the "boneyard" for repair. McComas issued two citations related to the dozer; one for operating the dozer while in unsafe condition, and one for failing to correct the condition. In addition, following a 110(c) investigation, the mine foreman, Lloyd Keith Branham, was charged as an agent for the alleged violative condition of the dozer.

MSHA Inspector Larry Wolford was at the mine the same day to conduct an inspection after the local MSHA office received a complaint from a nearby resident that, after blasting at the mine, a number of rocks had rolled toward the homes at the bottom of the slope. Wolford, who has been an inspector for six years, issued a citation to the mine for failure to follow the mine's ground control plan, in that the catch bench was full of material and did not catch the rock and debris that was either blasted or rolled as a result of being moved by equipment. McComas assisted in the investigation of the ground control violation, took photographs, and issued a citation for the failure to conduct an adequate on-shift examination.

For the reasons that follow, I find that the citations and orders issued by both inspectors are valid as issued. However, I find that there is not sufficient evidence to demonstrate that Lloyd Keith Branham knew, or had reason to know, of the dozer's violative condition.

Each of the alleged violations described below has been designated as significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts

[1] On September 10, 2012 the parties submitted a Joint Motion to Approve Partial Settlement of all but one of the alleged violations in Docket No. KENT 2011-1558. The settlement is addressed below.

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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> 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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). This evaluation is 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 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Three of the four violations that were contested by the operator in these cases are designated as unwarrantable failure, and the fourth, while not unwarrantable, is alleged to be the result of high negligence. Unwarrantable failure has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). The Commission has stated that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

a. Citation No. 8258770

On April 8, 2011, MSHA Inspector Wanda McComas issued Citation No. 8258770 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.404(a) of the Secretary's regulations. The cited standard 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." 30 C.F.R. § 77.404(a). The citation described the alleged violative condition, in pertinent part, as follows:

> The Cat D10N dozer, Co. #1, being used at this mine site to develop drill benches and pushing shot. The following defects were found: 1. The hand/grab rails (mounted onto the engine) on both the left and right sides are bent and twisted with the smaller grab rail on the left side completely missing. 2. The audible alarm (front horn) is inoperative. 3. The automatic warning device (back up horn) is inoperative. 4. The audible and visual fault warning system is inoperative. 5. The seat is broke and moves back and forward. 6. The latches to the windows are broke and will not allow the window to stay shut exposing the employee to dust and noise. 7. Both left and right side doors/handles are defective in that the left door is hard to open and the right door requires the employee to kick the door for it to open. 8. The decking on the right side of the dozer directly outside of the operator's compartment is covered in oil creating a slip and fall hazard. 9. The front and left and the right side windows are scored (hazed over where the wipers have scraped the window interfering with the operator's visibility. 10. The ignition switch is defective in that it took several tries for the operator to get the dozer to start. 11. The left jacks on the blade and the ripper are leaking and some blowing back onto the transmission. 12. The engine side panels on both the left and right sides are missing exposing persons to moving machine parts.[2] Management was well aware of the defects as they had been recorded in the pre-op book since 3-18-2011. Management made the decision and could not justify continual operation of the dozer without correcting the defects. The operator has engaged in more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

McComas determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $14,000.00 has been proposed for this violation.

[2] Item No. 12 was added via a subsequent modification to the citation.

The dozer cited in this violation was moving rock and dirt the day the inspector arrived at the mine. As soon as McComas reached the guard shack, the operator of the dozer was told to bring the equipment in for repair. After receiving the advance notice of the inspector's approach, the dozer was removed from the job it was doing and placed in an area for service. McComas examined the dozer and described the many defects mentioned in the citation, the hazards associated with the defects, and provided photographs of nearly half of the twelve defects that she recorded. (Tr. 61-66). She reviewed the pre-op inspection reports for the time period from March 18th until April 8th, the date of the inspection. She found many defects listed in the inspection reports that apparently had not been repaired during that period. She also reviewed the pre-op inspection report handed to her by the dozer operator on the day of the inspection.

The mine operator, and particularly Louis Hatfield, one of the mine's three dozer operators at the time, disputes that all of the twelve defects found by McComas are safety defects. Hatfield alleges that the broken window, the door, the seat and the oil on the step do not affect safety. Hatfield is confident that, if the dozer was not safe to operate, he could refuse to operate it and call the mine superintendent, who would determine if the equipment should be removed from service. Hatfield explained that none of the dozer operators wanted to run this particular dozer because it was old. He noted that one of the other dozer operators, Jack Gayhart, who he alleges was operating the dozer the day of the inspection, was always complaining about the equipment because it was old. According to Hatfield, Gayhart kept two sets of pre-op inspection reports; one that listed no defects, and one that he kept in the cab and later handed to the inspector that did list mechanical defects on the equipment.

Hatfield's view of what is safe varies from the inspector's, and his allegations against Gayhart, the allegedly errant dozer operator, are suspect. However, even if Hatfield is correct, he did not deny that the horn was not working, that the back-up alarm was not functioning, that the engine cover was missing, and that oil was leaking. Those alone are sufficient to find a violation, and taken together certainly do so. I find that a reasonably prudent person familiar with the mining industry and facts of this case would have recognized that Kentucky Fuel failed to both maintain the machinery and equipment in safe operating condition, and to remove the unsafe equipment from service. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 438-439 (May 2005). Hence a violation has been demonstrated as alleged.

The mine argues that the violation is not S&S. Hatfield testified that he did not see a defect that would, in his view, cause an injury. McComas, however, identified several defects that would cause an injury. The oil on the engine can create a fire hazard, there were several slip and fall hazards given the defective handrail and the oil on the step up to the cab, the door that could not be opened from the inside could result in entrapment in the event of an accident, and the window that would not be closed exposed the driver to silica dust. Further, according to McComas, the dozer normally operated in a lot of different areas of the mine, including congested areas like the boneyard where there were other vehicles or foot traffic, and both the front horn and backup alarm were inoperable, making it impossible to notify miners in the area that the dozer was moving. Finally, the ignition switch was being hot-wired which, in turn, caused a spark near where the oil was leaking and the missing engine panel left belts open to exposure.

The Commission and courts have held that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). I credit Inspector's McComas' description of the defects and associated hazards. I find that there is a violation, and that the many hazards, individually and/or together, would result in a serious injury. Therefore, the violation is significant and substantial.

McComas found this violation to be the result of high negligence and an unwarrantable failure to comply. She determined that the negligence was high based upon the amount of time the conditions existed and the mine's failure to correct any of the multiple defects even though they had been recorded on the pre-op inspection logs for several weeks. Further, the dozer was being operated on the day of the citation but was taken out of service as soon as the mine learned that an inspector was nearing the site. The many defects resulted in a high degree of danger to the dozer operator as well as those miners on foot and in other vehicles that traveled in proximity to the dozer. Given the many defects and the pre-op reports, one can safely conclude that the defects were obvious to the dozer operator and to management. As Hatfield indicated after each pre-op, the inspection sheets were picked up by the mine superintendent, David Ison, and were kept on file at the mine. McComas indicated that, while some of the pre-op sheets were missing from the file, it was not difficult to see that many defects went uncorrected for a number of weeks. I agree that the violation was a result of high negligence and an unwarrantable failure to comply. This violation is further aggravated by the fact that the dozer was being used earlier that day but taken out of service immediately when the inspector arrived on the property. For all of the reasons listed herein, I assess a penalty of $20,000.00.

*i. 110(c) Agent Case Involving Lloyd Keith Branham*

The Secretary, in conjunction with the issuance of Citation No. 8258770 to the mine, seeks a civil penalty of $3,000.00 against Lloyd Keith Branham pursuant to Section 110(c) of the Act. The Secretary alleges that Branham, acting as an agent of the mine, knowingly authorized, ordered or carried out the violation addressed by Citation No. 8258770.

Section 110(c) of the Act states that "[w]henever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties[.]" 30 U.S.C. § 820(c). In *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) the Commission outlined what is necessary to establish 110(c) liability:

> The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition,

> not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp*., 402 U.S. 558, 563 (1971)).
>
> A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'" *Id*. (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

McComas testified that Branham was a foreman and one of his duties was to assure that the site was safe. McComas knows that Branham was in the area where the dozer was being operated on the day she arrived to conduct the inspection, but she does not know who ordered the dozer out of service. McComas asserts that because the dozer had been used prior to her arrival, and the unsafe conditions were obvious to anyone near the dozer, Branham would have been aware of the dozer's unsafe condition and allowed it to continue operating. Additionally, McComas contends that since the pre-op checks noted a number of safety defects with the dozer over a period of weeks, and those reports were in the mine office, Branham would have been aware of the conditions. Branham was in the position to take care of the employees and he was one of the direct supervisors, and McComas believes that he was also the supervisor of the dozer operator.

Branham has worked at the mine for the past four years as a foreman and, prior to that time, worked at various surface mines since 1996. He was a foreman on the day shift on the day the citation was issued. While Branham is familiar with and can operate all equipment at the mine, he asserts that he worked only with the coal, and had nothing to do with the equipment, such as the dozer, that was used to move the rock and spoils. Branham repeatedly stated that he took care of coal production, quality, and shipping. Branham had a crew of four miners who worked directly for him. None of those miners operated the dozer. He argues that he did not know, and had no reason to know, about the defects on the dozer for the many weeks they existed.

Branham was supervised by David Ison, who was the mine superintendent at the time of the violation. The duties at the mine were balanced between Ison and Branham. Branham explained that he did nothing with Ison, and worked solely on coal production and had no knowledge of the dozer or its condition. Branham asserts that Ison was responsible for all equipment at the mine, including the dozer that was found to be defective. Branham asserts that it was Ison's responsibility to gather all of the pre-op sheets each shift and take them to the office. The mine and Branham argue that, since Ison collected the pre-ops, and Branham was not the management personnel responsible for the dozer, there is no reason to believe that

Branham had viewed the pre-op sheet the day of the citation and knew, or had reason to know, of the defective conditions. While I do not find Branham to be a particularly credible witness, his testimony was supported by Hatfield.

Hatfield agreed that Branham did not deal with the dozers, and that he, as a dozer operator, gave his pre-op sheets to Ison, who collected them within an hour or two after the pre-op was complete. There was no testimony regarding Branham's access to the pre-op sheets once they were in the office, and no evidence that Branham had been near enough to the dozer to observe the defects.

Branham does not deny that miners were given notice of the inspection, however, he does not know who ordered the dozer to stop working. McComas, also was not told and did not know who told the dozer operator to remove the dozer from service due to the inspector being nearby, nor can she say with any certainty that Branham had seen the defects on the dozer or otherwise had a reason to know of the defects.

If sufficient evidence had demonstrated that Branham knew, or at least should have known, about the safety defects, then this would have a different outcome. However, the evidence is simply not enough to demonstrate that he did know, or had reason to know, of the defects and failed to act on the information. Further, there is no evidence to indicate that Branham was the individual that gave advance notice and ordered the dozer out of service. Rather, the evidence seems to suggest that Ison, who is no longer at the mine and cannot be located, is the guilty party. Again, while it is likely that Branham saw some pre-op reports prior to the day of the inspection, I am not convinced that there is enough evidence to reach the conclusion that he did know, or had reason to know, of the defects on the dozer and failed to have them corrected. Accordingly, I vacate the Secretary's 110(c) penalty.

b. Citation No. 8258773

On April 8, 2011, MSHA Inspector Wanda McComas issued Citation No. 8258773 pursuant to section 104(a) of the Act to Kentucky Fuel for an alleged violation of section 77.1606(c) of the Secretary's regulations. The cited standard requires that "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c). The citation described the alleged violative condition, in pertinent part, as follows:

> The operator at this mine site failed to correct equipment defects affecting safety prior to using the equipment. The operator of The Cat D0N dozer, Co. #1, has recorded numerous safety defects that needed to be corrected since 3-18-2011, and the operator failed to make any corrections.

McComas determined that a fatal injury was highly likely to occur, that the violation was significant and substantial, that one person was affected, and that the negligence was high. A civil penalty in the amount of $14,373.00 has been proposed for this violation.

This citation relies on many of the facts and findings discussed above. However, this citation, unlike the first, describes a violation based upon my finding that the dozer was being operated in an unsafe condition just prior to the inspector's arrival. Given my above finding that the dozer was not being maintained in a safe operating condition, and the undisputed fact that the dozer was being operated just prior to the inspector's arrival, I find that the Secretary has established a violation as alleged.

Operating this dozer with the many defects described above created a number of safety hazards, including, hitting other equipment or a miner on foot due to the inoperable front horn and back-up alarm. While the other safety hazards are notable in the context of an S&S analysis, the inability to signal as the dozer is moving creates a safety hazard that would lead to a very serious injury and, alone, is enough to sustain the Secretary's significant and substantial designation.

This dozer had so many hazards that operating it without correcting those hazards became extremely dangerous. The mine's failure to correct the hazards prior to operation created a hazard separate and apart from the general requirement that the safety defects be repaired. Not only had the defects been listed on the pre-op sheets for a number of weeks and no repairs undertaken, but the mine was operating the equipment right up until the time the MSHA inspector arrived. As McComas explained, some of the defects were "easy fixes" that could have been done as soon as they were reported. I find that Secretary has established that the violation was the result of high negligence given the easy fixes that could have been made and the fact that no action had been taken to correct these conditions while the dozer continued to be operated over an extended period of time. Accordingly, I assess a penalty of $15,000.00.

Kentucky Fuel argues that this citation alleges the same condition as in Citation No. 8258770, that the two alleged violations are duplicative and, accordingly, one should be vacated. I find no merit to the argument. In *Cumberland Coal Resources, LP,* the Commission explained that "citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator. 28 FMSHRC 545, 553 (Aug 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008) (citing *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) and *Cyprus Tonopah Mining Corp*., 15 FMSHRC 367, 378 (Mar. 1993)). In this case, one standard imposes a requirement that defects be repaired or the equipment be taken out of service, while the other standard requires that the equipment not be operated until they are repaired These are separate and distinct requirements and require different actions from the operator in order to comply. Accordingly, I reject Kentucky Fuel's argument.[3]

[3] Kentucky Fuel, in making its argument that the citation and order are duplicative, also asserted that MSHA's Program Policy Manual directs that section 77.404(a), the standard cited in the first violation addressed above, "should not be cited when any other safety standard applies." Kentucky Fuel Br. 17. I reject this argument. As the Commission recently stated, "it is well-established that the Secretary's PPM does not prescribe rules of law that are binding on the Secretary or the Commission." *American Coal Co.*, 34 FMSHRC 1963, 1970-71 (Aug. 2012).

Kentucky Fuel further argues that the cited standard applies only to "loading and haulage equipment" and that, because the dozer does not "load" or "haul" dirt, the standard is inapplicable. I note that Kentucky Fuel's argument relies not on language in the substantive subsection of standard, but rather the text of the subtitle, "Loading and haulage equipment; inspection and maintenance." I find that the dozer falls within the meaning of "loading and haulage equipment " as noted in the heading. *See Farco Mining Co.*, 10 FMSHRC 184, 187 (Feb. 1988) (ALJ). The Secretary's regulations do not define "loading and haulage equipment" but the term "haulage" is defined as the "[t]he drawing or conveying, in cars or otherwise, *or movement of* men, supplies, ore and *waste*, both underground and on the surface." *Dictionary of Mining Mineral and Related Terms* 255 (2d ed.1997) (emphasis added). I find that the dozer's act of "push[ing] dirt," Kentucky Fuel Br. 16, amounts to "moving . . . waste" and, as a result, brings it within the type of equipment contemplated by the standard. Therefore, there is no basis to agree with the argument made by the operator.

c. Order No. 8258801

On April 8, 2011, MSHA Inspector Larry Wolford issued Order No. 8258801 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.1000 of the Secretary's regulations. The cited standard states as follows:

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000. The order described the alleged violative condition, in pertinent part, as follows:

> The operator has failed to comply with the acknowledged ground control plan dated March 26, 2010 in the Pond Creek cut through area. The catch bench for this area is not sufficient to catch the loose material. Evidence of material, large rocks, trees, and spoil have not been contained within the permitted area. The material has been allowed to leave the mine property and roll toward dwellings at the bottom of the mountain. This condition exposes the occupants of the dwellings to the hazards of fly rock. When asked management was aware of this condition and has made no effort to correct this hazard. Management cannot give an excusable or justifiable reason for this condition to exist. This violation is an unwarrantable failure to comply with a mandatory standard.

The order was later modified to include language about the plan revisions for termination. Wolford determined that a fatal injury was highly likely to occur, that the violation was

significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $47,200.00 has been proposed for this violation.

Larry Wolford, a mine inspector from MSHA's Phelps, Kentucky field office, has been an inspector for six and a half years. Prior to becoming an inspector he worked seven years in coal mines as, among other things, a foreman, continuous miner operator, shuttle car operator, and roof bolter.

Wolford traveled to the Beech Creek mine on April 8, 2011 to follow up on a complaint made by a homeowner in the area who reported that he heard a blast, and rock and debris came down the hill from the mine toward his home. Wolford met with Ison upon his arrival at the mine and explained that a complaint had been received by MSHA that rocks and debris were dangerously close to the homes below the area where the mine was working. Ison told Wolford that the rocks that had rolled over the hill were due to a dozer pushing material, and not from a blast as the complaint alleged. Ison acknowledged, and Wolford observed, that various size rocks had traveled down the hill toward the homes.

Wolford traveled to the working area and observed that the safety bench, designed to catch errant rocks and debris, was full. The purpose of the bench is to catch material and prevent it from rolling down the mountain into the area where the homes are located. The catch bench is required by the mine's ground control plan. Sec'y Ex. 6 p. 10 item 8. The plan requires that the bench be cleaned after each blast so that there is room on the bench to catch rock and debris from above. Wolford explained that a full bench will not catch any more material, and should be cleaned to make certain that rocks, boulders and debris will not roll down the hill.

Wolford found the violation to be S&S and explained that, with the bench full, the large boulders he observed, along with the rock and debris, had nowhere to go but down the hill towards the homes. The large rocks, as well as the smaller ones, have the potential to crash into and through the side or roof of a home, or hit a vehicle or person. If a person were struck by a rock rolling down the hill, it was highly likely that the individual would be severely injured or killed by crushing injuries.

Inspector McComas, who was also in the area at the time, explained that she observed large rocks near the residences as she walked up the hill towards the catch bench from the area below. McComas testified that the homes, which sit in a valley at the bottom of the hill below the mine, are occupied. There is a major road in front of the homes. An old dirt road, some trees, and a small creek were located between the backs of the homes and mine. She agrees with Wolford that there were rocks and boulders that appeared to have recently rolled near the homes.

McComas took photos of the catch bench, Sec'y Exs. 10 and 11, and explained that, at the time the citation was issued, the catch bench was completely full and could no longer protect against rolling rock and debris. McComas, who is familiar with the ground control plan at this mine, explained that an outcrop shot, the kind of shot named in the ground control plan, is normally the first shot and the catch bench is there to catch any flying or rolling material from that shot. The clean-up must be done right away so that the catch bench remains open and able

to catch all debris. The catch bench, as she saw it and photographed it, shows that there is no room remaining to catch even a small rock.

The mine argues that the blast and spoil areas were far enough from the homes to prevent a problem. While McComas estimated the distance from the catch bench to the homes at 300 feet, Branham, using a map, estimated it at 1200 feet. In any event, I find that there were rocks and large boulders that had rolled over the full catch bench, down the hill, and were very near the occupied residences.

The mine also argues that it need not clean the bench immediately after each blast, but instead only clean the bench before the next blast. However, I find that the plan is clear and the bench must be cleaned after each blast. Logic dictates that, if the bench is cleaned after each blast, then there is room for rocks, boulders, and debris that may roll as the spoils are moved or other work is done after the blast. If the mine waits until immediately before the next blast, the catch bench has already become over-loaded and a hazard has been created. The condition of the bench was such that the safety of miners and those residents that lived below the mine was compromised to the point that a safe workplace was not provided.

I find that the Secretary has established a violation of the cited standard and ground control plan as alleged, and that the failure to clean the catch bench resulted in boulders, rock and debris flying or rolling very close to the occupied homes below the mine. The hazard of large rock flying and rolling into an area where people live, drive, and play, will result in an accident or injury to one of the residents or their guests. The injury will be very serious, if not fatal. Therefore, I find the violation to be significant and substantial.

I find this violation to be the result of the mine's high negligence and an unwarrantable failure to comply with the Mine Act and the ground control plan. Both inspectors understood that Ison, the superintendent and one of two supervisors working at the time, was aware that the rocks went over the hill, that the catch bench was full, and that it had been that way for several shifts. No effort had been made to clean the bench following the last blast. Ison freely admitted to the inspectors that nothing had been done to clear the bench after the last blast occurred a number of shifts prior to the inspection, and that the mine had no intention to clean the bench any time soon. The blasting records demonstrate that the last blast occurred on the morning of April 7th. The bench therefore contained rock, boulders, tree stumps and other material for at least the two shifts on April 7th and into the first shift on April 8th. Further, McComas credibly testified that it would have taken more than three shifts to accumulate so much rock and debris and it is her belief that several shots were set without cleaning the catch bench. I find that the condition of the catch bench, and the fact that it violated the mine's ground control plan, was obvious. The bench was full and, as can be seen from the photos, it was obviously overflowing with rock and debris. The bench should have been cleaned after every shot, but both Wolford and McComas explained that there was enough debris to indicate that it had not been cleaned for some time and the mine had probably had several shots since it had last been cleaned. The rolling rock and material created a very dangerous situation. McComas explained that MSHA has seen flyrock go through the roofs of houses, and roll into houses, vehicles and pedestrians. She believed that the operator had no interest in cleaning up the bench or complying with the standard. I credit

both McComas' and Wolford's testimony and find that the violation was a result of the mine's high negligence and unwarrantable failure. Accordingly, I assess a penalty of $50,000.00.

d. Order No. 8258774

On April 8, 2011, MSHA Inspector Wanda McComas issued Order No. 8258774 pursuant to section 104(d)(1) of the Act to Kentucky Fuel for an alleged violation of section 77.1713(a) of the Secretary's regulations. The cited standard states as follows:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. §77.1713(a). The order described the alleged violative condition, in pertinent part, as follows:

> Management at this mine site failed to conduct and/or document the results of adequate on-shift inspections at this mine site. On this date, a D-order has been issued due to ground control. The on-shift books upon a visual review did not show any documentations of the conditions found justifying the D-order. The on-shift book stated that everything was ok at the times of the inspections when in fact, material had rolled off the mine permit to the areas around the dwellings located at the bottom of the Pond Creek cut through. The inadequate checks and or documentation will lead to someone being fatality injured. Management did not give an excuse or justifiable reason for the inadequate inspection/documentation. The operator has engaged in more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard

McComas determined that a fatal injury was highly likely to occur, that the violation was significant and substantial, that one person was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $15,971.00 has been proposed for this violation.

As discussed above, McComas traveled to the catch bench with Wolford as a result of a complaint made to MSHA by a resident that lived below the catch bench. McComas observed that the catch bench was full, that there was no room for any more material, and it appeared that it had been that way not only since the blast from the day before, but even longer. At a distance of about 100-200 feet behind the homes she found large rocks and boulders, some of which were 4-5 feet long. McComas reviewed the on-shift inspections and saw nothing to indicate that the

catch bench was full and that rock and debris had rolled off the hill. After observing the catch bench and the area below, and noting that Ison had already conducted an on-shift inspection, as had an examiner on the two shifts prior, McComas issued this order for failure to conduct an adequate on-shift.

In addition to McComas' concern about the safety of the people living below the bench, she was also concerned that miners who were not aware of the hazard would be injured. Ison failed to note the condition in the on-shift report and, in doing so, failed to notify the miners that a hazard existed. The purpose of the examination is to find hazardous conditions and correct them prior to miners performing work in the area. Since the on-shift records did not note the rock, and Ison did not tell miners of the hazard that remained while they worked, he was placing them in danger. The bench was so over-loaded that other activities, aside from blasting, could have caused the rock and debris to fall and cause a serious injury.

The condition of the catch bench was readily apparent and, given the amount of material, had existed in that condition for a number shifts, if not a number of days. McComas reviewed the on-shift books and observed that no hazards were documented. However, given what she observed, the supervisor should have noted that the safety bench was full and needed to be cleaned. The mine, at a minimum, should have started the cleanup.

I agree that a violation has been shown and that the violation is a significant and substantial one. Hazards are noted in on-shift examination reports so that miners will not be assigned to work in unsafe areas, and so that work will begin to correct the conditions. When hazards are not listed, the workers are not aware, and may not be as careful around the unsafe area as they would have been if they had been warned. The hazard of not recording the condition of the catch bench, thereby not warning others of the condition so that it could be corrected and/or avoided, will lead to an injury or illness which will be serious or fatal. I agree with McComas that, as mining continues, failing to recognize and correct the hazard will result in someone being severely injured or killed. In this instance, failure to record and then remove a hazard threatened persons working at the mine as well as those living below the mine. The rocks observed by McComas and Wolford were large and, with the speed developed during a roll, would go through a house and kill an individual if it hit them. McComas explained that she has seen situations where rocks crashed through roofs or the backs of houses, barely missing the people inside. I find that, assuming the continued course of mining, it is likely that a fatal injury will occur. Accordingly, I affirm the S&S designation.

The inspector indicated that this violation was the result of high negligence and an unwarrantable failure to comply. The violation was obvious, that is the rock and debris on the catch bench was plainly evident and should have been noted in the examination report, which it was not. It is the responsibility of the supervisor to look for and record these kinds of hazardous conditions in an effort to warn and protect miners from harm. The violation was extensive in that it was not noted in a preshift for an extended period of time in spite of its obviousness. The hazard of failing to report the condition of the bench was readily apparent to management, yet no action was taken to warn miners, or correct the condition. Supervisors must look at the on-shift reports and recognize what should or should not be noted, as well as what should be done to warn miners. The condition was obvious, existed for a long period of time, and there was no

plan to clean the bench. I credit McComas observation that it would have taken several shots to fill the bench to the extent that it was filled. In spite of such, neither Branham nor Ison had attempted to record it, warn miners, or see that it was cleaned up. I find that the evidence supports that the violation was a result the mine's high negligence and unwarrantable failure to comply. Accordingly, I assess a penalty of $16,000.00.

## II. SETTLED CITATIONS

Prior to hearing, the parties filed a Joint Motion to Approve Partial Settlement of the remaining citations in Docket No. KENT 2011-1558. The originally assessed amount for those citations was $3,015.00 and the proposed modified penalty amount is $2,200.00.

Respondent, Kentucky Fuel, has agreed to accept Citation Nos. 8259226, 8259227, 8259228, 8259229, 8259233, 8259239, 8259240, 8259241, 8259242, 8259243 and 8259244 as issued and pay the originally proposed penalties.

The parties represent that, with regard to Citation No. 8259225, at hearing, the Respondent would have presented evidence that the berm provided from the parking lot to the working pits was capable of impeding travel and deflecting a truck's path should there be a loss of control. Therefore, it contends that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $210.00.

The parties represent that, with regard to Citation No. 8259245, at hearing, the Respondent would have presented evidence that a crew was in the process of cleaning the loose material that remained on the highwall face in the Cedar Grove 992C Pit. Therefore, it contends that this citation should be modified to "low" negligence and that the proposed penalty should be reduced in light of this characterization. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $145.00.

The parties represent that, with regard to Citation No. 8259246, at hearing, the Respondent would have presented evidence that a berm was being constructed to prevent over travel and overturning on the WA 900 loader pit dump. Therefore, it contends that this citation should be vacated. The Secretary recognizes that Respondent raises factual and legal issues. Accordingly, in the interest of settlement, the Secretary agrees to accept, and Respondent, Kentucky Fuel, agrees to pay a reduced penalty of $210.00.

The settlement amounts are as follows:

| Citation Number | Assessment | Settlement Amount |
|---|---|---|
| 8259225 | $460.00 | $210.00 |
| 8259226 | $100.00 | $100.00 |
| 8259227 | $100.00 | $100.00 |
| 8259228 | $100.00 | $100.00 |
| 8259229 | $100.00 | $100.00 |
| 8259233 | $207.00 | $207.00 |
| 8259239 | $207.00 | $207.00 |
| 8259240 | $100.00 | $100.00 |
| 8259241 | $207.00 | $207.00 |
| 8259242 | $100.00 | $100.00 |
| 8259243 | $207.00 | $207.00 |
| 8259244 | $207.00 | $207.00 |
| 8259245 | $460.00 | $145.00 |
| 8259246 | $460.00 | $210.00 |
| **Total:** | | $2,200.00 |

I accept the representations of the Secretary as set forth in the motion to approve partial settlement. I have considered the representations and documentation submitted, and I conclude that the proposed partial settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED.**

## III. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [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 on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). 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), aff'd, 736 F.2d 1147 (7th Cir. 1984). 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 of the statutory criteria and the deterrent purpose[s] … [of] the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of the violations are discussed above. The operator demonstrated good faith in abatement but I find it troubling that in at least one instance, the mine was given advance notice of the inspection as the inspector approached and was therefore able to take the equipment out of service prior to the inspection. Based on my findings set forth above and the criteria in section 110(i), I assess a penalty of $101,000.00 for the citations and orders addressed at hearing

Given my above findings, I assess a total penalty of $103,200.00 for the settled citations and orders and those citations and orders that were addressed at hearing. Kentucky Fuel is hereby **ORDERED** to pay the Secretary of Labor the sum of $103,200.00 within 30 days of the date of this decision.

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

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January 16, 2014

| | | |
|---|---|---|
| AMERICAN COAL COMPANY, | : | CONTEST PROCEEDING |
| v. | : | |
| | : | Docket No. LAKE 2010-408-R |
| SECRETARY OF LABOR, | : | Order No. 8418503; 1/19/2010 |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | |
| Respondent, | : | |
| | | New Era Mine |
| | | Mine ID 11-02752 |

## DECISION ON REMAND

Appearances: Robert H. Beatty, Jr., Dinsmore & Shohl, LLP, Morgantown, WV 26501, for the Contestant;
Barbara M. Villalobos, Office of the Solicitor, U.S. Department of Labor, Chicago, IL 60604, for the Respondent.

Before: Judge Miller

This matter is before me on a remand from the Commission, in a case originally decided by Judge Avram Weisberger, *American Coal Co.*, 35 FMSHRC 380 (Feb. 2013). The case involves a Notice of Contest filed by American Coal Company challenging the issuance of a Section 103(k) Order by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") at American Coal's New Era Mine. The order was issued after an inspector observed smoke, ash and heat on a coal stockpile. The mine filed a notice of contest to the 103(k) order and the case was assigned to ALJ Weisberger.

As a result of the contest and at the request of the mine operator, Judge Weisberger held an expedited hearing on July 22, 2010 in St. Louis, Missouri. At the conclusion of the hearing the parties presented oral arguments and Judge Weisberger issued a bench decision in favor of American Coal, which was later reduced to writing and issued on September 28, 2010. Subsequently, the Secretary of Labor, appealed the matter to the Commission. On February 28, 2013 the Commission issued its decision vacating Judge Weisberger's order and remanding the case for further proceedings. Judge Weisberger has retired and as a result, the case, along with two related cases, Docket Nos. LAKE 2010-409-R and LAKE 2010-759, have been assigned to me. The two related dockets are a contest and a subsequent penalty case involving a citation that was issued for failure to report the accident that is the subject of the order on appeal. Consequently, the dockets should move forward from this point together.

On January 19, 2010, MSHA issued a section 103(k) order at the New Future stockpile alleging that an accident, in the form of a mine fire, had occurred. The same day MSHA issued a

second, similar order at the New Millennium Stockpile. The order issued at the New Millennium Stockpile was not contested by the operator because, in that instance, the parties observed flame in several areas. In this case, the inspectors did not observe a flame on the New Future Stockpile, but did observe smoke, smoldering material, and white ash in several areas. American Coal contested the 103(k) order issued at the New Future Stockpile arguing that smoke alone, in the absence of a flame, is not enough to establish that there is a mine fire and, accordingly, the 103(k) order was improperly issued. While Judge Weisberger agreed with American Coal and vacated the order, the Commission vacated the judge's decision, remanded the case, and directed the judge to "apply the Secretary's reasonable interpretation of the term 'mine fire' . . . to the facts of the case." 35 FMSHRC at 387.

On remand, this case again hinges on whether the conditions at the mine constituted a "mine fire." If I find that that there was a fire, the parties agree that the order was validly issued. Conversely, the parties have stipulated that if I find there was not a fire and, hence, no accident, the 103(k) order will be dismissed. (Tr. 11-12). For the reasons discussed below, I find that a "mine fire" existed and that the 103(k) order was properly issued.

## I. STATEMENT OF FACTS

American Coal operates the New Era Mine, an underground coal mine which is part of American Coal's Galatia Complex. The mine is located in Galatia, Illinois. Coal is mined underground, brought to the surface by a series of conveyors, and dumped on the New Future Stockpile. Once at the stockpile, the coal is moved by a dozer and eventually fed across a beltline to a preparation plant. The Galatia Complex also has a separate stockpile, known as the New Millennium Stockpile.

Michael Rennie, a MSHA supervisor and mine inspector for nearly twenty years, traveled to the New Future Stockpile on January 19, 2010. He, along MSHA inspector Wendell Ray Crick and Michael Smith, a safety representative for the mine, arrived at the stockpile between 8:00 a.m. and 8:30 a.m. Rennie observed and took pictures of smoking and smoldering areas in the lower portion of the stockpile as shown in Sec'y Exs. 2, 3, 4 and 5.

Wendell Ray Crick has been MSHA inspector for three years and has twenty-two years of prior mining experience, including work overseeing the safe operation of a coal stockpile. In addition, prior to his time with MSHA, he owned a mine safety company and conducted mine safety refresher trainings and taught coal mine safety classes on various topics, including stockpile safety. Further, he has eight years of experience as a firefighter and was called to respond to a fire just four weeks prior to the hearing in this case.

Crick described the New Future Stockpile as approximately 1000 feet wide, slightly more than 300 feet long, and 50 to 70 feet high. As Crick arrived at the stockpile, he picked up a sulfur-like odor which he described as a burning coal smell. He indicated that, at approximately five different locations, he observed smoking and smoldering material. Crick was able to approach within about five feet of some of the burning areas. According to Crick, the sulfur

odor got stronger as he got closer to the smoking areas. The smoke was about three to five feet in diameter and rose to roughly eight to ten feet high. He described the smoke as "whitish, brownish" and described heat waves coming off the coal and a whitish coat of ash around the areas where the smoke was rising. (Tr. 54). The extent of the ash was from three to five feet in diameter depending on the area. According to Crick, at the time of the inspection, there was a slight wind blowing in the area of the stockpile. As a result of his observations, Crick issued the subject 103(k) order.

Crick opined that a hazard existed because at any time the conditions that he observed could burst into flame due to oxygen or wind hitting the smoldering coal. Further, there was a dozer operating at the stockpile at the time of the inspection, and Crick indicated that the smoldering coal can create a void area in the stockpile which would present a hazard for the dozer operator if he drove over the area.

Crick could not get close enough to the fire to take a carbon monoxide reading, nor did he have a heat gun to measure the heat generated by the smoldering coals. He did not see any flames at the smoking areas that he observed. However, it was his opinion that, based on his experience, if there is smoke, there is fire. He explained that a fire continues to burn if there is smoke present and that "as a firefighter . . . we don't walk off and leave things smoking because of fire." (Tr. 70).

Michael Smith, the mine's safety representative and a member of the mine fire brigade, testified on behalf of the company. He indicated that he traveled with the inspectors, observed the five cited areas, but did not see any flames. He travelled to within 60 or 70 feet of the smoking and smoldering areas and did not see any white ash as described by Crick. Based upon his observation that there was no flame, he indicated that there was no fire.

## II. CONCLUSIONS OF LAW

On January 19, 2010 MSHA inspector Crick issued Order No. 8418503 pursuant to section 103(k) of the Act. The order alleges, in pertinent part, that "[u]pon inspection of the New Future raw coal stockpile located at the New Future portal, the stockpile is observed with 5 separate locations smoking with white colored ash surrounding these areas." The parties have stipulated that the singular issue in this matter is whether a mine fire, as contemplated by the Act, existed on the New Future Stockpile. For the reasons that follow, I find that a mine fire did exist, that an accident occurred, and, accordingly, that the 103(k) order was validly issued.

Section 103(k) of the Act provides, in pertinent part, that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine[.]" 30 U.S.C. § 813(k). The Act defines the word "accident" as "include[ing] a mine explosion mine ignition, *mine fire*, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 3(k) (emphasis added).

The Commission, in vacating the Judge's original decision, conducted a Chevron two step analysis of the statutory language and found that the Mine Act is silent or ambiguous as to whether a "mine fire" requires the presence of a flame, and that the Secretary's interpretation of the term was reasonable and controlling. *American Coal Co.*, 35 FMSHRC 380, 382-384 (Feb. 2013); *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984).

The Secretary interprets the term "mine fire" to "include 'both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames.'" *Id*. at 384. In its decision, the Commission stated that the Secretary's interpretation was "consistent with the statute's language, purpose, and legislative history concerning fires in mines." *Id*. at 385. Given the testimony of the inspector, it is clear that the smoldering, smoking area had the potential to burst into flames and therefore constitutes a mine fire.

In applying the Secretary's interpretation, I find that the area observed and subsequently cited, constitutes a "mine fire" based upon the observation of the smoke and ash. Both Crick and Rennie testified that they observed smoking and smoldering areas on the stockpile. Additionally, Crick testified that he observed "heat waves" and white ash in the smoking and smoldering areas. Further, he explained that if oxygen or air hit those areas, they "could burst into flame at any time." (Tr. 59) Smith, the mine's sole witness, did not testify as to the existence or non-existence of smoke or smoldering material, and instead offered that he did not see flames, "hot coals," or white ash. While Smith testified that he was only able to get within 60 to 70 feet of the smoldering areas, Crick indicated that he was able to travel within five feet of at least one of the areas. Given the testimony as a whole, I find that smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time, and therefore there was a fire on the stockpile, which in turn is an accident as described by the statute.

In its decision, the Commission noted the following: "Time is of the essence when dealing with a fire, and requiring an inspector who observes smoldering coal to wait to observe a flame before evacuating an area may cause a delay that is the difference between life and death. Furthermore, a flameless smoldering mine fire is dangerous in and of itself." Smoldering fires clearly present a safety hazard to miners, and therefore must fall within the parameters of a "mine fire." 35 FMSHRC at 385. Given Congress' and the Commission's acknowledgement of the particular dangers of smoldering flameless fires, as was the case here, along with the Rennie and Crick's testimony, I find that the areas of the stockpile named in the order presented conditions that amounted to a "mine fire" and, in turn, an "accident" as contemplated by the Act. Accordingly, I **AFFIRM** the section 103(k) order.

## III. ORDER

Consistent with the Commission's decision and direction on remand, and based upon the record evidence, I find that the Secretary has established that Order No. 8418503 was validly issued. Order No. 8418503 is hereby **AFFIRMED** and this contest proceeding is **DISMISSED**.

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

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January 16, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. SE 2012-341<br>A.C. No. 40-03177-281099 |
| v. | : | Docket No. SE 2012-386<br>A.C. No. 40-03177-283759 |
| REBCO COAL, INC.,<br>Respondent | : | Mine: Valley Mine No. 1 |

# DECISION

Appearances: Sean Allen, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado for the Secretary

Roy Wagner, President, REBCO Coal, Inc., 4427 Highway 190, Pineville, Kentucky for Respondent

Before: Judge Steele

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against REBCO Coal, Inc., ("REBCO" or "Respondent") at the Valley Mine No. 1 ("Mine"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The Secretary seeks civil penalties in the amount of $13,999.00 for five alleged violations of the Secretary's mandatory safety standards for underground, surface or other mines. The parties presented testimony and documentary evidence at the hearing which was conducted on March 13-14, 2013 in Middlesboro, Kentucky. For the reasons set forth below, I affirm each citation and order and assess penalties accordingly.

## STIPULATIONS

There were no stipulations in either docket.

## JURISDICTION

Respondent's activities in rehabilitating a coal mine at its Valley Mine No. 1 subjects it to the jurisdiction of the Act as a "coal or other mine" as defined by Section 3(h) of the Act, 30 U.S.C. § 802(h). Further, Respondent meets the definition of an "operator" as defined by Section 3(d) of the Act, 30 U.S.C. § 802(d). Hence this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judge pursuant to Sections 105 and 110 of the Act, 30 U.S.C. §§ 805, 813.

## SE 2012-341

### A. Order No. 8351502

Order No. 8351502 was issued under Section 104(d)(1) of the Act on August 10, 2011 at 11:15 a.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.380(f)(3)(iii). This safety standard, entitled "Escapeways; bituminous and lignite mines," states:

> The following equipment is not permitted in the primary escapeway:
> (iii) Underground transformer stations, battery charging stations, substations, and rectifiers except –
> (A) Where necessary to maintain the escapeway in safe, travelable condition; and
> (B) Battery charging stations and rectifiers and power centers with transformers that are either dry-type or contain nonflammable liquid, provided they are located on or near a working section and are moved as the section advances or retreats.

*Id*.

In his narrative, the inspector found:

> The Extreme Power Scoop Charger, S/N AU867100011, is installed in the primary escapeway at C/Cut next to the charger, is equipped with a cathead which is not locked or tagged out, and is readily available for use. The charger is not vented to the return or coursed to the outside. There are scoop tracks in front of the charger and a scoop parked 1 C/Cut outby the charger to indicate the batteries are being charged in this location. The charger was observed in this area during a mine visit on 6-2-11, was out of service and slated to be moved. Since that time the operator has placed the charger back in service. The operator has engaged in conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory health and safety standard.

Government Exhibit 2.[1]

[1] Hereinafter, Government exhibits will be referred to as "GX" followed by a number. Respondent's exhibits will be referred to as "RX" followed by a number. Cites to the transcript will be labeled "Tr." followed by the page number(s).

The inspector noted that the risk of injury or illness for the violation was unlikely and was not significant and substantial. *Id*. The injury or illness could reasonably be expected to be lost workdays or restricted duty and would affect one person. *Id*. The negligence was assessed as high, as well as an unwarrantable failure to comply with a mandatory health or safety standard. *Id*. The proposed penalty for this Order is $2,300.00. The Order was terminated on January 12, 2012, when the scoop charger was moved close to the feeder and was vented into an entry coursed into the return. *Id*.

**1. The Secretary's Evidence**[2]

Inspector Kenny Dixon ("Dixon") testified that the Valley Mine No. 1 is an older mine that had been mined by a previous owner, but was then closed. Tr. 30. Respondent reopened it and began the process of rehabilitation[3] to get the mine into working order and up to code. Tr. 30-31. At the time of the hearing, the mine was in non-producing status. Tr. 30.

During his inspection, Dixon traveled with Earl Wagner ("Wagner"), the superintendent of the mine. Tr. 35. Dixon observed the scoop charger ("Charger") in the primary escapeway. Tr. 34; GX-4. He cited Respondent for a violation of 30 C.F.R. § 75.380(f)(3)(iii), which prohibits electrical installations, i.e. battery chargers, from being located in the primary escapeway unless it is needed to keep the escapeway in travelable condition or it advances and retreats with the section. Tr. 40. If the charger is needed to maintain the escapeway, it must be bratticed[4] off, there must be air lock doors going in and out and it must be enclosed in a fireproof enclosure or equipped with a fire suppression system. Tr. 40. In Dixon's opinion, Respondent did not meet either of the exceptions because, although the Charger was a dry-type charger, the rehabilitation point had advanced, but the Charger was left behind. Tr. 45-46. Also, the escapeway was in good condition, so the scoop was not needed to maintain it. Tr. 45-46.

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

[3]Dixon testified that when a mine sits for an extended period of time, the roof and ribs deteriorate, rocks fall and water may build up. Tr. 78. In order to begin mining again, all of these problems must be corrected to meet the regulations, thus, rehabilitating the mine. Tr. 78.

[4] A brattice is a permanent stopping built basically from cinder blocks to separate air courses. Tr. 43.

Dixon testified that on May 17, 2011, he discussed this issue with Wagner and specifically told him that the Charger had to advance with the section. Tr. 41. Then, on June 2, 2011, the section had advanced, but Dixon observed the Charger in the same location. Tr. 41-42. He again talked to Wagner but did not issue a citation because it was unplugged with the cord wound up on top and Dixon deemed it to be out of service. Tr. 42-43. According to Dixon, when he returned on August 10, 2011, the date of the instant Order, the Charger was in the same location; however, someone had routed the cable through the brattice and back to the power center. Tr. 43, 63. It was not plugged in at that time, but it was not locked out or tagged out and was available for use. Tr. 43-44, 63. Based on the location of the plug and the scoop tracks leading up to the Charger, Dixon believed that the Charger had been used. Tr. 44. As further evidence, Dixon found a scoop part located one break outby the Charger. Tr. 44.

Upon inspection, Dixon found no faults with the Charger. Tr. 56. Further, it had short-circuit protection, which would trip the breaker if a fire were to occur. Tr. 56-57. For this reason, he designated the violation as unlikely. Tr. 56. However, Dixon testified that if a fire were to occur, the primary escapeway is in the intake, which brings fresh air into the mine. Tr. 56. Any minersinby the fire would be subjected to injuries associated with smoke inhalation, carbon monoxide poisoning and burns, which Dixon designated as lost workdays or restricted duty-type injuries in the instant case. Tr. 56. Dixon believes that preventing these types of injuries is the purpose of the standard. Tr. 55. Preshift and weekly examination records showed that miners were inby the Charger. Tr. 49-52; GX-5; GX-6. Dixon was also terminating or extending citations issued on July 15, 2011, some of which were inby the Charger. Tr. 52; GX-4. Dixon stated that he believed only one miner would have been affected because the alternative escapeway was located in the belt entry, which has an exhaust fan that brings fresh air into the alternative escapeway. Tr. 65. Under continued normal mining operations, Dixon believed the Charger would have been used. Tr. 84. Otherwise, the use of the scoop would have been exceptionally limited. Tr. 84.

Due to an impact inspection in which imminent danger orders and Section 104(d) orders were issued affecting the intake of the mine, operations were shut down between July 15, 2011 and July 31, 2011. Tr. 52-53. Respondent had to submit a comprehensive action plan to MSHA explaining the corrective actions it would take upon reentering the mine. Tr. 53. This was approved and on August 1, 2011, Respondent had completed the first two steps. Tr. 53. Dixon was sent to modify one of the imminent danger orders to allow Respondent to complete steps three through six, nine days prior to the issuance of this Order. Tr. 53-54.

Dixon determined that the Order was the result of Respondent's high negligence that constituted an unwarrantable failure to comply with a mandatory standard. Tr. 57-58. He testified that he had discussed the location of the Charger with Wagner on two previous occasions. Tr. 57-58. Preshift examination records indicated that examiners walked within feet of the Charger, but it was never moved. Tr. 57-58. By Dixon's calculation, the condition existed for almost three months. Tr. 58. Even after the Order was issued, no attempts were made to abate the condition. Tr. 59. Instead, Wagner turned to another miner and stated that Dixon was the reason that the employees would no longer have jobs. Tr. 59. Dixon said that termination would have been as easy as using the scoop to pick up the Charger and move it. Tr. 59. However, it was not moved until January 2, 2012. Tr. 60. Dixon testified that, while he found

the negligence to be high and an unwarrantable failure, he did not believe it was reckless disregard or intentional misconduct by Respondent. Tr. 84.

**2. Respondent's Evidence**

During cross-examination, Dixon admitted that he did not see power installed in the Charger; rather, the cathead was lying next to the power center. Tr. 62. Dixon testified, however, that the criteria for being considered out of service is some kind of physical dismemberment of the equipment. Tr. 62. Respondent admits that although it believes the Charger was out of service, it did intend to return it to service. Tr. 67. Dixon further testified that Wagner stated that the regulations allowed Respondent to keep the Charger in its location for up to six months. Tr. 63. Dixon asked Wagner to produce some evidence of this assertion, but none was presented. Tr. 63-64.

Respondent argues that it was constantly advancing and retreating, creating multiple working sections[5] within the mine. Tr. 66. It believes that Dixon's time lapse in inspecting the mine led to the assumption that it was continuously advancing. Tr. 66. It also pointed out to Dixon that it had two chargers. Tr. 69-72. Dixon testified that one was on the rehab section, and the other was the one cited here. Tr. 73.

Wagner testified that on July 15, 2011, both scoop chargers were located near the face or working area. Tr. 256. After the impact inspection, the Charger was brought back into the primary escapeway for safe storage. Tr. 256-257, 264. He stated that when miners were allowed to reenter the mine, the Charger was needed in the primary escapeway in order to maintain it. Tr. 257. He also testified that the existence of tracks was the result of mud on the mine floor. Tr. 257. According to Wagner, the tracks had been made at some earlier date, but nothing had happened following that instance to erase the tracks. Tr. 267. While he admits that the cord was unwrapped and routed to the power center, he asserts that it was out of service regardless and neither scoop was being used. Tr. 265, 267. Finally, Wagner argued that Dixon never warned Respondent about the Charger's location in the primary escapeway; although, Wagner admits that Dixon mentioned that the Charger would have to be moved. Tr. 260-261, 263.

**3. Contentions of the Parties**

The Secretary contends that Respondent violated 30 C.F.R. 75.380(f)(3)(iii) by placing a battery charging station in the primary escapeway. He argues that neither of the exceptions permitted in the safety standard applied to this particular case. Finally, he states that this violation was an unwarrantable failure to comply with a mandatory safety standard.

Respondent contends that the power scoop charger was permitted in the primary escapeway because it was necessary to maintain the primary escapeway. It also argues that it was located near a working station and was being moved as the section advanced or retreated.

[5] According to Dixon, the definition of a working section is the loading point and any areas of the mine inby. Tr. 64. Based on this definition, Respondent's working section was from the feeder inby. Tr. 65.

Alternatively, it argues that the battery charger was not in service because it was not plugged into the power center. Based on this evidence, Respondent asserts that the violation is not an unwarrantable failure to comply with a mandatory safety standard. Finally, it argues that the charger can remain in its location for six months.

**4. Findings of Fact and Conclusions of Law**

**a. Validity**

I find that the violation existed as cited by the inspector. The regulation prohibits battery charging stations being located in the primary escapeway except in two instances – its necessity to maintain the escapeway or those that are dry-type and located near a working section, provided that they advance and retreat with the working section. The Secretary has met his burden of proving that the Charger was located in the primary escapeway and that neither exception applied.

Respondent does not deny that the Charger was located in the primary escapeway. Instead, it argues that both exceptions apply. Wagner testified that the scoop was needed to maintain the escapeway when Respondent reentered the mine after the shutdown. However, he does not describe the existence of any conditions warranting the need for the Charger and scoop to be located there. I further credit the consistent testimony by Dixon that the escapeway was in decent condition. Respondent did nothing at hearing to discredit this testimony.

I further credit Dixon's testimony that the Charger remained in the same location for nearly three months. Wagner testified that both chargers had been located near the face as the working section advanced. However, he stated that the Charger at issue was relocated to the primary escapeway when the withdrawal orders were issued. Based on Respondent's testimony, the other charger was relocated out of the mine. It begs the question why both chargers were not relocated out of the mine. If Respondent was truly concerned about the safety of this Charger, it could have moved it out of the mine since it was moving it away from the working face anyway. Respondent's testimony was riddled with inconsistencies in this way. Apparently, the primary escapeway was not the only place for safe storage since the other charger was not located here as well. Based on this evidence, I find that the violation existed as cited and the Order is valid.

Concerning Respondent's argument that the Charger could be left in its location for up to six months, this is pure assertion. There is no evidence in the testimony, regulations or case law to suggest that this is true. I discredit this argument all together.

**b. Gravity**

I agree with Inspector Dixon's assessment that the violation was unlikely to result in injury or illness to miners. He credibly testified that he did not find any faults with the Charger itself. I am further unaware of any citations that were issued on the Charger. It was also equipped with short-circuit protection that would trip the breaker in the unlikely event that a fire would occur. In light of this evidence, I find that the gravity was correctly designated as unlikely to cause injury or illness.

**c. Unwarrantable Failure**

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to 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." *Id*. MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

By its definition, an unwarrantable failure suggests more than ordinary negligence. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). A judge may also determine, in his discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors 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 at 353 ("*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); *Beth Energy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (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 Company*, 31 FMSHRC at 1351.

I do find that the violation was the result of Respondent's high negligence and unwarrantable failure to comply with a mandatory standard. Dixon credibly testified that he had discussed the issue of the Charger with Wagner on two prior occasions. Although Wagner denied this, he later admitted that Dixon had "mentioned" that the Charger would have to be moved. His testimony on this issue was disingenuous at best. I, therefore, credit the testimony of Dixon.

The Charger remained in the primary escapeway for nearly three months. During this time, Respondent's agents walked past the Charger while conducting preshift and weekly examinations; however, the Charger was never moved. When Dixon finally issued the instant Order, Wagner did nothing at all to abate the condition. Rather, he informed Rebco employees that if they lost their jobs, they could blame Dixon. In fact, the Charger was left in the location until January 2, 2012, nearly five months after this violation. While I could find that the condition was a result of Respondent's reckless disregard for the regulation, I also credit Dixon in his testimony that he did not believe the violation was the result of intentional misconduct. In light of this, I affirm Dixon's findings of high negligence and unwarrantable failure.

**B. Citation No. 8406276**

Citation No. 8406276 was issued under Section 104(a) of the Act on July 12, 2011 at 2:30 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.202(a). This safety standard, entitled "Protection from falls of roof, face and ribs," states:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

*Id*.

In his narrative, the inspector found:

> The rib between cross cuts #6 and #7 on the #2 belt travel way (secondary escape way) is not be [sic] controlled to protect persons that work and travel in the area. The rib is approximately seven feet high in this area and the top three feet of the rib is [sic] loose and is leaning out in the direction of the travel way. The loose rib measures nineteen feet long and up to a foot thick. The top three feet of the rib is rock. Persons being struck by the rib could reasonably be expected to suffer fatal injuries. The life line is installed along this rib.
>
> Standard 75.202(a) was cited 4 times in two years at mine 4003177 (4 to the operator, 0 to a contractor).

GX-13.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial. *Id*. The injury could reasonably be expected to be fatal and would affect one person. *Id*. The negligence was assessed as moderate. *Id*. The proposed penalty for this Citation is $2,500.00. The Citation was terminated ten minutes later on the same day when the loose rib was pulled down with a bar. *Id*.

**1. The Secretary's Evidence**

Inspector Charles Broughton ("Broughton") entered Respondent's Mine as part of a complaint about electrical issues, smoking and drugs. Tr. 155. While there, he found a rib to be loose and leaning out into the travelway. Tr. 157. He testified that the loose rib measured nineteen feet in length, seven feet high and was about one foot thick; however, his greatest concern was the top three feet of it. Tr. 160. According to Broughton, the leaning is caused by a fracture which separates the material from the main body of the rib. Tr. 161. The material would weigh several hundred pounds. Tr. 131. If it fell or rolled, miners could receive crushing injuries resulting in death. Tr. 160-161. This concern was amplified by the fact that the condition was located in the secondary escapeway within four feet of the lifeline[6], and the mine has a history of rock falls, roof falls, rib issues and kettle bottoms[7]. Tr. 162, 172. Broughton further testified that "[m]iners work and travel in this area on a daily basis if the belt is running. And if people are assigned to work in the area, they're required to do a preshift examination." Tr. 164.

Broughton explained that 30 C.F.R. § 75.202 is one of MSHA's Rules to Live By.[8] Tr. 165; GX-16. Operators are specifically given notice of these standards in order to provide notice that special attention must be paid to these types of violations. Tr. 165-166. Broughton testified that the condition here was "very obvious;" however, he designated this violation as moderate negligence due to mitigating circumstances. Tr. 166-167. While he did not find dates, times and initials at the rib, he did find them at the entries. Tr. 167. Although he felt sure that the condition existed for more than a shift, he could not say whether Respondent's agents observed and ignored it. Tr. 167.

The condition was immediately abated when all of the loose material was pulled down. Tr. 167. According to Broughton, it only took approximately ten minutes to terminate the Citation, which indicates that the material was extremely loose. Tr. 168. In his opinion, the material was ready to fall, and a miner could have easily jarred it loose by bumping against it. Tr. 168-169.

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[6] The lifeline is a cord or rope that runs from the working section to the surface. Tr. 163.

[7] Kettle bottoms are deformities in the mine roof in which the rock has a slick surface that coats it. Tr. 162. They do not necessarily cause roof falls, but they do make it difficult for roof tiles to stick. Tr. 162.

[8] MSHA's Rules to Live By program consists of the standards that are most often cited. Tr. 165. The goal of the program is to prevent these violations. Tr. 165.

**2. Respondent's Evidence**

John Golden ("Golden") testified for Respondent and stated that he was with Broughton and was the miner who pulled down the loose rib. Tr. 277. He asserted that when loose ribs were found, Respondent would danger the area off, get a slate bar and pull the material down. Tr. 278. The material subject to this Citation fell in "chunks," according to Golden, not as a piece measuring nineteen feet long. Tr. 278. He also states that he only scaled six to nine feet of the rib. Tr. 279. Although the time was logged on the Citation, Golden disputes that it only took ten minutes to pull down the material. Tr. 280-281. He also testified that there are not presently any major falls of which he is aware. Tr. 279. Under cross-examination, Broughton admitted that he was not aware of any injuries or fatalities at the mine due to rib falls. Tr. 173.

**3. Contentions of the Parties**

The Secretary contends that Respondent violated 30 C.F.R. 75.202(a) by failing to control the ribs between crosscut #6 and #7. The area involved was an area where persons work or travel. He further argues that this violation was significant and substantial because the condition was reasonably likely to result in fatal injuries to one miner.

Respondent disagrees with the Secretary's evidence concerning the size of the rib and his contention that the top three feet was loose and leaning out. It asserts that the rib was not easily pulled out, taking longer than ten minutes. It further argues that the lifeline was at least six feet from this rib. Respondent contends that there is no history of injuries or fatalities at this Mine involving rock, roof or rib falls since it took control of the Mine in November 2008, which indicates proper control and protection. Finally, Respondent argues that proper precautions are taken if any loose ribs are found by the preshift examiner.

**4. Findings of Fact and Conclusions of Law**

**a. Validity**

I find that Citation No. 8406276 was validly issued. Broughton credibly testified and Respondent admitted that loose rib existed in an area where miners regularly travel. To make the circumstances worse, the condition existed in the secondary escapeway near the lifeline. As miners could be fatally injured by material falling from the rib, I find that 30 C.F.R. § 75.202 was violated.

**b. Gravity**

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). 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 Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99,103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is 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 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I also find that this violation was reasonably likely to result in reasonably serious injuries and is S&S in nature. As previously stated, a violation of the safety standard exists. This contributed to the hazard of a miner bumping the rib, jarring the material loose and receiving crushing injuries. Given the ease and speed with which the material was pulled down, it is likely that a miner would receive injuries resulting in his or her death.

Respondent argues that the measurement of the loose material was exaggerated by Broughton, and the lifeline was at least six feet away from the material. It also asserts that the rib was not easily pulled down and took more than ten minutes. In his testimony, Broughton credibly testified that he measured the loose rib with a steel tape. Tr. 170. Golden offered no testimony as to his knowledge of the length of the loose rib, and did nothing to explain how Broughton's measurement could have been wrong. Although Respondent argues that the lifeline was at least six feet away from the material, it presented no testimony or evidence to this.

Finally, although the time of abatement was documented in real time, Golden baldly asserts that it took longer. Again, no explanation is given for this knowledge. In light of the fact that Respondent conducted no measurements and could not explain its assertions, I credit the testimony of Broughton and affirm the Citation as reasonably likely to result in a fatal injury and S&S.

**c. Negligence**

I affirm the Secretary's finding that the violation was the result of moderate negligence. As stated above, a violation is the result of moderate negligence when it knew or should have known about the violations, but mitigating circumstances exist. Although Broughton found dates, times and initials at the entries, he did not find them at the location of the rib. Further, he could not prove that the condition existed at the time of the preshift examination. Finally, Broughton admitted that he was not aware of any fatalities or injuries at Respondent's mine due to rib conditions. Although Respondent should have known the condition of the rib, I agree that mitigating circumstances exist and affirm the determination of moderate negligence.

**C. Citation No. 8406311**

Citation No. 8406311 was issued under Section 104(a) of the Act on August 10, 2011 at 12:35 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 75.220(a)(1). This safety standard, entitled "Roof control plan," states:

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

*Id*.

In his narrative, the inspector found:

> The operator is not controlling the mine roof to protect miners working and traveling in the area from hazards [sic] conditions along the #4 belt. There is a section of mine roof on the in by corner one cross cut in by the #4 belt drive on the right side of the entry that is not adequately supported. It is five feet from the last roof bolt to the rib.
>
> Standard 75.220(a)(1) was cited 3 times in two years at mine 4003177 (3 to the operator, 0 to a contractor).

GX-17.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial. *Id*. The injury or illness could reasonably be expected to be lost workdays or

restricted duty and would affect one person. *Id*. The negligence was assessed as moderate. *Id*. The proposed penalty for this Citation is $475.00. The Citation was terminated on August 22, 2011, when the operator set three timbers on the corner located one crosscut in by the #4 belt drive. *Id*.

**1. The Secretary's Evidence**

At hearing, Inspector Broughton testified that rib sloughage created a distance of more than five feet from any permanent roof support. Tr. 178, 194. This measurement was taken with a steel tape. Tr. 194. He testified that this was a violation of Respondent's roof control plan which allows for no more than four feet. Tr. 178, 184; GX-20. He determined that part of the roof could fall, striking a miner, causing lost workdays or restricted duty type injuries such as amputated toes, broken bones, crushing injuries, cuts and abrasions. Tr. 184-185. Miners traveled in this area because it was near the belt line and escapeway. Tr. 185-186. Broughton designated this violation to be reasonably likely to result in injury and S&S because the mine has a history of rock falls, and injuries have occurred due to the falls. Tr. 187-188; GX-21. According to his testimony, there was a rock fall the day of the inspection, which affected his gravity determination. Tr. 189. No company official was escorting Broughton at this time. Tr. 191.

In Broughton's opinion, the condition was obvious, but he took into consideration that the fall had been cleaned and rock dusted. Tr. 190. Under those circumstances, the condition could have been missed. Tr. 190. The Citation was terminated twelve days later, and it took three supports to make the area compliant. Tr. 195, 289; GX-17.

**2. Respondent's Evidence**

Wagner testified that at the time that this violation was issued, Respondent was pulled back under the action plan and no one was scheduled to work in that area. Tr. 284. He states that he did not believe that a violation existed because the bolt was a little less than five feet from the rib. Tr. 287. Further, although he admits that the span was five feet after the sloughage, he argues that the existing bolt could hold the roof regardless. Tr. 284. According to Wagner, Broughton recommended that one timber needed to be set, but Wagner suggested that three be set to "remove all doubt." Tr. 285.

**3. Contentions of the Parties**

The Secretary contends that Respondent failed to follow its approved roof control plan and did not adequately support the Mine roof to protect miners in that there was a section of Respondent's roof that was more than five feet from the last roof bolt to the rib. He argues that this violation was significant and substantial because all four elements of the *Mathies* test were present.

Respondent argues that the area covered under this Citation was not in a working area on the date of the Citation. It contends that no examination was required in this area on the date that the Citation was issued because there was no working section in this area. It further states that

the belts were not being operated, and no one, including the examiner, was required to work or travel there. Respondent asserts that one bolt that is not in compliance with the roof control plan does not constitute a violation. It states that the area was narrowed to the maximum width allowed by the roof control plan with conventional support; therefore, there was no violation of this safety standard. Finally, it argues that there is no history of injuries or fatalities at this Mine, indicating proper roof support.

**4. Findings and Conclusions of Law**

**a. Validity**

I find that a citation was validly issued under 30 C.F.R. § 75.220(a)(1). Respondent failed to follow its roof control plan when rib sloughage created a condition in which the last row of roof bolts was five feet from the rib. Respondent's agent admitted at hearing that roof bolts should be spaced no more than four feet apart, and this condition created a spacing of more than that allowed. Tr. 287.

Respondent argues that no violation exists because one bolt out of compliance does not constitute a violation and the area was narrowed by conventional roof support. Both of these arguments fail. While it may be that one bolt out of compliance may not result in a violation, this violation was the result of a row of roof bolts being out of compliance. I credit Broughton's testimony that the entire last row of bolts was more than four feet away from the rib, especially given the fact that Wagner admitted this at hearing. Further, while I credit Respondent for setting timbers to terminate the Citation, its testimony at hearing is that no timbers existed at the time that the Citation was issued. Tr.288. Therefore, I find that the Secretary has met his burden in establishing a violation.

**b. Gravity**

I also find that the violation was reasonably likely to result in a reasonably serious injury and is S&S in nature. I have already determined that the underlying violation is valid. This contributes to the hazard of rock falling from the span of roof and striking a miner walking or working below. Because the area in question is a belt line, as well as an escapeway, it is reasonably likely that miners would be in the area, even if work is not scheduled in this particular section of the mine. When the belt is running, miners will be observing the process from beginning to end to ensure that everything is running smoothly. As an escapeway, the area must be examined on no less than a weekly basis anyway. Regardless of whether work is being performed in the particular section of the mine, there will be people traversing the walkway. If rock were to give way, it could cause serious injuries, including fatalities. While I could increase the injury reasonably expected based on the facts and circumstances as they existed, I decline and instead choose to respect the determinations made by the inspector, which Respondent did nothing to discredit.

**c. Negligence**

I agree with the inspector that Respondent's negligence was moderate. Respondent had recognized the rib sloughage and had cleaned it. Given this, it should have recognized that the last row of bolts was too far from the rib. However, while the roof control plan called for bolts to be no more than four feet apart, the last row of bolts was a little less than five feet from the rib. It is possible that Respondent did not identify the hazard because it was only out of compliance by several inches. In light of this, I find that Respondent's negligence was moderate, as designated.

**D. Citation No. 8406312**

Citation No. 8406312 was issued under Section 104(a) of the Act on August 10, 2011 at 12:38 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 75.202(a)(1). As previously stated in Citation No. 8406276, this safety standard states:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

*Id*.

In his narrative, the inspector found:

> The right rib one cross cut in by the #4 belt drive is loose. The rib is approximately ten inches thick and three feet high that is separated from the main rib.
>
> Standard 75.202(a) was cited 9 times in two years at mine 4003177 (9 to the operator, 0 to a contractor).

GX-22.

The inspector noted that risk of injury or illness was reasonably likely and significant and substantial. Id. The injury or illness could reasonably be expected to be fatal and would affect one person. Id. The negligence was assessed as moderate. Id. The proposed penalty for this Citation is $2,100.00. The Citation was terminated on August 22, 2011, when the operator removed the loose material from the rib. Id.

**1. The Secretary's Evidence**

At hearing, Broughton testified that he issued the Citation because the top three feet of the rib were loose, and the section was approximately ten inches thick. Tr. 202. According to Broughton, the rib had sloughed off some, and there was some flaking. Tr. 203. He could see a gap at the top where the rib was leaning outward. Tr. 203. When he examined it more closely,

he could see rock dust behind the loose material which indicated to Broughton that the condition began some time prior. Tr. 204.

Broughton stated that miners regularly work and travel in this area. Tr. 205. They shovel the beltlines to pick up loose material. Tr. 205. Due to the size of the loose rib, Broughton testified that miners struck by the material could suffer crushing injuries likely to result in a fatality. Tr. 206. He designated the violation as S&S because, under continued normal mining conditions, the rib would only get worse, not better. Tr. 206. That said, he believed that the condition could have been easily terminated if he had had someone from the company with him to do so. Tr. 206-207. At the time of issuance, the area was not an active working section, but miners had been working in the area either that day or the day before. Tr. 210. Broughton testified that he knew this information because he was also there to terminate some previously issued citations, and Respondent's employees would have had to be in the area to do the needed work. Tr. 210-211. Regardless, the examiner would have been traveling in the area even if the area was inactive. Tr. 209. The evidence showed that the areas inby were preshifted every day for more than a week prior to the issuance of the citation. Tr. 298-300; GX-5. In Broughton's opinion, the rib was ready to roll, and the condition was obvious. Tr. 207, 214. He stated that he noticed it immediately upon entering the area. Tr. 208.

**2. Respondent's Evidence**

Wagner argues that the belts were not being used on the day that the Citation was issued. Tr. 290. While he admits that this area is an escapeway and is subject to a weekly examination, he states that it was not an escapeway at that particular time, so the examination standards did not apply. Tr. 291, 296. Records show that a weekly examination had been conducted in this area. Tr. 296-297; GX-6.

**3. Contentions of the Parties**

The Secretary contends that Respondent violated 30 C.F.R. § 75.202(a) by failing to adequately support its roof to protect persons from hazards related to the fall of ribs, and this violation was significant and substantial. He states that the area for which this Citation was written was an area where persons work or travel, such as examiners. He further argues that the rib in the cited area was not supported or otherwise controlled, and this had to be known to Respondent because the rib was rock-dusted after it had begun to separate.

Respondent contends that the area referred to in the Citation was not in a working section on the date that the Citation was issued, as miners were not required to work or travel there. It states that this includes the examiner. It argues that the preshift examiner was using the intake air course and return air course for travel to the previous rehabilitation area, and these examinations were conducted weekly. Because there was no working section in the cited area and the belts were not being operated, Respondent asserts that the intake and return air courses were the escapeways and, therefore, no examination was required on the day that the Citation was issued. It finally contends that there is no history of injuries or fatalities at this Mine involving rock, roof or rib falls, which proves that Respondent was protecting miners working or traveling in this Mine.

### 4. Findings of Fact and Conclusions of Law

#### a. Validity

I find that the Secretary has met his burden in proving a violation of 30 C.F.R. § 75.202(a)(1). The rib by the #4 belt drive was loose and ready to roll. The standard requires that operators ensure that ribs are supported and otherwise controlled to protect miners from hazards relating to their fall. Broughton credibly testified that the condition existed as described. Respondent did nothing to argue that the condition did not exist. It, instead, argues that no one was required to be in the area, including examiners. However, the evidence proves otherwise. Respondent's own records show that the area was examined weekly. Further, as stated by Broughton, the termination of prior citations relied on Respondent's employees working in the area to correct the cited conditions. In light of all of this, I find that Citation No. 8406312 was validly issued.

#### b. Gravity

I further find that the violation as correctly designated as S&S in nature. As stated above, I have found an underlying violation of the standard. This contributes to the hazard of the rib rolling and landing on any miners passing through at that time. Although Respondent argues that this is not a working area, the examiner passes through this area on a weekly basis at the very least. Further, miners were in the area the previous day in order to abate unrelated citations, and records revealed that the areas inby had been preshifted every day of the week prior to the issuance of this Citation. Moreover, this is the beltline. Regardless of whether Respondent is running coal, it is removing material from the mine using the beltline. Miners could be in this area at any given time. Given the foot traffic and the condition of the rib, I find that it is reasonably likely that a fall would result in impact or crushing injuries. There is no question that these injuries could be fatal.

#### c. Negligence

Finally, I agree that Respondent's negligence was moderate. Broughton stated that the condition was obvious, and he immediately noticed it upon entering the location. However, the area was not an active working area at the time of the inspection. Additionally, Broughton did not testify that management was aware of the condition at any time prior to the issuance of the Citation. In light of this, I affirm Broughton's designation of moderate negligence.

**SE 2012-386**

**Order No. 8353129**

Order No. 8353129 was issued under Section 104(d)(1) of the Act on July 15, 2011 at 1:00 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.400. This safety standard, entitled "Accumulation of combustible materials," states:

> 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.

*Id*.

In his narrative, the inspector found:

> Accumulations of combustible materials in the form of loose coal, float coal dust, and other combustible materials such as plastic soda bottles, frayed conveyor belt, candy wrappers, hydraulic oil cans, wood and other trash were allowed to accumulate around the 006 section area rehab feeder. The exposed area measures 1 foot to 5 feet high x 20 feet in width and 25 feet in length. No rock dust is present on the mine roof in this area. These combustible materials are exposed to probable explosion and fire ignition sources, and the conditions observed could reasonably be expected to cause serious harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous conditions are eliminated. The miner operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

GX-7.

The inspector noted that the risk of injury or illness was reasonably likely, later modified to highly likely, and was significant and substantial. *Id*. The injury or illness could reasonably be expected to be permanently disabling and would affect eight persons. Id. The negligence was assessed as high, as well as an unwarrantable failure to comply with a mandatory health or safety standard. Id. The proposed penalty for this Order is $6,624.00. The Order was terminated on January 12, 2012, when the accumulations of trash were removed and a trash can was provided. Id. Further, the accumulations of loose coal were cleaned up and the area was rock dusted. Id.

**1. The Secretary's Evidence**

Inspector Robert Barnes ("Barnes") testified that he visited the Valley Mine No. 1 on July 15, 2011 as part of an impact inspection[9]. Tr. 91. During this inspection, Barnes issued Order No. 835329 for excessive accumulations at the feeder[10]. Tr. 92-93. Specifically, Barnes found a large amount of combustible materials surrounding the section feeder. Tr. 94, 98; GX-8. He testified that the accumulation was twenty-five feet long, twenty feet wide and five feet high. Tr. 96. Barnes stated that the accumulation was rib-to-rib, and it had to be climbed over to get past it. Tr. 102. Because of the size of the area, he deduced that it would have to be shoveled out manually unless the feeder was moved. Tr. 102. Anything inby the feeder is considered to be an active working area because although Respondent is not mining coal, it is rehabilitating issues such as rock falls and blocked roadways. Tr. 103, 123.

Within the accumulation, Barnes found black, dry loose coal, float coal dust, rocks, pieces of conveyor belt, nearly empty oil cans, soda bottles, wood, and various other amounts of trash lying around. Tr. 97, 136, 138. He testified that all are considered to be combustible materials because they easily ignite. Tr. 97-98. Further, there was no rock dust present on the roof of the mine. Tr. 98. According to Barnes, the feeder was not being used during the inspection, but it had been used to load the material that was being rehabilitated, and it was plugged into the power center. Tr. 100, 109. He observed coal dust on the top of the feeder, on the mine roof and in the surrounding areas back over the crosscut. Tr. 101. The float coal dust was located on top of the accumulation and equipment, as well as on the mine roof, which Barnes stated was an explosive hazard. Tr. 101, 129.

Barnes designated the Order as permanently disabling because he believed it could help propagate a fire or explosion, causing injuries from burns and/or smoke inhalation. Tr. 103-104. He determined that a fire was highly likely due to a confluence of factors – no rock dust present, the size of the accumulation, and the presence of electrical equipment. Tr. 108-109. He found that the violation was significant and substantial because the feeder, electrical cables and mobile equipment were all potential ignition sources, with their hot motors and electrical wires. Tr. 105. He found that this would be reasonably likely to result in a fire. Tr. 105. In fact, Barnes noted that several violations were issued on that day related to electrical equipment, some of which was located near this accumulation. Tr. 107. Barnes noted that if there had been any history or presence of methane, the violation would have been an imminent danger, and everyone would have been evacuated. Tr. 135.

Barnes also found that the accumulation was the result of Respondent's high negligence. Tr. 113. He testified that there was no effort to remove the material. Tr. 113. Further, mine

[9] An impact inspection is a saturation inspection in which several inspectors enter a mine to get a snapshot of the conditions at that time. Tr. 91. Impact inspections typically occur in troubled mines with a history of violations. Tr. 91-92. In this particular instance, a complaint was called into MSHA concerning drugs, smoking and electrical problems in the mine. Tr. 92.

[10] A feeder is a piece of mining equipment that loads coal onto the conveyor belt for transfer. Tr. 96.

management had been in the area on several occasions, but the accumulation was not listed in any examination reports, including in the reports for the prior day, and had basically been ignored. Tr. 113, 115-116; GX-11; GX-12. According to Barnes, Respondent did not view the accumulation as a problem and did nothing to abate the condition. Tr. 121. When Barnes showed coal to the foreman, Wagner and the foreman simply stated that there was no scoop available to clean it up. Tr. 142. In Barnes's opinion, the accumulation could not have occurred after the preshift examination. Tr. 116. Rather, it would have taken several days to create an accumulation of this size. Tr. 117. He stated that the accumulation was not only much larger than typical accumulations in a mine, it was also obvious. Tr. 119-120. However, it was not abated until January 12, 2012. Tr. 122.

Although Wagner disputed the existence of combustible materials, he admitted on cross examination that there was loose coal in the accumulation as well as pieces of conveyor belt, wood, oil cans, soda bottles and candy wrappers, all of which could catch fire. Tr. 239-240. He further admits that the entire intake had been cited for garbage accumulations, but argues that it was garbage left by the previous owner of the mine. Tr. 244.

**2. Respondent's Evidence**

Respondent entered a video into evidence taken two weeks after the Order was issued. Tr. 127; RX-1. Although dark, the video shows a large accumulation of mud, rocks or coal, wood and trash. RX-1. In the video, Earl Wagner is speaking and states that there is no coal and picks up a few handfuls of material, which it is impossible to identify by the video. RX-1. During the hearing, Barnes could not verify that the video was taken in the correct section of the mine, and the feeder was not shown. Tr. 146. At hearing, Wagner testified that the material was only eighteen feet wide and six to ten inches deep, and it consisted of rock, which he considered to be a "normal" accumulation. Tr. 229, 236-237. He also stated that the "garbage" cited consisted of two glue boxes and a couple of empty oil cans that Respondent was preparing to remove at the time of the inspection. Tr. 229-230. He estimated that the mine used approximately twenty cans of oil a day, and the two observed had been put in the feeder the same day that the Order was issued. Tr. 230. On the day that the video was taken, Wagner stated that approximately six to eight inches of water existed in front of the feeder and opined that this was due to the mine sweating. Tr. 230-231.

During cross-examination, Barnes admits that he neither observed coal dust in suspension at the time of the violation nor did he take any dust samples. Tr. 128. However, he further testified that there was coal dust in various areas and, in order for an explosion to occur, there must be coal dust in suspension, a heat source, fuel and oxygen. Tr. 131-132. Although Respondent asserted that the mine typically dried out during the winter months, not the summer, Barnes stated that during his inspection, the garbage was not wet, water was not dripping from the roof and the area was not sweating. Tr. 128, 131, 231. He admitted that there was some mud located in the mine, but he mostly observed dry powder. Tr. 145. He further did not recall a water pump near the feeder. Tr. 139.

Wagner did not consider the materials to be combustible because the coal observed had been left by the previous owner and was minimal. Tr. 232. Instead, Respondent had been

engaged in cleaning up rocks and rock falls for more than three years. Tr. 232-233. He further argues that there were no ignition sources because none of the equipment in the mine gets hot. Tr. 232. Wagner stated that he had never seen coal dust in suspension and did not know of any float coal dust issues in the mine. Tr. 233-234. The men rock dust regularly, but he acknowledges that a small portion of the area was not rock dusted due to the sweating of the mine. Tr. 238-239. According to him, the area was not cleaned because Respondent was operating under an action plan in which it had to follow step-by-step instructions. Tr. 235. Aside from this, he stated that the accumulation did not exist for more than one shift, which explained why it did not appear in the preshift examination records. Tr. 237.\

**3. Contentions of the Parties**

The Secretary contends that Respondent failed to clean up accumulations of coal dust, float coal dust, loose coal and other combustible materials from around a section rehab feeder, constituting a violation of 30 C.F.R. § 75.400. He states that the combustible materials were allowed to accumulate and was neither marked on a preshift or onshift examination for the morning that the violation was discovered nor the day before. He argues that this violation occurred in an active working place and was significant and substantial as well as an unwarrantable failure to comply with a mandatory health or safety standard.

Respondent argues that the MSHA inspector overstated the amount of the accumulations. It argues that the accumulations were not exposed to explosion or ignition sources due to the amount of water, lack of methane and lack of dust suspension in that area of the Mine.

**4. Findings of Fact and Conclusions of Law**

**a. Validity**

I find that a violation of 30 C.F.R. § 75.400 existed as written in the Citation. Whether the accumulation was eighteen feet wide or ten feet wide, it did not belong around the feeder. While Respondent argues that the accumulation did not consist of combustible materials, its superintendent admitted at hearing that most of the components could catch fire and were, therefore, combustible. Respondent's video did little to improve its case. Other than coal and float coal dust, which could not be ascertained given the condition of the mine and the darkness of the video, it essentially proves the existence of everything asserted by the Secretary. Further, it should be noted that the video depicts the mine after it has essentially been abandoned for two weeks, not the conditions as they were on July 14, 2011. Even if the video showed that an accumulation did not exist, it is largely irrelevant. In light of this, I find that the violation is valid.

**b. Gravity**

I further find that this violation was correctly designated as S&S in nature. As previously stated, an underlying violation of the mandatory standard exists. This accumulation contributes to the hazard of a fire within in the mine. The combustible materials were found lying from rib to rib around the section feeder. He further found coal dust laying on top of the feeder, on the

accumulation, on the roof and in the surrounding areas of the crosscut. None of this had been rock dusted. Although the feeder was not in use at the time that the violation was issued, it was plugged into the power center. There was also mobile equipment in the area, some of which received violations. The accumulations and coal dust could be ignited by any of the equipment or electrical cables in the area. If a fire were to occur, this would be reasonably likely to result in inhalation injuries due to the smoke or burn injuries due to fire. Either could result in permanently disabling injuries to the miners, especially to those designated to fight the fire. Based on the foregoing, I find that the violation is S&S in nature as designated by the Secretary.

**c. Unwarrantable Failure**

Finally, I find that this violation was the result of Respondent's high negligence and was an unwarrantable failure to comply with a mandatory standard. Barnes credibly testified that the accumulation was large enough that it would have taken several days for an accumulation of this size to amass. However, it did not exist in any preshift or onshift examination records, and it was essentially ignored until, and in fact after, cited. Even though it had been cited for similar violations in the intake in the past, Respondent made no effort remove the accumulation and even climbed over it to get to get to the working section of the mine. Most disturbing, however, is the cavalier nature of Respondent's response to the violation. At one point in the video, Wagner points out the candy wrapper that he states has everyone so scared. This, coupled with the fact that Wagner does not believe that an accumulation of this size is abnormal, is indicative of Respondent's general disregard for safety regulations. Given all of this evidence, I am constrained to find that Respondent's behavior is highly negligent and an unwarrantable failure to comply with a mandatory standard.

**PENALTIES**

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) 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. The Act requires that in assessing civil monetary penalties the Commission and its judges shall consider the six statutory penalty criteria, found at Section 110(i) of the Act:

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

*Id*.

**A. History of Violations**

In the two years prior to these particular citations and orders, the operator had received a total of 172 citations. Of these, fifty-one were S&S and none had been issued under Section 104(d) of the Act.

**B. Appropriateness of Penalties to the Operator's Size**

At the time that these penalties were issued, Respondent employed approximately fifteen to nineteen employees. However, for the quarter in which these violations and, in fact, for the entire year of 2011, Respondent reported no production of coal. See MSHA's Mine Data Retrieval System at www.msha.gov. Respondent should therefore be categorized as a very small operator.

**C. Negligence**

As stated above, I find that Respondent's negligence in each citation or order is affirmed as written by the Secretary.

**D. Effect on Ability to Continue in Business**

On March 19, 2013, Respondent submitted a letter to the Commission requesting that further hearings be postponed until such time that Respondent could obtain representation by an attorney. It states that its ability to obtain counsel is limited by the fact that REBCO has made no profit in the four years since it opened. Respondent further represents that, at this time, any penalties it is forced to pay would affect its ability to continue in business. It did not disclose any financial documents as proof of this alleged hardship.

**E. Gravity**

As stated above, I find that the gravity of each citation or order is affirmed as written by the Secretary.

**F. Good Faith Abatement**

Respondent did not act in good faith in abating these citations and orders. The inspectors credibly testified that some of the violations could have been terminated easily and immediately. However, in some instances, it took Respondent five months to abate the conditions. Further, Respondent, in regard to at least one violation, explained to its workers that the MSHA inspectors, not its own lack of regard for the safety standards, were the reason that the miners would eventually lose their jobs. As such, I find no good faith abatement in this instance.

## ORDER

For the reasons set forth above, the citations and orders are **AFFIRMED** as written. REBCO Coal, Inc., is **ORDERED** to **PAY** the Secretary of Labor the sum of $13,999.00 in 24 monthly installments beginning March 1, 2014 and due every 30 days thereafter. [11] REBCO Coal, Inc. shall pay 23 installments of $583.30 with a final payment of $583.10 due March 1, 2016. Should REBCO fail to make a payment under this plan, the remainder of the balance shall become due and immediately payable.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

Distribution:

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Roy Wagner, President, REBCO Coal, Inc., 4427 Highway 190, Pineville, KY 40977

/kmb

[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**
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577/FAX 303-844-5268

January 22, 2014

| | | |
|---|---|---|
| BRENDA A. CULLINAN, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | Docket No. WEST 2013-541-D |
| v. | : | DENV CD 2013-05 |
| | : | |
| PEABODY TWENTYMILE MINING LLC, | : | |
| | : | |
| Respondent | : | Foidel Creek Mine |

# DECISION

Appearances: Brenda A. Cullinan, Complainant/Pro-se;
Christopher G. Peterson, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me upon a complaint of discrimination brought by Brenda A. Cullinan against Peabody Twentymile Mining, LLC., under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Act"). A hearing in the case was held in Steamboat Springs, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

For the reasons below, I find that Twentymile did not discriminate against Cullinan under the Act when it terminated her employment and the discrimination complaint is dismissed.

## I. SUMMARY OF EVIDENCE

Brenda A. Cullinan worked at the Foidel Creek Mine for approximately five and a half years. In early 2012, Cullinan served as a fire boss. While serving as fire boss, Cullinan believes that Twentymile discouraged her from recording hazardous conditions in the examination books. Cullinan cited specific examples of this conduct on March 6, 2012, May 1 2012, and May 7, 2012. (Exs. C-1,2,3,4). Twentymile managers, however, claim that they wanted Cullinan to differentiate between conditions that created hazards or were violations of safety standards and conditions that simply needed to be corrected. Cullinan also filed a discrimination complaint with MSHA in late June or July, 2012, which is not related to the present case. (Tr. 41-43).

In October 2012, Cullinan received a routine reassignment from fire boss to rock duster during a longwall move. Cullinan complained on October 28, 2012, that her asthma prevented her from being a rock duster due to dust exposure so she was subsequently reassigned to the road crew with no change in hours, pay, or overtime opportunities. (Tr. 50). When the longwall

move was finished, Cullinan was not reassigned to her position as fire boss. Allen Meckley, a mine foreman, testified that because fire bosses were required to work in areas during rock dusting he chose not to return Cullinan to her fire boss position because he believed it would be hazardous for Cullinan due to her asthma. (Tr. 143). Cullinan believed that acting as a fire boss did not affect her asthma and that she was reassigned to road crew due to her complaints about asthma and her identification of hazards as a fire boss. (Tr. 14-15).

On November 20 to 21, 2012, Cullinan noticed exposed roof bolts in one location and she accidently dislodged roof support timbers in another location while driving a vehicle as a member of the road crew. Cullinan called Mike Zimmerman, her mine foreman, when she noticed the exposed bolts, but did not mention the timbers that she had dislodged. He told her to set timbers in the area of the exposed roof bolts. Cullinan later told Zimmerman that only one timber remained to be set, but another miner informed him that none of the timbers were set at the location of the exposed roof bolts. Cullinan testified at the hearing that she was referring to the site of the timbers she knocked down when she stated that only one remained to be set, while Zimmerman testified that he had no knowledge that Cullinan knocked down any timbers and knew only of the site of the exposed roof bolts. (Tr. 56-57, 85).

Zimmerman testified that Cullinan told two other miners to set the timbers where she reported exposed roof bolts and that she continued hauling rock after he specifically told her to discontinue hauling rock and set the timbers. (Tr. 86). Cullinan testified that the other miners offered to set the timbers for her. (Tr. 37). After ensuring that Cullinan would personally set the timbers, Zimmerman investigated the progress of timber setting in person. He found that the task was incomplete because only one timber had been set and it only touched the roof mesh and did not extend to the roof itself. Thus, it did not provide any roof support. He ordered her to set more timbers and to replace the defective timber.

On November 25, 2012, as a result of the events of November 20 to 21, 2012, a meeting was held with Scott Harrel, who was the director of human resources for Twentymile's Colorado region, and William Bennett, who was superintendent of underground operations at Twentymile at the time. In addition to meeting with Cullinan, they met with other members of the crew including Dallas Daniels. Daniels told management at the meeting that Cullinan asked him to load her rock hauler so she could continue hauling rock even though the timbers were not yet set where rock bolts were exposed. Cullinan's rock hauler could only be loaded while working under the exposed roof bolts and unsupported roof that Cullinan herself identified as a hazard. (Tr. 94-95, 115, 130). At the hearing, Harrel testified that Cullinan admitted that she knew that the one timber that she set did not reach the roof and therefore did not support the roof, and that she only reset it when confronted by Zimmerman. (Tr. 111, 120). Harrel and Bennett made the final decision to terminate Cullinan following this meeting. (Tr. 134; Ex. R-2).

Cullinan alleges that Twentymile terminated her employment as a result of the large number of safety hazards she identified when she worked as fire boss. Cullinan filed this discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against Twentymile on November 27, 2012. On January 31, 2013, the Secretary determined that the facts disclosed during his investigation into the complaint did not constitute a violation of section 105(c) of the Act. On or about February 28, 2013, Cullinan

filed this proceeding upon her own behalf with the Commission under section 105(c)(3) of the Act.

## II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Discussion and Analysis

I find that Cullinan established a prima facie case that Twentymile discriminated against her when it terminated her employment. A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden for establishing a prima facie case is low, only requiring that a judge could infer discrimination based upon the complainant's evidence. *Turner v. National Cement Co. of California*, 33 FMSHRC 1059, 1066 (May 2011). Cullinan presented evidence of protected activity and a connection between that activity and her termination that could allow an inference of discrimination, but Twentymile rebutted the prima facie case by showing that Cullinan's termination was not motivated by her protected activity.

I find that Cullinan established that protected activity occurred. A miner establishes the first element of a prima facie discrimination case by establishing that protected activity occurred. *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1825 (Aug. 2012) citing *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). The Act states that protected activity includes when a miner "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent…of an alleged danger or safety or health violation." 30 U.S.C. §105(c)(1). Cullinan claims that while she was an examiner she notified Respondent of numerous alleged dangers, which led to her termination.[1] (Tr. 18-23, 61; Exs. C-1,2,3,4,5,6). Respondent argues that the conditions cited by Cullinan did not constitute protected activity because they did not concern actual hazards.[2] These conditions, however, constituted "alleged" hazards, which are related to the Act and therefore protected by 105(c)(1). The Act, moreover, does not protect a miner based upon the nature of hazards, but based upon the action of making a complaint or report to an operator about those hazards. I find that the numerous

[1] Cullinan also filed a formal discrimination complaint with MSHA in July 2012. (Tr. 41). Based upon Cullinan's testimony, the substance of this complaint was not safety related. (Tr. 43). The fact that she made this complaint, however, is still protected under the act and is included in my discussion and findings concerning protected activity. 30 U.S.C. §105(c)(1).

[2] There is a point where a miner's safety related precautions are no longer protected because they are beyond the Act. Precautions should be protected when the miner holds a "good faith, reasonable belief that such precautions are needed, and when the precautions themselves are reasonable." *Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 993 (Sep. 1999) quoting *Robinette*, 3 FMSHRC at 812. I find that Cullinan held a good faith, reasonable belief that her actions as a fire boss were necessary safety precautions.

occasions that Cullinan notified Respondent of alleged dangers while she was a fire boss qualify as protected activity under the Act.[3]

Cullinan established a connection between her protected activity and termination through showings of Twentymile's knowledge and animus.[4] A miner can establish the second element of a prima facie case, that the adverse action experienced by the miner was in any way a result of the miner's protected activity, through indirect evidence such as "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner,* 33 FMSHRC at 1066 citing *Chacon*, 3 FMSHRC at 2510. Zimmerman testified that he was aware of Cullinan's extensive identification of safety issues while she was fire boss. (Tr. 74-75). Bennett and Meckley also testified that they were aware of Cullinan's protected activities. (Tr. 135, 143). The protected activities occurred five to nine months prior to Cullinan's termination. I find that Respondent did have knowledge of Cullinan's protected activities.

Cullinan established that Twentymile exhibited animus toward her protected activity. The more that animus "is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon*, 3 FMSHRC at 2511. Cullinan testified that on March 6, 2012, Zimmerman complained about her record keeping as a fire boss, telling her that she was "only allowed to write two lines," and not a "novel." (Tr. 18; Ex. C-1). Later that same day, Meckley suggested that they take Cullinan's pen away because she wrote too much. (Tr. 21; Ex. C-2). On May 1, 2012, Cullinan identified hazardous roof bolts and asked Zimmerman how to record the condition and he replied "not at all[,]" but then told Cullinan to list it as a hazard after she stated that she feared being responsible for an MSHA examination

[3] I find that Cullinan's contention that she was terminated due to her asthma is not supported by the evidence. There has been no showing that she suffered from an acute disease like pneumoconiosis. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 495 (Apr. 1988). In addition, Cullinan testified that her personnel file had always reflected her asthmatic condition and that in 2010 she successfully refused a rock duster position based upon her asthma. (Tr. 9-12). The evidence shows that Twentymile accommodated her asthma when assigning her work. I find that Cullinan's complaints concerning her asthma did not constitute protected activity and Twentymile did not terminate her for those complaints.

[4] I find that Cullinan's reassignment from fire boss to road crew was not an adverse action. Adverse action must be "'materially adverse to a reasonable employee.'" *Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1927 (Aug. 2012) citing *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Cullinan did not argue that her work on the road crew was more dangerous or difficult than her work as a fire boss. Meckley testified that the road crew was "one of the easiest jobs in the mine and it's a good way to learn the mine." (Tr. 141). He also testified that the road crew worked in the intake, which had fresh air and less dust than the belt lines where the fire bosses work, which Meckley believed would be safer for Cullinan's asthma. (Tr. 142, 146-48). The reassignment did not change Cullinan's shift, rate of pay, or opportunity for overtime. (Tr. 50). Although Cullinan's reassignment may suggest that Twentymile disliked Cullinan's actions as a fire boss, it was not materially adverse to a reasonable employee and was therefore not adverse action.

violation. (Tr. 22-23; Ex. C-3). Cullinan also testified that at one point she was taken into a back room and told not to "write up so much stuff in the books." (Tr. 25). Cullinan's showing that she performed protected activity that Twentymile knew of and exhibited animus toward could support an inference of discrimination and therefore Cullinan established a prima facie case.

Twentymile, however, rebutted that prima facie case by showing that Cullinan's termination was not motivated by her protected activity. The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). I credit Zimmerman's testimony that prior to meeting with Harrel and Bennett, Twentymile planned to simply discipline Cullinan for insubordination because she told Zimmerman that the timbers were set when they were not, she did not set the timbers herself as ordered, and she incorrectly set a timber. (Tr. 91-92). During the meeting, however, management learned that Cullinan told Dallas Daniels, another miner on the crew, to load her hauler with rock while parked underneath the exposed roof bolts and unsupported roof. (Tr. 115; Ex. R-19). Twentymile's representatives in the meeting believed that Cullinan directed or sanctioned the other, less experienced miner to work under unsupported roof, that she deliberately misled Zimmerman when he inquired about the progress of setting the timbers, and that she knowingly set a timber incorrectly and did not intend to correct the mistake until Zimmerman forced her to do so. (Tr. 85-87, 111-12). Twentymile's witnesses credibly testified that Twentymile terminated Cullinan's employment for insubordination and a safety violation, not as a result of Cullinan's protected activity. (Tr. 105, 111-12, 134).

I find that Twentymile did not believe that Cullinan recorded too many hazards, but rather that she identified nonthreatening conditions as hazards. On March 6, 2012, for instance, Cullinan cited water in a belt line as a hazard in her examination book. (Ex. C-2). Because the belt line was not an escapeway, Zimmerman made a notation in the examination book that the condition was not a hazard that required immediate attention. (Tr. 77). Cullinan was not disciplined for this situation. (Tr. 81). Whenever Cullinan cited conditions as creating a hazard, Twentymile would try to immediately correct the condition. (Tr. 71). The company believed that immediately correcting conditions that did not create a hazard was inefficient and removed miners from addressing actual safety concerns.

Twentymile presented evidence showing that it treated Cullinan the same as it treated other employees involved in cases of "comparable seriousness." (Tr. 118, 122; Ex. R-30). *Bridge Pero v. Cyprus Plateau Mining Corporation*, 22 FMSHRC 1361, 1368 (Dec. 2000) citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976). Cullinan was previously disciplined for failing to set a parking brake on a mantrip. (Tr. 95; Ex. R-13). The mantrip rolled and was seriously damaged. The two other miners involved in the events on November 20 to 21 were also disciplined. One miner, Dallas Daniels, received a disciplinary letter instead of termination because he was less experienced than Cullinan, was not certified, had no previous disciplinary record, and told Twentymile that Cullinan directed him to work under the unsupported roof. (Tr. 115; Ex. R-19). Steven Soos, a contract employee involved in the incident with the timbers, was retrained instead of terminated because he had less experience than Daniels or Cullinan and was working under their direction. (Tr. 117; Ex. R-20). Other

miners had been terminated for serious safety violations. (Tr. 121-22, 131-35; Ex. R-30). I find that Cullinan was terminated because of her unsafe actions and the insubordinate behavior she exhibited on November 20, 2012. Cullinan's protected activity that occurred five months or more prior to the termination was not a factor in her termination.

I also find that although Twentymile exhibited some degree of animus toward Cullinan's protected activity; management never disciplined her for that activity. I credit Zimmerman's testimony that, although Cullinan documented various conditions as safety hazards in the company's books that he did not believe were safety hazards, he did not discipline her. (Tr. 74-75, 80-81). I also credit Zimmerman's testimony that when he told Cullinan not to record exposed roof bolts that she discovered in May 2012, he was joking. (Tr. 99-101; Ex. C-3). He then told Cullinan to mark it down as a hazard. *Id.* Bennett testified that he supported Cullinan's actions as a fire boss and attributed her mistakes to inexperience. (Tr. 135). Meckley testified that he assigned Cullinan to road crew instead of fire boss solely because of her health concerns, not due to her protected activity. (Tr. 143). Twentymile did not want to suppress Cullinan's identification of unsafe conditions, but rather wanted her to recognize which conditions represented actual hazards requiring immediate attention. Cullinan, furthermore, was no longer a fire boss at the time of her termination. Cullinan's protected activities occurred five to nine months before her termination, but the events of November 20 to 21 occurred just days before and, by Cullinan's own account, led directly to the meeting with management on November 25. (Tr. 38). Based upon the testimony of Twentymile management at hearing, Cullinan's termination was not motivated by her protected activity. I found the testimony of Zimmerman to be especially credible and convincing in this case.

Cullinan bears the burden to show that her termination was the result of her protected activity. *Metz*, 34 FMSHRC at 1829. She has not produced sufficient evidence to prove that her protected activity motivated her discharge.

## III. ORDER

For the reasons set forth above, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED.**

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

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 23, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | :<br>:<br>:<br>: | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 2010-784-M<br>A.C. No. 15-18478-211341 |
| v. | : | |
| APEX QUARRY, LLC,<br>Respondent | :<br>: | Mine: Apex Quarry |

## DECISION AND ORDER

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Todd Harris, pro se, White Plains, Kentucky for Respondent

Before: Judge McCarthy

## I. Statement of the Case

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 Petition charges Respondent, Apex Quarry, LLC (Apex) with thirteen violations of mandatory safety standards and seeks a total civil penalty of $23,979 for those violations.

Prior to hearing, the parties participated in a series of conference calls to discuss the status of settlement negotiations and narrow the issues for hearing. Respondent, through its *pro se* owner, Todd Harris, claimed that Apex Quarry was unable to pay the proposed penalties given the company's current financial situation.

A hearing was held in Nashville, Tennessee. The parties introduced rather limited testimony and documentary evidence, particularly given the number of citations at issue.[1] The

[1] Joint Exhibit 1, which reflected stipulated facts, and well as P. Exs. 1-14 (copies of citations, supporting documentation or photographs, and a certified violation history report) and R. Ex. 1 (a 2010 safety award), were received into evidence. (Tr. 10-15).

Secretary's sole witness was inspector Hollis.[2] Hollis gave a brief description of each citation and the bases for his gravity and negligence determinations supporting the proposed penalties. Harris, content with answers provided by Hollis after cross-examination, declined to provide narrative testimony concerning the citations at issue. Tr. 165. Instead, Harris' testimony was limited to Respondent's claimed inability to pay and additional testimony in response to cross-examination and questions from the bench. Tr. 167-80. Both parties waived post-hearing briefs. Tr. 165-66.

After carefully considering the testimony of inspector Hollis and pro se owner Harris, I find that the Secretary has demonstrated a clear violation of MSHA standards as alleged in Citation Nos. 6596269, 6596270, 6596275, 6596271, 6596273, and 6596276. These citations are affirmed as written. The Secretary, however, did not meet his burden of proof regarding Citation/Order Nos. 6596268, 6596269, 6596278, and 6596279. Accordingly, these citations and orders are vacated. Finally, Citation Nos. 6596272, 6596274, and 6596277 are modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

Based on the entire record and my observation of the demeanor of the witnesses,[3] I make the following:

## II. Stipulations

At hearing, the parties agreed to the following stipulations:

1. Apex Quarry, LLC is the operator of the Apex Quarry; Mine ID No. 15-18478. The Apex Quarry is located in Christian County, Kentucky.

2. The Apex Quarry is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

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[2] Inspector Hollis has nearly thirty year of mining experience and has been with MSHA since April 1999. Tr. 29. Hollis' experience is exclusively with surface and underground metal/non-metal mines including "sand and gravel operations, dredges, limestone quarries, underground zinc mines, [and] underground lead mines." Tr. 31. Although clearly an experienced inspector, Hollis' interpretation of certain facts was fraught with unsubstantiated conclusions and logical fallacies. Accordingly, I give appropriate weight to this fact in assessing the probative value of Hollis' testimony and the Secretary's burden of proof.

[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, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

3. At all times relevant to these proceedings, products of the Apex Quarry entered commerce, or the operations or products of thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Employees at the Apex Quarry worked approximately 20,000 hours in the two years preceding the violations at issue.

5. Copies of the violations at issue in this proceeding were served on Apex by an authorized representative of the Secretary.

6. Apex Quarry, LLC timely contested the violations.

7. [Withdrawn].[4]

8. In an effort to narrow the issues in this proceeding, Apex Quarry, LLC stipulates to the following facts related to the violations below:

   A. Citation No. 6596269 - N/A

   B. Citation No. 6596268 - Apex stipulates that there was not a breaker, or a dummy breaker, in the breaker box located in the foreman's office. However, Apex contends that the condition would not cause a fatal injury.

   C. Order No. 6596269 - N/A

   D. Citation No. 6596270 - Apex stipulates that the parking brake on the WABCO #4 35-ton haul truck was not maintained in functional condition. The parking brake would not hold the truck on the maximum grade that the truck travels. However, Apex contends that the condition would not cause a fatal injury.

   E. Citation No. 6596271 - Apex stipulates that the lights on the Kawasaki 770Z front loader were not maintained in functional condition. However, Apex contends that the condition would not cause a fatal injury.

   F. Citation No. 6596272 - Apex stipulates that the tail pulley on the return conveyor was not guarded. However, Apex contends that the condition was not reasonably likely to cause an injury.

[4] The original stipulation read: "Apex Quarry, LLC claims that the proposed civil money penalties will affect its ability to remain in business. Apex Quarry, LLC requests an opportunity to present proof regarding its financial condition." At hearing, the parties withdrew the stipulation because Apex had gone out of business after the stipulations were drafted. Tr. 10-11.

G. Citation No. 6596273 - Apex stipulates that the lights on the #3 haul truck were not maintained in functional condition. However, Apex contends that the condition would not cause a fatal injury.

H. Citation No. 6596274 - Apex stipulates that the door glass on the WABCO #3 haul truck was broken. However, Apex contends that the condition was not reasonably likely to cause an injury.

I. Citation No. 6596275 - Apex stimulates that the parking brake on the #3 haul truck was not maintained in functional condition. The parking brake would not hold the truck on the maximum grade that the truck travels. However, Apex contends that the condition would not cause a fatal injury.

J. Citation No. 6596276 - Apex stipulates that there was not a plate covering an opening on the side of the portable impact safe start box. However, Apex contends that this condition would not cause an injury.

K. Citation No. 6596277 - Apex stipulates that adequate pre-operational checks of mobile equipment were not being conducted at the time the citation was issued. However, Apex contends that the violation was not reasonably likely to cause an injury. Apex further contends that the violation would not cause a fatal injury.

L. Order No. 6596278 - N/A

M. Citation No. 6596279 - Apex stipulates that the guardrails on the scales were not "mid-axle height" of the largest piece of equipment that uses the scales. However, Apex contends that the condition was not reasonably likely to cause an injury. Apex further contends that the scales are not a "roadway" as contemplated by 30 C.F.R. § 56.9300(b).

9. Apex Quarry, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.

10. Apex timely abated all citations at issue.

Jt. Ex. 1; *see also* Tr. 11 re stipulation 10.

## III. Findings of Fact and Legal Analysis

Respondent is a limited liability company that operated a small limestone quarry in White Plains, Kentucky. In December of 2009, when the contested citations were issued, the mine was owned and operated by Todd Harris. Tr. 168. Harris had just taken control of Apex following a buyout of his partner, Leslie Strong. Harris alleges that Strong defrauded Apex and third parties, placing the company in a "negative cash flow situation." Tr. 168. Under Harris' management, Apex's financial troubles were exacerbated when Respondent incurred a series of MSHA citations and proposed penalties. *Id.*

In 2011, Harris represented Apex in an unrelated civil penalty case before the undersigned. In those proceedings, Respondent contested a penalty of $19,632 on the grounds that the size of the penalty would prevent him from remaining in business. *Apex Quarries, LLC*, 33 FMSHRC 3158-59 (Dec. 20, 2011) (ALJ McCarthy). Because Respondent did not provide audited financial statements as requested by the bench, I found that Respondent had failed to meet its burden of proof on that issue. *Id.* at 3162-63. After review of that record, I ordered Respondent to pay a reduced total penalty of $9,971 in 60 equal installments of $163.13.[5]

Unable to manage outstanding tax liabilities to the Kentucky Department of Revenue, however, Apex ceased operations in September 2011. Tr. 171. In March of 2012, Respondent sold all its mining equipment, real estate, and permits to Apex Materials, Inc., an independent limited liability company. Tr. 171, 172. Respondent, however, did not dissolve Apex Quarry, LLC on the advice of Respondent's accountant. *Id.*

### A. Citation No. 6596269

Citation No. 6596269 alleges a non-S&S[6] violation of 30 C.F.R. § 46.3(a) and states that, "[a] review of the training plan revealed that the new miner training section of the plan did not have the required hours, to total the 24 hours needed. The plan showed 12 hours total in the time required." P. Ex. 1.

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[5] According to MSHA's Mine Data Retrieval System, Respondent is delinquent on all citations issued after November 2007 for which a penalty has been assessed. *See* Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), http://www.msha.gov/drs/drshome.htm (Apex Quarry, LLC ("1518478")).

[6] The Mine Act defines 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). 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).

The violation is alleged to affect one person and to be a result of moderate negligence. *Id.* Hollis found that the operator's negligence was mitigated by the fact that the violation was an oversight in an otherwise valid plan. Tr. 36. The citation further alleges that no injury was likely to result from the bookkeeping error. P. Ex. 1.; *see also* Tr. 35. The Secretary proposed a penalty of $100.

30 C.F.R. § 46.3(a) provides that an operator "must develop and implement a written plan, approved by [MSHA] under either paragraph (b) or (c) of this section, that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training." To receive MSHA approval, a training plan can be submitted the "Regional Manager, Educational Field Services Division, or designee, for the region in which the mine is located." 30 C.F.R. § 46.3(c). Alternatively, a plan is assumed to be approved if it contains, at minimum, the following information:

> 1) The name of the production-operator or independent contractor, mine name(s), and MSHA mine identification number(s) or independent contractor identification number(s); 2) The name and position of the person designated [to be] responsible for the health and safety training at the mine. This person may be the production-operator or independent contractor; 3) A general description of the teaching methods and the course materials that are to be used in the training program, including the subject areas to be covered and the approximate time or range of time to be spent on each subject area; 4) A list of the persons and/or organizations who will provide the training, and the subject areas in which each person and/or organization is competent to instruct; and 5) The evaluation procedures used to determine the effectiveness of training.

30 C.F.R. § 46.3(b).

Respondent does not deny the paperwork violation, but claims that the inspector did not take into account additional mitigating circumstances. Tr. 38. Respondent highlights Hollis' testimony on cross-examination that during his inspection, he did not discover any miner who lacked the requisite training. Tr. 141.

It is clear from the record that the bookkeeping omission constitutes a violation of section 46.3(a). Pursuant to 30 C.F.R. § 46.5, new miners must be provided twenty-four hours of mandatory training. Respondent's training plan did not account for half of the required training in contravention of this regulatory requirement. Even assuming that additional mitigating factors exist, as Respondent contends, the Secretary has proposed the minimum penalty for this paperwork violation. Accordingly, the Citation and $100 penalty are affirmed.

## B. Citation No. 6596268

Citation No. 6596268 alleges a non-S&S violation of 30 C.F.R. § 56.12032. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The Citation specifically alleges that "[t]he breaker box located in the foreman's office is absent a breaker/ or dummy breaker in the box. The breaker or dummy breaker is helpful in isolating energized components from mines [sic] who may open the box." P. Ex. 2. The Citation further alleges that an injury would be unlikely to result from this condition, but if an injury occurred, the injury could reasonably be expected to be fatal assuming the miner was wet or standing in water. *Id.; see also* Tr. 42. Finally, the Citation alleges moderate negligence, with one person affected. P. Ex. 2. The Secretary has proposed a penalty of $425.

The circuit breaker box in question appears similar to the type commonly found in residential buildings. *See* P. Ex. 2B. The breaker box grants easy access to the breaker switches, while preventing access to the electrical components. Two vertical rows of metal knockouts provide potential slots for additional breakers to be installed. *Id.* The offending hole in the breaker box at issue was partially filled by a breaker, leaving only a small gap. *Id.*

Hollis testified that the door to the breaker box was closed and located indoors, in an "out-of-the-way place," and therefore a miner would not come into contact with energized components "without putting some effort into it." Tr. 40. Hollis explained that the purpose of the cover plate was to prevent inadvertent contact with electric components and to protect the electrical equipment from "becom[ing] compromised . . . by moisture . . . animals . . . birds, [or] wasps . . . making nests" in the electrical housing. Tr. 103-04.

After carefully examining the evidence before me, I conclude that the Secretary has not met his burden to establish a violation of section 56.12032. The standard only requires that a cover plate be installed which, according to Hollis, should be capable of preventing inadvertent contact and environmental hazards. Although Hollis believed that the presence of a dummy breaker would be "helpful," the cited standard makes no mention of a dummy breaker and the standard does not require both a protective door and dummy breaker.[7]

Given the small size of the gap and the fact that Respondent kept the breaker box closed when not in use, I find that the breaker box door effectively guards against the risks outlined by Hollis and thus serves as a cover plate for the purposes of section 56.12032. Accordingly, this Citation and its associated penalty are vacated.

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[7] I note that the Secretary has previously maintained that a door can serve as a cover plate under section 56.12032. *Lakeview Rock Products, Inc.*, 18 FMSHRC 1504, 1506-07 (Aug. 1996) (ALJ) (finding a violation of the standard where the door to an electrical junction box was left ajar); *Essroc Cement Corp*., 33 FMSHRC 459, 465-66 (Feb. 2011) (ALJ) (same).

## C. Order No. 6596269

Order No. 6596269 alleges a violation of 30 C.F.R. § 46.7(a) and states:

> Mr. Joey Peterson, haul truck driver, had not received adequate task training to operate the truck. When Mr. Peterson was asked to demonstrate the emergency steering function of the truck, he was unable to. When Mr. Peterson was asked how long he had been operating the truck he stated "this was his first day on that truck[.]" The mine operator was aware of the Part 46 training requirements. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

P. Ex. 3. The cited standard provides that, before a miner performs a new task, the operator "must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program." 30 C.F.R. § 46.7(a).

The Order is alleged to be significant and substantial, to wit, reasonably likely to result in an injury that would reasonably be expected to be fatal, and the result of high negligence, with one person affected. P. Ex. 3. The Secretary has proposed a penalty of $7,774.

During the inspection, Hollis flagged down a haulage truck and proceeded to question the driver about the truck's safety features. Tr. 46. The truck driver, Joey Peterson, answered all of Hollis' questions correctly, but was unable to engage the emergency steering function when asked to do so. *Id.;* Tr. 143. On this fact alone, Hollis determined that Peterson had not received adequate task training.

Hollis placed little importance on the fact that this was the first day that Peterson had been assigned to the haulage truck, and because the Order issued at 11:55 a.m., Peterson had driven the truck for only several hours. Tr. 47; P. Ex. 3. More importantly, Hollis appears to have completely disregarded the fact that Respondent had a record of providing the appropriate training to Peterson, but Hollis did not record this fact in his inspection notes or in the Order's narrative. Hollis testified, "I checked the records. But, again, when you ask a man to demonstrate something and he can't demonstrate it, the records is the records and the demonstration is the demonstration." Tr. 142.

Peterson's failure to demonstrate a single safety feature on a vehicle that he had only been operating for several hours, does not, in itself, prove that Respondent failed to provide training required under section 46.7(a). Had Peterson been unfamiliar with multiple safety features or had other miners also failed to demonstrate knowledge of the emergency steering function, perhaps an inference could be drawn that Respondent's training regime was incomplete

or inefficient. Alternatively, Hollis could have attempted to determine the content of Respondent's new task training for this particular vehicle. Instead, Hollis' inquiry ended prematurely and the Secretary has been left to make a case on an incomplete set of facts that falls far short of meeting his burden of proof.

Accordingly, I find that the Secretary has failed to meet his burden of proof to establish a violation of 30 C.F.R. § 46.7(a). This Citation and its associated penalty are vacated.

**D. Citation No. 6596270**

Citation No. 6596270 alleges a violation of 30 C.F.R. § 56.14101(a)(2) and states:

> The parking break [sic] provided on the WABCO #3 35 ton haul truck was not maintained in a functional condition. The parking brake would not hold the truck either empty or loaded on the steepest grade it is required to traverse in the mine.

P. Ex. 4. The cited standard provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2).

The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 4. *Id.* The Secretary proposed a penalty of $425.

Hollis testified that when the truck was parked on the steepest road at the mine and the parking break was engaged, the vehicle rolled back approximately five or six feet. Tr. 55-56. Hollis expected that any injury to a miner hit by the large haulage truck would likely be fatal. Tr. 58-59. Respondent has stipulated to the violation, but argues that MSHA regulations require redundant breaking mechanisms. Tr. 143.

Given the parties' stipulation that the truck's parking brake was not operational, I find a violation of the cited standard. The inspector took into account the redundant braking mechanisms on the truck when determining that the violation would be unlikely to result in an injury. Tr. 53. This appears contrary to analogous Commission precedent in the S&S context,[8] but under other extant Commission precedent, I lack authority to modify the non-S&S

[8] C*f. Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133 (7th Cir. 1995); *see also Amax Coal*, 18 FMSHRC 1355, 1359 (Aug. 1996); *Amax Coal*, 19 FMSHRC 846, 850 (May 1997); *Big Ridge,* 35 FMSHRC 1525 (June 2013); *Cumberland Coal*, 33 FMSHRC 2357, 2369-70 (Oct. 2011), *aff'd Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013).

designation and make it S&S.[9] Although Respondent appears to contend that additional braking mechanisms also mitigate negligence, the presence of additional safeguards already required under the Act or MSHA regulations do not mitigate Respondent's duty to comply with a mandatory health or safety standard requiring operational parking brakes.

Additionally, Respondent contends that the violation is not likely to result in a fatal injury. Jt. Ex. 1. In explaining the "fatal" designation, Hollis testified that parking brake failures have resulted in fatalities in the past and that he was aware of instances where miners have died while working under unspecified vehicles. Tr. 58-59. Hollis' testimony on this point, however, was vague and generic. The inspector did not provide an example in which a miner at Apex would face a reasonable likelihood of injury, considering the type of vehicle cited, its use at this particular mine, and the location where it was normally parked or serviced. Instead, he proposed a scenario, unsupported by any factual basis, where a miner would be "climbing around . . . [and] crawling under [the vehicle], trying to work on it" while parked on an incline. Tr. 59.

Despite the paucity of specific evidence on this issue, I find that the hazard was reasonably likely to contribute to a serious and possibly fatal injury. The size of the Wabco #3 truck, capable of carrying 35 tons, substantially increases the likelihood that the failure of the parking brake to hold on the mine's steepest incline contributed to a run-away truck hazard that would reasonably result in a fatal crushing injury. In addition, I take administrative notice of the fact that MSHA has designated § 56.14101(a) in its "Rules to Live By" program as one of the most commonly cited standards in fatal accident investigations at metal/non-metal mines. MSHA, FATALITY PREVENTION - RULES TO LIVE BY, available at www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp (last accessed Jan. 23, 2014). Accordingly, Citation No. 6596270 is affirmed, as written, and Respondent is assessed a penalty of $425.

**E. Citation No. 6596275**

Citation No. 6596275 alleges a violation of 30 C.F.R. § 56.14101(a)(2) and states that "[t]he parking break [sic] on the WABCO #3 haul truck would not hold the truck on the steepest grade it [is] required to traverse in the mine. The truck was tested loaded and empty and the parking brake would not hold in either case." P. Ex 9.

For the reasons set forth in the previous citation, Citation No. 6596275 is affirmed and a penalty of $425 is assessed against Respondent.

**F. Citation No. 6596271**

Citation No. 6596271 alleges a violation of 30 C.F.R. § 56.14100(b) and states:

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

> The lights on the Kawasaki 770 Z front-end loader are not working. The loader is used to feed the plant hopper and the lights would be helpful in the event of rail or dusty conditions.

P. Ex. 5. The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 5. The Secretary has proposed a penalty of $425.

Inspector Hollis testified that the lights on the front-end loader provided two important safety functions: 1) to aid the operator's vision in inclement weather, low light, or dusty conditions, and 2) to warn miners and other traffic of the vehicle's approach. Tr. 62-63. Hollis determined that an injury was unlikely because the mine operates during daytime hours, but added that the mine would likely continue normal operations in rainy weather or dusty conditions. Tr. 64-66.

Respondent stipulated that the headlights were not operational at the time of the inspection, but maintains that the violation would not contribute to a hazard that would result in a fatal injury. Jt. Ex. 1. Hollis justified the "fatal" designation because he was concerned that "someone could have been run over and killed." Tr. 66. Hollis testified that there were miners on foot and miners operating other vehicles in the area where the loader was operating. Tr. 64.

Similar to the analysis in the parking brake citations above, I find that if an exposed miner, particularly a miner traveling on foot, was hit by a large vehicle like the front-end loader, the resulting injury would likely be fatal. Furthermore, Section 56.14100(b) has been recognized in MSHA's Rules to Live By III as a major contributor to fatalities at metal/non-metal mines. MSHA, RULES TO LIVE BY III - PREVENTING COMMON MINING DEATHS, *available at* www.msha.gov/focuson/RulestoLiveByIII/MNMStandards.asp (last accessed January 23, 2014). Accordingly, Citation No. 6596271 is affirmed, as written, and Respondent is assessed a penalty of $425.

## G. Citation No. 6596273

Citation No. 6596273 alleges a violation of 30 C.F.R. § 56.14100(b) and states that "[t]he lights on the WABCO #3 haul truck are not working. The lights would be helpful in the event of rain or dusty conditions." P. Ex. 7. The non-S&S Citation alleges that an injury was unlikely to occur from this condition, but if an injury did occur, it could reasonably be expected to be fatal, with one person affected as a result of moderate negligence. *Id.* The Secretary has proposed a penalty of $425.

For the reasons set forth in the previous citation, Citation No. 6596273 is affirmed and a penalty of $425 is assessed against Respondent.

## H. Citation No. 6596272

Citation No. 6596272 alleges a violation of 30 C.F.R. § 56.14107(a) and states:

> The tail pulley guard on the return conveyor has been damaged and has exposed the moving machine parts (fluted tail pulley) to passing miners. There are footprints in the mud where miners have passed by the exposed parts. If the condition is continued [sic] to exist it is reasonably likely that a miner could contact the moving parts. If a miner accidentally contacted the parts, he/she could receive severe possibly permanently disabling injuries.

P. Ex. 6. The cited standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a).

The S&S Citation alleges that the cited condition was reasonably likely to contribute to a hazard that would result in an injury and that such injury would reasonably be expected to be permanently disabling, with one person affected as a result of moderate negligence. P. Ex. 6. The Secretary has proposed a penalty of $946.

Respondent does not contest the fact that the tail pulley guard was damaged, but maintains that the violation was not reasonably likely to result in injury. Jt. Ex. 1. Respondent points out that the tail pulley guard was in place, but that one corner of the guard had been damaged or bent back, thereby exposing the flutes on the tail pulley. Tr. 144-45; *see also* P. Ex. 6B. Respondent also asserts that the area was not accessed often, thereby reducing the likelihood that a miner would come into contact with the unguarded tail pulley. *Id.*

When asked why the citation was designated reasonably likely to result in an injury, Hollis replied:

> Well, there was exposure or evidence that someone had been in the area by the footprints in the mud. The location of the pulley, the person could easily get within a seven-foot criteria on 14107(a) as far as guarding moving machine parts. So if the condition would have been allow[ed] to continue, it's reasonably likely someone at one time could have contacted those machine parts and got into them.

Tr. 82.

Hollis further testified that a ground man may patrol the area to ensure that the machinery is operational and to perform routine maintenance or clean up. Tr. 83. Hollis also testified, however, that this particular tail pulley was self cleaning and "doesn't get a material

buildup on it like a smooth tail pulley does," and conceded that the footprints could have been left by a miner greasing the bearing during a pre-shift examination. Tr. 78-79; 145.

Under the Mine Act, an S&S violation is 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). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (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. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra*, 52 F.3d at 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). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co.* (*U.S. Steel III*), 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co.* (*U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984).

The tail pulley was mostly guarded, as shown in the inspector's photograph. *See* P. Ex. 6B. The gap in the damaged guard appears relatively small and positioned in such a way that a miner would be unlikely to come in contact with the fluted tail pulley without reaching into the gap. I find it unlikely that a ground man would come in contact with the unguarded section while patrolling the area. Rather, only a miner working in very close proximity to the tail pulley while the machinery was operational would likely be exposed to the hazard. The Secretary has offered no evidence to establish that a miner would ever be subject to these conditions while the machinery was running.

Therefore, I find that the Secretary has failed to meet his burden of proof to show that, assuming continued mining operations, the violative condition contributes to a hazard that was reasonably likely to result in a serious injury. Accordingly, the Citation is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. Applying the criteria set forth in section 110(i) of the Act, I assess a penalty of $190 to reflect the lower level of gravity.

## I. Citation No. 6596274

Citation No. 6596274 alleges a violation of 30 C.F.R. § 56.14103(b) and states:

> The door glass (right side sitting in the seat) of the WABCO #3 haul truck is broken with sharp raised edges. The truck operator sits within 3 feet of the sharp edges. If the condition is allowed to exist it is reasonably likely that the operator would contact the sharp raised edges, receiving injuries requiring time to heal. The truck is used to haul material from pit to plant.

P. Ex. 8. The cited standard provides that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment." 30 C.F.R. § 56.14103(b).[10]

The S&S Citation alleges that it was reasonably likely that an injury would result from the cited condition and that such injury would reasonably be expected to result in lost workdays or restricted duty, with one person affected. P. Ex. 8. Hollis determined that the alleged violation was the result of low negligence after he was informed that Respondent had ordered a replacement window. Tr. 99, 178. The Secretary has proposed a penalty of $285.

Respondent stipulated to the fact that the window glass was broken, but argues that the hazard was not reasonably likely to cause injury. Hollis testified that the broken window was approximately three feet to the right of the driver's seat. Tr. 92. While fractured, the window remained mostly intact, with the exception of a portion of the top right quadrant. P. Ex. 8B. When asked how an operator would come in contact with the broken glass, Hollis testified, that "getting in the truck, the person could possibly come in contact with the glass." Tr. 92. Upon questioning from the undersigned, Hollis conceded that an operator would enter the cab from the left side, not the right side where the window was broken. Tr. 92, 94.

Next, Hollis testified that the operator of the truck might come in contact with the glass when being jostled around the cab while operating the truck on the mine's bumpy roadways. Tr. 95. Hollis, however, conceded that if wearing a seatbelt, as required, the operator would be less likely to extend his arm to the window three feet away in an effort to regain balance. Tr. 147. Hollis also testified that the operator might place a water jug or lunch bucket on the right side of the cab or that a buddy seat might be installed on the right side to accommodate an additional passenger. Tr. 97. Hollis, however, could not remember if such conditions existed in the cited vehicle. *Id.*

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[10] The Secretary does not claim that the broken window impaired the operator's visibility or exposed the operator to adverse environmental conditions.

Harris and Hollis gave conflicting testimony as to the composition of the broken window. Section 56.14103(a) requires that all windows of self-propelled mobile equipment should be made of "safety glass or material with equivalent safety characteristics."[11] Harris testified that the window was made of plastic plexiglass. Tr. 178. Hollis, however, claimed that it was not plexiglass, but what he called "door glass" or "windshield glass." Tr. 146. Inspector Hollis's characterization of the glass did not draw any distinction between tempered glass or laminate glass, which may react differently when shattered and pose a different level of risk of cuts or lacerations. Both parties do agree, however, that the broken window did have some sharp edges. Tr. 100, 178.

I find that the Secretary established that the safety glass posed a hazard to the operator of the vehicle under the cited standard and therefore the Secretary established a violation of section 56.14103(b). Based on the existing record, the risk of such hazard, however, appears to be remote. The most likely scenario set forth by Hollis was that the mine's bumpy roads would jostle the operator, causing him to reach out and cut his arm on the broken window.[12] Tr. 95. For a vehicle operator wearing a seat belt to touch the broken glass, the driver's arm would have to extend three feet and come in contact with the top right quadrant of the window. Such a location does not appear a likely candidate for an operator to grasp in an attempt to regain balance. *See R S & W Coal Co. Inc.*, 30 FMSHRC 100, 101-02 (Jan. 2008) (ALJ) (violation was not S&S when the vehicle operator was unlikely to come in contact with the broken section of the driver-side window). Furthermore, I credit Harris that the window was made of plastic plexiglass over Hollis' vague characterization of the glass. Since I find that the window was plastic, the chance of lacerations was substantially decreased. *See Johnson Paving Co., Inc.*, 31 FMSHRC 1246, 1258-59 (Oct. 2009) (ALJ) (citation vacated where judge found that "[s]afety glass typically cracks rather than shatters. It is common knowledge that such cracks do not necessarily produce edges capable of cutting a person's hand.").

Accordingly, Citation No. 6596274 is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. Applying the criteria in Section 110(i), a civil penalty of $100 is assessed for this violation.

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[11] Safety glass is defined as either tempered glass "that when struck breaks into relatively harmless granules rather than large jagged pieces" or laminated glass. *Webster's Third New Int'l Dictionary (Unabridged)* 1998 (1993). Laminate glass is a "plate consisting of two or more sheets of glass with plastic sheeting bonded between to resist shattering." *Id*. at 1267.

[12] The other scenarios set forth by Hollis appear to be mere conjecture with little or no foundation based on the actual condition or use of the truck in question. Tr. 92 (contact with glass when entering vehicle), or Tr. 97 (contact with glass when reaching for a water jug or a passenger riding in a buddy seat).

## J. Citation No. 6596276

Citation No. 6596276 alleges a violation of 30 C.F.R. § 56.12032 and states:

> There is not a knock-out plug/cover plate in place on the side of the portable impact safe start box located in the motor control center. The plug/plate is helpful in maintaining the inner integrity of the box and provides a level of protection.

P. Ex. 10. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R. § 56.12032. The non-S&S citation alleges that an injury would be unlikely to occur from this condition, but if an injury did occur, such injury would reasonably be expected to cause lost workdays or restricted duty, with one person affected as a result of moderate negligence. P. Ex. 10. The Secretary has proposed a penalty of $127.

Respondent has stipulated to the violation, but argues that the hazard would not result in injury. Jt. Ex. 1. Unlike Citation No. 6596269 discussed above, the motor control start box did not have a door or cover that would protect against inadvertent contact or environmental hazards. Exposed electrical components clearly pose a risk of injury, even if such risk is unlikely, as the Secretary maintains. Accordingly, the Citation is affirmed, as written, and I assess a penalty of $127.

## K. Citation No. 6596277

Citation No. 6596277 alleges a violation of 30 C.F.R. § 56.14100(a) and states:

> Adequate pre-operational checks of mobil [sic] equipment are not being conducted at the mine. This is evident by the amount of citations issued on equipment conditions. A through [sic] pre-operational check helps identify conditions that could be hazardous to equipment operators and notifies the mine operator of the conditions.

P. Ex. 11. The cited standard provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). The S&S Citation alleges that it is reasonably likely that an injury would result from the cited practice and that the injury would reasonably be expected to be fatal, with one person affected as a result of moderate negligence. P. Ex. 11. The Secretary has proposed a penalty of $2,106.

Pre-operational safety examinations should be performed each shift before a piece of equipment is put into operation. Tr. 113. Hollis testified that Harris told him that pre-operational examinations were performed on all vehicles in accordance with the standard. Tr.

111. In addition, the operators of the equipment produced examination checklists documenting that the examinations were performed and that "everything was okay." Tr. 116-17. Hollis testified that the checklists were "good forms" and included a detailed list of safety features that should be examined. Tr. 117-18.

While section 56.14100(a) does not specifically include an adequacy requirement, Hollis testified that he believes the standard was violated because the mobile equipment operators did not document the violative conditions above regarding inoperative parking brakes and headlights. Tr. 112. Hollis testified that equipment operators must do more than pay lip service to checking the oil and fluids. Rather, they must establish that they have checked all safety-related features, such as brakes and steering, prior to engaging a vehicle. *Id.*

I note that here were five citations issued for defects in mobile equipment: two citations for inoperative headlights, two citations for inoperative parking brakes, and one citation for a broken window. Citation No. 6596274 was documented by mine management and a replacement window had been ordered at the time the citation was issued. Tr. 178. Accordingly, that Citation does not demonstrate that the pre-operational examination was inadequate. Similarly, the Citations for the faulty parking brakes are not very persuasive because the vehicle must be put into operation and driven to the mine's steepest gradient before the violative condition can be tested or observed. 30 C.F.R. § 56.14101(a)(2) requires that parking brakes be capable of holding the equipment with the "typical load on the maximum grade it travels." To observe this condition, the vehicle must be loaded then driven to the part of the road with the steepest grade. Notably, inspector Hollis did not discover the faulty parking brakes by visual inspection, but by asking the vehicle's operator to attempt to engage the parking brake on the steepest grade at the mine. Tr. 56. There was no testimony adduced at hearing about whether the condition would be apparent to an operator *before* the equipment was put into operation.[13]

On the other hand, I find that it unlikely that the headlights on two different vehicles became inoperable after pre-operational examinations were concluded. Rather, it appears that the equipment operators were not checking the functionality of the headlights during the pre-operational examination. Had a full examination been performed, the problems should have been obvious to a competent, well-trained miner. *Cf. Sunbelt Rentals, Inc.*, 35 FMSHRC 3208 (Sep. 2013) (ALJ McCarthy), *petition for rev. granted*, Unpublished Order dated Jan. 13, 2014 (summary dismissal granted where facts established that a properly recorded pre-shift examination by a competent examiner failed to note a *latent hazard)*. Although section 56.14100(a) does not require that examinations be "adequate," where the violative condition is patently obvious or especially egregious, the failure to note such condition during the examination is tantamount to the failure to conduct a pre-operational examination. *See Cemex,*

[13] I note that the standard requires pre-operational examinations to be performed by the vehicle operator, not a certified mechanic. As such, the complexity of the examination is controlled by what a competent vehicle operator can reasonably be expected to perform prior to operation of the vehicle.

*Inc.*, 32 FMSHRC 1897, 1903-04 (Dec. 2010) (ALJ) (discussing pre-shift workplace examinations under § 56.18002(a)). Accordingly, I find such a violation here with respect to the headlights on two separate trucks.

The two citations for inoperable headlights alone, however, do not warrant the S&S designation. As noted above, the deficiencies with the pre-operational examinations were not as extensive as inspector Hollis had determined when issuing the Citation because Hollis improperly considered the parking brake and broken window violations. Tr. 108.

Furthermore, I find that the gravity for this Citation should not exceed that of the headlight violations, Citation Nos. 6596273 and 6596271, which were not alleged to be S&S. While the decisions of other judges are not binding on the undersigned, I note that inspector Hollis's classification of the violations for inoperable headlights as non-S&S was in keeping with a long line of ALJ decisions finding the same. *See Freeman Rock, Inc*., 28 FMSHRC 354, 358 (May 2006) (ALJ Melick) (inoperable headlights violation was of low gravity); *Nelson Bros. Quarries*, 24, FMSHRC 980, 989 (Nov. 2002) (inoperable headlights did not pose a hazard under § 56.14100(b) when vehicle operated only during daylight hours) (ALJ Feldman); *Florida Rock Indus.*, 34 FMSHRC 745, 762-63 (Mar. 2012) (ALJ Zielinski) (citation for broken headlights was not S&S when operation of vehicle in darkness or reduced visibility was rare); *Walker Stone Co.*, 20 FMSHRC 1225, 1226 (Oct. 1998) (ALJ Manning) (violation for inoperable headlights "was not very serious" when vehicle only used in daylight hours); *Bob Bak Constr*., 19 FMSHRC 582, 605 (Mar. 1997) (ALJ Fauver) (judge credited inspector testimony that if the vehicle was only operating during daylight hours, the violation of § 56.14100(b) was not S&S); *Walker Stone Co.*, 20 FMSHRC 1218, 1222 (Oct. 1998) (ALJ Manning**)** (lack of headlights not S&S when vehicle operated during daylight hours). It is undisputed that the mine only operated during daylight hours and that mines such as Apex Quarry typically cannot operate in heavy rain. Tr 64-65. As the failure to check headlights during pre-operational examinations of mobile equipment contributes to the same hazard as the citations for inoperable headlights, I modify the citation to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

With regard to negligence, I find that Apex was performing and documenting pre-operational examinations and its pre-operational checklist exceeded industry standards. As inspector Hollis noted, Respondent provided equipment operators with a comprehensive pre-operational checklist that required operators to check safety features. According to Hollis, Apex's checklist appears to have exceeded normal industry standards and thus mitigated Respondent's negligence. In these circumstances, I affirm the inspector's finding of moderate negligence.

As such, Citation No. 6596277 is modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely;" to delete the significant and substantial designation. Based on the reduction in gravity, I find that a reduced penalty of $425 is appropriate under section 110(i) of the Act.

## L. Order No. 6596278

Order No. 6596278 alleges a violation of 30 C.F.R. § 46.11(a) and states:

> Three contract miners working at the mine have not received the required site-specific hazard training. The mine operator was aware of the training requirements. The mine operator must withdraw the contract miners until they have received the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

P. Ex. 12. The section 104(g)(1) Order is alleged to be significant and substantial because the training violation is reasonably likely to result in an injury that would be fatal, with three people affected as a result of high negligence. P. Ex. 12. The Secretary has proposed a penalty of $9,882.

The cited standard provides that the operator "must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards . . . . The training must address site-specific health and safety risks, such as unique geologic or environmental conditions, warning and evacuation signals, evacuation and emergency procedures, or other special safety procedures; and recognition and avoidance of electrical and powered-haulage hazards, and hazards resulting from traffic patterns and control or in restricted areas. 30 C.F.R. § 46.11(a), (d). Unlike other training requirements, MSHA regulations are much more lenient in determining what constitutes training under this section. Operators need only alert miners of site-specific hazards by means of "written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means." 30 C.F.R. § 46.11(e). Further, such training is "not required for any person who is accompanied at all times by an experienced miner who is familiar with hazards specific to the mine site." 30 C.F.R. § 46.11(f).

The record reveals that during the inspection, Hollis approached three contractors working near the plant in an area where vehicles were parked when not in use. Tr. 121. Hollis identified one of the contractors, Mark Bowles, as the supervisor or owner of the contracting company. Tr. 122-23. Hollis then asked each contractor if they had received site-specific hazard training "for contractors." They replied that they had not. *Id.*; Tr. 150. When Hollis requested that the mine superintendent produce records showing that the contractors had been given site-specific hazard training, he was unable to locate such records. *Id.* 122.[14] While the Order was

[14] It is not clear from the record if Respondent was required to maintain site-specific hazard training records for two of the contractors. Section 46.9 specifically exempts operators from having to maintain such records for maintenance or service workers, who do not work at a mine site for frequent or extended periods. *See* 30 C.F.R. § 46.2(g)(2). Two of the contractors were preforming maintenance on mobile equipment at the time that the Order was issued. Tr.

(continued...)

premised on Hollis' belief that the contractors had no familiarity with Apex Quarry, the inspector did not ask the contractors about their experience working at Apex Quarry. Tr. 123-24, 151.

Hollis maintains that even though the contractors may have been experienced, failure to provide site-specific hazard training to the contractors put them at risk of fatal injuries. Tr. 123-24. Hollis testified that the contractors should have received training regarding the hazards associated with "their exposure to the blasting activities, the traffic pattern activities, and other hazards associated with mine property." Tr. 125. On the other hand, Harris argues that the contractors did not need to receive site-specific hazard training because they were accompanied by an experienced miner with knowledge of the hazards specific to the area of the mine where the contractors were working. Harris argues that, in addition to his role as a contractor, Bowles was Respondent's employee and had experience working at the mine site. Tr. 150. Harris also testified that in addition to his job with Respondent, Bowles rents mining equipment to Respondent. *Id.*; Tr. 160-61.

Pursuant to subsection 46.11(f), an operator does not need to provide site-specific hazard training when miners are accompanied by an experienced miner familiar with the hazards specific to the mine site. It is undisputed that the contractors were under the supervision of Bowles, an experienced miner. Tr. 123. Harris maintains that Bowles worked both in his capacity as a rank-and-file miner and as a contractor renting equipment to Respondent. Tr. 150, 160-61. Although Respondent has not provided additional evidence concerning Bowles' relationship with Respondent, the Secretary has presented no evidence in support of Hollis' allegation that Bowles was unfamiliar with the mine site and its hazards. In fact, during the inspection, Hollis did not even inquire as to the contractors' experience or familiarity with Apex Quarry and the site-specific hazards to which they were exposed. Tr. 151.

Even assuming, *arguendo*, that Bowles was not an experienced employee of Apex Quarry, the Secretary has not established that there were site-specific hazards that the contractors might be exposed to, but of which they were unaware. Section 46.11(a) only requires that site-specific hazard training address hazards to which the contractors may be exposed. Hollis testified that there were at least two potential hazards at Apex Quarry that the contractors should have been made aware of: blasting activities and traffic pattern activities.

There is insufficient evidence to support Hollis' contention that the contractors were exposed to blasting hazards. The contractors were working at a ready line near the plant, which by Hollis' own estimation was between 150 and 200 yards from the pit. Tr. 57, 121. Hollis could not recall if the mine was blasting while the contractors were on mine property. Tr. 125. Further, the Secretary has not proffered any evidence that the contractors would be required to enter the pit where the operator was engaged in blasting activities. Given the contractors'

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[14](...continued)
127. There was no testimony regarding the amount of time the contractors spent at the mine. Tr. 151.

considerable distance from the pit and limited work area, I cannot assume without any supporting evidence, that the contractors were in an active blast area and thus required to have site-specific hazard training to make them aware of the potential hazards associated with blasting.

As to the Hollis' claim that the contractors were subject to hazards from their exposure to traffic pattern activities, I find that the severely limited scope of Hollis' investigation failed to support his conclusion that the contractors were not made aware of such hazards. Hollis' allegations are based primarily on the response of the contractors when asked by Hollis if they had received site-specific training for contractors. While the contractors replied that they had not received such training, it is unclear if the contractors understood the special meaning of the term "training" in the context of section 46.11. While most training in the MSHA context consists of highly standardized formal instruction, section 46.11 has a significantly more expansive definition of what constitutes "training" than what one normally would assume.[15]

As noted, under the regulation, operators can provide training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means to alert persons to site-specific hazards. 30 C.F.R. § 46.11(e). Thus, a violation of the standard does not rest simply on whether a miner received formal instruction, but rather whether the operator took appropriate steps to alert miners of site-specific hazards. The inspector, however, did not inquire as to the contractor's familiarity with the mine site or whether they were made aware of any hazard particular to this mine. Because the inspector did not examine other means of "training" that MSHA has deemed appropriate, Hollis's inquiry did not go far enough to establish a violation of the standard.

Thus, after consideration of all the circumstances in the existing record, I find that the Secretary has failed to establish a violation of 30 C.F.R. § 46.11(a). Accordingly, Order No. 6596278 and its associated civil penalty are vacated.

## M. Citation No. 6596279

Citation No. 6596279 alleges a violation of 30 C.F.R. § 56.9300(b) and states:

> The rails of the truck scales are not at least mid-axle height of the largest piece of equipment that uses them .. [sic] The existing rails are approximately 4-5 inches from the deck floor. The mid-axle height of the equipment is about 17-19 inches. There is a 3-3 ½ foot vertical drop on one side of the scales. If a truck over turned on this drop is it [sic] reasonably likely that the operator could receive injuries requiring time to heal. The scales are used everyday to weigh trucks.

[15] Even inspector Hollis was hesitant to classify informal discussion with miners and mine management as "training." Tr. 199.

P. Ex. 13. The cited standard provides that "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b). The cited condition is alleged to be a significant and substantial violation of the standard because it contributed to a tip-over hazard that was reasonably likely to result in a lost-workdays or restricted-duty injury, with one person affected as the result of moderate negligence. P. Ex. 13. The Secretary has proposed a penalty of $634.

Respondent concedes that the truck scale did not have guards or berms of mid-axle height, but contends that the hazard was not reasonable likely to result in injury. Jt. Ex. 1. Further, Respondent argues that the truck scale does not constitute a "roadway" for the purposes of section 56.9300(b). *Id.*

The facts concerning Citation No. 6596279 closely mirror those in *Knife River Corp.*, 34 FMSHRC 1109 (May 2012) (ALJ McCarthy). At issue in *Knife River* was a truck scale equipped with a 10-inch rub rail and a 41-inch drop-off that was cited under section 56.9300(b). *Id.* at 1111. I found, as a matter of fact and law, that the Secretary failed to establish that the Paetsch pit truck scale at issue in that case was a roadway or part of the mine's roadways. *Id.* at 1122.[16] My rationale was based on the fact that the scale was "a piece of equipment designated and used for a specific purpose. It was not designed to serve as a roadway and does not share roadway features, such as banks, that are envisioned in section 56.9300. Not all traffic must travel the scale to reach a particular destination and the scale is not integral to the adjacent roadway's function." *Id.*

In this case, Hollis' description of the truck scale's function and use is more akin to the limited-use equipment described in *Knife River* than to the bridges, ramps, and benches that the Commission has found to be extensions of a mine's roadway system in the context of a similar regulation concerning elevated roadways at coal mines. *See El Paso Rock Quarries*, 3 FMSHRC 35, 36 (Jan. 1981) (bench is an elevated roadway); *Burgess Mining & Constr. Corp.*, 3 FMSHRC 296 (Feb. 1981) (bridge is an elevated roadway); *Capitol Aggregates, Inc.*, 4 FMSHRC 846 (May 1982) (ramp is an elevated roadway); *see also* 30 C.F.R. § 77.1605. Hollis testified that a "truck would not have to cross over the scales to leave the property. There was a road right beside the scales . . . and if [the truck] didn't need weigh[ing] or wasn't weighed, [the truck driver] could go around the scales." Tr. 131. Further, there was only one vehicle on the scale at a time and the vehicle would be traveling "very, very slow," less than two to three miles an hour. Tr. 134, 136, 152.

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[16] Additionally, I found in *Knife River* that the Secretary's broad definition of a roadway encompassing truck scales was unreasonable, inconsistent with the regulatory language and history, and unworthy of deference. *Knife River Corp., supra*, 34 FMSHRC at 1127-31. In this case, the Secretary has declined to brief the issue or set forth his rationale for interpreting section 56.9300(b) to include truck scales. In the interest of brevity, my legal findings in *Knife River* regarding the scope and plain meaning of the standard are incorporated by reference.

Upon examination of the use and function of the truck scale at issue, I find as a matter of fact that the truck scale at Apex Quarry is not a roadway or part of the mine's roadways under section 56.9300. Furthermore, I incorporate by reference the legal analysis set forth in *Knife River* establishing that a truck scale is not a "roadway" under the clear and unambiguous meaning of the standard. Accordingly, Citation No. 6596279 and the associated proposed penalty are vacated.

## VI. Penalty Assessment

Section 110(i) of the Mine Act sets forth the following criteria to be considered in determining an appropriate civil penalty:

> 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 and violation.

Apex is a small quarry, employing no more than eight employees at any given time. Tr. 170. The parties have stipulated that Respondent timely abated the violations in good-faith. Tr. 11. The negligence and gravity factors have been addressed above with respect to each violation.

Both Respondent and the Secretary agree that Apex is no longer in the mining business. Tr. 10. Harris provided undisputed testimony that Apex has sold its assets and is no longer operational. Tr. 169. Harris further testified that he does not intend to reopen mining operations and is currently working as a contract mechanic. Tr. 172. Respondent, however, has not dissolved its corporate entity based on advice from its accountant. Tr. 171.

The Secretary contends that the section 110(i) criteria regarding the effect of a penalty on an operator's ability to continue in business is inapplicable to an operator who is already out of business. *Spurlock Mining Co.*, 16 FMSHRC 697 (Apr. 21, 1994). In *Spurlock*, the Commission declined to reduce a penalty where a mine ceased operations, but intended to reopen once sufficient financing was secured. *Id.* 700. The Commission, however, specifically declined to pass on whether it would be appropriate to reduce the penalty if a mine was permanently out of business. *Id.*

Respondent has offered no evidence demonstrating that Apex is permanently out of business. The company remains registered with the State of Kentucky as a corporate entity and Respondent has not been able to account for all of the $750,000 obtained through the sale of Apex's assets. Tr. 171-74. While a portion of this money is due to creditors, any remaining funds could be used by Apex to reenter the mining industry. As Respondent has not provided

any audited financial documentation showing what Apex is owed and what it owes it creditors, I cannot determine if Apex is unable to pay the penalties assessed.

Furthermore, although Apex Quarry, LLC may have sold its assets, the mine continues production under new ownership as Apex Materials, LLC. Tr. 172. In an apparent attempt to avoid paying MSHA penalties, Harris testified that he was advised to keep the Apex Quarry alive as a corporate entity to avoid personal liability for outstanding MSHA penalties. Tr. 171. The sale of a mine, however, does not absolve the owners from paying outstanding MSHA penalties, particularly in the successor or alter ego context. *See generally Performance Coal Co.*, 34 FMSHRC 587 (Mar. 2012) (ALJ) (approving settlement of outstanding proposed penalties to be paid by successor-in-interest); *Ember Contracting Corp.*, 33 FMSHRC 2742, 2758 (Nov. 2011) (ALJ) ("The Mine Act's concession to operators having difficulties in continuing their businesses does not reward those engaged in shell games.").

For the reasons set forth above, I decline to reduce the assessed penalties on account of Respondent's financial position. Accordingly, a total penalty of $2,642 is assessed against Respondent.

## VII. Order

**WHEREFORE**, it is **ORDERED** that Citation/Order Nos. 6596279, 6596268, 6596278 and 6596269 be **VACATED**. Citation Nos. 6596274, 6596277, and 6596272 are **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 Respondent pay a total penalty of $2,642 within thirty days of this decision.[17]

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

Distribution:

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Todd Harris, Apex Quarry, LLC, 1627 Cavanaugh Road, White Plains, KY 42464

/tjr

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
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January 23, 2014

| | | |
|---|---|---|
| JIM WALTER RESOURCES, INC., Contestant, | : | CONTEST PROCEEDING |
| | : | Docket No. SE 2012-681-R |
| v. | : | Order No. 8522884; 08/13/2012 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent. | : | Mine ID: 01-01401 Mine: No. 7 Mine |

## DECISION

Appearances: Carmen L. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner

David M. Smith, Esq. and Allen B. Bennett, Esq., of Birmingham, Alabama, for the Respondent

Before: Judge James G. Gilbert

This case is before me upon a notice of contest filed by Jim Walter Resources, Inc. ("JWR") following the issuance of an imminent danger order, Order No. 8522884, pursuant to section 107(a), 30 U.S.C. § 817(a), of the Federal Mine Safety and Health Act of 1977 (the "Act"). The parties presented testimony and evidence at a hearing held in Birmingham, Alabama.

### I. Stipulations of Fact

1. JWR operates the No. 7 mine, an underground coal mine located in Brookwood, Alabama, and the mine's operations affect commerce within the meaning and scope of the Federal Mine Safety and Health Act of 1977, as amended.

2. The mine is subject to the jurisdiction of the Act.

3. The administrative law judge and Federal Mine Safety and Health Review Commission have jurisdiction to hear this matter.

4. The mine is subject to regular inspections by the Mine Safety and Health Administration pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a).

5. On August 13, 2012, MSHA inspector Larry McDonald was at the No. 7 mine to conduct the rock dust survey on the No. 8 section of the mine.

6. JWR demonstrated good faith abatement.

7. JWR timely contested the imminent danger order in this proceeding and timely served its notice of contest to the Secretary of Labor.

## II. Background

JWR operates the No. 7 mine, an underground coal mine located in Brookwood, Alabama. *Stipulation* No. 1. The mine is subject to the jurisdiction of the Mine Safety and Health Act of 1977, as amended. *Id.*; *Stipulation* No. 2. The mine is also subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a), as well as five day spot inspections due to the quantity of methane liberated at the mine. *Stipulation* No. 4; Tr. 60, 65. The mine is considered a very gassy mine, liberating 20 million cubic feet of methane in a 24 hour period. Tr. 65. MSHA Inspector Larry McDonald was familiar with the mine, its history as a gassy mine, and previous ignitions that occurred in the mine. Tr. 65-72; Government's Exhibit (Gov. Exh.) 1.

On August 13, 2012, McDonald issued an imminent danger order under section 107(a) of the Act as the result of a buildup of methane in a roof cavity in Section 8 of the No. 7 mine. Gov. Exh. 9.

Section 107(a) of the Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a).

Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Act provides for the issuance of an order requiring the withdrawal of persons in areas of a mine who are exposed to such an imminent danger. "Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary's regulations." *Jim Walter Resources, Inc.*, 33 FMSHRC 3211 (December 2011) (ALJ). "This is an extraordinary power that is

available only when the 'seriousness of the situation demands such immediate action.'" *Id.* (citing *Utah Power & Light Co*., 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting Sen. Rep. No. 91-411, *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 215 (1975))).

The 107(a) order in this case stated as follows:

> Methane was allowed to accumulate in a high cavity on #8 section (MMU-008) between the #2 intake entry and the #3 intake belt entry, which is the long crosscut. This crosscut was located at spad #24394 in the #2 intake entry. The high cavity was approximately 165 foot [*sic*] in the crosscut from the #2 intake, [*sic*] There was a line brattice curtain hung within 25 foot [*sic*] from the high cavity. Upon inspection of the high cavity, that measured approximately 5 foot [*sic*] in width by 7 foot [*sic*] in length by 2 foot [*sic*] in depth into the mine roof, detected a concentration of methane gas that went over range on the X-AM Drager multi-gas detector. Bottle sample was taken bottle #R9897. An oral 107 (a) imminent danger order was issued to John Connellan (Safety Supervisor), at 11:00 hours on this date. Power was immediately re-moved [*sic*] from the section and only miners needed to improve ventilation was [*sic*] allowed in the area. Citation #8522885 is being issued in conjunction with this order.

Gov. Exh. 9.

JWR contests the imminent danger order in this proceeding. For the reasons that follow, I find that the MSHA inspector did not abuse his discretion in the issuance of the 107(a) order on August 13, 2012.

## III. Hearing Testimony

### A. Testimony of Inspector Larry McDonald

On August 13, 2012, MSHA Inspector Larry McDonald conducted an inspection at the No.7 mine, accompanied by JWR safety supervisor John Connellan and United Mine Workers of America ("UMWA") miners' representative Steve Pendley (referred to collectively as "the inspection party"). Tr. 79, 264. On that day, McDonald entered the mine by elevator, rode a diesel manbus down the section 8 track, and traveled inby on the section 8 track to the end of the track, where the inspection party exited the manbus. Tr. 80. He then turned left into the number 2 entry, where he saw the Lo Trac and inspected it. Tr. 92-93. The Lo Trac passed inspection. Tr. 93. McDonald then continued to the spad number for his first rock dust survey. Tr. 93. After completing a rock dust survey in the number 1 entry, McDonald observed the Lo Trac enter the long crosscut by the number 2 entry where the cavity at issue in this case was located. Tr. 95. McDonald was approximately 520 feet from the long crosscut at the time he made his observation. Tr. 159.

McDonald continued to conduct his rock dust survey as the inspection party made their way toward the long crosscut. McDonald observed his methane detector fluctuate as he walked toward the number 2 entry.

> And at that time, I came through the man door leading to the number 3 entry, traveling toward the number 2 entry in this long crosscut. As I come through the door, I had my detector already in my hand and I observed the change in methane, that it went up.

Tr. 96.

At this point McDonald observed a line curtain hung up in the long crosscut, which he surmised was present to ventilate the area of methane. Tr. 96. When he reached the right corner of the brattice to make a reading, he observed a cavity in the roof of the long crosscut. Tr. 96. McDonald then stepped up on a pallet of blocks and raised his detector into the cavity. Tr. 97. About two inches into the cavity above the roof line the reading was 1 percent. Tr. 97.

As he continued to raise the detector further into the cavity, the readings continued to rise past 5 percent. Tr. 97. At this point, the detector was approximately 14 inches from the peak of the cavity roof. Tr. 97. McDonald then had Pendley bring his detector over to compare and see if he obtained the same results. Tr. 97. Pendley's detector confirmed the reading. Tr. 97. Connellan also brought his detector and all three detectors confirmed McDonald's reading. Tr. 97. At this point, McDonald issued the imminent danger order. Tr. 97. McDonald then took a bottle sample of the air in the cavity which eventually identified a reading of 51.77 percent methane. Tr. 104, 110; Gov. Exh. 6, Gov. Exh. 7.

McDonald testified on cross-examination that there were eight miners in the vicinity, though he was not clear on where those miners were located, or how close to the long crosscut those miners may have been. Tr. 183. The closest miners not part of the inspection party were identified as Eric Church and James Woods. Tr. 123.

### B. Testimony of Miner Eric Church

Mine worker Eric Church was present in section 8 when McDonald, Connellan, and Pendly arrived for their inspection. Tr. 223. According to Church, McDonald did not inspect the Lo Trac after exiting the manbus prior to his rock dust surveys; instead, Church requested that McDonald inspect the Lo Trac after he had the chance to clean and degrease the Lo Trac. Tr. 224. Church waited for the inspection party to pass before driving the Lo Trac to the washdown station just outside the long crosscut where the cavity containing the methane was located. Tr. 224, 226-28. Church stated that the Lo Trac never entered into the long crosscut at any point during the time the inspection was ongoing, nor did it move from its parked location at the washdown station in the number 2 entry for the next 24 hours. Tr. 228-31. McDonald inspected the Lo Trac at this location, and the Lo Trac was "tagged out" as a result of that inspection, and, as a result, the Lo Trac was out of operation until the identified problem could be repaired. Tr. 230.

### C. Testimony of Safety Supervisor John Connellan

Mr. Connellan and Mr. Pendley joined Inspector McDonald for the rock dust survey. Tr. 258, 264. After traveling on the manbus to section 8, the inspection party exited the manbus. Tr. 264-65. Church had been present detrashing the track, and after exiting the manbus, Connellan spoke with Church. Tr. 264. McDonald then inspected the Lo Trac that was present in section 8 at the time. Tr. 265. The Lo Trac had an unidentified issue, and Connellan or Pendley placed a danger tag on the Lo Trac. Tr. 265. Connellan then instructed Church to bring the Lo Trac to the washdown station in the number 2 entry, clean it, and locate an electrician to correct the Lo Trac. Tr. 265. The inspection party then took various rock dust surveys until it approached the number 2 entry. Tr. 267. Connellan entered the long crosscut first and walked past the cavity in the long crosscut, almost to the end, but realized that McDonald and Pendley were not with him. Tr. 270. At this point, he stopped and turned and observed Pendley and McDonald taking gas measurements by the brattice line. Tr. 270-71. He checked his spotter and noted that his readings of methane were two tenths to three tenths. Tr. 271. He walked back to where Pendley and McDonald were taking readings and observed McDonald step onto some blocks, raise his methane detector into the cavity, and the detector alarmed. Tr. 271. McDonald then told him to cut the power and that he was issuing an imminent danger order. Tr. 271.

Connellan then walked down the long crosscut to the number 2 entry at approximately Spad No. 24395 where he observed Church by the washdown station and instructed Church to get a blower curtain. Tr. 277, 279; Gov. Exh. 3. He then proceeded in the number 2 entry to the power center, where he met Randall Emory, the day shift supervisor, and he informed Emory that they had an imminent danger order in the long crosscut and instructed Emory to cut power. Tr. 276. Emory turned off the power at the power center near Spad No. 24959. Tr. 276; Gov. Exh. 3. Emory accompanied Connellan back to the long crosscut to where McDonald and Pendley remained near the cavity. Tr. 276-77. McDonald informed Connellan that he took a bottle sample. Tr. 277. Connellan also measured the cavity and placed his methane detector in the cavity where it alarmed. Tr. 277. McDonald then told Connellan that it was in his best interest to shut down the belt line. Tr. 277. Connellan travelled back through the mandoor to the number 3 entry and hit the emergency stop on the belt line. Tr. 278. The parties then hung the blower curtain sufficient to ventilate the cavity. Tr. 278. McDonald stepped back on the blocks and placed his methane detector into the cavity and it did not alarm. Tr. 282. At that point, McDonald terminated the imminent danger order. Tr. 282.

### D. Testimony of Engineer Tom McNider

Mr. McNider is general manager of engineering for JWR. Tr. 324. Included in his job functions is overseeing the ventilation plan for the No. 7 mine. Tr. 325; Gov. Exh. 17. McNider stated that in his best judgment, based upon his knowledge of the ventilation plan for this mine, the air in the number 2 entry was moving approximately 65,000 cubic feet per minute ("CFM"), and that the air diverted into the long crosscut by the existing blower curtain was something less than 65,000 CFM on the date of the citation. Tr. 354, 365.

### E. Testimony of Expert Witness Dr. Jerry Tien

Dr. Tien was accepted as an expert witness to testify on the issue of methane dilution. Tr. 385. Dr. Tien stated that with 6,500 CFM of air moving into the cavity, the cavity would achieve full methane dilution (15 methane reading or less) in .02106 of a second. Tr. 394. Dr. Tien further opined that the diluted methane from the cavity would not have escaped in a volatile amount (5-15% methane) after its dilution, once it entered the long crosscut. Tr. 400. Dr. Tien said the methane would travel along the roof line, as it is lighter than air, and the dilution with the airstream would carry it from the mine. Tr. 400. He opined that because the identified ignition sources were downwind of the cavity containing the methane, there was little likelihood that any of the identified ignition sources could act as an ignition source given their existing location at the time of issuance of the 107(a) order. Tr. 402-03.

### F. Rebuttal Testimony of Inspector Larry McDonald

In rebuttal to the lack of air quantity readings near the cavity location at the time of issuance of the order, McDonald stated that he did not take air quantity measurements at the location of the cavity in the long crosscut because there was insufficient air movement to operate the anemometer blades. Tr. 426-27.

## IV. Discussion

To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)). The Commission has held that an "abuse of discretion" is found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996).

While the crucial issue is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing. *Jim Walter Res., Inc.,* 29 FMSHRC 1043 (Nov. 16, 2007).

The critical question in determining whether an accumulation of methane presents an imminent danger is whether there is an ignition source that might reasonably be expected to cause an explosion, resulting in death or serious injury within a short period of time. *Consol of*

*Kentucky, Inc.*, 30 FMSHRC 1 (Jan. 2008); *see also Island Creek Coal Co.*, 15 FMSHRC 3339, 346-247 (Mar. 1993); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).[1]

### A. Potential Ignition Sources

There is no debate that at the time of the issuance of the 107(a) order, there was a buildup of methane in the cavity in the long crosscut that was in the explosive range. While JWR went to great lengths to discuss the effects of remediation of the methane buildup, and the rapid method available for dissolution of methane, the issue in this case is not the speed of remediation but whether there existed a potential ignition source for the buildup of methane in the cavity sufficient to justify the issuance of the 107(a) order. McDonald identified four separate potential ignition sources that led to his issuance of the imminent danger order: (1) the high voltage cable; (2) the battery charger; (3) the power center; and, (4) the Lo Trac. Tr. 113-14, 117.

The high voltage cable was located "coming down the number 2 entry." Tr. 117. There was no evidence that the high voltage cable was actually in the long crosscut. The number 2 entry is downwind of the long crosscut. Tr. 96; Gov. Exh. 3. As Dr. Tien testified, ignition sources located downwind of the cavity were unlikely to produce a spark to ignite methane in the long crosscut given that the spark would travel downwind as well. Tr. 408. Methane that might be expected to "leak" from the cavity would be quickly diluted upon entering the long crosscut, and further dilute as the gas enters the number 2 entry. Tr. 403. Also, the diluted methane, none of which would be in the combustible range due to the dilution, would travel along the roof line as it exited the mine through normal ventilation procedures. Tr. 400. Indeed, the ventilation in the mine was not at issue in this case. Accordingly, I find that methane that might have escaped the cavity would be properly diluted and rendered harmless once it entered the long crosscut and eventually down the number 2 entry along the roofline, passing the high voltage cable. For these reasons, I find that the high voltage cable located in the number 2 entry was not a likely ignition source for the buildup of methane in the cavity at the time of issuance of the 107(a) order.

Likewise, the battery charger as an ignition source suffers the same fate. McDonald credibly testified that the battery charger is an ignition source "given these battery chargers have little regulators behind them, and it's going to pull air across that battery charger to keep the -- when you're charging batteries, they produce hydrogen during the charging process, and they have to be ventilated straight into the return." Tr. 117-118. However, there was no evidence that the battery charger was a mobile piece of equipment or that it would likely be used in or near the cavity in the long crosscut. As this piece of equipment was located downwind of the cavity, and beyond the long crosscut in the number 2 entry, it was unlikely that the battery charger could act

[1] The Secretary presents an alternate theory in support of his case. The Secretary argues that if there does not exist an ignition source based on the facts of this case, the imminent danger order must be upheld, as the presence of methane in the explosive range alone is sufficient evidence to issue an imminent danger order under section 107(a) without identification of an ignition source. This argument was referred to in a recent case as a "*per se* rule of 5 percent methane." *Jim Walter Resources, Inc. v. Sec'y of Labor*, 33 FMSHRC 3211, 3220 (Dec. 2011)(ALJ). As I find that an ignition source exists, I need not reach the Secretary's alternate theory in support of the 107(a) order.

as an ignition source for the cavity. Also, as any methane that might escape the cavity would be sufficiently diluted before reaching the battery charger, there was no concern for ignition beyond the long crosscut or in the number 2 entry. The power center located at Spad No. 24959 is also not located near enough to the cavity, nor upwind of the cavity, to be reasonably considered to be a potential ignition source at the time of issuance of the imminent danger order. Gov. Exh. 3. This leaves a review of the potential of the Lo Trac as an ignition source.

McDonald testified that the Lo Trac was a potential ignition source because it is a piece of "non-permissible" equipment. Tr. 88. "Non-permissible" equipment means it does not have explosive proof enclosures on it. Tr. 89, 209-10. The Lo Trac has electrical connections that are open, an exposed alternator, and frictional brakes that may cause sparks. Tr. 209-210. While mine witnesses refuted McDonald's testimony that he observed the Lo Trac in the long crosscut on August 13, 2012, I find that McDonald reasonably believed that he observed the operation of the Lo Trac in the long crosscut, and that such operation could be a potential ignition source. In its location in the number 2 entry, Respondent is correct that the Lo Trac, like the aforementioned sources, was not a potential ignition source. However, unlike the above cited potential ignition sources, the Lo Trac is a mobile piece of equipment. Witnesses for the mine testified that the Lo Trac is certainly capable of traveling in the long crosscut. Tr. 315. I need not find that the Lo Trac did, in fact, operate in the long crosscut on August 13, 2012, to find that the Lo Trac was a potential ignition source.

The Lo Trac was only a short distance from the long crosscut after it was brought to the washdown station by Mr. Church. Tr. 224, 226, 274-75; Gov. Exh. 3.[2] McDonald could reasonably anticipate that the Lo Trac would be used for delivery of supplies or other intended uses in the long crosscut at some point in the near future, and certainly before the condition could be abated. Thus, even if McDonald was mistaken that the Lo Trac entered the long crosscut as he observed prior to issuance of the 107(a) order, given the Lo Trac's exposed components, its lack of explosive proof enclosures, its proximity to the long crosscut, and its mobility, it was not unreasonable for McDonald to consider the Lo Trac as a potential ignition source.

JWR contends that the Lo Trac could not be an ignition source because the distance between the engine's exposed machinery and the roof cavity, some four or five feet, made the possibility of ignition highly unlikely. Tr. 400. It also points out that because methane is lighter than air, it will travel along the roof line if it escapes from the cavity and that because it will dissipate rapidly once it leaves the cavity, the cavity remains the sole location of methane in the explosive range, and thus any ignition must occur in the cavity. Tr. 400. As the Lo Trac is not likely to spark upwards some four to five feet sufficient to ignite the methane, considering the Lo Trac to be an ignition source, even if it were to enter the long crosscut, is a bridge too far. Tr. 408, 415.

I have considered these arguments, and I agree that the likelihood of ignition from the Lo Trac might appear somewhat remote. However, it is not impossible, nor is it even improbable. A potential ignition source is precisely that. In *Jim Walter Resources, Inc.*, 33 FMSHRC 3211,

[2] The Lo Trac was parked by the number "3" of Spad No. 24935 as identified by the witness on Government's Exhibit 3. Tr. 274-75.

3217 (Dec. 2011) (ALJ), potential ignition sources included such remote occurrences as clothing static. In other words, when methane gathers in the explosive range, any spark is an ignition source, even if the likelihood of that spark seems somewhat remote. The issue is whether the inspector's decision to consider the possibility that the Lo Trac could enter the crosscut and a spark therefrom could ignite the methane is a reasonable one. Potential ignition sources are by their nature speculative. That speculation must be within the realm of reasonable probability to support its existence as a potential ignition source. While I am sympathetic to JWR's position, I cannot discount McDonald's conclusion that the Lo Trac may spark if driven in the crosscut. While that spark may have to travel upwards as much as four or five feet "at exactly the right angle at the right moment to make it happen" it would be sufficient to ignite the methane in the cavity. Tr. 414-15; *Utah Power & Light Co.*, 13 FMSHRC at 1622 ("[w]ithout considering the 'percentage of probability that an accident will happen,' the inspector must determine whether the condition presents an impending threat to life and limb.").

While other identified potential ignition sources were downwind of the crosscut, and not likely to enter the crosscut or be in or near the cavity itself, the Lo Trac is a mobile piece of machinery that can be reasonably expected to travel to various portions of the mine, including the long crosscut. The fact that the Lo Trac had been "tagged out" for repair (not by order of the inspector but by mine authorities) is not dispositive on this issue. Tr. 230. The Lo Trac was in an operable condition at the time of the issuance of the imminent danger order as evidenced by Church's movement of the Lo Trac to the washdown station just outside the long crosscut in the number 2 entry. Tr. 224. Nothing prevented its use by mine personnel for its intended purpose. The proximity of the Lo Trac to the cavity, combined with McDonald's observation that the Lo Trac had been operating in the long crosscut that day, was sufficient for McDonald to reasonably conclude that the Lo Trac was a potential ignition source. I cannot find that Inspector McDonald abused his discretion in the issuance of the imminent danger order when he reasonably believed that the Lo Trac could, and did, enter the long crosscut while the buildup of methane remained in an unremediated condition.

### B. Immediate Danger

Respondent argued that the facts of this case lack the immediacy aspect of an imminent danger. "An imminent danger is present when 'the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice.'" *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991) (quoting Sen. Rep. No. 91-411, *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 215 (1975)). Respondent elicited testimony from McDonald that the immediacy considered under an imminent danger order means the danger may occur and is "close and fixing to happen." Tr. 131-32. Respondent correctly states in its post hearing brief that the immediacy present in an imminent danger situation is among considerations that distinguish an imminent danger order from a "significant and substantial" (S&S) violation. *Jim Walter Resources Inc.'s Post-Hearing Brief* at 15. Thus, when reviewing an imminent danger order, it is important to consider whether the immediacy of the situation justifies the issuance of the order.

In an attempt to negate immediacy, Respondent presented expert testimony that addressed the rapid dissolution of methane after it escapes the cavity, thereby arguing that a danger that can be remediated rapidly cannot act as an imminent danger. This argument has been rejected previously because the issue is not the rapidity of the abatement but the potential for injury or death if the methane is left in an unremediated condition and normal mining operations are permitted to continue. *Eastern Assoc. Coal Corp. v. IBMA*, 491 F.2d 277, 278 (4th Cir. 1974).

Respondent also argued that the absence of an identifiable ignition source in the long crosscut within the immediate vicinity of the cavity made the finding of immediacy unreasonable. I accept the expert's analysis on the issue of ventilation, as reflected by my decision to discount the potential ignition sources downwind of the cavity. However, Respondent's focus on immediacy places a high burden on the inspector that section 107(a) does not require. An ignition source need not be in the immediate vicinity of the methane buildup in a "ready to spark" condition for it to be a potential ignition source. It need only exist within a reasonable proximity that an experienced inspector can conclude presents an imminent danger if the ignition source were brought in contact with methane in the explosive range. Such determinations are fact specific and are based upon the inspector's knowledge of normal mining operations. This is not a situation in which the inspector opined about such potential ignition sources as roof falls or lightning. *Consol of Kentucky, Inc.*, 30 FMSHRC at 6. Rather, the potential ignition source identified by the inspector was just beyond the long crosscut in an operable condition.

While the other identified potential ignition sources were not likely to spark near the methane build-up given their location at the time of issuance of the order, the Lo Trac was close by, operable, and capable of entering the long crosscut at any time. While not in a position directly beneath the methane filled cavity at the time of issuance of the 107(a) order, the inspector knew it was just beyond the crosscut in the number 2 entry and that it could reasonably be expected to enter the long crosscut under normal mining operations. There is evidence in the record that the long crosscut was the source of some activity, and given the presence of materials stored in the long crosscut, it was not unreasonable for the inspector to assume that the Lo Trac might enter the long crosscut to retrieve or move such materials in the foreseeable future. That knowledge was sufficient to establish imminence and render the Lo Trac a potential ignition source for the methane accumulation in the cavity.[3]

[3] In addition to the inspection party, two miners were identified as being within the vicinity of the long crosscut and would likely be seriously injured in the event of an explosion in that area. Tr. 123. The record is unclear as to exactly who else may have been present, or whether the mine was "in production" at the time of the issuance of the 107(a) order. Nevertheless, I find that there was sufficient activity in or near the long crosscut to place miners located in that area in danger of "death or serious physical harm" in the event of an explosion of methane in the cavity in the long crosscut.

### C. Post-Hoc Justification

Finally, Respondent suggested that the inspector's identification of potential ignition sources constituted a *post-hoc* justification for issuance of the imminent danger order. Tr. 36. I credit the inspector's testimony that while he focused on the build-up of methane in the cavity as the basis for issuance of his imminent danger order, he knew of the existence of the potential ignition sources at the time he issued the order. The inspector did testify that he believed that the build-up of methane alone justified his 107(a) order, but in addition he testified that the identified ignition sources discussed above also informed his decision to issue the imminent danger order. I have no reason to doubt the credibility of the inspector on that issue.

## V. Conclusion

For the above stated reasons, I find the Secretary has demonstrated by a preponderance of the evidence that Inspector McDonald did not abuse his discretion.

## ORDER

The Imminent Danger Order issued on August 13, 2012, as reflected by Citation 8522884, is **AFFIRMED** as issued.

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2011-1172-M |
| Petitioner | : | A.C. No. 26-02512-255877 A3V |
| | : | |
| v. | : | Docket No. WEST 2012-1171-M |
| | : | A.C. No. 26-02512-292804 A3V |
| SMALL MINE DEVELOPMENT, LLC, | : | |
| Respondent | : | Mine: Leeville |

## DECISION AND ORDER

Appearances: Alena E. Amundson, Esq. (Trial Counsel) and Courtney Przybylski, Esq. (Briefing Counsel), U.S. Department of Labor, Denver, Colorado, for Petitioner

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, Colorado, for Respondent

Before: Judge McCarthy

### I. Statement of the Case

These proceedings are before me based upon two Petitions for Assessment of Civil Penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). Three citations issued by the Secretary of Labor ("the Secretary") against Small Mine Development, LLC ("SMD"), remain at issue.[1]

[1] The above-captioned dockets involve a total of six citations. Docket No. WEST 2012-1171-M contains five citations. Docket No. WEST 2011-1172-M contains a single citation. The parties have filed a joint motion to approve partial settlement for three of the five citations at issue in Docket No. WEST 2012-1171-M. Jt. Ex. 1. The parties propose a reduction in total civil penalty, from $12,421 to $8,317 for the three citations. The settlement terms include deleting the significant and substantial designation, and reducing the likelihood of injury or illness from "reasonably likely" to "unlikely" for Citation No. 8692424. The settlement terms also include reducing the injury or illness which could reasonably be expected to occur, from "fatal" to "lost workdays or restricted duty" for Citation No. 8692428. Respondent has agreed to accept Citation No. 8692426 as written with the corresponding proposed penalty. Having considered the representations and documentation submitted in this matter, I conclude that the proffered settlement is appropriate under the criteria set forth under section 110(i) of the Act. Accordingly, the motion to approve partial settlement is granted.

On May 1, 2012, Citation Nos. 8691999 and 8692000 (Docket No. WEST 2012-1171-M) were issued as part of the same inspection. Citation No. 8691999 alleges that a miner was adjusting the forks on a forklift in a dangerous manner in violation of section 57.14105 and/or in violation of sections 57.14211(c) or 57.14206(b) of the Secretary's mandatory safety standards for underground metal and nonmetal mines. 30 C.F.R. §§ 57.14105, 57.14211(c), 57.14206(b).[2] As a general matter, these standards address the hazards associated with unsecured raised components. Citation No. 8692000 alleges that the same miner had not been properly task trained regarding the operation and adjustment of the forklift in violation of section 48.7 of the Secretary's standards for training underground miners. 30 C.F.R. § 48.7.

Citation No. 8602339 (Docket No. WEST 2011-1172-M) was issued during an earlier inspection on April 20, 2011. It alleges that a concrete remix truck was being operated with a spider-webbed crack in the windshield in violation of section 57.14103(a), which requires that windows on self-propelled mobile equipment be maintained to provide visibility for safe operation. 30 C.F.R. § 57.14103(a).

A hearing was held on April 18-19, 2013 in Sparks, Nevada.[3] The record was left open for the filing of a joint motion to approve partial settlement in Docket No. WEST 2012-1171-M and the filing of the parties' joint stipulations. Tr. 15, 17.[4] Both filings were received on May 17, 2013. *See* Jt. Exs. 1 and 2, respectively. The parties then filed post-hearing briefs on June 17, 2013.

Based on the entire record, including the parties' post-hearing filings and briefs and my observation of the demeanor of the witnesses, I find the following:

## II. Stipulated Facts

The parties have stipulated to the following facts:

1. At all times relevant to these proceedings, Respondent was engaged in underground metal mining operations at the Leeville mine (Mine ID 26-02512) in Eureka County, NV.

2. Respondent's mining operations affect interstate commerce.

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[2] The Secretary's Motion to Plead in the Alternative was granted during a March 5, 2013 conference call. Tr. 10.

[3] During the hearing, Petitioner's Exhibits 1-12, 15, 17, and 18, and Respondent's Exhibits 1-19 and 23-27, were received into evidence. Tr. 20.

[4] As noted, I have reviewed the parties' joint settlement motion and I approve the parties' partial settlement agreement set forth in Jt. Ex. 1 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Leeville mine where the Citations being contested in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to § 105 of the Act.

6. The individuals whose signatures appear in Block 22 of the Citations at issue in these proceedings are all authorized representatives of the United States Secretary of Labor at the time of the inspection at issue.

7. It is agreed that the Citations at issue in the above-referenced dockets were issued in a timely manner, and while the correctness of the violations alleged in those citations is in dispute, no claim is made that any improper procedures were followed in the issuance of those Citations.

8. The Citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

9. The proposed penalties will not affect Respondent's ability to remain in business.

10. The certified copies of the MSHA Assessed Violations History reflect the history of the citation issuance at the mine for fifteen months prior to the date of the Citations and may be admitted into evidence without objection by Respondent.

11. The operator demonstrated good faith in abating the violations.

12. This pleading has been reviewed by Charles Newcom [counsel for Respondent] and he has authorized Alena Amundson [counsel for the Secretary] to apply his electronic signature to the pleading and to file it.

Jt. Ex. 2.

## III. Factual Background

### A. May 1, 2012 Inspection

Leeville Mine is an underground metal mine owned by Newmont Mining Corporation. Respondent, SMD, is a contractor for Newmont and performs all aspects of mining, including drilling, blasting, loading, and haulage. Tr. 45-46.

On May 1, 2012, MSHA Inspector Patrick Barney[5] performed a spot inspection of the Leeville Mine. Barney was accompanied by personnel from Newmont, but personnel from Respondent. Tr. 49-50.

**1. Citation No. 8691999**

The core facts surrounding the issuance of Citation No. 8691999 are largely undisputed. R. Br. at 2. At approximately 9:45 a.m., the inspection party arrived at the 4450 station. P. Ex. 7. Barney observed SMD employee Antonio Gaytan in the process of adjusting the forks on the No. 32 Skytrak Forklift to accommodate a smaller load. Gaytan was standing between the inner fork and the mine rib. The forks were approximately 2½ feet from the floor, and the engine was running. The front right tire had been turned in toward the rib. The back right tire had been chocked. The parking break was set. The forklift as a whole was immobile. The boom controlling the raising and lowering of the forks, however, was not physically blocked against movement.[6] At that time, neither Gaytan nor his supervisor, Chad Borresch, knew whether the forklift had mechanical locks on the hydraulic cylinder ("check valves") to prevent the boom from lowering inadvertently. *See* Sec'y Br. at 8-10; R. Br. at 3.[7]

Concerned that the boom could lower unexpectedly in the event of hydraulic failure and cause injury, Barney determined that Gaytan was adjusting equipment, which was not protected against hazardous motion in violation of section 57.14105. Accordingly, he issued Citation No. 8691999 alleging a violation of 30 C.F.R. § 57.14105. Tr. 76-77, 83; P. Ex. 1. Citation No. 8691999 alleges the following:

> At the 4450 station there was a miner adjusting the forks on forklift c/n FL32 while standing between the equipment and the rib. The equipment was running and there was no operator in the cab. This citation is issued in conjunction with the 107a imminent danger order #8691998.

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[5] Barney has been an inspector with MSHA's Elko, Nevada field office since February 2011. Tr. 41, 44.

[6] The forks are raised and lowered via the boom, which functions on hydraulics. The boom is connected to the forks via a backstop, a horizontal bar between the forks, which also prevents loads from shifting when the forks are raised at an angle. Tr. 68. In order to prevent raised forks from lowering unexpectedly, the backstop can be rested on a block between the forks. Tr. 64.

[7] The boom is extended by pumping oil into a hydraulic cylinder, which increases pressure in the system. The boom is collapsed by sucking oil out of the cylinder, which relieves pressure in the system. Check valves prevent inadvertent movement in hydraulic systems by preventing oil from leaking out of the cylinder. Tr. 288, 306. Because check valves are usually located inline on the hydraulic cylinder, they are generally difficult to detect during inspections. Tr. 164, 289-90.

P. Ex. 1.[8] Barney determined that the cited condition was a significant and substantial contribution to a safety hazard that was reasonably likely to result in lost workdays or restricted duty to one person as a result of moderate negligence. The Secretary proposed a penalty of $3,493.

As noted, the Secretary appropriately alleged before trial that the cited condition violates one of three standards (30 C.F.R. § 57.14105, 30 C.F.R. § 14211(c), or 30 C.F.R. § 14206(b)), pled in the alternative:

> 30 C.F.R. § 57.14105, cited by the inspector, states:
>
> Repairs or maintenance on machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.
>
> 30 C.F.R. § 14211(c), alternatively pled by the Secretary, states:
>
> A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.
>
> 30 C.F.R. § 14206(b), also alternatively pled by the Secretary, states:
>
> When mobile equipment is unattended or not in use, dippers, buckets and scraper blades shall be lowered to the ground. Other movable parts, such as booms, shall be mechanically secured or positioned to prevent movement which would create a hazard to persons.

SMD safety superintendent Jon Nyberg testified that after the citation was issued, a company mechanic confirmed that the forklift had operational check valves. Tr. 334. Assistant superintendent Kimball Rowley testified that check valves are built into all Skytrak model forklifts, including the cited forklift. Tr. 284-87. The parties stipulated that check valves are

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[8] Upon first observing Gaytan standing between the forks and the rib, Barney issued an imminent danger order pursuant to section 107(a) of the Act. Respondent has not contested that Order. Tr. 51. Commission precedent makes clear, however, that the failure to contest an imminent danger order does not provide a basis for establishing the validity or S&S nature of a related citation because an operator may decide not to contest an imminent danger order for any number of reasons. *See*, *e.g.*, *Wyoming Fuel Co.,* 16 FMSHRC 1618, 1625-26 (Aug. 1994) (finding no legal authority for the judge's conclusion that an uncontested imminent danger order has a preclusive effect with regard to an S&S designation for a related citation); *id*. at 1632 (Commissioners Doyle and Holen, concurring in part and dissenting in part) (noting that issues must be previously litigated to have preclusive effect).

referenced in the maintenance manual for the Skytrak forklift, but they are not mentioned in the operator's manual applicable to the equipment. Tr. 235. No explanation for the omission in the operator's manual is present on the record.

Inspector Barney conceded that he would not have issued the citation if he had been able to confirm that the forklift had functioning check valves. He contends, however, that the boom must be considered unsecured against hazardous motion because neither Gaytan nor Borresch knew whether check valves were present. The check valves were not tested for functionality at the time the citation was issued. Tr. 71-72, 166, 174-75.

**2. Citation No. 8692000**

After observing the conditions described above, Barney spoke with Gaytan. Gaytan told Barney that he was adjusting the forks according to how he had been trained. Tr. 99. Barney interpreted this to mean that Gaytan had been trained to adjust the forks without first shutting down the forklift, while standing between the rib and the forks, and while the forks were raised 2½ feet. Tr. 99-100. Concluding that Gaytan had been trained to adjust the forks in an unsafe manner in violation of section 48.7, Barney issued Citation No. 8692000.

Citation No. 8692000 states in relevant part:

> On the 4450 shaft station there was a miner operating the forklift c/n FL32 that was not task trained adequately as to the operation and adjustment of that equipment. The miner was working between the rib and the running piece of equipment with no operator in the cab. . . .

P. Ex. 4. Barney determined that the cited condition or practice was a significant and substantial contribution to a safety hazard that was reasonably likely to result in a fatal injury to one person as a result of moderate negligence. The Secretary alleges a violation of 48.7(a)(1), which states that miners assigned to new tasks as mobile equipment operators shall not perform those new work tasks until the prescribed training has been completed, and such training "shall include . . . the safe operating procedures related to the assigned tasks." The Secretary has proposed a penalty of $11,597 for the alleged training violation.

With regard to training, the record establishes that Gaytan began his employment at Leeville Mine on April 24, 2012. He received hazard training on April 25 and then received five days of training on the No. 32 Skytrak Forklift from his supervisor, Chad Borresch. Such training covered operation of the forklift, the preoperational checklist, and two days of supervised operation of the forklift. Tr. 199-203, 212-14, 242-43. Gaytan's certificate of training was signed on April 30, 2012, the day before Citation No. 8692000 was issued. P. Ex. 6.

Gaytan and Borresch testified that the training covered two methods for adjusting the forks. The first method was to raise the forks a few feet in the air and slide them by foot. The second method was to raise the forks to a higher level, tilt the carriage until the forks were

hanging free, and then slide them by hand. Tr. 201, 216, 265. Although Gaytan was trained to rib and chock the forklift, he was not trained to shut off the machine before adjusting the forks. Tr. 216-17, 278. Borresch also testified that Gaytan had been trained to push the forks from the outside to avoid pinch hazards, and travel around and refrain from stepping over the forks to avoid tripping hazards. Tr. 270, 275-76.

Gaytan testified that he used the following procedure to adjust the forks at issue on May 1, 2012. He raised the forks 2½ feet, turned the wheel into the rib, set the parking brake, alighted from the driver's cab, chocked the rear driver's side wheel (away from the rib), slid the fork further from the rib and into position with his foot, walked over the forks, and pushed the fork nearer the rib into place while leaning against the rib. Tr. 193-95, 207-09. At no point was Gaytan standing under the forks. Tr. 194. Barney arrived as Gaytan was stepping back across the forks to check the adjustment from the cab. Tr. 195.

The majority of Barney's testimony regarding the alleged training violation focuses on the differences between Gaytan's method for adjusting the forks, and the procedures outlined in the Skytrak Forklift operator's manual, which Gaytan concedes was not referenced during his training. Tr. 220. The method for adjusting forks outlined in the manual includes elevating the forks to five feet, tilting the forks forward until they are hanging free, and pushing or pulling to slide the forks closer together or farther apart. Tr. 100-02; P. Ex. 17 at 5-13. The manual also states that shutdown procedures should be followed before exiting the cab, which include lowering the forks to the ground and removing the ignition key. P. Ex. 17 at 1-12, 4-3.

Barney attempts to resolve the apparently contradictory requirements that the forks be raised five feet and lowered to the ground by stating that if the forks were resting on a block, they would be raised and at their lowest point. Tr. 64, 67. Barney concedes, however, that subject to the constraints of the Secretary's regulations, an operator may exercise discretionary judgment when dealing with inconsistent provisions in an operator's manual. Tr. 144. In this case, however, Gaytan left the cab with the engine running and the forks were only 2½ feet above the ground. Tr. 102-05.

The Secretary also argues that Gaytan's training was inadequate because he was not trained to perform a pre-shift examination on the check valves. Sec'y Br. at 21. Gaytan admitted that check valves were not covered in his training. Tr. 236. In addition, I note that SMD assistant superintendent Rowley admitted that testing the check valves should be part of standard pre-operational procedure. Tr. 295. Rowley also testified, however, that a forklift operator would know if the check valves were not functional or operational even without testing them because the boom would "bleed off" or start to lower on its own. Tr. 313.

**B. April 20, 2011 Inspection**

On April 20, 2011, Barney was assisting with a regular inspection at the Leeville Mine. Tr. 49-50. While in the main haulageway, a remix truck pulled out and came close to hitting the

inspection party.[9] Barney observed a spider-webbed crack in the truck's windshield. Tr. 117-18; P. Ex. 9; P. Ex. 11. Barney did not enter the cab of the truck to assess visibility from the driver's vantage point. Nevertheless, he testified that the spider-webbed crack extended across the driver's head area, when viewed from directly in front of the truck. Accordingly, Barney determined that the crack must have interfered with visibility. Tr. 119-20. Barney also expressed concern that the crack would create a glare in headlights. Tr. 123.

Barney spoke with the driver, who stated that the windshield had been cracked for about four days, and had been noted in the truck's pre-operational checklist for eight corresponding shifts. Tr. 117-18. The driver also told Barney that the crack had been reported to his shop supervisor, Bill Hanks, who instructed the driver to operate the truck while new glass was being ordered. Tr. 117-18. Barney then spoke with Hanks, who confirmed that he knew about the cracked glass and told the driver to operate the truck in that condition until the windshield could be replaced. Tr. 120.[10] When asked whether he was given any mitigating circumstances for why the truck was left in service, Barney admitted that Hanks told him in the shop that Hanks thought it was okay to run in that condition. Tr. 134.

Barney issued Citation No. 8602339 to Hanks after concluding that the remix truck had been operated with a cracked windshield, that the condition was extant for four days, and that shop supervisor Hanks knew of the condition, but directed that the truck be driven anyway. Tr. 117; P. Ex. 9. Citation No. 8602339 states:

> The MTI Remix Truck c/n T56 was being operated with a cracked and spider webbed driver side windshield. The condition had existed and been reported for 4 days (8) shifts. A spider webbed windshield causes reduced visibility during operation. The Shop Supervisor knew of the condition and ordered new glass. This truck operates in the vicinity of other equipment and foot traffic.

P. Ex. 9. The Citation alleges that this condition violates section 57.14103(a), which states that windows on operator stations of self-propelled mobile equipment "shall be maintained to provide visibility for safe operation." Inspector Barney designated the violation to be S&S because it contributed to a collision hazard that was reasonably likely to result in a fatal injury, with one person affected as a result of high negligence. The Secretary proposed a penalty of $29,529.

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[9] The remix truck was carrying shotcrete (concrete conveyed through a hose at high velocity), which was delivered from the surface through a slickline (tubing for a pumping system). The remix truck had just pulled out into the main haulageway from the slickline dump point, when inspector Barney observed it. Tr. 124-25. The main haulageway had a number of dump and draw points, and a large amount of foot and equipment traffic. Tr. 124-25, 119.

[10] Barney testified that he was not shown a purchase order for the new windshield. His testimony did not address whether he asked to see a purchase order. Tr. 120.

## IV. Legal Analysis

### A. Citation No. 8691999

#### 1. 30 C.F.R. §57.14105

Under 30 C.F.R. §57.14105, the initial question presented is whether Gaytan's adjustment of the forks on the No. 32 Skytrak Forklift in order to pick up a smaller load constitutes "[r]epair or maintenance on machinery or equipment." If so, the power must be off and the forklift must be blocked against hazardous motion, unless forklift "motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are [still] effectively protected from hazardous motion." *See* 30 C.F.R. §57.14105.

No evidence has been presented that the forks or boom were broken. In fact, Barney conceded that no repair on machinery or equipment was being performed. Tr. 81-82. Rather, Barney recalled Gaytan telling him that he was adjusting the forks in order to carry a smaller load (as opposed to adjusting the forks to accommodate or fix a problem with the equipment). Tr. 86. Nor does the Secretary allege that adjusting the forks constituted "repair." Sec'y Br. at 11.

Furthermore, no maintenance on machinery or equipment was being performed. I agree with Respondent that the act of adjusting forks on the forklift was not maintenance or a task such as an oil change, changing tires, or replacing a light, which is performed to keep the forklift in good working order or to correct a deteriorating or malfunctioning condition. *See* R. Br. at 5-6. Maintenance is defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd* 156 F.3d 1076 (10th Cir. 1998) (finding that dislodging a rock to restore a crusher's functionality was properly encompassed under "repair or maintenance"). The Commission has distinguished between activity "designed to prevent [equipment] from lapsing from its existing condition or to keep the [equipment] in good repair," i.e., maintenance and activity designed to "increase its usefulness." *S. Ohio Coal Co.*, 14 FMSHRC 978, 982-83 (June 1992) (moving a conveyor belt was not maintenance since the move was meant to improve rather than preserve functionality), *cited in Walker Stone*, 19 FMSHRC at 52.

The Secretary asserts that Gaytan's activity should be considered "maintenance" because adjusting the forks to allow the forklift to carry loads of varying sizes keeps the equipment functioning in a state of efficiency. Sec'y Br. at 11. Contrary to the Secretary, I find that adjusting the forks is not an activity designed to maintain the forklift in a state of repair or efficiency. Rather, it is labor designed to improve or modify functionality by increasing the variety of loads that the equipment can accommodate.

Inspector Barney himself testified that adjusting the forks does not constitute maintenance or repair because it does not require a qualified mechanic. Tr. 82. Instead, Barney seems to have divorced the two sentences in section 57.14105, and issued the citation solely on

the basis that Gaytan was adjusting the forks while the equipment was running and while he was allegedly not protected against hazardous motion. Tr. 83. The Secretary argues that Barney's opinion as to the definition of maintenance is not dispositive. Sec'y Br. at n. 6. Rather, the Secretary argues that maintenance was being performed. Therefore, the second sentence of the standard can be applied because an adjustment to the forks was being made, the forklift was running at the time of the adjustment, and such adjustment did not require the forklift to be running. *See* Sec'y Br. at 10-11 (citing Tr. 78, 80, and 83).

Under the plain language of the standard the second sentence is triggered only if repairs or maintenance are being performed within the meaning of the first sentence of the standard. The second sentence operates as an exception to the first sentence, with a proviso. As discussed above, I find that Gaytan was not performing repair or maintenance. Therefore, I conclude that section 57.14105 does not apply.

**2. 30 C.F.R. § 57.14211(c)**

Under 30 C.F.R. § 57.14211(c), the determinative question is whether the raised boom was "secured to prevent accidental lowering." A boom can be secured by either placing a block under the backstop to physically prevent the component from lowering, or placing a mechanical lock (such as a check valve) on the boom's hydraulic cylinder. Sec'y Br. at 13; Tr. 64. The Secretary has recognized that check valves adequately protect against the uncontrolled descent of a raised component in the event of hydraulic failure.[11] Inspector Barney conceded that he would not have issued a citation if he had been able to confirm the presence of functioning check valves. Tr. 166, 174.

Since the forks were not physically blocked, I must determine whether the boom was secured by functioning check valves. I find that it was.

With regard to the presence of check valves, I credit the testimony of SMD assistant superintendent Rowley that all Skytrak model forklifts have built-in check valves. Tr. 284-87.[12]

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[11] 30 C.F.R. § 57.14211(d) states that "under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device . . . ." MSHA's Program Policy Manual reiterates that check valves will prevent uncontrolled descent in the event of a failure of the system holding up a raised component. P. Ex. 15.

[12] Rowley testified that he had operated a number of Skytrak forklifts, including the No. 32, and all of them had check valves. Tr. 284-87. Rowley further testified that check valves can be hard to spot, though they are visible on the Skytrak model if you know what you are looking for, namely, two screw caps on a box on the back side of the boom hydraulic cylinder. Tr. 289-90. Although Inspector Barney testified that when he looked over the forklift while waiting for the supervisor he did not see any "obvious ball valves or check valves," he concurred that check valves are difficult to spot and that he could not be sure from his cursory review whether or not this forklift had check valves. Tr. 162, 164, 166.

I also emphasize the parties' stipulation that check valves are referenced in the maintenance manual for Skytrak Forklifts. Tr. 235. There is no reason to believe that the manufacturer omitted check valves from this particular forklift. With regard to whether the check valves were functioning, I credit the testimony of safety superintendent Nyberg that prior to the close-out conference, a mechanic tested the check valves on the No. 32 forklift and found them to be operational. Tr. 334; R. Ex. 28 at 2 (Nyberg's prepared statement read at the closeout conference).[13]

The Secretary emphasizes that neither Gaytan nor supervisor Borresch knew whether the forklift had check valves at the time the citation was written. Therefore, the Secretary argues that inspector Barney was unable to test whether the forklift had functioning check valves before issuing the citation. Sec'y Br. at 9-10. Similarly, the Secretary suggests that because Gaytan did not know whether check valves were present, they were not being "used" and therefore they were not protecting him against hazardous motion. Sec'y Br. at 13-14.

I agree that it is unwise for a forklift operator to be unaware of a safety measure built into the forklift, but this argument has more weight in the context of the alleged training violation. Section 57.14211(c) only requires actual protection against hazardous motion. Because I have found that functional check valves were present, the requirement that raised components be secured against hazardous movement under section 57.14211(c) was met, regardless of the forklift operator's knowledge of the presence of the check valves.

Barney's failure to test the functionality of the check valves when issuing the citation does not negate a finding that they were functional at that time. Citations may be vacated or modified when subsequent information proves the inspector's concerns unfounded. As for the argument that the check valves must be "used" to protect against hazardous motion, because check valves operate independently and do not need to be switched on or off, the check valves could be functioning without the forklift operator's knowledge. Tr. 306. Thus, operator knowledge that the check valves were functioning is not necessary for compliance with the standard.

**3. 30 C.F.R. § 57.14206(b)**

30 C.F.R. § 57.14206(b) requires that "when mobile equipment is unattended . . . booms [] shall be mechanically secured or positioned to prevent movement which would create a hazard to persons."

[13] This finding of functionality is bolstered somewhat by Rowley's testimony that malfunctioning check valves would be obvious because the hydraulic system would begin to lose pressure and the boom would begin to lower on its own ("bleed-off"). Tr. 292, 313. Rowley further testified that even if the operator did not know what was causing the problem, he would be able to tell that there was a problem with the hydraulics, and would likely stop operation. Tr. 313. Neither Barney nor Gaytan testified about any bleed-off of the boom on the day the citation was issued.

As a preliminary matter, I find, contrary to Respondent, that the forklift was unattended. In the mining context, equipment or areas are defined as "attended" in the "presence of an individual or continuous monitoring *to prevent unauthorized entry or access*." 30 C.F.R. § 57.2 (emphasis added). More generally, "unattended" means "lacking a *guard, escort, caretaker*, or other watcher." *Webster's Third International Dictionary 2482* (1986) (emphasis added).

Respondent contends that because the forklift was always in Gaytan's line of sight, it was being monitored, and therefore attended. R. Br. at 6-8. I disagree. Being attended requires more than visibility, it requires control. The monitoring miner must be able to prevent unauthorized access. In this regard, a Commission judge has found that a truck was unattended despite the mechanic working underneath it, because the mechanic was not in a position to prevent the truck from moving. *Nevada Cement*, 18 FMSHRC 1653, 1655 (Sept. 12, 1996) (ALJ).

Here, Gaytan conceded that while adjusting the forks, his direct route to the operator's cab was at least six feet, and he would have had to travel even farther because his direct route was blocked by the ribbed front wheel. Tr. 210-11. Because Gaytan was not in a position to timely reach the controls, I find that the running forklift was unattended.

Nevertheless, as discussed above in the context of section 57.14211(c), the boom was mechanically secured via functioning check valves.[14] The Secretary again contends that the boom was not secured because Gaytan and his supervisor did not know whether check valves were present or functional. Sec'y Br. at 15. For the reasons discussed above, this argument is rejected. As with section 57.14211(c), section 57.14206(b) only requires actual protection against hazardous motion, rather than knowledge of protective measures. Because functioning check valves were present, the requirement in section 57.14206(b) that the boom be secured when equipment is unattended has been met.

Because I find that adjusting forks does not constitute repair or maintenance, and the No. 32 Skytrak Forklift had functioning check valves which secured the raised boom, I find that the Secretary has not established a violation of any of the three standards alleged in the alternative. Accordingly, Citation No. 8691999 is vacated.

**B. Citation No. 8692000**

For the reasons set for the below, I find that the Secretary established a violation of section 48.7(a)(1) as a result of moderate negligence. I also find that the violation was S&S. However, I find that any injury that would occur would likely result in lost workdays or restricted duty, not a fatality.

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[14] As noted above, section 57.14211(d) of the Secretary's regulations and MSHA's Program Policy Manual both state that raised components are considered mechanically secured if a functioning check valve is present. Although the regulation and guidance explicitly apply to section 57.14211(c), because sections 57.14211(c) and 57.14206(b) address essentially the same hazard (the danger posed by uncontrolled movement of raised components such as booms), I conclude that the check valves provide the same safe harbor under section 57.14206(b) because they sufficiently secure the boom to prevent movement which would create a hazard to persons.

### 1. The Training Violation

The Secretary argues that Gaytan's training was inadequate in two ways: 1) the procedures outlined in the operator's manual for the Skytrak Forklift were not followed with regard to shutting down the forklift and adjusting the forks; and 2) the training did not cover securing the boom. Sec'y Br. at 21. I find that the failure to follow the operator's manual did not render Gaytan's training inadequate, per se. On the other hand, the omission of training regarding the check valves and their role in securing of the boom did constitute a failure to fully train Gaytan regarding the safe operating procedures related to the forklift.

The Skytrak Forklift operator's manual states that operators should not exit the forklift until the proper shutdown procedure has been performed. P. Ex. 17 at 1-12. This procedure involves seven steps. It is uncontested that Gaytan applied the parking brake, shifted the transmission to neutral, and exited the cab safely (steps 1, 2, and 7). Moreover, the Secretary has not established that Gaytan failed to idle the engine before exiting, and/or failed to exit safely (steps 4 and 6). Therefore, the only steps that Gaytan did not follow were shutting off the ignition, and lowering the forks to the ground (steps 3 and 5). *See* P. Ex. 17 at 3-4; Tr. 102-05.

The operator's manual also outlines a procedure for adjusting the forks. As noted, that procedure involves elevating the forks to approximately five feet, tilting the carriage forward until the fork heel is hanging free, standing to the side, and pushing or pulling the forks to slide them in or out. P. Ex. 17 at 5-13. Gaytan has conceded that the manual was not discussed or used as a reference during his training. Tr. 220.

The failure to follow procedures set forth in an operator's manual is not determinative as to sufficiency of training. *See, e.g., Foothills Materials*, 35 FMSHRC 495 (Feb. 2013) (ALJ) (noting that the failure to follow an operator's manual is insufficient evidence that the elements of safe operating procedure were overlooked during training). This is particularly true in this case where, as discussed below, the procedure that Gaytan was trained to employ was effective at protecting the miner against hazardous motion, and the manual is internally inconsistent with regard to the proper height at which the forks should be set while being adjusted. *See* P. Ex. 17 at 3-4, 5-13.

The Secretary alleges that Gaytan's training was inadequate in large part because the engine was not shut off before he exited the operator's cab, and because he placed himself in a dangerous position between the rib and a fork. Sec'y Br. at 20-21; Tr. 99-100. Gaytan admitted that he was not trained to shut down the engine before adjusting the forks, if the wheel was chocked and the brakes were set. Tr. 216-17. But the Secretary has conceded that immobilizing the vehicle alleviated any danger of being pinched between the fork and the rib. Sec'y Br. at 9, n. 4. And Gaytan was trained to set the parking brake and chock the wheel. Tr. 216-17.

Accordingly, I find that the failure to additionally shut off the engine does not, in and of itself, constitute a failure to train in safe operating procedures.[15]

The Secretary also suggests that Gaytan's training was inadequate because he was trained to raise the forks 2½ feet above the ground to adjust them. Sec'y Br. at 20. But the Secretary failed to clarify whether the proper height was on the ground, in accordance with the manual's shutdown procedure, or raised five feet, in accordance with the manual's adjustment procedure. It is difficult to fault the operator for not complying with the manual when the Secretary is uncertain how to do so. I also note that raising the forks to 2½ feet was not the only method for adjustment covered in Gaytan's training. Alternatively, he was trained to raise the forks to five feet and tilt the carriage, the same method suggested in the operator's manual. Tr. 201, 265; P. Ex. 17 at 5-13.

Inspector Barney conceded that an operator may exercise discretionary judgment when dealing with inconsistent provisions in a manual, subject to the constraints of the Secretary's safety regulations. Tr. 144. Here, the manual provisions are inconsistent, and the Secretary has failed to show that the alternate training methods chosen by the operator, to wit, immobilizing the forklift without fully shutting down, and allowing the forklift operator to adjust the forks at a height of 2½ feet as well as at five feet, is any less safe than the methods provided in the operator's manual. An operator's primary concern should be addressing all elements of safe operating procedure during training, rather than blindly following contradictory provisions in a manual.

I agree with the Secretary, however, that Gaytan should have been trained to conduct a pre-operational check of the check valves. Sec'y Br. at 21. Assistant superintendent Rowley conceded that testing check valves should be part of a forklift operator's standard pre-operational procedure. Tr. 295. The safety standards at issue clearly indicate that safe operating procedure requires raised booms to be secured against hazardous movement. Although Respondent unwittingly complied with the cited standards through functional operation of the check valves, safe operating procedure requires an operator to take steps to ensure that the check valves were present and functioning. Reliance on luck is not a safe operating procedure.[16]

[15] Additionally, given the inconsistency between the manual's procedures for shutting down the forklift, which state that the forks should be lowered to the ground, and its procedures for adjusting the forks, which state that they should be raised to five feet, it is unclear whether the shutdown procedure is even meant to apply when adjusting the forks.

[16] Alternatively, if the forklift did not have check valves or built-in mechanical locks, Gaytan's training should have included methods for physically blocking a raised boom against hazardous motion.

Gaytan admitted that check valves were not covered during his training. Tr. 221, 236. Accordingly, I find that SMD violated section 48.7(a)(1) by failing to train Gaytan regarding the presence and proper functioning and testing of the check valves in the Skytrak Forklift.[17]

2. **The Violation Was Significant and Substantial (S&S)**

As a general proposition, a violation is properly found to be S&S if there is 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 Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (approving *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation, and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

Section 104(g)(1) of the Act states that "a miner who has not received the requisite safety training . . . [shall be declared] a hazard to himself and others, and . . . be immediately withdrawn from the coal or other mine." 30 U.S.C. § 824(g)(1). Relying on section 104(g)(1), the Secretary contends that such failure to adequately task train Gaytan constitutes an S&S violation. Sec'y Br. at 22-23.

Initially, I note that Gaytan received significant training as to the safe operation of the No. 32 Skytrak Forklift. On April 26, 2012, Borresch showed Gaytan how to operate the boom, parking brake, and lights; how to adjust the forks; and how to go through the pre-operational checklist, including checking the oil, parking brake, transmission, coolant, fuel, and frame. On April 27, 2012, Borresch and Gaytan did a walkthrough of the pre-operational checklist, and began hands-on training. Gaytan then operated the forklift for two days under Borresch's supervision, prior to executing his certificate of training on April 30, 2012. Tr. 199-203, 212-14,

[17] Respondent asserts that check valve training was not required because check valves were not mentioned in the manual. R. Br. at 19. I disagree. The omission of certain training in a manual does not mean that miners need not be trained in that element, particularly if necessary to ensure safe operation of certain machinery or equipment.

242-43. I have found that Gaytan's task training omitted a *single element,* testing the check valves during the pre-operational procedure.[18]

In the circumstances of this case, however, I find that Respondent's failure to train Gaytan with respect to operation of the check valves does constitute an S&S violation. Cf. *Jim Walter Res.*, 28 FMSHRC 579, 596-97 (Aug. 2006) (finding that inadequate training did not constitute an S&S violation where the operator regularly instructed its miners in firefighting techniques, but failed to provide on-site simulated fire drills). The failure to train Gaytan with respect to operation of the check valves contributed to a hazard which was reasonably likely to result in an injury. As Rowley testified, if the check valves were to malfunction, "the boom would drop by itself . . . [and] the forks would curl forward." Tr. 313. Barney testified that a crushing injury would result if the forks were to drop unexpectedly while the forklift operator's feet were underneath. Tr. 77. Although Gaytan claims that he did not stand with his feet under the forks on this particular instance (Tr. 194), given continued mining operations, a forklift operator likely will spend time standing around or under the forks and boom of the forklift he is operating. In fact, Gaylan testified that he walked back across the forks on this occasion, contrary to his training. Tr. 195, 209, 275.[19] Accordingly, I conclude that the failure to train Gaytan to perform a pre-operational check of the check valves contributes to the hazard of unexpected lowering of the boom in the event that a check valve malfunctions during continuous mining operations, which is reasonably likely to result in a serious injury to a limb that is caught underneath the falling boom. Therefore, the S&S designation for Citation No. 8692000 is affirmed.

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[18] The Secretary contends that the gravity of the violation is compounded by additional elements which were omitted from Gaytan's training, namely, the failure to turn off the engine, and the failure to leave sufficient space between the forks and the rib. Sec'y Br. at 22. The failure to turn off the engine is immaterial here because no repair or maintenance work was being performed under section § 57.14105. Therefore, that standard, which requires that the engine be turned off and the machinery or equipment be blocked against hazardous motion, is inapplicable. Furthermore, Gaytan's training included alternate ways to immobilize the equipment (ribbing and chocking), which Barney conceded was sufficient to immobilize the forklift and allay his concern that Gaytan could have been pinned between the rib and the equipment. Tr. 77. Therefore, I conclude that injury was not reasonably likely to result from failing to turn off the engine or leave space between the forks and the rib.

[19] Thus, the procedure to adjust the forks that Gaytan actually *employed* included an unsafe element that contradicted Gaytan's training. Gaytan stepped over the forks while adjusting them. Tr. 209. Supervisor Borresch credibly testified that Gaytan was *trained* not to step over the forks, as that presented a tripping hazard. Tr. 275. Because stepping over the forks was not part of Gaytan's training, however, there was no inadequate task training violation that contributed to the associated tripping hazard or otherwise compounded the gravity associated with Citation No. 8692000.

Although I find the inadequate task training violation to be S&S, I reduce the injury that could reasonably be expected to occur from fatal to lost workdays or restricted duty. The Secretary conceded in Citation No. 8691999 that the greatest injury which could reasonably be expected to occur as a result of the boom unexpectedly dropping onto the forklift operator's feet would be lost workdays or restricted duty. Sec'y Br. at 8-9; P. Ex. 1. The hazard here is the same. Accordingly, based on the particular facts surrounding this violation, the S&S designation is affirmed, but the injury which reasonably could be expected to occur is reduced from fatal to lost workdays or restricted duty.

**1. Negligence**

Moderate negligence is attributable to an operator who "knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Here, Inspector Barney noted that Gaytan's task training had been performed for several days prior to the inspection, but was incomplete, rather than non-existent, indicating some due diligence on the part of Respondent and agent Borresch. Tr. 115. I find that the Secretary properly considered the training that Gaytan did receive as a mitigating factor. Sec'y Br. at 23. Accordingly, I affirm the moderate negligence designation.

Respondent asserts that it could not be expected to know that training with regard to check valves was required, because it was not mentioned in the operator's manual. R. Br. at 19. As noted, however, this is countered by the testimony from Assistant Superintendent Rowley's testimony that check valves should be examined as part of the typical pre-operational procedure. Tr. 295.

**4. 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)). 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 Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the de novo assessment of civil penalties 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).

Although judges have the authority to assess penalties *de novo*, the penalty calculation tables provided in 30 C.F.R. § 100.3 provide a useful guide. The parties have stipulated to the operator's history of previous violations, that the proposed penalties will not affect Respondent's ability to remain in business, and that Respondent has demonstrated good faith in abating the violations. Jt. Ex. 1, stipulations 9-11.[20] Accordingly, based on the criteria set forth in section 110(i) of the Act, and the gravity and negligence findings discussed above, I assess a civil penalty of $3,143 for the inadequate task training violation found in Citation No. 8692000.

### C. Citation No. 8602339

#### 1. The Violation – The Spider-Webbed and Cracked Windshield Impaired Visibility

For the reasons discussed below, I find the violation, but reduce Respondent's negligence from high to moderate, and assess a penalty of $8,893.

At the outset, I note that Respondent does not dispute that there was a spider-webbed crack in the windshield of the remix truck. R. Br. at 20. Rather, Respondent disputes the inspector's determination that the crack interfered with visibility and safe operation of the vehicle.

I credit inspector Barney's testimony that when he first saw the remix truck he was directly in front of it and could see that the crack in the windshield "went right across where [the driver's] head was," and "was right in his line of vision." Tr. 120. A photograph taken at the time of the Citation supports Barney's contention that the spider-webbed crack in the windshield

[20] MSHA's originally proposed penalty of $11,597 did not include a 10% reduction for good-faith abatement pursuant to MSHA's penalty proposal criteria. *See* 30 C.F.R. § 100.3(f). The parties, however, have stipulated that Citation No. 8692000 was abated in good faith. Accordingly, I apply a 10% reduction to the penalty assessment.

was near the driver's head. P. Ex. 11.[21] I also credit inspector Barney's testimony that the glare from headlights would likely glint off the crack in the windshield, temporarily blinding the driver. Tr. 123; Sec'y Br. at 25-26; *see also Lafarge Midwest, Inc.*, 32 FMSHRC 1832, 1841 (Dec. 8, 2010) (ALJ) (crediting the inspector's testimony that glare from the sun glinting off a cracked windshield would cause the driver to be unable to see). Just as the glare from the sun combined with the cracked windshield was found to interfere with visibility in *Lafarge Midwest,* I find that the glare from headlights in this underground mine combined with the cracked and spider-webbed windshield interfered with the driver's visibility. Accordingly, I concur with the inspector's determination that the windshield was not being maintained to provide visibility for safe operation. Tr. 119.

Respondent's primary argument is that because Barney did not sit in the driver's seat, he could not determine the driver's angle of vision or determine whether visibility would be impaired by the cracked windshield. R. Br. at 22. Barney admitted that he did not sit in the driver's seat. Tr. 120. But that admission does not invalidate his determination that the location of the spider-webbed crack impaired visibility. As a practical matter, an obstructed sightline is usually obstructed from both ends. In any event, I find it reasonable for Barney to conclude that the crack was "right in [the driver's] line of vision" because Barney stood directly in front of the truck where he "could see that [the crack] went right across where his head was." Tr. 120. Accordingly, I find that inspector Barney's testimony concerning the location of the spider-webbed crack in the windshield and the photograph he took to document it (P. Ex. 11), are sufficient to establish the likelihood of impaired visibility that diminishes safe operation of the remix truck.

Respondent argues that a Commission judge in another case found that the Secretary failed to prove impaired visibility where the inspector did not sit in the driver's seat of a truck with a cracked windshield. R. Br. at 20-22 (citing *Walker Stone Co.*, 17 FMSHRC 1389, 1394 (Aug. 1995) (ALJ)). Although the judge in *Walker Stone* vacated the citation, that case is distinguishable because it essentially turned on credible testimony from the driver of the truck that his vision was not impaired when he drove the truck with the cracked windshield. Specifically, the judge stated:

> Based on the evidence in this record, *most particularly the photographs of the truck (GX-6 and GX-7), which quite clearly depict the damage*, I conclude that it is insufficient to establish that the windshield cracks noted by the inspector impaired the operator's visibility to any significant extent. In this regard, I also find *Mr. Moenning's testimony that his vision was not impaired* when he drove the truck to be credible. *I also note* that Inspector Ramage admitted that he never got into the truck and looked through the windshield himself to determine whether the cracks would affect the operator's visibility. Accordingly, the citation fails of proof and will be vacated herein.

[21] Although Barney's photograph (P. Ex. 11) does not show the entire windshield, I find the proximity of the crack to the center of the driver's-side windshield wiper provides a useful frame of reference that supports Barney's testimony. *See* R. Exs. 24 and 25.

17 FMSHRC at 1393-94 (emphasis added). In other words, the inspector's failure to sit in the driver's seat was supplemental evidence supporting a conclusion which was primarily based on photographic evidence and direct testimony from the driver.

In *Lafarge Midwest,* another Commission judge similarly weighed the evidence and came to the opposite conclusion, finding that the cracked windshield impaired visibility:

> In the case at hand, the inspector did not sit in the driver's seat of this particular gator but he did look through the windshield and Ballard, who drove the gator daily, testified that the condition of the windshield obscured his vision . . . .

32 FMSHRC at 1839. In *Lafarge Midwest*, primary emphasis was placed on the testimony of the inspector and the driver, which was sufficient to establish impaired visibility, despite the inspector's failure to view the condition from inside the operator's cab.

In this case, there is no direct testimony from the driver. Accordingly, the weight of the evidence hinges on the testimony of the inspector, which I credit, and the photograph of the windshield, which I find supports the inspector's impaired-visibility determination. As in *Lafarge Midwest,* the inspector's failure to view the condition from the driver's seat alone is insufficient to rebut the Secretary's evidence.[22]

Respondent also challenges the Secretary's characterization of the width of the crack. Respondent argues that the photograph does not show the entire windshield, and that inspector Barney's notes do not provide any measurements.[23] R. Br. at 22; Tr. 140-43. I am not persuaded by these arguments. In determining visibility, the width of a crack is not determinative. A small crack directly in a driver's line of sight can be more disruptive than a wide crack along the top or bottom of a windshield. Although the photograph does not conclusively establish how far the crack in the windshield extended, it supports the inspector's testimony that the spider-webbed crack *began* in a location that would impair driver visibility. P. Ex. 11.

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[22] As indicated in the above-cited cases, a direct and credible statement from the driver that his visibility was unaffected may have been enough to change the outcome in Respondent's favor. The Secretary contends that because the driver and former shop foreman Hanks were not called to testify on this issue, the undersigned should infer that if they had been, their testimony would have been adverse to Respondent, and that I should draw an adverse inference from Respondent's failure to call such witnesses. Sec'y Br. at 26 (citing the missing witness rule discussed in *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-1122 (Oct. 2001)). I decline to draw an adverse inference here, particularly since Hanks is no longer employed by Respondent, and the driver could have been deposed or subpoenaed by either party. Rather, as noted, I find that inspector Barney's testimony and the photograph he took to document the crack (P. Ex. 11), are sufficiently credible to establish impaired visibility.

[23] Specifically, the Secretary alleges that the crack extended ¾ of the width of the windshield or approximately 18 inches (Sec'y Br. at 24), while Respondent counters that the crack may have been as narrow as ¼ of the width of the windshield or 6 inches (R. Br. at 21).

In sum, in the circumstances of this case, I am not persuaded by Respondent's arguments that the Secretary failed to meet his burden of proof because Barney failed to observe the spider-webbed and cracked windshield from inside the operator's cab, or because Barney failed to establish the extent of the crack in his photograph and notes. R. Br. at 22. While it is true that the Secretary bears the burden of proving each and every element of an alleged violation, *Jim Walter Res.*, 9 FMSHRC 903, 907 (May 1987), the Secretary meets that burden by a preponderance of the evidence, i.e., by showing that the existence of a fact is more probable than its nonexistence. *Rag Cumberland Res.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Here, the Secretary established that driver visibility was impaired by a preponderance of the credible evidence based on Barney's testimony concerning the location of the crack as corroborated by the photographic evidence establishing that the crack was in the driver's line of vision. Tr. 120; P. Ex. 11 cross referenced in R. Exs. 24-25. Respondent's counter arguments regarding Barney's failure to sit inside the operator's cab and alleged failure to take adequate photographs and notes are insufficient to rebut that evidence.

**2. The Violation was Significant and Substantial (S&S)**

Logic dictates that impaired visibility puts others at risk of being struck by the remix truck, and that if a miner pedestrian were struck, a fatality would reasonably be expected to occur. Furthermore, the remix truck was a heavy piece of machinery and it was driven in an area with numerous draw and dump points and heavy traffic, both pedestrian and vehicular. Tr. 119, 124-25. Accordingly, I find that the cracked windshield violation significantly contributed to a discrete safety hazard (collision) that was reasonably likely to result in injury, particularly given the high traffic in the area. I further find that such injury would reasonably be expected to be fatal if a pedestrian was involved. *See Lafarge Midwest, supra,* 32 FMSHRC at 1841 (finding an S&S violation where mobile equipment with a cracked windshield was operated in a high traffic area). Accordingly, I affirm the Secretary's determination that the cited condition was an S&S violation that was reasonably likely to result in a fatality.

**3. Negligence**

A violative condition is attributable to high negligence where the operator "knew or should have known of the violative condition . . . and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Respondent clearly knew of the violative condition. The cracked windshield had been noted on the pre-shift examination book for eight shifts and the driver had reported the condition to his shop supervisor. Tr. 117-18.

When asked whether he was given any mitigating circumstances for why the truck was allowed to operate, inspector Barney admitted that shop supervisor Hanks told him in the shop that Hanks thought it was okay to run in that condition. Tr. 134. Inspector Barney continued, "I guess you could say that was mitigation. Maybe he did not realize it was a hazard, maybe he did not realize the severity of the hazard." *Id*. Hanks also ordered a replacement windshield. Tr. 120. In these circumstances, I am hard-pressed to conclude that Respondent did not offer credible evidence of some mitigating circumstances.

The Secretary argues that Hanks' statement through the hearsay admission of Barney that he thought that it was okay for the truck to be driven until the replacement window arrived, should not be considered a mitigating circumstance and should only remove the cited condition from the realm of an unwarrantable failure. Sec'y Br. at 27; *cf., Lafarge Midwest, supra,* 32 FMSHRC at 1843 (finding an unwarrantable failure where the driver and other miners "constantly made complaints that went unheeded" for at least six months). I do not agree. Barney candidly admitted that Hanks told him that "he thought it was okay to run in that condition." Tr. 134. Furthermore, the record reveals a legitimate dispute as to whether the crack would impair visibility. In these circumstances, the Secretary's position gives insufficient credit for Barney's own admission of evidence of mitigation. Moreover, it results in a significantly increased penalty where credible evidence of mitigation exists. Hanks should have taken the truck out of service until the windshield was replaced, rather than playing the odds. But Barney's own hearsay testimony supports Respondent's case for mitigation. Accordingly, I reduce Respondent's negligence from high to moderate.

**4. Civil Penalty**

As noted above, the penalty calculation tables provided in 30 C.F.R. § 100.3 provides a useful guide. Given the parties' stipulations regarding Respondent's ability to remain in business and its good faith in abating the violation, and based on my moderate negligence finding above, I reduce the proposed penalty of $29,529 and assess a civil penalty of $8,893 for the cracked windshield violation in Citation No. 8602339.

## V. ORDER

**WHEREFORE**, the parties' motion to approve partial settlement in Docket No. WEST 2012-1171-M is **GRANTED**. Consistent with the parties' settlement terms, it is **ORDERED** that Citation No. 8692424 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 further **ORDERED** that Citation No. 8692428 be **MODIFIED** to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty."

Consistent with this Decision, it is **ORDERED** that Citation No. 8691999 in Docket No. WEST 2012-1171-M is **VACATED**. It is further **ORDERED** that Citation No. 8692000 in Docket No. WEST 2012-1171-M is **MODIFIED** to reduce the expected injury or illness from "fatal" to "lost workdays or restricted duty." It is further **ORDERED** that Citation No. 8602339 in Docket No. WEST 2011-1172-M is **MODIFIED** to reduce the level of negligence from high to moderate.

Accordingly, Respondent, Small Mine Development, LLC, is **ORDERED** to pay, within thirty days of the date of this decision, a total civil penalty of $20,353 in satisfaction of the six Citations at issue in the above-captioned dockets.[24]

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

Distribution:

Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

Charles W. Newcom, Esq., Sherman & Howard, LLC, 633 Seventeenth Street, Suite 3000, Denver, CO 80202

/tmw

[24] 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.

# ADMINISTRATIVE LAW JUDGE ORDERS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
**1331 Pennsylvania Ave., NW Suite 520N**
**WASHINGTON, D.C. 20004**
(202) 434-9933

January 16, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 2011-129-M |
| Petitioner | : | A.C. No. 2402070-000232297 |
| v. | : | |
| | : | |
| JOHN RICHARDS CONSTRUCTION | : | Mine Name: RICHARDS PIT |
| Respondent | : | |

## NOTICE OF HEARING and RULING ON MOTIONS

**Hearing:**

Upon consultation with the parties it was agreed that **the hearing in this matter shall commence on Thursday, April 3, 2014.** The hearing location will be held in or as close as possible to **Missoula, Montana.** If the parties prefer, this hearing can also be set for **July 10, 2014.** The parties are directed to advise the Court as to the preferred date for the hearing. A subsequent notice shall note the date chosen and provide the courtroom location**.**

The hearing will be conducted in accordance with the Mine Act and the Commission's Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are as identified in the pleadings.

Any party intending to offer exhibits at the hearing shall submit an exhibit list at the start of the hearing. Each exhibit shall be marked; each of the Secretary's Exhibits are to be marked with a "P" or some other uniform designation, followed by a number, in sequence, and, in the same fashion, each of Respondent's Exhibits are to be marked with an "R" or with some other uniform designation, followed by a number, in sequence. A copy of each exhibit is to be provided to the opposing side.[1] Each potential witness is also to be identified, along with a brief statement of the expected testimony from that witness. This exchange is to occur on or before February 28, 2014. Supplemental exchanges may be made as long as they are made in good

[1]Any attendee requiring special accessibility features and/or any auxiliary aids (such as sign language interpreters) must make such a request sufficiently in advance of the hearing to allow for accommodation, subject to the limitations set forth in 29 C.F.R. §§ 2706.150(a) and 2706.160(d).

faith and arising from information which was not reasonably available at the time of the initial exchange.

**Ruling on Motions**

Having considered the Respondent's Motion requesting a hearing on MSHA's request to designate this matter for Simplified Proceedings, 29 C.F.R. Part 2700, Subpart J and Respondent's request for depositions, the Secretary's Response thereto, and "Defendants" Response to the Secretary's response, **the Court designates this matter for simplified proceedings and DENIES the Respondent's request for the taking of depositions**.

This case involves a single section 104(a) citation, in which the Secretary alleges a violation of 30 C.F.R. § 56.14112(b), a guarding standard which provides that "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The citation alleges that a guard was not in place at a self-cleaning tail pulley at the bearing/take up area. Because of its location, away from the travel way, the citation was not designated as "significant and substantial" and the risk of injury was marked as "unlikely." This resulted in a proposed assessment of $100.00 (one hundred dollars).

Respondent seeks to conduct depositions in this matter and asserts that it is entitled to a hearing, that MSHA has the burden of proof, and that it is entitled to "due process." Respondent's assertions are correct: it is entitled to due process, it does have a right to a hearing, and the Secretary, acting on behalf of MSHA, does have the burden of proof . The Secretary does not contest that the Respondent has a right to a hearing, nor that the burden of proof is on the Secretary. The Secretary also does not challenge the Respondent's claim to due process and each of these rights will be observed. The claimed "right" to take depositions, however, is another matter.

This matter fits squarely within the type of case that is completely appropriate for simplified proceedings. Pursuant to 29 C.F.R. § 2700.100, generally and, more particularly, applying § 2700.101, "Eligibility for Simplified Proceedings," the single citation involved here includes *all* of the characteristics identified in that provision. It is noted that, to fit within such eligibility, only "one or more" of those characteristics need be present; there is no requirement that all of the characteristics be present. Further, addressing the Respondent's general claim of entitlement to "due process," the Court informs that due process is a flexible concept. The process which is "due" is not uniform for every case that is litigated and this is true for all litigation disputes, not simply Mine Act matters. Affording the Respondent with a hearing, which includes the right to present witnesses on its behalf, as well as to cross-examine the government's witnesses, and to present exhibits, as well as to review the exhibits of the opposing side, all comport with satisfying due process. Depositions are not an essential part of due process for matters of this nature. *Starr v. Commissioner of Internal Revenue*, 226 F.2d 721(7th Cir. 1955), cert. denied, 350 U.S. 993 (1956). The Administrative Procedure Act contains no provision for pretrial discovery in the administrative process. *N.L.R.B. v. Vapor Blast Mfg. Co.*,

287 F.2d 402 (7th Cir. 1961), *Silverman v. Commodity Futures Trading Commission,* 549 F.2d 28, *33 (7th Cir. 1977). Here, with the prehearing exchange of expected witnesses, together with a statement about the subject of their testimony, and the exchange of all exhibits intended to be introduced, these disclosures insure that fundamental fairness will be present. In fact, the Secretary has stated that as of January 5, 2012, it had provided the Respondent with "the inspection file, [which] includ[ed] copies of the citation, [the] inspector's field notes, and [the] inspection information form. Secretary's Response to Respondent's Request for Depositions at 2. Thus, Respondent will have been provided with "[t]he fundamental requirement of procedural due process [by] the opportunity to be heard 'at a meaningful time and in a meaningful manner appropriate to the nature of the case." *Capital Cement Corp.,* 21 FMSHRC 883, 887 (Aug. 1999). *See also, Sec. v. Cactus Canyon Quarries of Texas, Inc.* , 2013 WL 1856602, March 2013 (Judge Barbour).

As the Secretary observes, pursuant to 29 C.F.R. §2700.107, discovery where a matter has been designated for simplified proceedings, is not permitted except as ordered by the Court. Significantly, as the Secretary also points out, even where a matter is *not* under simplified proceedings, the Court has the discretion to determine in any Mine Act matter whether discovery should be limited in the interests of time, burden to the parties, and expense. Discovery may be limited "to prevent undue delay or to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). Here, the reasons put forth by the Respondent in its "Defendants Response" simply asserts that due process includes depositions. As explained, that claim is incorrect and the Respondent has not offered any cognizable reason why the discovery allowed is insufficient.

**So ordered.**

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

Distribution:

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John Richards, Owner, John Richards Construction, P.O. Box 276, Seeley Lake, MT 59868

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-920-8689

January 16, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | TEMPORARY REINSTATEMENT |
| MINE SAFETY AND HEALTH | : | PROCEEDING |
| ADMINISTRATION (MSHA), | : | |
| Petitioner | : | Docket No. WEVA 2012-1448-D |
| | : | MSHA Case No. PINE-CD-2012-02 |
| v. | : | |
| | : | |
| ARGUS ENERGY WV, LLC, | : | Mine: Deep Mine No. 8 |
| Respondent | : | |

## ORDER TOLLING TEMPORARY REINSTATEMENT OF CLINTON RAY WARD

Appearances: John M. Strawn, Esq. and Jodeen M. Hobbs, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA on behalf of Clinton Ray Ward

Mark E. Heath, Esq., and Dennise R. Smith, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd, East, P.O. Box 273, Charleston, WV for the Respondent

Before: Judge Steele

This matter is before me on Respondent's December 12, 2013 Motion to Dissolve Temporary Reinstatement.[1] In the Motion, Respondent argued that the mine where Clinton Ray Ward worked would be closed on December 27, 2013, and Ward's position would be eliminated. The Secretary opposed the Motion, arguing that the Respondent has not met its burden of proof in arguing that the Temporary Reinstatement should be tolled.

Ward has been temporarily reinstated since August 21, 2012. A discrimination hearing was held on June 27-28, 2013 in South Charleston, West Virginia. On December 12, 2013, Respondent filed a Motion to Dissolve the Temporary Reinstatement due to the December 27, 2013 closure of Deep Mine No. 8. I issued a Decision and Order Denying the Discrimination Complaint and Dissolving the Temporary Reinstatement on December 27, 2013. In the decision,

[1] Parties originally filed their motions in this matter under the Discrimination Proceeding, WEVA 2013-597-D. However, they corrected this error and requested that all matters related to this Motion be considered under the Temporary Reinstatement Proceeding, WEVA 2012-1448-D.

I did not rule on the pending Motion to Dissolve the Temporary Reinstatement because I found the matter to be moot.

Respondent requested that the Motion to Dissolve the Temporary Reinstatement be ruled upon in order that the temporary reinstatement be dissolved on the date of the mine closure, rather than after it becomes a final order on the complaint.[2] The parties briefed their respective positions, expedited discovery was permitted, and a hearing was scheduled for January 16, 2014 in South Charleston. On January 09, 2014, the Secretary communicated that a hearing was unnecessary, and that they would oppose the motion through briefing. For the following reasons, I order that Ward's temporary reinstatement be tolled, effective December 27, 2013.

**FINDINGS OF FACT**

The only evidence submitted in support or opposition to this motion was the affidavit of Charles Leonard, the General Manager of Argus Energy's West Virginia properties, and notices required under the Worker Adjustment Retraining Notification ("WARN") Act, including notice issued to all employees, notice to the State of West Virginia Dislocated Worker Unit, notice to the Mayor of Kenova, and notice to the Wayne County Commission.[3]

The reason for the closure of these facilities was due to, among other things, "the collapse of the Central Appalachian coal market. *Sec. Supp. Aff. Leonard* ¶ 2. According to the affidavit, Leonard was involved in the business decision to close Argus' mining complex in West Virginia, which included, among other facilities, Mine #8. *Sec. Supp. Aff. Leonard* ¶ 2; *WARN Notice*. There was a "complete and total cessation of coal production at the mine complex" on December 27, 2013, and "there were no extensions of the layoffs and no persons were transferred to any other Argus facilities." *Id.* at ¶ 3. The closure of the facilities is expected to be permanent. *WARN Notice*. The only work being performed at the mine complex is removal and transportation of equipment, and the only coal being transported is for clean-up purposes. *Id.* at ¶ 4, 5. Of the original 62 employees at the mine, 56 were laid off. *Id.* at ¶ 7.

Six underground employees have been retained at Mine No. 8, where Ward was employed, and four have been retained at Mine No. 7. *Id.* at ¶ 6. The individuals were chosen to

[2] Section 105(c)(2) of the Mine Act states that, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, "shall order the immediate reinstatement of the [complaining] miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added). Section 113(d)(1) of the Act states: "The decision of the administrative law judge … shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed …." 30 U.S.C. § 824(d)(1) (emphasis added). Therefore, the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision.

[3] An affidavit for Charles Leonard was attached to the Respondent's Motion to Dissolve the Temporary Reinstatement on December 12, 2013, and a second supplemental affidavit for Charles Leonard was submitted on January 9, 2014.

assist in the process of closing down the mine on the basis of seniority, experience, certifications, and skills. *Id.* Their tasks included examinations of the mine and its airways, as well as EMT services, during the equipment removal, as required by law. *Id.* at ¶ 7, 8. There were no persons from the second shift or the third shift crew retained. *Id.* at ¶ 6.

At the time of Ward's discharge, Ward had 4.5 years of underground experience, 2 years of experience as an electrician, and 8 months of experience at Argus No. 8 Mine. He had an underground miner certification and electrical cards. He did not have his foreman papers and was not an EMT, and therefore is unable to perform examinations other than electrical examinations. *Id.* at ¶ 9.

The six individuals retained to assist in closing Mine No. 8 were the following:

- Grover Meade—Mine Superintendent. Meade has worked as mine superintendent of No. 8 Mine for three years and has 16 years of experience as a coal miner. Meade is certified as a foreman in West Virginia and Kentucky, has underground surface mining cards for West Virginia and Kentucky, and is a federal limited instructor and EMT. *Id.* at ¶ 7.
- Lloyd Mann—Mine Foreman. Mann worked for 1.5 years at Argus, has been a certified mine foreman since 2002, and has 24 years of underground mining experience. *Id.*
- Jake Bowen—Chief Electrician for all shifts. Bowen worked for Argus for 3 years and four months, has 7 years of experience as a chief electrician, 15 years of experience as an electrician, and 27 years of experience as a coal miner. He has electrical and EMT certifications for West Virginia and Kentucky, has mine foreman's certification, MSHA certification in dust, is an approved Kentucky and MSHA mine safety instructor. *Id.*
- John Dingess—Master Electrician, Plumber, and Examiner. Dingess worked for Argus for 11 years and has 32 years of experience as a coal miner. He is a certified plumber and airways examiner, has a mine foreman's and electrician's card, and is an EMT. *Id.*
- Kay Adkins—Outby Mine Foreman and Examiner. Adkins worked for Argus for 11 years, two of which were as mine foreman. He has 33 years of experience as a coal miner. Adkins is a West Virginia certified mine foreman, a certified EMT, and CPR certified, and he has a surface miner card. *Id.*
- Robert Ratcliff—Outside Man. Ratcliff was the mine outside mine prior to the mine closure and is being retained in that role during closure. He operates the mine communication system and dispatches, and is an EMT. *Id.*

## CONTENTIONS OF THE PARTIES

The Respondent argues that Ward's temporary reinstatement should be dissolved due to the closure of Mine No. 8, the cessation of all mining operations, and the elimination of Ward's position on December 27, 2013. *Resp. Mot. Dissolve Temp. Reinst.*, 1-4. Respondent argues that it would be contrary to Commission precedent and inequitable to permit the temporary

reinstatement to continue under a bona fide economic retrenchment, where all but several more senior miners have been laid off. *Id.* at 4.

In Response, the Secretary argues that Respondent has not met its burden of proof under the "not frivolously brought" standard applicable to tolling arguments in a temporary reinstatement hearing.[4] *Sec. Reply to Mot. To Diss. Temp. Reinst*., 3-4. Specifically, the Secretary argues that Respondent has not provided sufficient evidence concerning the status of miners after December 27, 2013, the possible availability of jobs to laid off miners, and the duration of the closure. *Id.* at 5. Furthermore, the Secretary asserts that the Respondent has not sufficiently explained how the six miners retained during the closure were selected, and questions the objectivity of the selection. *Id.* The Secretary argues that Ward was capable of performing the work during closure, and the Respondent has not proven otherwise. *Sec. Resp. to Sec. Supp. Aff. Leonard*, 2-3.

**ANALYSIS**

A. The Mine's Closure and Mass Layoff Tolls the Temporary Reinstatement

"The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc*., 31 FMSHRC 1050, 1054 (Oct. 2009). This "limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous," must be consistent with the "narrow scope of temporary reinstatement proceedings." *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

> [a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin,* 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

*MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC*, 2013 WL 865606, *4 (Feb. 2013). "In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous." *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

The Commission has categorized tolling as an affirmative defense, and held that the operator must make a showing by a preponderance of the evidence that no work was available

[4] In the *Secretary's Reply to Respondent's Motion to Dissolve Temporary Reinstatement*, the Secretary also argued that in the alternative discovery should be permitted. Expedited discovery and an opportunity for hearing was so permitted, however after conferring and exchanging some discovery the parties decided that no additional discovery or a hearing were necessary.

for the miner. *KenAmerican Resources*, 31 FMSHRC at 1054-55; see also *Chadrick Casebolt*, 6 FMSHRC 485, 499 (Feb. 1984) ("if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.")

In the instant case, the Secretary has called into question the objectivity of the layoff as applied to Ward. It has suggested that Ward could perform work during the closure, and has raised the issue of whether other miners who did not allege discrimination were provided alternate employment opportunities. Therefore, the Respondent must make a showing by a preponderance of the evidence that the layoff was for legitimate non-discriminatory reasons under the "not frivolously brought" standard.

The Secretary has not submitted any evidence to support its position, so the only evidence that may be considered are the Respondent's evidentiary submissions, as well as any relevant evidence from the original temporary reinstatement hearing. Charles Leonard, the general manager of Argus Energy's West Virginia properties, has stated that the closure of Mine No. 8 (as well as Mine No. 7 and several other facilities) was due to "the collapse of the Central Appalachian coal market."[5] *Sec. Supp. Aff. Leonard* ¶ 2. As a result of the closure, 56 of the mine's 62 employees have been laid off. *Id.* at ¶ 7. The six employees not laid off, have been retained to assist in the mine closure, and they were chosen on the basis of seniority, experience, and skill. *Id.* at ¶ 3-7. No employees from the second or third shift crews were retained, and Ward worked in the third shift. *Id.* at ¶ 7, 10. Considering the totality of the Respondent's evidence submitted in this case, and the complete lack of any evidence from the Secretary to the contrary, I find that the Respondent has met its burden.[6] As a result, the temporary reinstatement shall be tolled from the date of the mine's closure.

B. The Temporary Reinstatement Should be Tolled on December 27, 2013

Respondent's Motion presents a procedural issue upon which neither party briefed. Respondent requested that its Motion to Dissolve be ruled upon even though it was successful in the Discrimination Proceeding, in order that it not be required to continue Ward's employment

[5] In the October 25, 2013 *WARN Notice* to employees, the operator stated that it was working to secure additional sales contract that may permit the mine to remain open. However, in Leonard's Second Supplemental Affidavit on January 9, 2014, he stated under oath that "there was a complete and total cessation of coal production." *Sec. Supp. Aff. Leonard* ¶ 3. I accept the latter statement to be the more accurate, as it was stated after the mine's December 27, 2013 closure.

[6] It should be noted that this is an exceptional case where Ward's Discrimination complaint has already been denied by this Court, there was a complete closure of the mine, and the Secretary submitted no evidence opposing Respondent's claims.

during the period before this Court's decision becomes final.[7] The issue that must now be resolved is whether an Administrative Law Judge may dissolve or toll a temporary reinstatement prior to a "final order on the complaint." 30 U.S.C. § 815(c)(2).

In this case, the conditions changed after Ward was temporarily reinstated, and the plain language of the Act indicates that the reinstatement may only be terminated upon a "final order on the complaint." 30 U.S.C. § 815(c)(2). *See* note1 *supra*. Such a final order may only come from the Commission. Therefore, it would seem that the ALJ is permitted to order a temporary reinstatement effective on the date of the Order, but not dissolve one until after the Commission has had the opportunity to review it.

Previous Commission decisions concerning tolling have involved cases where the tolling argument was raised contemporaneously with the application for temporary reinstatement. Furthermore, Commission decisions concerning dissolving temporary reinstatements have involved cases where the Secretary has announced that it would not be filing a discrimination complaint on the miner's behalf. Under such circumstances, the Sixth Circuit has held "that upon the Secretary's determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement." *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012).

The Sixth Circuit reversed the Commission's decision in *MSHA obo Mark Gray v. North Fork Coal Corp*., 33 FMSHRC 27 (Jan. 2011), on a narrow issue, holding that the Secretary's decision not to file a discrimination complaint provides the statutory prerequisite to dissolve the discrimination complaint. Therefore, it remains unclear whether the Commission's holding that a judge lacks "the necessary statutory prerequisite for dissolving [a] temporary reinstatement because no final order had been issued on the miner's complaint," would still hold in situations where the Secretary filed a discrimination complaint on the behalf of the miner. *Id.* at 37.

In the instant case, it is more precisely tolling that is at issue, rather than dissolution of the temporary reinstatement. Though Respondent's submissions in this case were styled as motions to dissolve, their arguments all spoke to tolling. I found, *supra*, that the operator's obligations under the temporary reinstatement should be tolled due to the mine closure. Tolling is usually applicable only upon a showing economic necessity has resulted in mass layoffs or mine closure. As such, this extraordinary circumstances warrant that the tolling take effect immediately. I therefore hold that such tolling shall take effect on the date of the mine closure rather than after a final order of the Commission.

[7] "The decision of the administrative law judge … shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed …." 30 U.S.C. § 824(d)(1).

## ORDER

Based on the foregoing, it is hereby **ORDERED** that the temporary reinstatement of Clinton Ray Ward be **TOLLED** as of December 27, 2013.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

Distribution:

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January 27, 2014

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 2013-526-M<br>A.C. No. 24-02016-314135 |
| v. | : | |
| PORTABLE INC., Respondent | : | Wash Plant |

## ORDER ON MOTIONS

This matter involves a section 104(a) citation, alleging that the Respondent impeded an MSHA inspection at its mine, in violation of section 103(a) of the Mine Act. Before the Court are two motions, both filed by the Secretary. First, there is the Secretary's January 10, 2014 Motion to Plead in the Alternative and, second, its January 22nd Motion for a Protective Order. Respondent, Portable's, Opposition to the motion to plead in the alternative and its Response to the protective order were filed and considered by the Court. For the reasons which follow, the Motion to Plead in the alternative is GRANTED, while the Motion for a protective order is DENIED. The motions are discussed in turn.

**The Secretary's Motion to Plead in the Alternative**

As stated in the Secretary's Motion, this case involves one citation, alleging the impeding of an inspection at Respondent's mine, in violation of Section 103(a) of the Mine Act. Here, the Secretary seeks to plead in the alternative that the Respondent also violated the same provision of the Act by providing advance notice of that inspection. Motion at 1. The Secretary points to Review Commission decisions and the Commission's procedural rules in support of granting such amendments where they present an alternative theory for recovery and where such pleading amendments are consonant with justice being achieved. Only two bases for denying such amendments have been recognized: where bad faith, dilatory conduct and undue delay are at the root of the request; or where granting the request would create prejudice. *Id.* at 3. In this instance, the Secretary emphasizes that its motion involves the same provision of the Act and puts forth only an alternative theory of recovery: "[t]he facts, witnesses, and evidence that the Secretary will proffer in litigating the alleged violation for impeding [ ] [the] inspection will largely mirror the evidence he uses to prosecute the alleged advance-notice violation." *Id.* It notes that the proof for both theories "will refer to the exact same conduct as originally described in the citation" and therefore no prejudice will result to the Respondent. *Id.*

In its Opposition, Respondent, Portable, observes that in his deposition the issuing inspector stated that the citation he issued was based on being unduly delayed in commencing his inspection and further that he did *not* issue the citation on the basis that there had been advance notice given of the inspection. Portable contends that it would be prejudiced if the amendment is permitted because it would experience "undue difficulty in defending this lawsuit based on the Secretary's delay in both arriving at and asserting such claim." Opposition at 3. That "undue difficulty," however, is not identified other than it "would result in the accrual of additional time and expenses." *Id.* At the same time, Respondent notes that the Secretary has attempted to shut the door on an additional deposition of the inspector regarding the advance notice claim by its filing a motion for a protective order. This latter motion, it is contended, "further prejudices" Respondent. *Id.* at 4.

Upon consideration, the Court grants the Secretary's Motion to plead in the alternative. There is no dispute over the appropriate law to apply when the Secretary seeks to amend its complaint. Indeed, both sides point to *Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992), as guiding Commission precedent. Sec. Motion at 2, Respondent's Opposition at 3. As set forth in *Wyoming Fuel Co.*, and several other cases, such motions are evaluated by determining if the mine operator suffered prejudice by the amendment. As applicable here, that translates into whether the operator is "able to adequately prepare for hearing." *Sec. v. Black Beauty Coal Co.,* 34 FMSHRC 1733, 2012 WL 3255590, (Aug. 2012). There has been no showing that the Respondent will not be able to adequately so prepare. Further, it has been observed that the Federal Rules of Civil Procedure may be consulted, as a source of guidance, where the Commission's procedural rules do not fully address a question. In that regard, Rule 15(a) of Federal Rules provides that such amendments to pleadings should be liberally allowed, in the interest of justice being done.[1] As noted above, while the Respondent has alleged undue difficulty in defending the lawsuit, it has not supported that claim.

**The Secretary's Motion for Protective Order**

The Secretary's Motion for Protective Order is related to its Motion to plead in the alternative and it is evaluated in light of that fact. The essence of the Secretary's Motion for a protective order is that Portable has already had its opportunity to question the Inspector who issued the citation. It is true that the Respondent deposed the Inspector on December 18, 2013.

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[1] As the Commission observed in *Wyoming Fuel, "*In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires."Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, Moore's Federal Practice.Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) ("Moore's"). And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.*" Wyoming Fuel* at *1290, also citing *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990).

The Secretary contends that because the issuing Inspector, during his deposition, made reference to the event and remarked that, looking back on what transpired that day, he believed the mine's conduct gave notice that he was present for an inspection, that testimony effectively notified the Respondent of the alternative violation theory. The Secretary continues that it was the Inspector's impression that the mine was trying "to delay [the inspection] as much as possible. The Inspector stated that, "Phone calls were made to the mine while [he] was outside waiting for them, for somebody to escort [him] in, you know, looking back at it now, you know, giving them notice that [he] was there." Sec. Motion at 2, quoting Inspector Bellfi's Deposition at 11:19-12:3. On this basis, the Secretary asserts that the Inspector's response should have prompted Respondent's Counsel to inquire further about the suggestion that Portable had given advance notice of the impending inspection.

The problem with the Secretary's criticism is that Portable *did inquire* about the suggestion, asking the Inspector directly if he believed that the operator had violated the advance notice prohibition. The Inspector responded that he did *not* believe advance notice had occurred. It is true that the Respondent did not belabor the point. It took the Inspector's denial as the answer. The Secretary apparently believes that the Respondent should not have taken the Inspector's "no" for an answer.

The Secretary contends that its Motion to Plead in the Alternative, discussed *supra*, was based "not on [Inspector] Bellfi's specific perceptions . . . but rather [on] the testimony of Portable's own employees."[2] Motion to Plead in the Alternative at 3. However, the Secretary does not disavow that it will use the issuing inspector's testimony to support its alternative pleading claim. It also asserts that, beyond having already had an ample bite at the apple, allowing a second deposition would be unreasonably cumulative or duplicative and therefore should be denied, following the guidance offered pursuant to Federal Rule of Civil Procedure 26(b)(2). Motion for Protective Order at 4-5.[3]

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[2] The Secretary also makes procedural complaints about Portable's effort to depose the Inspector a second time, noting that the Respondent's deposition notice did not specify a date and time, nor did it specify the reason for taking it. It also observes that Portable did not first confer with the Secretary before serving its deposition notice and that it did not seek leave of the Court to conduct the second deposition. Looking to the Federal Rules of Civil Procedure for guidance, the Secretary contends that these objections form independent bases to grant the protective order. Portable's Response states that a date and time were not specified simply because it wanted to confer with Secretary and arrive at an acceptable schedule. Subsequently, with no agreed-upon date, Portable served it notice for deposition for January 28th, in Denver, curing that objection.

[3] As an alternative, the Secretary proposes "allowing Portable to serve an additional five interrogatories about Belfi's impressions relating to advance notice." Motion for Protective Order at 6. What those five interrogatories would be or why, for that matter, the number would

(continued...)

In its Response to the Secretary's Motion for a Protective Order, Portable maintains that, given the Inspector's very clear response, when asked if his citation was issued on the basis of an advance notice claim, that it was not so based, it had no cause to delve further. The Court agrees that, while the Inspector reminisced about the event and whether notice had been given that he was at the mine, the unequivocal response from the Inspector that he was not contending an advance notice violation closed the door on that theory, at least at that point in time. For the Secretary to contend that the Respondent should have rooted around further to see if it could stir up an additional basis for the citation's issuance makes no sense.

Portable notes that the resolution of this issue is largely within the judge's discretion. While the Federal Rules may be consulted for *guidance*, they are only that. Further, even if leave of court is required for a second deposition, in this instance it is warranted because, in light of the Secretary's motion to plead in the alternative, Portable has not had an ample discovery opportunity on that new allegation and therefore it is neither cumulative nor duplicative.

As the Court has noted, while the Secretary has filed separate motions, they are linked. The Respondent had no fair warning from the initial deposition of the issuing Inspector that an advance notice theory was looming. In fact, that theory was disavowed by the Inspector. Accordingly, the Secretary's Motion for Protective Order is DENIED.

Therefore, the Respondent may conduct a second deposition of the Inspector who issued the citation being litigated here. However, the Court trusts that, as Respondent has stated, the deposition will be conducted in Denver, where the parties are located, unless they mutually agree to another location. There is ample time to conduct the deposition, as the hearing is still three weeks away. The hearing date will not be rescheduled. The Respondent is directed to limit its questions to those reasonably related to the Secretary's alternative theory that the Respondent provided advance notice and to not ask questions that rehash those already propounded in the first deposition.

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

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[3](...continued)
be "five," is not explained. Given that it is the Respondent's discovery, and although the Court may be called upon to impose limitations on discovery, it is not for the Secretary to set such terms.

Distribution

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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January 30, 2014

| | | |
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| BRODY MINING, LLC,<br>Contestant | : | CONTEST PROCEEDINGS |
| | : | Docket No. WEVA 2014-82-R |
| | : | Order No. 9003242; 10/28/2013 |
| v. | : | |
| | : | Docket No. WEVA 2014-83-R |
| | : | Order No. 7166788; 10/28/2013 |
| SECRETARY OF LABOR | : | |
| MINE SAFETY AND HEALTH | : | Docket No. WEVA 2014-86-R |
| ADMINISTRATION (MSHA),<br>Respondent | : | Order No. 4208892; 10/29/2013 |
| | : | |
| | : | Docket No. WEVA 2014-87-R |
| | : | Order No. 4208893; 10/29/2013 |
| | : | |
| | : | Docket No. WEVA 2014-97-R |
| | : | Order No. 7166790; 11/04/2013 |
| | : | |
| | : | Docket No. WEVA 2014-151-R |
| | : | Order No. 9003246; 11/07/2013 |
| | : | |
| | : | Docket No. WEVA 2014-161-R |
| | : | Order No. 9004638; 11/12/2013 |
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| | : | Docket No. WEVA 2014-190-R |
| | : | Order No. 4208898; 11/14/2013 |
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| | : | Docket No. WEVA 2014-191-R |
| | : | Order No. 7166793; 11/18/2013 |
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| | : | Docket No. WEVA 2014-192-R |
| | : | Order No. 4208899; 11/19/2013 |
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| | : | Order No. 9005720; 11/20/2013 |
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: Docket No. WEVA 2014-284-R
: Order No. 8154092; 12/05/2013
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: Docket No. WEVA 2014-285-R
: Order No. 7166798; 12/09/2013
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: Docket No. WEVA 2014-447-R
: Order No. 7166805; 01/15/2014
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| : | Docket No. WEVA 2014-457-R |
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| : | Order No. 7166815; 01/23/2014 |
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| : | Docket No. WEVA 2014-480-R |
| : | Order No. 7166816; 01/23/2014 |
| : | |
| : | Docket No. WEVA 2014-81-R |
| : | Notice No. 7129154 |
| : | |
| : | Brody Mine No. 1 |
| : | Mine ID 46-09086 |

**ORDER**

Appearances: R. Henry Moore, Michael T. Cimino, Benjamin McFarlane, Jackson Kelly, PLLC, for Contestant

Robert S. Wilson, Office of the Regional Solicitor, U.S. Department of Labor, for Respondent

Before: Chief Judge Robert J. Lesnick

These consolidated proceedings are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act or Act).[1] Brody Mining LLC (Brody) has contested several orders issued to it by the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to an October 24, 2013 notice of a pattern of violations of mandatory health or safety standards under section 104(e) of the Act, 30 U.S.C. § 814(e). On November 27, 2013, Brody filed a Motion for Summary Decision under Rule 67 of the Commission's Procedural Rules, 29 C.F.R. § 2700.67. On December 10, 2013, the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody Mining's Motion for Summary Decision. For the reasons set forth below, I **DENY** Brody's motion and **GRANT** the Secretary's motion.

[1] These proceedings, which I hereby consolidate under Rule 12 of the Commission's Procedural Rules, 29 C.F.R. § 2700.12, were originally assigned to Commission Administrative Law Judge William Steele. When Judge Steele recently announced his intention to retire, the proceedings were reassigned to me by order of January 10, 2014.

As a preliminary matter, I note that on October 30, 2013, Brody notified the Secretary that it was contesting the Pattern of Violations (POV) Notice No. 7219154 issued to Brody. This contest was docketed at the Commission as Docket No. WEVA 2014-81-R. The Commission, however, lacks the necessary jurisdiction to adjudicate Brody's contest of the POV notice. As noted in *Rushton Mining Co.*, "[t]he Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." 11 FMSHRC 759, 764 (May 1989). Under the Mine Act, for example, the Commission and its judges have "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Under the Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, Commission judges have the authority to adjudicate contests of citations, orders, and penalties; complaints for compensation and of discrimination; and applications for temporary relief. No provision of the Act or the Commission's Procedural Rules, however, grants me the authority to adjudicate the POV notice itself. I therefore **DISMISS** Docket No. WEVA 2014-81-R.

On the other hand, a mine operator can challenge a POV notice on an expedited basis[2] before the Commission because I clearly have jurisdiction under section 105(d) of the Act to hear any contest of any order issued pursuant to section 104(e) of the Act, and any properly contested citation or order relied upon by the Secretary in issuing the POV notice. Moreover, I also find that I have jurisdiction to consider Brody's arguments that the rules implementing section 104(e) of the Act, set forth at 30 C.F.R. Part 104, are invalid – arguments set forth in the company's motion for summary decision.

The Commission has long held that it has the authority to entertain arguments regarding the validity of regulations. *See Freeman United Coal Co.*, 6 FMSHRC 1577, 1580 (July 1984). In *Drummond Co.*, the Commission found that a policy letter issued by the Secretary was invalid because the Secretary failed to promulgate it according to the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 551. 14 FMSHRC 661, 692 (May 1992). In explaining its authority to address challenges to the Secretary's regulatory actions, the Commission stated:

> The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to … Commission policy" or that present a "novel question of policy…." Since

[2] I note that, in these proceedings, Brody filed an Application for Temporary Relief on November 4, 2013 (eleven days after it was issued a POV notice on October 24), which was argued before Judge Steele on November 8, 2013. Brody's Application was denied on November 21, 2013. A hearing was set for December 3, 2013 on several of the violations that served as the basis for the POV notice, but the hearing was continued on December 1, 2013 after Brody filed its Motion for Summary Decision on November 27, 2013 (the day before the Thanksgiving holiday). This was done to allow the Secretary to respond to Brody's motion, and provide the Commission the opportunity to consider and rule on the parties' dispositive motions.

> Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

*Id*. at 674-75 (citations and footnote omitted).

It is clear that the function of the Commission is to assure that there is meaningful judicial review of the process by which the Secretary promulgates rules, and the appropriate time to do so is when the agency takes its first enforcement action against a mine operator under the new rule or policy. It is also clear that a case such as this, which raises important questions of statutory interpretation that "require a uniform and comprehensive interpretation of the Mine Act," falls squarely within the area of Commission expertise as an independent review body. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994).

## I. STATUTORY AND REGULATORY BACKGROUND

### A. Mine Act Section 104(e)

Section 104(e) of the Act states in part:

> If an operator has a pattern of violations of mandatory health or safety standards [POV] in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. § 814(e). Once given a POV notice, an operator is subject to an order of withdrawal each time an inspector cites it for a significant and substantial (S&S)[3] violation until a complete inspection of the mine has revealed no further S&S violations. *Id.*

Section 104(e) is one of several enforcement tools available to MSHA to ensure that mine operators place the safety of miners above all other considerations, in accordance with the Mine Act's declaration that "the first priority and concern of all in the . . . mining industry must

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

be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a). Identifying and sanctioning mine operators for patterns of serious violations "is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for 'increasingly severe sanctions for increasingly serious violations or operator behavior.'" *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981)). Thus, section 104 of the Act provides authorized representatives of Secretary – i.e., MSHA inspectors – with the authority to issue citations and orders after they make certain findings that violations of the standards and regulations implementing the Act have occurred, including citations issued under section 104(a), orders issued under section 104(b) for a failure to abate a violation cited under section 104(a), and section 104(d) citations and orders issued when a mine operator commits an unwarrantable violation.

Section 104(e) provides an incrementally more severe sanction – a withdrawal remedy – that MSHA may invoke when it finds that a mine operator has engaged in a pattern of S&S violations. The statute contemplates the following sequence of events: First, a mine operator shall have been "engaged in a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of . . . mine health or safety hazards." When MSHA determines that such a pattern exists, the agency provides to the operator a "written notice that such a pattern exists." Following the issuance of the pattern notice, for a period of ninety days, if the mine operator has any newly discovered S&S violations, MSHA may issue a section 104(e) withdrawal order. 30 U.S.C. § 814(e)(1).

Once one or more of such orders are issued, the mine operator may be subject to additional withdrawal orders for each new S&S violation subsequently discovered, until such time as there is a complete inspection of the mine that discloses no S&S violations. 30 U.S.C. § 814(e)(2). These withdrawal orders "cause all persons in the area affected by such violation . . . 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(e)(1).

The term "pattern of violations" is not defined in the text of the Mine Act. Nor has the Commission fully adjudicated any enforcement actions wherein the Secretary has stated how he proposed establishing what constitutes a "pattern of violations." Thus, the Commission has not had the opportunity to determine the statutory meaning of the term "pattern of violations."

**B. Rules Implementing Mine Act Section 104(e)**

Although the Act grants the Secretary the authority to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists," 30 U.S.C. § 814(e)(4), it was not until 1990 that such regulations were promulgated. 55 Fed. Reg. 31136 (July 31, 1990) (codified at 30 C.F.R. Part 104). The

Secretary revised the Part 104 POV regulations in early 2013, with an effective date of March 25, 2013. 78 Fed. Reg. 5056 (Jan. 23, 2013).

Under the procedures promulgated in 1990, MSHA engaged in an annual initial screening process, which included reviewing information regarding a "mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1) (1990). Section 104.3 specified the information MSHA used to identify mines with a "potential" POV (PPOV). It stated:

> (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:
>
> (1) A history of repeated [S&S] violations of a particular standard;
>
> (2) A history of repeated [S&S] violations of standards related to the same hazard; *or*
>
> (3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.
>
> (b) Only citations and orders issued after October 1, 1990, and *that have become final* shall be used to identify mines with a *potential* [POV].

30 C.F.R. § 104.3 (1990) (emphasis added). This section does not specify the actual numbers of final orders to be applied in the screening process, which provided MSHA wide discretion in determining when a POV existed. Guidance issued by the agency stated, however, that "[f]or a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became final orders of the [C]ommission during the most recent 12 months OR at least two S&S unwarrantable failure violations that became final orders of the [C]ommission during the most recent 12 months." Secy's Motion Sum. Dec. at Ex. 2 (Pattern of Violations Screening Criteria – 2012) (emphasis omitted). The record is silent on how often this disjunctive final order screening process had operated to remove many otherwise potentially "at risk" operators from further POV consideration.

When notified of a PPOV, an operator would have the opportunity to engage in an assortment of remedial measures, including submission of a written corrective action plan designed to eliminate repeated S&S violations. In determining whether to issue a formal POV notice after issuance of a PPOV, MSHA would determine whether the operator had reduced the frequency rate of S&S violations by 30 percent or had achieved a frequency rate for S&S

violations that was at or below the industry average. The citations and orders used to make such a determination *did not need to be final orders of the Commission. See Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1129-30 & fn.4-5 (Dec. 2008) (ALJ).]

MSHA revised the Part 104 POV regulation in 2013 because it "determined that the existing regulation [did] not adequately achieve the intent of the [Mine Act] that the POV provision be used to address mine operators who have demonstrated a disregard for the health and safety of miners." 78 Fed. Reg. at 5056. From the time of the passage of the Mine Act, a number of mine operators received PPOV notices but actual POV notices were almost never issued because, at least during the violation avoidance period, the subject mine operators were able to reduce the issuance rates to below MSHA's improvement criteria. *Id.* at 5058. *See also* Sec'y 6th Cir. Br. at 11.[4] In fact, the National Mining Association claims that no economically viable mine operator ever received a pattern of violations notice. NMA 6th Cir. Br. at 40.

The 2013 revision to the POV regulation streamlines the procedures set forth in the prior rule. As in the prior rule, once every 12 months MSHA will review the compliance records and accident and injury records of mines to identify where patterns of S&S violations exist. There are initial screening criteria composed of eight elements related to issuances of certain types of citations and orders, accident and injury rates and mitigating factors. 30 C.F.R. § 104.2(a)(1-8). These criteria are nearly identical to the screening criteria under the prior rule, but in the revised regulation, there is no requirement that any of the issuances considered in the initial screening be final orders of the Commission. *See* 78 Fed. Reg. at 5059-60. MSHA has also disclosed its internal procedures that illustrate how the agency will conduct POV reviews. According to MSHA's POV Procedures Summary, at least once per year, a date will be chosen to conduct the review, and screening criteria will be applied. The MSHA Administrator will send the results to MSHA district managers who, in turn, will write a memorandum to the MSHA Administrator reporting any mitigating circumstances that justify postponing a POV notification. Next, a POV panel reviews that information, along with any other necessary information, and makes a recommendation to MSHA administrators and other high level officials. The administrators make the final decision regarding the issuance of a POV notice after receiving that information. In addition, a mine operator can meet with a district manager to provide input as to the accuracy of MSHA's records. *See* Brody Appl. for Temp. Relief at Ex. 11.

[4] Both the Secretary and Brody have submitted for my consideration briefs filed in the U.S. Court of Appeals for the 6th Circuit in the matter *Nat'l Mining Ass'n v. MSHA*, Case No. 13-3324. The Secretary's briefs were filed in the 6th Circuit on behalf of MSHA. The briefs on which Brody relies were filed on behalf of the National Mining Association (NMA) by counsel that are not of record in the instant proceeding, though the NMA briefs were incorporated by reference in Brody's filings. Broday has since indicated that it adopts some, but not all, of the NMA's arguments made to the 6th Circuit. I have not considered any arguments not specifically adopted. Hereafter, arguments are to be made to me by counsel of record in this proceeding.

The new rule provides that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2(b). The preamble to the regulation states that the information available on MSHA's website will include "the specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations." 78 Fed. Reg. at 5064. MSHA also notes that it "may from time to time need to modify thresholds and other factors to assure mine operators of fair and equitable criteria that take into account different mine sizes, mine types, and commodities." *Id.*

The preamble also highlights MSHA's creation of "a user-friendly 'Monthly Monitoring Tool for [POV]' . . . that provides mine operators, on a monthly basis, a statement of their performance with respect to each of the PPOV screening criteria." *Id.* at 5057. MSHA characterizes the Monitoring Tool as "quick and easy to use; it does not require extra skill or training." *Id.* MSHA eliminated all of its prior PPOV procedures based largely on the creation of this tool, stating in the preamble that "[e]limination of PPOV underscores the mine operators' responsibility to monitor their own compliance records and encourages them to verify that the information on MSHA's Web site is accurate." *Id.* at 5059.

Under the new rule, following the initial review process, the appropriate district manager simply issues the POV notice to any mine operator that he or she believes has committed a pattern of S&S violations. Thus, the revised rule eliminates the PPOV process that existed under the prior rule (with attendant delays of up to 120 days for assessment of compliance improvement). 30 C.F.R. § 104(3); *see* 78 Fed. Reg. at 5058-5059.

To summarize, the effects of the revised POV regulation are to change only two salient aspects of the prior POV issuance process. First, the final order screening criteria MSHA used under the prior rule in one step of the POV screening process has been eliminated. Second, the PPOV process, with its attendant "cure period," has been eliminated and replaced by a system of ongoing internet self-monitoring, with any compliance efforts considered as a mitigating factor. As for the statutory meaning of the term "pattern of violations" for purposes of demonstrating a valid POV notice, the revised regulation does not break the silence of its predecessor.

**C. Summary Decision before the Commission**

Motions for summary decision are governed by Commission Procedural Rule 67, which 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 fact; and

> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure,[5] under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

## II. PROCEDURAL HISTORY

On October 24, 2013, MSHA issued to Brody a notice that "a pattern of violations exists at the Brody Mine No. 1." Notice No. 7219154. The notification explained that "a review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of the violations which are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine safety or health standards." What follows in the notice is a listing of 54 S&S citations and orders issued between October 9, 2012 and October 8, 2013, grouped according to the hazards they allege (ventilation and methane hazards, emergency preparedness and escapeway hazards, roof and rib hazards, and inadequate examination hazards). *Id.* All the citations and orders listed in the notice are either contested or in the penalty assessment process and have not become final orders of the Commission.

Since the issuance of Notice No. 7219154, MSHA has issued (and continues to issue as of the date of this order) numerous section 104(e) withdrawal orders. Brody has contested, and continues to contest, all of these orders (since Brody received its POV notice, and as of the date of this order, it has been issued 28 section 104(e) orders that have been contested and docketed at the Commission). As additional contests are filed with the Commission, I will consolidate them with these proceedings.

On November 4, 2013, Brody filed an Application for Temporary Relief and Vacation of the Notice of Pattern of Violations. Brody's application was denied on November 21, 2013 because it did not establish that the requested relief would not adversely affect the safety and health of miners. Before me now are the aforementioned cross motions for summary decision filed by Brody on November 27, 2013, and the Secretary on December 10, 2013.

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[5] Rule 56(a) of the Federal Rules of Civil Procedure provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a).

## III. STIPULATIONS OF FACT

The parties have entered the following stipulations of fact relevant to my consideration of their cross motions for summary decision:

1. Brody is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the Orders at issue in this proceeding were issued.

2. The Brody Mine, an underground bituminous coal mine at which the Orders were issued in this proceeding, is subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individuals whose signatures appears in Block 22 of the Orders at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Orders were issued.

5. True copies of the Orders at issue in this proceeding were served on Brody as required by the Mine Act.

6. The regulations on which MSHA relies to issue the notice of pattern of violations became final on March 25, 2013. *See* [78] Fed. Reg. § 5056 (January 23, 2013). Such rules are currently being challenged in the United States Court of Appeals for the Sixth Circuit by the National Mining Association and Murray Energy Corporation, among others.

7. The rule relies upon issued citations/orders regardless of whether they are final orders of the Commission as a basis for determination of the existence of a pattern of violations.

8. MSHA based its POV determination on a 12-month period ending August 31, 2013.

9. The parties disagree as to the effect of MSHA's screening criteria set forth on MSHA's website. Brody believes the effect is that, absent mitigating circumstances, a mine that meets the screening criteria is placed on a pattern of violations. The Secretary submits that such criteria are used to screen mines and identify mines that will be more closely reviewed for the determination of whether a pattern of violations exists.

10. The screening criteria were not subjected to mandatory notice-and-comment procedures. The parties disagree as to whether such notice and comment procedures were required by the Administrative Procedure Act.

11. A written notice was issued under Notice No. 7219154 on October 24, 2013, pursuant to section 104(e)(1) of the Act, 30 U.S.C. § 814(e), notifying the operator that MSHA finds that a pattern of violations exists at the Brody Mine No. 1.

12. Under the heading and caption "Condition or Practice" the Notice alleges in relevant part as follows:

> Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Brody Mine No. 1 (ID 46-09086). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards:
>
> 1. The following eighteen citations/orders were issued citing conditions and/or practices that contribute to ventilation and/or methane hazards: 8125045 (10/9/12), 8137713 (10/9/2012), 8146352 (10/9/2012), 7167400 (11/26/12), 7168841 (11/26/2012), 7168866 (1/14/2013), 8139621 (1/15/2013), 7168913 (2/13/2013), 3577965 (2/2/7/2013), 3578036 (5/15/2013), 8155954 (5/21/2013), 8155960 (5/29/2013), 8154782 (6/5/2013), 9000282 (6/10/2013), 7165682 (7/24/2013), 9000311 (7/30/2013), 9000312 (7/30/2013), 9002292 (8/27/2013).
>
> 2. The following twenty citations/orders were issued citing conditions and/or practices that contribute to emergency preparedness and escapeway hazards: 8153617 (10/9/2012), 7167386 (10/22/2012), 7167387 (10/23/2012), 7167388 (10/29/2012), 7167389 (10/29/2012), 7167393 (11/1/2012), 7167405 (12/4/2012), 7167412 (12/12/2012), 7168854 (12/17/2012), 7167474 (3/18/2013), 8155914 (4/8/2013), 9000286 (6/19/2013), 7165680 (7/17/2013), 9000305 (7/24/2013), 9000309 (7/29/2013), 9000313 (7/30/2013), 7165694 (8/14/2013), 7166781 (10/3/2013), 7166783 (10/8/2013), 7166784 (10/8/2013).
>
> 3. The following nine citations/orders were issued citing conditions and/or practices that contribute to roof and rib hazards: 8151320 (10/18/2012), 7168899 (2/5/2013), 7167471 (3/6/2013), 8155908 (4/4/2013), 8155925 (4/17/2013), 8155936 (5/6/2013), 9000277 (6/5/2013), 7165683 (7/24/2013), 9000307 (7/29/2013).

> 4. The following seven citations/orders were issued citing conditions and/or practices that contribute to inadequate examinations: 7168801 (10/18/2012), 7167473 (3/18/2013), 8155909 (4/4/2013), 8155926 (4/17/2013), 8155937 (5/6/2013), 9000278 (6/5/2013), 9000304 (7/24/2013).
>
> These groups of violations, taken alone or together, constitute a pattern of violations of mandatory health and safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards.
>
> If upon any inspection within 90 days after issuance of this Notice, an Authorized Representative of the Secretary finds any violation of a mandatory health or safety standard that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the Authorized Representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in Section 104(c) of the Mine Act, 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. This Notice of Pattern of Violation shall remain posted at the Brody Mine No. 1 until it is terminated by an Authorized Representative.

13. The contest of that Notice is docketed at No. WEVA 2014-81-R.

14. 253 S&S citations/orders were issued to Brody Mine No. 1 over the course of 12 months from September 1, 2012 through August 31, 2013. 108 S&S citations/orders were issued between March 25, 2013 and August 31, 2013.

15. The rate of S&S issuances at the Brody Mine No. 1 was 8.41 per 100 inspection hours during the screening period.

16. None of the S&S citations/orders that were issued at the Brody Mine No. 1 during the screening period are final orders of the Commission.

17. Each of the citations/orders listed in POV Notice 7219154 have either been contested by Brody or have not yet been assessed a civil penalty by MSHA . . .

18. 21 elevated enforcement actions (defined as citations or orders issued pursuant to Sections 104(b), 104(d), 104(g) or 107(a) of the Mine Act) were issued by MSHA at the Brody Mine No. 1 during the screening period.

19. The rate of elevated enforcement actions issued to the Brody Mine No. 1 during the screening period was .7 per 100 inspection hours.

20. The Severity Measure for the Brody Mine No. 1 was above the national average for the screening period.

21. Approximately 57% of the S&S citations listed in the 2013 POV review data for Brody Mining are currently in contest due to the designated severity, with a significant portion of S&S issuances presently un-assessed. Further, 31 of the citations upon which MSHA is referencing in the POV notice have not been assessed penalties.

22. 24 citations/orders referenced in the pattern notice were issued before March 25, 2013. 30 citations/orders referenced in the pattern notice were issued after March 25, 2013.
23. Brody contends that if the citations referenced in the pattern notice at issue only involve those issued after March 25, 2013, the number of S&S citations per 100 inspection hours would be below the 8.0 S&S per 100-hour criteria. The Secretary contends that application of the screening criteria is not subject to review and Brody contends that it is. The Secretary further contends that the screening criteria are designed to apply to a twelve month period and applying those criteria to a shorter time frame would not be as representative. It is further the Secretary's position that all S&S citations/orders issued during the period under consideration, not just those listed in the pattern notice, must be considered when applying the screening criteria. It is Brody's contention that based on the Secretary's arguments in this matter that he is arguing that the citations /orders in the pattern notice establish a pattern of violations.

24. 108 S&S citations or orders were issued to Brody Mine No. 1 between March 25, 2013 and August 31, 2013 with a total of approximately 1468.75 MSHA inspection hours as calculated by MSHA (1506 by Brody's records). The S&S rate using MSHA's number, for that period would be 7.35 per 100 inspection hours and 7.17 by Brody's calculation.

25. 12 citations/orders designated as S&S with a negligence finding of high or reckless disregard were issued between March 25, 2013 and August 31, 2013 representing 11% of the 108 S&S citations/orders issued during that period.

## IV. PARTIES' ARGUMENTS

Brody argues that it is entitled to summary decision on several grounds. As a preliminary matter, the company argues that the revised POV rule (78 Fed. Reg. 5056) is invalid because it is arbitrary, capricious, and an abuse of discretion, and because it impermissibly construes the term "violation" to include non-final orders. Brody Mot. Sum. Dec. at 3; NMA 6th Cir. Br. at 6. Brody also argues that its POV notice is invalid because MSHA relied on screening criteria that was not subject to notice-and-comment rulemaking, which, Brody argues, MSHA was required to do. Brody Mot. Sum. Dec. at 3. Further, Brody argues the application of the POV rule does not provide adequate procedural due process to mine operators. NMA 6th Cir. Br. at 19. Finally, Brody argues that the POV notice it was issued is invalid because it relies on violations

that occurred before the effective date of the new regulations in an impermissibly retroactive manner. Brody Mot. Sum. Dec. at 1-2.

The Secretary opposes Brody's motion in its entirety, and believes he is entitled to summary decision on certain issues of law. The Secretary argues that the POV rule is valid, that it is consistent with the Mine Act and Administrative Procedure Act, and does not violate the due process clause of the 5th Amendment to the U.S. Constitution. Sec'y Mot. for Sum. Dec. at 2. The Secretary also argues that the screening criteria are a valid statement of agency policy and did not need to be subjected to notice-and-comment rulemaking as a matter of law. *Id.* Finally, the Secretary argues that the application of the POV rule to Brody was not impermissibly retroactive. *Id.*

## V. FINDINGS OF LAW

### A. The Term "Violation" as used in Section 104(e)

I first address the question of whether the regulation promulgated by the Secretary to implement section 104(e) of the Mine Act, 30 C.F.R. Part 104, is consistent with the terms of the Act. When assessing the validity of standards and regulations the courts have adopted the two-part test set forth by the Supreme Court in *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-843 (citations and footnotes omitted). *See also Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 526 (D.C. Cir. 1997) (relying on *Chevron*).

The Court in *Chevron* explained that when there is an explicit delegation of rulemaking authority, the degree of deference given to the promulgating agency is very high:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the

> formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

467 U.S. at 843-844 (citations and footnotes omitted).

In this case, in specifying that the Secretary "shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists," 30 U.S.C. § 104(e)(4), Congress has granted the Secretary explicit regulatory authority to determine the criteria for action under Section 104(e) of the Act. Accordingly, the Commission must give controlling weight to the criteria the Secretary determined were necessary for the Secretary's POV determination unless the criteria are "arbitrary, capricious or manifestly contrary to the statute." 467 U.S. at 844.

Brody argues that under the Mine Act, only *final* orders can be considered in establishing a POV because the term "violation" in the phrase "pattern of violations" as set forth in section 104(e) can only refer to finally adjudicated issuances. NMA 6th Cir. Br. at 21-22. According to Brody, this is evident from the plain meaning of the term "violation:" "A 'violation' is '[a]n infraction or breach of the law; a transgression . . . [t]he act of breaking or dishonoring the law; the contravention of a right or duty.' *Black's Law Dictionary* 1564 (7th ed. 1999). A violation is an established fact – not a mere allegation – that an operator violated a law or regulation." NMA 6th Cir. Br. at 22.

Brody notes that the issuance of a section 104(a) citation occurs when a mine inspector "believes" that a mine operator has violated any standard, rule, or regulation; and that section 104(a) of the Act requires that each citation reference the legal rule "alleged to have been violated," which would be surplus language if "violation" was merely taken to mean an issued citation or order. The Secretary responds to Brody's textual arguments by claiming that the term "violation" is ambiguous, and under the tenets of statutory construction set forth in *Chevron*, the Secretary is owed deference to his reasonable interpretation that the "pattern of violations" referred to in section 104(e) includes issuances that are not yet final. *See generally* Secy's 6th Cir. Br. at 23-33. The Secretary points out that although section 104(a) does include language requiring citations to state the provision "alleged to have been violated," it also requires the citation the inspector issues to "fix a reasonable time for the abatement of the violation." Secy's 6th Cir. Br. at 22. The Secretary refers to sections 104(b) and 104(d) in which the word "violation" must be read as referring to recent acts, which are remedied under those provisions and thus not yet subject to final adjudication. Secy's 6th Cir. Br. at 22-23. The Secretary also cites to the Commission's reading that under Section 104(d)(1), a subsequent withdrawal order can be issued although no penalty has yet been proposed for the order or citation preceding it. Secy's 6th Cir Brief at 23 (citing *Energy Fuels Corp*., 1 FMSHRC 299, 307-308 (May 1 1979)).

The Secretary also claims that his reading is consistent with section 104(h) of the Act, which states that "[a]ny citation or order under this section shall remain in effect until modified, terminated or vacated" by the Secretary, the Commission, or the courts; and with comments in the Congressional Record by Senators considering the meaning of the term "pattern of violations." Secy's 6th Cir. Br. at 24, 30-33.

Brody's textually based arguments lack merit. It is unclear how the *Black's Law Dictionary* definition that Brody relies on compels one to find that only finally adjudicated actions are violations. In fact, the definition of "violation" as an "act of breaking or dishonoring the law; the contravention of a right or duty" emphasizes that the term can refer to an action rather than a legal outcome. This second common definition is consistent with the Secretary's reading of section 104(e).

More importantly, the term "violation" is used in the Act in several remedial sections that clearly indicate that existence of a final order was never contemplated. For example, section 104(b) mandates that a violation need not be finally adjudicated for a duty to abate to arise. This duty to abate is one of the very cornerstones of the Mine Act. The statute has also established in section 104(d) a procedure for issuance of unwarrantable failure orders. By the wording of the statute it is clear that prior *non-final* issuances suffice to establish a section 104(d) withdrawal sequence. After the issuance of an unwarrantable failure citation, any subsequent unwarrantable violations found "during the same inspection or any subsequent inspection of such mine within 90 days" will result in the issuance of an unwarrantable failure orders. 30 U.S.C. § 814(d). Because of the time frames involved, it is clear that Congress did not intend the initial issuances to have become final orders before the subsequent orders were issued.

Moreover, the legislative history makes clear that 104(d) orders can be validly issued even if the prior, predicate orders and citations are still in contest. As one judge noted in an earlier opinion on this question:

> [T]he Secretary aptly compares the pattern of violation application with the unwarrantable failure sequence of Section 104(d). This is not a stretch by any means, as the Senate Report itself made such a comparison, observing that the POV "sequence parallels the current unwarrantable failure sequence." S. Rep. No. 95-181, p. 33. Particularly pertinent here in that comparison is the point that "[i]t is beyond debate that a closure order under Section 104(d)(1) may be based upon a Section 104(d)(1) citation that is not final, and a closure order under Section 104(d)(2) may be based upon a Section 104(d)(1) order that is not final." *Id.* at 25.

*Bledsoe Coal Corp.*, 34 FMSHRC 1136, 1154 (May 2012) (ALJ).

Another usage of the term "violation" that indicates it was never intended to refer only to finally adjudicated citations and orders is found in section 103(g) of the Act, which gives miners

the right to notify MSHA of "violations." The section states in part: "Prior to or during any inspection of a . . . mine, any representative of miners or a miner . . . may notify the Secretary . . . of any violation of this Act." 30 U.S.C. § 813(g)(2).

Finally, Brody argues that the consideration but ultimate rejection of a bill proposing amendments to the Mine Act that would have eliminated the final order requirement in the POV rule indicates Congressional support of the final order requirement. NMA 6th Cir. Br. at 26-28. I find this unconvincing. As the Secretary correctly points out, the Supreme Court has held that courts should give little if any weight to failures by Congress to enact clarifying amendments related to the interpretation of a statute. Sec'y 6th Cir. Brief at 33; *Central Bank of Delaware v. First Interstate Bank of Delaware*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." (citations omitted)).

I conclude that the term "violation," as used in section 104(e) of the Act, is ambiguous, and that the Secretary's interpretation of the term as referring to a violation which is the subject of an issuance, whether final or not, is reasonable and as such is entitled to deference.

**B. Validity of 30 C.F.R. Part 104 under the Administrative Procedure Act**

**1. Arbitrary and Capricious Discussion**

Having determined that nothing in the Mine Act requires that MSHA must rely on issuances that have become final orders in determining whether a mine operator should be considered for further evaluation and potentially issued a POV notice, I now turn to the question of whether the policy choices the Secretary made when promulgating 30 C.F.R. Part 104 were arbitrary, capricious, or an abuse of discretion. In essence, Brody wants MSHA to base its POV decisions on *past* violations rather than *current* conditions in a mine. For the following reasons, I reject this proposition.

A regulation will run afoul of the provisions of section 706(2)(A) of the Administrative Procedure Act (APA) if a reviewing court finds it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Auto Ins. Co.*, the Supreme Court held that under the arbitrary and capricious standard, "a reviewing court may not set aside an agency rule that is rational, is based on consideration of relevant factors, and is within the scope of the authority delegated to the agency by statute." 463 U.S. 29, 43 (1983). The scope of review is narrow and a court must not substitute its judgment for that of the agency. *Id.* Courts will look to determine whether the agency examined the relevant data and articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.* The court went on to say:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to

> consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id*. at 44. The holding in *Motor Vehicles Manufacturers* has specifically been applied to standards issued under the Mine Act. *See NMA v. MSHA*, 116 F. 3d 520, 527 (D.C. Cir. 1997); *Kennicott Greens Creek Mining Ass'n v. MSHA*, 476 F.3d 946, 952 (D.C. Cir. 2007); *UMWA v. MSHA*, 626 F. 3d 84, 90 (D.C. Cir. 2010). A party challenging a rule has the burden of proof, and the court's review is limited to the rulemaking record before the agency. *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144 (D.C. Cir. 2005); *Kroger Co. v. Reg. Airport Auth.*, 286 F.3d 382, 387 (6th Cir. 2002).

Brody attacks MSHA's revised POV rule as non-compliant with section 706 of the APA on several grounds. First, it argues that the agency's decision to rely on citations and orders that include non-final issuances for its POV screening criteria is flawed, since some portion of the S&S violations MSHA uses may subsequently be vacated or modified to eliminate the S&S designation originally made by the inspector. NMA 6th Cir. Br. at 31-33; NMA 6th Cir. Reply Br. at 13. Brody claims that there is a fairly high rate – approximately 20 percent – of S&S issuances that are later vacated. Accordingly, it claims that MSHA should have given a better explanation as to why it is relying on a designation that the agency is so frequently unable to sustain for its POV screening procedures. NMA 6th Cir. Br. at 31-33; NMA 6th Cir. Reply Br. at 13. The Secretary acknowledges that recently issued, non-final S&S issuances can later be reversed, but points out that when uncontested S&S violations are included with contested ones, the actual reversal rate is lower than Brody claims. Sec'y 6th Cir. Br. at 38-39.

Having acknowledged that inspectors' findings are not invariably sustained, the Secretary articulates the reason for his choice to include them, to wit, that waiting for all issuances to be final carries the risk of precluding MSHA from considering the most relevant data, which is a mine operator's *recent* compliance history. Waiting on all determinations to become final before considering them for POV screening purposes would result in a mine's safety and health practices in the past to outweigh those of the present – clearly an anomalous result. *See* Sec'y 6th Cir. Br. at 36-38. This is particularly true in light of the fact that, as set forth in the preamble to the revised rule, high contest rates have in the past been correlated with low case disposition rates. In 2011, for example, contested issuances lingered an average of 534 days after issuance, and 18 percent of all violations remained pending in contest two years after issuance. 78 Fed. Reg. at 5059-5060.

In light of these considerations, I find that the Secretary did not engage in arbitrary and capricious decision-making or abuse his discretion when he determined that MSHA's POV screening criteria could be based on recent issuances irrespective of their status as final. I take particular note of the fact that MSHA's consideration of recent issuances – whether final or not – is for screening purposes only. The Secretary states in his brief to the 6th Circuit that "the

screening criteria do not finally and conclusively determine whether the mine has a POV. . . . [O]nce MSHA initiates an enforcement proceeding under section 104(a) any contest thereof is under the jurisdiction of the Commission, which is not bound by the Screening Criteria." Sec'y 6th Cir. Br. at 45.

Since the Secretary claims that these criteria are for his own pre-enforcement decision-making purposes, and that they do not bind the Commission, concerns about erroneous S&S determinations in issuances used to screen operators for POV scrutiny are secondary to the determinative issue of whether the Secretary can prove the existence of a POV by a preponderance of evidence in a de novo proceeding before an impartial judge of the Commission. In such a hearing, S&S violations must be conclusively proven to establish the existence of a POV. In light of this, the Secretary's reliance on recent issuances for its screening criteria is reasonable.

While a mine operator's long-term history of violations has clear relevance, including repeated violations of the same or similar standards that have become final orders, the Secretary is reasonably concerned with the current situation at a given mine in choosing which mine operators to proceed against under section 104(e). If only relatively older final orders were used for POV determinations, recent compliance levels would still have to be addressed in any contest proceedings involving section 104(e) orders issued after the issuance of a POV notice. Moreover, the data upon which Brody relies reveal that the percentage of S&S violations that will survive to finality is predictable. *See* NMA 6th Cir. Br. at 32. Accordingly, the screening criteria the Secretary uses to determine which mine operators should be subject to further scrutiny for MSHA's enforcement purposes can reasonably take into account all recent compliance history. I thus find the Secretary's adoption of this policy rational, as well as adequately justified.

Brody also argues that it was arbitrary and capricious for the Secretary to abandon the prior PPOV procedures, which Brody claims successfully reduced the issuance of violations at subject mines. NMA 6th Cir. Br. at 57-58; NMA 6th Cir. Reply Br. at 14-16. Specifically, Brody claims that MSHA's data show that 94 percent of all mines that received a PPOV notice were able to reduce their rate of S&S violations by 30 percent, and that mine operators that had received a PPOV notice reduced their rate of S&S violations to below the national average in 77 percent of the cases. Brody also points to the decline in the fatality rate during the effective period of the prior Part 104 rule as proof of its efficacy. NMA 6th Cir. Reply Br. at 15-16.

The Secretary agrees that the PPOV process resulted in reductions in violations for mines that had been subject to PPOV scrutiny. However, the Secretary notes that 21 percent of mine operators that received PPOV notices regressed in their compliance rates, and potentially faced being issued new PPOV notices. Sec'y 6th Cir. Br. at 40 (citing 78 Fed. Reg. at 5058). The Secretary also notes that after avoiding issuance of POV notices, mines saw injury rate increases in the following year at 39 percent of the subject mines. Sec'y 6th Cir. Br. at 40-41 (citing 78 Fed. Reg. at 5069). The Secretary points to the introduction of online monitoring, which allows mine operators to know earlier in the POV process that they are at potential risk for POV

scrutiny, thereby allowing earlier voluntary efforts to improve compliance. Sec'y 6th Cir. Br. at 41 (citing 78 Fed. Reg. at 5058-59). Finally, the Secretary disputes Brody's assertion that a causal link exists between the prior rule's PPOV process and overall reductions in fatalities during the time when the prior rule was in effect, noting that any such decrease can be attributed to any number of other causes, including MSHA's enforcement of the Act. Sec'y 6th Cir. Br. at 41-42.

Under the standard of review articulated in *Motor Vehicle Manufacturers*, 463 U.S. at 44, I find the Secretary's arguments persuasive, and that his determination to abandon the once-a-year PPOV process, and to replace it with an ongoing online monitoring process, is rational. I am particularly persuaded by the Secretary's concerns that PPOV compliance gains were sometimes fleeting, a phenomenon well documented in the preamble to the revised rule. 78 Fed. Reg. at 5058-59. The Secretary has adequately explained that the issuance of PPOV notices as a tool for improved compliance has been superseded by the nearly instantaneous notification of the need for greater compliance efforts through utilization of MSHA's web-based Monthly Monitoring Tool; and that the availability of online self-monitoring will benefit the health and safety of miners. *Id.* at 5059. I thus conclude that the Secretary's elimination of the prior PPOV procedure is rational, well explained, and not inconsistent with the Mine Act.

**2. Due Process Discussion**

Brody argues that the revised POV rule deprives it of adequate due process. NMA 6th Cir. Br. at 38-49. Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used," and the value of additional or substitute procedural safeguards; and (3) the government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In general, the Fifth Amendment guarantees some form of hearing prior to deprivation of life, liberty, or property. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). However, the Supreme Court has held that a post-deprivation hearing alone can be adequate when public health and safety is at stake. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-302 (1981) (holding that summary post-deprivation procedures satisfied due process when Secretary of Interior issued "immediate cessation" orders that were based on an inspector's determinations that a mine was violating the law and that surface mining activities were causing or could reasonably be expected to cause significant, imminent environmental harm); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 595-596 (1950) (affirming the FDA's seizure and destruction of mislabeled drugs without the opportunity for a pre-deprivation hearing due to the risk of injury to the purchaser of such drugs). In this instance, the new POV rule provides for the

issuance of a POV notice prior to a hearing under which withdrawal orders under section 104(e) may be issued, which burdens the operator's interest in uninterrupted mining operations. It is not until such a subsequent order is issued that an operator has the opportunity for a hearing in which it may contest the 104(e) order and the underlying notice. Determining whether this is permissible involves balancing the operator's property rights, the extent and type of procedure provided, and the governmental interest.

**Private Interest at Stake.** As a threshold matter, there must be a deprivation of a private property interest in order for a court to engage in the *Mathews* balancing test. Although the Secretary argues that Brody does not suffer any deprivation of property whatsoever, I find that Brody does in fact suffer a deprivation of property when subjected to the issuance of section 104(e) withdrawal orders under a POV notice. However, I also find that Brody's descriptions of the POV notice's impacts on its private interests are overstated. Brody argues that the private interests at stake are great because being on a POV notice may lead to mine closures and harms reputation and stock prices. NMA 6th Cir. Br. at 39-41. However, a withdrawal order generally applies only to the section of the mine or piece of equipment affected by the cited S&S violation, and MSHA generally orders withdrawal only of persons exposed to a risk of harm from the cited violation. *See* 78 Fed. Reg. at 5066. Furthermore, in underground coal mines, S&S violations are usually abated immediately or within hours of issuance and have little or no impact on production, as the orders are lifted as soon as abatement occurs. *Id.* at 5071. While some 104(e) orders might be disruptive to daily operations, they cannot be expected to result in closures of the entire mine on a regular basis. In addition, I reject Brody's claims that a POV sanction affects its private interests by harming its reputation and triggering immediate reporting requirements under Securities and Exchange Commission ("SEC") regulations because freedom from such corporate reputational harms is not a right entitled to due process protections. *See Paul v. Davis*, 424 U.S. 693, 711-12 (1976).

Thus, Brody has a property interest in the uninterrupted continuation of their mining operations without the threat of withdrawal orders during subsequent inspections, and being on a POV status hampers that interest by subjecting the mine to temporary disruptions of workflow whenever an S&S violation is written. The question is whether the Mine Act's post-deprivation, potentially expedited review processes and the government's interest in issuing POV notices to safeguard the health safety of miners are sufficiently strong to justify this property deprivation.

**Adequacy of Proposed New Procedures.** Although the procedures for protesting a POV notice are available only after the imposition of the first closure order, I find that the expedited procedures in the Mine Act and the Commission's Procedural Rules allow for expedient adjudication and relief for erroneous deprivations before significant deprivation of private interests occurs. Section 105(b)(2) of the Act allows for a party to file a request for temporary relief, which a Judge may grant after a showing by the applicant that there is a substantial likelihood that the findings of the Commission will be favorable to the applicant and that such relief will not adversely affect the health and safety of miners. *See* 29 C.F.R. Subpart F. The Commission's Procedural Rules further require that responses to an application for temporary relief be filed within four days, allowing for quick cessation of a POV notice should a

Judge find the notice was issued erroneously. *See* 29 C.F.R. § 2700.46(b). I note that Brody availed itself of these procedures in these proceedings before Judge Steele. Beyond the temporary relief provisions, the Commission's rules also provide parties the opportunity to request expedited proceedings in order to have cases quickly adjudicated. 29 C.F.R. § 2700.52. These procedures mitigate the pre-hearing deprivation of a POV by allowing for swift remedies in cases of wrongful issuance.

Brody argues that these procedures are inadequate because it claims that violations designated as S&S are later overturned by Commission Judges at a rate of 20-30 percent, and that review of S&S designations prior to deprivation is necessary to reduce the risk of erroneous deprivation. NMA 6th Cir. Br. at 41-44. Even at such a rate of S&S designations being overturned, the majority of S&S designations are still upheld or uncontested. *See* Sec'y 6th Cir. Br. at 58. The Secretary points out that when this is viewed in light of his position that he does not need a minimum number of valid S&S designations to prove a "pattern" within the meaning of the statute, the risk of erroneous deprivation due to overturned S&S citations is quite low. *Id.* at 57.

Brody's arguments also equate the elimination of the PPOV process to the elimination of a crucial procedural safeguard. But as discussed above, operators still have access to the screening criteria online and are capable of ascertaining whether they are at risk of receiving a POV notice and taking corrective action as needed. In fact, this provides operators with more day-to-day opportunities to understand their risk and take corrective action without having to wait for formal issuances from MSHA.

The cost of additional procedures that Brody suggests is unacceptably high. NMA 6th Cir. Br. at 47-48. Requiring MSHA to wait until it has final orders to issue a POV notice, as Brody suggests, would invite mine operators to contest as many cases as they can, creating delays that could extend for years, resulting in case backlogs at MSHA and the Commission. *See* 78 Fed. Reg. at 5059. It would also mean that if a POV notice did issue, it would likely be based on past violations that might not reflect current conditions in the mine. *Id.* Re-instating the PPOV process would also hamper future effective enforcement of section 104(e) of the Act. The PPOV system created circumstances in which operators would come into compliance during the relevant period and then "backslide" into the dangerous practices they engaged in before. *See* 78 Fed.Reg. 5058. Thus, an additional "warning" such as the PPOV is likely to harm more miners who are working in unsafe mines that managed to avoid POV status.

By contrast, the risk of erroneous deprivation under the current procedures is low. MSHA's decision not to give written notice of a "potential" pattern will not increase the risk of an erroneous pattern designation because MSHA provides the criteria on their website so operators can monitor their own POV risk. 78 Fed. Reg. at 5059. The temporary relief and expedited review provisions of the Mine Act and the Commission's Procedural Rules also provide a swift remedy for operators that believe they were issued POV notices erroneously – should they choose to avail themselves of such procedures – thus making the magnitude of any erroneous deprivation very small.

**Government Interest.** In this instance, the Government's interest is quite strong, because it centers on the health and safety of miners and is needed to prevent injuries and fatalities in mines that have demonstrated a pattern of dangerous conduct.

As the Supreme Court held in *Hodel v. Va. Surface Mining & Reclamation Ass'n*, pre-hearing deprivation of property interests is often justified in cases when the government must act quickly to protect public health and safety. 452 U.S. at 298-302. As the *Hodel* Court stated, "[p]rotection of the health and safety of the public is a *paramount governmental interest which justifies summary administrative action.* Indeed, deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action." *Id.* at 300 (emphasis added) (citations omitted).

In *Donovan v. Dewey*, the Supreme Court noted the importance of the Mine Act in particular as a statute designed to protect public health and safety. In upholding the constitutionality of the Act despite 4th Amendment challenges, the Court stated:

> As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

452 U.S. 594, 602 (1981) (relying on preamble to the Mine Act) (footnote omitted). *Donovan* highlights the importance of the Mine Act's concern with protecting the health and safety of miners working in an extremely dangerous industry, and judicial evaluation of its provisions must be cognizant of that goal.

The POV rule and the general provisions of section 104(e) of the Act fit perfectly into the types of governmental interests envisioned by *Hodel*. Like the immediate cessation orders upheld in *Hodel*, 104(e) orders issued pursuant to a POV notice are taken as an emergency measure to ensure miners are not in a dangerous part of the mine until the dangerous condition has been abated. The provision is only used in mines that have shown an egregious history of non-compliance, where similar but less stringent provisions of the Act have not been enough to incentivize the operator to reduce their violation history.

In fact, the changes to the POV rule are MSHA's response to the inadequacies of the prior rule and highlight the POV rule's focus on the truly bad actors that repeatedly allow dangerous working conditions to exist. Under the old rule, high-profile mine accidents took the lives of many miners, such as the massive coal dust explosion that occurred on April 5, 2010 at the Upper Big Branch mine in Montcoal, West Virginia. That accident killed 29 miners and injured two. MSHA Report of Investigation at 1 (available at www.msha.gov/Fatals/2010/UBB/

ExecutiveSummary.pdf). The mine is operated by Performance Coal Company, a former subsidiary of Massey Energy Company, which had "avoided being placed on a POV despite an egregious record of noncompliance." 78 Fed. Reg. at 5057. The preamble to the new POV rule makes it clear that the changes are aimed at ensuring the safety of miners, and shows that continuing to wait for the PPOV process to unfold could very well place the health and safety of miners at increased risk.

After balancing these three factors, I find that the government's significant interest in the timely protection of public health and safety, particularly in light of an operator's opportunity for expedited post-deprivation review, justify the deprivation of the small property interest associated with un-interrupted mine production prior to a hearing. I further find that the revised POV rule is valid, and that it does not run afoul of the due process clause of the 5th Amendment to the U.S. Constitution.

**3. Notice-and-Comment Rulemaking Discussion**

Section 553 of the APA generally requires agencies to provide notice of proposed rulemakings for all rules. 5 U.S.C. § 553. A "rule" is defined in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4). However, APA section 553(b)(3)(A) specifically states that the notice-and-comment requirements otherwise outlined in the section do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." In this instance, Brody argues that the POV screening criteria are legislative in nature and do not fall into any of the stated exceptions. The Secretary argues that the criteria are a general statement of agency policy, and thus, are valid even though they were not promulgated in accordance with notice-and-comment procedures.[6]

Legislative rules "implement congressional intent; they effectuate statutory purposes. In doing so, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (citations omitted). The D.C. Circuit further elaborated in *Dyer v. Sec'y of Health and Human Services*:

> In order to determine whether a particular statement is a binding rule or a general, non-binding policy statement, courts must examine both the language of the statement and the purpose it serves. If a pronouncement implements a statute by enacting a legislative-type rule affecting individual rights and obligations, it

[6] The APA also allows for a "good cause" exception to notice-and-comment requirements, 5 U.S.C. § 553(b)(3)(B), but the Secretary does not argue that the screening criteria fall under this exception.

> is likely to be a substantive rule. A statement is also likely to be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates. A policy statement is a pronouncement that simply advises the public what the agency's prospective position on an issue is likely to be.

889 F.2d 682, 685 (D.C. Cir. 1989) (citations omitted). While the Secretary's description of the type of rule he promulgated is afforded some weight, the more significant factors by far are the language and actual effects of the agency action. *See Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1968); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (D.C. Cir. 1986). In the context of the Secretary's rulemaking authority under the Mine Act specifically, the Commission discussed the requirements for notice-and-comment rulemaking most thoroughly in *Drummond Co.*, 14 FMSHRC 661 (May 1992).

*Drummond* involved a challenge to a Program Policy Letter, or "PPL," issued by the Secretary that set forth a system of proposing penalties known as the "excessive history program." 14 FMSHRC at 661. The Commission affirmed the Judge's ruling that the PPL was invalid because it was issued without having met the notice-and-comment requirements of the APA. *Id.* In the *Coal Employment Project I* litigation that took place prior to *Drummond*, the D.C. Circuit Court found that the single penalty program portion of the Secretary's Part 100 penalty regulations was unreasonable because it failed to adequately consider an operator's history of violations. *See* 14 FMSHRC at 665 (discussing *Coal Employment Project v. McLaughlin*, 889 F.2d 1134 (D.C. Cir. 1989)). The court remanded the case to MSHA with instructions to establish or amend their regulations to clarify the issues of concern regarding the single penalty standard and an operator's history of previous violations. 14 FMSHRC at 665. In addition, the court directed MSHA to issue interim instructions until the new regulations were promulgated. *Id.* at 665-66. Accordingly, the Secretary published both new regulations and interim PPLs that set up a method for assessment of penalties known as the "excessive history" program.

The issue in *Drummond* arose when the Secretary filed a penalty petition against Drummond calculating the proposed penalties according to the provisions of the PPL, which involved up to a 30 percent increase for "excessive history" based on the methods in the PPL. 14 FMSHRC at 668-669. The Judge in *Drummond* first held that the PPL went beyond the scope of authority granted by the court's interim mandate in *Coal Employment Project I*. Further, the Judge held that the PPL was not otherwise valid outside of the context of the interim mandate because it was a substantive rule that had not been subject to the notice-and-comment process. 14 FMSHRC at 669-70. Crucial to his analysis of the issue was the reduction or elimination of agency discretion that the PPL created, which is a key element of what makes an agency action substantive. *Id*. at 670.

The Commission affirmed the Judge's decision, relying on *Batterton* when determining whether the PPL was the type of administrative action that "carried the force of law" and thus,

was a legislative rule that should have been promulgated through notice-and-comment rulemaking. Legislative rules "narrowly constrict the discretion of agency officials by largely determining the issue addressed," whereas interpretive, non-binding rules "do not . . . foreclose alternate courses of action or conclusively affect rights of private parties." Further, non-binding statements "carry no more weight on judicial review than their inherent persuasiveness commands." 14 FMSHRC at 684 (quoting *Batterton v. Marshall*, 648 F.2d at 701-02).

The Commission's decision in *Drummond* centered on the ways in which the PPL restricted the Secretary's discretion and functioned like an automatic rule, creating new legal consequences for mine operators. Specifically, the PPL in *Drummond* restrained the Secretary's discretion by subjecting all his penalty proposals to a mathematical formula. 14 FMSHRC at 686. The impact of the rule was substantive because *all* assessments with excessive history as determined under the PPL were automatically increased by a factor of 18 percent greater than would otherwise have been assessed under the previous method. *Id.* In addition, the Judge hearing Drummond noted that although the penalty amounts proposed by the Secretary were not final because the Commission assesses penalties on a de novo basis, as a practical matter, the vast majority of proposals were not contested and therefore had become final. *Id.* at 670. The totality of these features of the PPL meant that it subjected operators to new, substantive penalty rules that restrained the Secretary's discretion such that they should have been promulgated through notice-and-comment to be valid.

In its Motion for Summary Decision, Brody argues that the criteria are legislative in nature and thus invalid because they were not subject to notice-and-comment rulemaking; and that the criteria are an important part of the new POV rule, particularly because in the absence of the old PPOV process, they are the only means mine operators have to monitor their performance and potential for facing liability. Brody Memo. in Support of Mot. for Sum. Dec. at 9. Brody argues that because MSHA did not include any specific numerical criteria in the rule itself, the published criteria are all that give the parties ascertainable direction in the POV process. *Id.* at 9-10.

Further, Brody argues that the screening criteria fall squarely within the definition of legislative rules as defined in *Batterton* because the criteria are what lead the Secretary to consider a particular operator for a POV notice, and thus restrain the discretion of the agency by narrowing the limits of who they consider for POV status. According to Brody, the criteria form the basis for the evaluation of whether a pattern exists, and MSHA applies the criteria across the board to all operators "as if it were the law." Brody Memo. in Support of Mot. for Sum. Dec. at 11-12. Brody also argues that the criteria impinge significantly on private interests because they have the potential to force mine closures and even lead to the shutdown of a mine. *Id.* at 14.

The Secretary argues that the criteria are a statement of agency policy and thus, are not subject to the notice-and-comment requirements of the APA. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 13. He states that Brody has mischaracterized the criteria as limiting the agency's discretion, and that the criteria merely set forth some possible scenarios that may lead to a pattern notice. *Id.* at 14. The criteria do not create any sort of definitive norm, and so do not

have the force of law. *Id.* at 15. As the Secretary describes it, the criteria "flag for MSHA those mines that should be subjected to further consideration to determine whether, in MSHA's case-specific and fact-based judgment, they have indeed demonstrated a pattern of violations. The Secretary retains discretion to make the actual determination regarding whether a pattern notice is sent." *Id.* at 14. The Secretary also notes that the criteria are designed to allow MSHA to change them in response to changing circumstances, and that because the agency expressly reserved the right to adjust the criteria as necessary, the publishing of the criteria "simply advises the public what the agency's prospective position on an issue likely to be." *Id.* at 15 (citing *Dyer,* 889 F.2d at 685).

While I believe that the Commission's *Drummond* decision is instructive in this case, I do not find that it compels me to find that the POV screening criteria are invalid because they were subject to APA notice-and-comment rulemaking requirement. To the contrary, I find that the criteria are not legislative rules that required notice-and-comment.

In *Drummond*, the Commission found the PPL to be so specific and universally applicable that it severely limited MSHA's discretion; and further, that the PPL established "a binding norm" and was "finally determinative of the issues or rights to which it [was] addressed." 14 FMSHRC at 670 (citation omitted). The PPL imposed substantive increases in penalty proposals under a system where such proposals would in all probability become final orders. 14 FMSHRC at 670, 686. The PPL set forth a system that was applied across the board to all operators subject to penalty proposals, without any opportunity for adjustments to account for particular circumstances or for the Secretary to exercise prosecutorial discretion. *Id.* at 686-87.

In contrast, the criteria merely serve as a "sieve" of sorts, to bring the Secretary's attention to mines that should be investigated further to see if they have engaged in what the Secretary believes could be a POV. The criteria do not attempt to define what a "pattern" is for adjudicative purposes. Further, the mitigating circumstances that MSHA must apply allow for a significant degree of subjective judgment to be exercised. Thus, an operator meeting the criteria is not subject to the same sort of automatic, across the board actions being taken against all operators as was the case in *Drummond*.

Here, the POV rule operates in such a manner that even after the issuance of a POV notice triggered in part by application of the screening criteria, an operator is likely to contest section 104(e) orders issued pursuant to a POV notice, giving the Commission the independent opportunity to determine whether a "pattern" has been established. The screening criteria do not operate to provide finality in a sense that is remotely close to the "excessive history" provisions in the *Drummond* PPL.

Although the criteria provide guidance to operators as to whether they are at risk for being placed on POV status, the ultimate decision of whether an operator is issued a POV notice still lies with the Secretary, who must still prove in a de novo proceeding before the Commission the validity of any enforcement actions taken under a POV notice. The criteria simply do not

sufficiently restrict the Secretary's discretion to constitute a legislative rule. I thus find that the criteria are a valid statement of agency policy which can be used by the Secretary as a prosecutorial tool without being subject to notice-and-comment rulemaking.[7]

**4. Retroactivity Analysis**

As a general rule, laws are presumed not to have retroactive effect absent express Congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, the Supreme Court has since held that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). Specifically, "a provision operates retroactively when it impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed." *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting *Landgraf*, 511 U.S. at 280).

In its 2002 *National Mining Association* decision, the D.C. Circuit invalidated some of the Department of Labor's rules promulgated pursuant to the Black Lung Benefits Act on retroactivity grounds. *See generally Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). The court went through a detailed analysis of each regulation, comparing the expectations of regulated parties before and after the regulation took effect – what it referred to as the "legal landscape." *Id.* The court found that the regulations at issue amounted to a change in the legal landscape and were impermissibly retroactive when they served to limit how an adjudicator decided a case before him or her or attempted to bind all courts to the ruling of one circuit. *Id.* at 861-68. However, when the changes constituted a clarification of a statutory term or initiated a change in procedures, there were no retroactivity problems. *Id.* The D.C. Circuit's analysis in *National Mining Ass'n* demonstrates that the evaluation of whether a rule operates retroactively is circumstantial and fact-based, and must account for the specific changes to the legal landscape and the particular expectations of regulated parties.

While agreeing with the general legal propositions above, the Secretary argues that the changes to the POV rules at issue are more procedural in nature, and thus, that Brody's liabilities have not changed and the rule has not been applied in an impermissibly retroactive manner. In *Landgraf*, the Court noted the diminished reliance interests in procedural matters, and that generally, application of a new procedure to past conduct was not impermissibly retroactive.

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[7] My finding is consistent with the finding of another Commission Judge who considered the same question under the old POV rule. *See Bledsoe Coal Corp.*, 34 FMSHRC 1136, 1155-58 (May 2012) (ALJ). I also note that although Brody argues that, even if the criteria are valid, MSHA did not follow its own stated standards correctly when choosing to issue a POV notice to Brody, in order to prevail on this argument, MSHA would have to be bound by the screening criteria in the same way they are bound by statutes and regulations. The agency is not so bound.

511 U.S. at 275. However, "[w]here a 'procedural' rule changes the legal landscape in a way that affects substantive liability determinations, . . . it may operate retroactively." *Nat'l Mining Ass'n*, 292 F.3d at 859 (citing *Martin v. Hadix*, 527 U.S. 343, 359 (1999)).

Thus, the key inquiry in determining whether the POV rule has been applied in an impermissibly retroactive fashion is whether the March 2013 changes to the POV rule amount to a "change in the legal landscape" that goes beyond procedural changes to alter the legal consequences that Brody faces for conduct prior to March 25, 2013, the effective date of the new rule. As *Landgraf* instructs, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." 511 U.S. at 270. This requires analysis of the circumstances and operation of both POV rules, with regard to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*

In enacting the new POV rule, MSHA made several changes from the old rule, and the nature and extent of those changes are instructive as to whether MSHA impermissibly applied the revised POV rule retroactively. First, the new rule eliminates the practice of issuing a PPOV notice prior to the issuance of a formal POV notice that carries the full consequences set forth in section 104(e) of the Act. Brody argues that this is significant because the PPOV system put operators on notice that they could be considered for a POV notice in the future, and allowed them the opportunity to develop a Corrective Action Plan in order to curb their rate of issuances before being faced with the consequences of operating under a pattern notice.

Although the POV screening criteria remain largely the same, the new POV rule eliminates the final order requirement of the old rule and relies on non-final orders. Specifically, the 2012 Pattern Screening Criteria provision that the new rule drops stated: "For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became **final orders** of the commission during the most recent 12 months **OR** at least two S&S unwarrantable failure violations that became **final orders** of the commission during the most recent 12 months." Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at Ex. 2 (emphasis in original).

Finally, the new rule states that specific screening criteria will be publicly posted on MSHA's website, which was not a feature of the old POV rule. *Compare Id.* at Ex. 2 *with Id.* at Ex. 3. Although the new POV rule explicitly refers to the publication of the criteria on MSHA's website, the agency had provided an online "Monthly Monitoring Tool" under the old regulation as well, so operators have had online notice of their status under POV screening criteria for the past few years. *See* 78 Fed. Reg. at 5059. As noted above, the criteria displayed online have remained the same except for the final order requirement.

Brody argues that the elimination of the PPOV and final order requirements amount to a substantive change in the POV criteria, and that these shifts alter the legal landscape today from that faced by Brody in the fall of 2012. Brody maintains that, if MSHA were to apply the new

POV rule prospectively, it would no longer meet the screening criteria. In making this argument, Brody submits that the citations per inspection hour calculations that are required under the screening criteria would yield a result lower than the required threshold if only violations from after March 25, 2013 were used. Brody Memo. in Support of Mot. Sum. Dec. at 26; *See* Joint Stip. 23, 24. However, this particular portion of the screening criteria has remained the same between the 2012 and 2013 criteria, and both sets of screening criteria have always used data over 12 month time periods. Brody has known since the issuance of the 2012 screening criteria that the relevant citations per inspection hours calculations would be taken using data that covered an entire year, based on the date MSHA chose to run its screening criteria. That this statistic changes from quarter to quarter, and has sometimes dropped below the required threshold for periods shorter than one year, does not entitle Brody to reconsideration on retroactivity grounds because other changes to the rule have been made. Rather, the rule is only applied in an impermissibly retroactive fashion if the changes to the legal landscape have altered Brody's liabilities.

In arguing that the POV rule has not been applied in an impermissibly retroactive fashion, the Secretary argues that the rule does not upset expectations because the subject violations were illegal under the old rule and are illegal now. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 17. There is no notice or fairness problem because Brody knew "that certain conduct could constitute an S&S violation and that a pattern of S&S violations could subject it to POV sanctions." *Id.* The Secretary argues that Brody is "'unable to point to anything [it] would have done differently had [it] known the effect of the' POV rule when it engaged in its pre-POV rule conduct." *Id.* (citing *Tarver v. Shineski*, 557 F. 3d 1371, 1375 (Fed. Cir. 2009)).

In considering the issue of retroactivity with respect Brody's mining operation, I find that nothing about the changes to the POV rule were so drastic as to impose new sanctions on previous conduct or interfere with notions of reasonable reliance. The types of citations and the numerical rates that trigger further consideration for a POV have remained largely the same under both rules. Thus, Brody has always been on notice that their high rate of S&S issuances had the potential to subject them to a POV notice. Specifically, Brody has had access to the numerical screening criteria, and has known that based on the criteria, they were getting close to POV status during several parts of 2012 and 2013. In fact, Brody was issued a PPOV notice on March 1, 2013, which indicates that even under the old rule, Brody had exhibited a history of S&S violations that they knew put them in danger of a POV notice.[8] Brody had also

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[8] Although neither party mentions Brody's PPOV notice in its brief, I take judicial notice of this fact based on Patriot Coal's March 2013 SEC filing. Patriot Coal Co., Current Report (Form 8-K), (Mar. 7, 2013), available at:

http://www.sec.gov/Archives/edgar/data/1376812/000119312513096304/d497205d8k.htm

(continued...)

implemented a CAP under the previous POV rule, which did not work to the degree necessary to reduce issuances of S&S violations at its mine. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 10 (citing Sec'y Opp. to Mot. for Temp. Relief at Exhibit A, page 10).

While the PPOV system did provide an extra procedural step to operators, I find that its elimination is a procedural change that does not change substantive liability determinations with regard to a POV notice. Under the 2013 POV rule, operators still have access to the screening criteria to get a sense of whether they are close to a POV notice, and, upon determining that they are at risk, have the opportunity to present evidence of mitigating circumstances to MSHA at any time, including implementation of a Corrective Action Plan if they so choose. Under the 2012 rule, operators similarly had access to the screening criteria and could present mitigating circumstances, but also had a more formal review period in which to lower their rate of S&S issuances. Generally, elimination of the PPOV and the operator's subsequent ability to present mitigating evidence has been replaced by guidance in the form of public screening criteria and the availability of a self-monitoring web based tool, as well as the operator's ability to present mitigating evidence at any time. 78 Fed. Reg. 5059, 5063. Taken together, these two aspects of the rule provide the operator similar opportunities to anticipate and avoid a pattern notice, so nothing about the "legal landscape" surrounding the POV process has changed in any substantive way. The change merely shifts the primary responsibility for monitoring for potential POV status from MSHA to the operator, and does not substantially change the conduct triggering a POV notice or the pre-notice opportunities for operators to change their violation history.

Thus, the record indicates that Brody cannot point to anything they would have done differently if they knew non-final violations would be included in the POV calculus or that the PPOV notices would cease being issued. I conclude that the changes between the old and new rules have little if any impact on this case and do not alter the legal landscape in such a way that Brody would have lacked notice that their prior conduct was likely to lead to a POV status. Accordingly, I reject Brody's arguments as to retroactivity, and find that the Secretary may use evidence of all violations listed in the pattern notice as evidence that a pattern of violations exists at Brody's Mine No. 1.

## CONCLUSION

On the cross motions for summary decision before me, the dispositive issue is whether the Secretary's revised rule implementing section 104(e) of the Mine Act is a rule of binding effect subject to the notice-and-comment requirements of the APA, or a policy set forth in a rule

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[8](...continued)

A court may take judicial notice on its own, at any stage of the proceeding, of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

that does not bind but rather assists the Secretary in the exercise of his prosecutorial discretion. I find the latter to be the case.

The Secretary has established that his revised POV rule is a prosecutorial tool he has used to identify Brody Mining, LLC as an operator critically in need of improvement in its approach to ensuring the health and safety of its miners. When the Secretary applied his new POV rule to Brody's history of S&S violations, he acted with deliberation and exercised his judgment to determine that Brody, among several thousand mine operators operating under the Mine Act, was one of but a few operators he deemed most at risk of having recurring problems arise at their mine that would affect the health and safety of miners.

I find Brody's plea to have the Commission remove this tool from the Secretary's hands as unavailing as it is ill-advised. I find none of the company's arguments persuasive. The revised POV rule is wholly consistent with the statutory provision it implements. The rule was properly promulgated. The Secretary's actions have not deprived Brody of due process – in fact, Brody has already availed itself of several opportunities before the Commission to obtain immediate relief.[9] In addition, the rule was properly applied to Brody under the circumstances presented in these proceedings thus far. It remains for the Secretary to prove that the violations that served as the basis for the POV notice did, in fact, constitute a "pattern" of S&S violations; and if so, that he had a valid basis for all of the subsequent enforcement actions he took based on the POV notice.

**WHEREFORE**, the Motion for Summary Decision of Brody Mining LLC is **DENIED**, and the Motion for Summary Decision of the Secretary of Labor is **GRANTED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

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[9] *See, supra* note 2.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2014

| | | |
|---|---|---|
| BRODY MINING, LLC,<br>Contestant | : | CONTEST PROCEEDINGS |
| | : | Docket No. WEVA 2014-82-R |
| | : | Order No. 9003242; 10/28/2013 |
| v. | : | |
| | : | Docket No. WEVA 2014-83-R |
| | : | Order No. 7166788; 10/28/2013 |
| SECRETARY OF LABOR | : | |
| MINE SAFETY AND HEALTH | : | Docket No. WEVA 2014-86-R |
| ADMINISTRATION (MSHA),<br>Respondent | : | Order No. 4208892; 10/29/2013 |
| | : | |
| | : | Docket No. WEVA 2014-87-R |
| | : | Order No. 4208893; 10/29/2013 |
| | : | |
| | : | Docket No. WEVA 2014-97-R |
| | : | Order No. 7166790; 11/04/2013 |
| | : | |
| | : | Docket No. WEVA 2014-151-R |
| | : | Order No. 9003246; 11/07/2013 |
| | : | |
| | : | Docket No. WEVA 2014-161-R |
| | : | Order No. 9004638; 11/12/2013 |
| | : | |
| | : | Docket No. WEVA 2014-190-R |
| | : | Order No. 4208898; 11/14/2013 |
| | : | |
| | : | Docket No. WEVA 2014-191-R |
| | : | Order No. 7166793; 11/18/2013 |
| | : | |
| | : | Docket No. WEVA 2014-192-R |
| | : | Order No. 4208899; 11/19/2013 |
| | : | |
| | : | Docket No. WEVA 2014-193-R |
| | : | Order No. 9005720; 11/20/2013 |
| | : | |

: Docket No. WEVA 2014-221-R
: Order No. 8155306; 11/26/2013
:
: Docket No. WEVA 2014-244-R
: Order No. 9005722; 12/03/2013
:
: Docket No. WEVA 2014-284-R
: Order No. 8154092; 12/05/2013
:
: Docket No. WEVA 2014-285-R
: Order No. 7166798; 12/09/2013
:
: Docket No. WEVA 2014-447-R
: Order No. 7166805; 01/15/2014
:
: Docket No. WEVA 2014-448-R
: Order No. 7166806; 01/15/2014
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: Docket No. WEVA 2014-449-R
: Order No. 7166807; 01/15/2014
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: Docket No. WEVA 2014-450-R
: Order No. 7166808; 01/15/2014
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: Docket No. WEVA 2014-451-R
: Order No. 8154104; 01/15/2014
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: Docket No. WEVA 2014-452-R
: Order No. 9005729; 01/13/2014
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: Docket No. WEVA 2014-453-R
: Order No. 9005731; 01/13/2014
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: Docket No. WEVA 2014-454-R
: Order No. 9005732; 01/14/2014
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: Docket No. WEVA 2014-455-R
: Order No. 9005733; 01/14/2014
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: Docket No. WEVA 2014-456-R
: Order No. 9005735; 01/15/2014

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| : | Docket No. WEVA 2014-457-R |
| : | Order No. 9005736; 01/15/2014 |
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| : | Docket No. WEVA 2014-479-R |
| : | Order No. 7166815; 01/23/2014 |
| : | |
| : | Docket No. WEVA 2014-480-R |
| : | Order No. 7166816; 01/23/2014 |
| : | |
| : | Brody Mine No. 1 |
| : | Mine ID 46-09086 |

**CERTIFICATION OF INTERLOCUTORY RULING**

Before: Chief Judge Lesnick

These consolidated proceedings are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (Mine Act). Brody Mining, LLC (Brody) filed a Motion for Summary Decision on November 27, 2013. On December 10, 2013, the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody Mining's Motion for Summary Decision. On January 30, 2014, I issued an order denying Brody's motion and granting the Secretary's motion.

Commission Procedural Rule (76)(a)(1)(i) provides that I may certify, upon my own motion, that my interlocutory ruling of January 30, 2014, involves a controlling question of law and that immediate review by the Commission will materially advance the final disposition of this proceeding.

The issue addressed in my January 30, 2014 Order is whether the Secretary's Pattern of Violations rule promulgated at 78 Fed. Reg. 5056, and effective March 25, 2013, is valid as it was applied by the Secretary's Mine Safety and Health Administration (MSHA) when it issued a "pattern of violations" notice, Notice No. 7219154, to Brody on October 24, 2013. My Order concludes that the subject rule is a valid exercise of the Secretary's rulemaking authority under the Mine Act, meets the relevant requirements of the Administrative Procedure Act, and does not unconstitutionally deprive operators of procedural due process rights. Further, my Order holds that with respect to Brody, the 2013 rule was not applied in an impermissibly retroactive manner.

The subsequent hearings in this case will reach the issue of the validity of the underlying citations listed in the pattern notice issued to Brody, whether the Secretary has shown through those citations that a "pattern" existed within the meaning of section 104(e) of the Mine Act, and further, whether the subsequent 104(e) orders issued to Brody after October 24, 2013 were valid. Resolution of the threshold issue of whether the regulation on which MSHA relied to issue the pattern notice was validly promulgated will remove any doubt as to whether the Secretary can

proceed with the bulk of his case. I note that the validity of the pattern of violation regulation is a question currently before the United States Court of Appeals for the Sixth Circuit in the matter *Nat'l Mining Ass'n v. MSHA*, Case No. 13-3324. Resolution of the threshold issues before me in these cross-motions for summary decision in this matter is thus not only important for the resolution of the above dockets, but will also provide guidance to the Secretary and the regulated community as to the extent the rule may be used in future enforcement actions.

In light of the foregoing, pursuant to Commission Procedural Rule 76(a)(1)(I), 29 C.F.R. § 2700.76(a)(1)(I), the Order of January 30, 2014 confirming the validity of 30 C.F.R. Part 104, as promulgated at 78 Fed. Reg. 5056 and as applied to Brody Mining, LLC in the above dockets, is certified for interlocutory review.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

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