November 2014

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 14, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MIZE GRANITE QUARRIES, INC. ROBERT W. MIZE III; and CLAYBORN LEWIS Both Employed by MIZE GRANITE QUARRIES, INC.	Docket Nos. SE 2009-401-M SE 2009-402-M SE 2009-553-M SE 2009-554-M SE 2010-849-M SE 2010-850-M

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This case comes to the Commission a third time for review under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary of Labor asserts that a supervisory miner was erroneously relieved of the burden of proving his inability to pay an individual penalty. We conclude that substantial evidence in the record supports the Judge's finding on inability to pay and the resultant penalty adjustment. Therefore, we affirm the decision.

I.

Factual and Procedural Background

In 2009, Mize Granite Quarries, Inc. ("MGQ"), a corporation, operated a stone quarry located in Elberton, Georgia. 33 FMSHRC 886, 888 (Apr. 2011) (ALJ). MGQ employed six regular employees and one foreman, Clayborn Lewis. Tr. 179. Lewis had worked at MGQ for 18 years. Tr. 161. After inspections on January 13 and March 11-12 of 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued eleven citations/orders against MGQ. MSHA also issued one citation and three orders against the owner of MGQ, Robert Mize and, separately, against Lewis. MSHA proposed individual penalties pursuant to section 110(c)

of the Mine Act[1] against both Mize and Lewis in the amounts of $3,600, $6,000, $4,000, and $4,000. After a hearing, the Judge dismissed one order but found violations with respect to the remaining citation and orders against Mize and Lewis. These three violations included total proposed penalties of $13,600 against Mize and Lewis individually.

After the parties filed post-hearing briefs, the Judge found that evidence of the personal income and financial responsibilities of Mize and Lewis was germane to the determination of appropriate penalties under section 110(c) of the Act. Therefore, she ordered Mize and Lewis to provide documentary evidence relative to their incomes and financial responsibilities. Unpublished Order Reopening for Submission of Evidence at 1-2 (Mar. 4, 2011). Mize responded by supplying financial information to the Judge. Lewis, whom Mize had represented at the hearing, did not respond to the Judge's order. Thereafter, the Judge assessed three penalties of $500 each against Mize totaling $1,500 and three penalties of $300 each against Lewis totaling $900. 33 FMSHRC at 917.

The Secretary petitioned the Commission for review and asserted with respect to both Mize and Lewis that the Judge had not adequately explained the basis for dismissing one order and for substantially reducing the penalties for the remaining citation and orders. Upon review, the Commission affirmed the dismissal of the order but remanded the case for a further determination of the appropriate penalties on the basis that the Judge erroneously had included the size of the mine and the penalties levied against the corporation in assessing the individual penalties. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760 (Aug. 2012). The Commission also noted that the March 4, 2011 Order requiring submission of evidence had not been sent to Lewis directly but had been addressed to him in care of Mize Quarries. Therefore, the Commission ordered that Lewis should be directly notified of penalties proposed by MSHA and should be given the opportunity to respond regarding his personal income and financial responsibilities. The notice was to include a statement that if Lewis failed to provide evidence of income, net worth, and financial obligations, the Judge could presume that the imposition of the assessed penalties would not adversely affect his ability to meet financial obligations. *Id.* at 1766.

On remand, the Judge reevaluated the individual penalties assessed against Mize and Lewis. *Mize Granite Quarries, Inc.*, 35 FMSHRC 414 (Feb. 2013) (ALJ). The Judge again assessed penalties against Mize and Lewis in the amounts of $500, $500, and $500 (totaling $1,500) and $300, 300, and $300 (totaling $900), respectively. The Judge based the continued reduction for Mize on her review of Mize's individual income tax return and personal financial responsibilities. The Judge stated specifically that she had taken the financial information provided by Mize into account in the reduction of the penalty.

Despite the letter sent to Lewis as a result of the Commission's initial decision, Lewis did not submit any information to the Judge. However, the Judge found that, because Lewis was

[1] Section 110(c) of the Act provides in relevant part that, whenever a corporate operator violates a mandatory safety standard, "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation" shall be subject to penalties as an individual. 30 U.S.C. § 820(c).

only a foreman at the operation owned by Mize, Lewis' ability to pay was no greater than Mize "and most likely sizably less." *Id.* at 417. Therefore, the Judge again assessed penalties totaling $900 against Lewis.

The Secretary again sought and obtained review by the Commission of the penalties assessed against both Mize and Lewis. The Commission upheld the Judge's analysis of the penalties to be assessed against Mize and Lewis. In doing so, the Commission applied the substantial evidence test to the Judge's factual findings. *Mize Granite Quarries, Inc.*, 36 FMSHRC 1813 (July 2014).

Regarding Lewis, the Commission found that documents in the record related to Mize also constituted sufficient evidence to support the Judge's evaluation of Lewis' ability to pay and the reduction in the penalty. More specifically, the Commission referenced the operator's tax return that was in the record and calculated that the average annual salary for MGQ employees was approximately $21,500. Based on this and other findings, the Commission affirmed the Judge's findings with regard to the effect of the proposed penalties on Mize's and Lewis' ability to meet financial obligations as based factually on substantial evidence and not an abuse of discretion.

The Commission, however, also found that the Judge's decision on remand misstated the negligence and gravity findings contained in her initial decision. Consequently, the Commission again remanded the case and ordered the Judge to consider the penalty assessments in light of the correct negligence and gravity findings. *Id.* at 1817.

Upon remand, the Judge reiterated the negligence and gravity findings from the initial decision. She further found that "in consideration of all section 110(i) factors, including the negligence and gravity of the violations as stated in my first decision, the amount of the penalties against both individuals is appropriate and I reiterate my decision." *Mize Granite Quarries, Inc.*, 36 FMSHRC 1912 (July 2014) (ALJ).

The Secretary filed and the Commission granted a third petition for discretionary review. The Secretary did not challenge the reduction in the individual penalty assessed against Mize, the owner and operator of MGQ, to $1,500. However, the Secretary continues to object to the Judge's decision to reduce Lewis' total penalty from $13,600 to $900.

II.

Legal Principles

Civil penalties under the Mine Act serve an important public purpose: motivation of conduct. To achieve this purpose, Congress enumerated six statutory criteria for assessment of penalties against mine operators: the size of the operator's business, the operator's history of previous violations, the operator's ability to continue in business, the operator's negligence, the gravity of the violation, and good faith abatement efforts. 30 U.S.C. § 820(i).

As the Mine Act directs, and as the Commission has consistently held, the Commission makes independent penalty determinations based upon the statutory criteria in section 110(I) of the Mine Act. *See Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). The determination of the amount of the penalty for a particular violation is an exercise of discretion by the Administrative Law Judge but must reflect consideration of all six statutory criteria of the Act. *Id.* at 294. In turn, the Commission reviews a Judge's factual determinations under the substantial evidence standard. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984); *see also Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996).

In applying the criterion of inability to continue in business, the Commission has found that the burden rests upon the operator to introduce evidence demonstrating that a proposed penalty would adversely affect its ability to continue in business. *Broken Hill Mining*, 19 FMSHRC 673, 677-78 (Apr. 1997). Thus, the Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). To adjust a penalty based upon an operator's inability to pay, therefore, the Judge must have, and must point to, material in the record bearing upon the operator's ability to pay.

Congress did not create a set of statutory criteria for the assessment of penalties against individuals pursuant to section 110(c) of the Mine Act separate from the criteria applicable to operators under section 110(i). The Commission has held that in assessing penalties under section 110(c), "judges must make findings on each of the criteria as they apply to *individuals*." *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997) (emphasis in original). Application of the ability to continue in business criterion to an individual requires an inquiry into whether the penalty will affect the individual's ability to meet his financial obligations. *Id.*; *Steen, emp. by Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997). As a result, the present case rests upon a determination of whether the Judge abused her discretion in finding that the proposed penalty of $13,600 would adversely affect Lewis' ability to meet his financial needs and, consequently, reducing the penalty to $900.

III.

Disposition

The Secretary no longer seeks review of an assessed penalty of $1,500 against Mize, the owner/operator of MGQ, based upon the financial information provided by him, including the showing of the income he derives from his privately-owned, seven-employee quarry in rural Georgia. Nonetheless, the Secretary continues to seek a penalty of $13,600 against Lewis, who had been an employee at the quarry for 18 years at the time of the violation.

Such tenacity apparently results from concern that, because Lewis himself did not submit financial information, a reduction in the penalty assessed against him would undercut the burden of proof governing demonstration of an inability to pay. That is not correct. Neither the Judge nor the Commission made any finding that modifies or diminishes the burden of proving an inability to pay. The burden of proof is not at issue in this case.[2] The question in this case is whether substantial evidence in the record supports the Judge's factual determinations upon which she based her discretionary decision to reduce the penalty.[3]

The Judge's assessment in this case is based upon the total record before her. The Judge drew an inference regarding Lewis' ability to pay based upon that record.[4] Without doubt a Judge may draw such inferences, provided they are reasonable. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006).

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[2] Citing our decision in *Broken Hill Mining Co.,* 19 FMSHRC 673, 677-78 (Apr. 1997), the Secretary argues "[t]he burden of proving inability to pay a penalty is on the operator making such a claim, and in the absence of such proof the ability to pay is presumed." PDR at 5. This argument mixes two separate principles to attempt to reach a third principle which goes beyond anything the Commission has stated. It is true that the operator has the burden of proving inability to pay a proposed penalty. It is also true that in *Broken Hill*, the Commission stated that in the absence of proof that the imposition of a proposed penalty would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur. In the situation of an operator claiming inability to pay, it makes sense to assume that such proof would be produced by the operator itself. But in the situation of an individual faced with a section 110(c) penalty, the proof need not be submitted by the individual himself. It is the existence of the proof in the record which matters rather than the identity of the party submitting the proof.

[3] The Commission ordered the Judge to inform Lewis that, if he failed to provide financial information, "the judge may presume that the imposition of the assessed penalties would not adversely affect his ability to meet financial obligations." 34 FMSHRC at 1766. The Judge, however, was not required to make such a presumption if evidence in the record submitted by another person supported a reasonable inference of adverse financial impact upon Lewis. *See supra*, n.2. Because the Judge may, indeed must, consider all the relevant evidence in the record, Lewis' personal failure to submit evidence of his financial status does not require imposition of the proposed penalty if evidence in the total record is sufficient to carry his burden on the inability to pay criterion.

[4] An "inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 897 (10th ed. 2014). The Judge may not have selected the ideal phrasing for the inference as she stated that she would "assume" Lewis was a man of modest means. Clearly, however, her finding was a conclusion reached by considering other facts and reaching a logical consequence from them.

Such inferences are a fundamental principle of judicial decision making. For example, in *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1101 (D.C. Cir. 1998), the court held:

> This case turns not on the construction of regulations or on statutory interpretation, but on the weighing of evidence and reasonable inferences made therefrom. Thus, our deference runs not to the policymaking body, MSHA and the Secretary, but to the ALJ, the factfinder who oversees the adjudicatory proceedings.

See also Grundy Mining Co. v. Flynn, 353 F.3d 467, 484 (6th Cir. 2003) (quoting *Moseley v. Peabody Coal Co.,* 769 F.2d 357, 360 (6th Cir.1985)).

The Judge had the authority to draw a reasonable inference from the record before her, and such a reasonable inference may be overturned only if absence of support in the record makes the inference unreasonable. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946) ("Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. . . . [T]he appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."); *Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007) ("*Lavender's* principles apply to our review of administrative findings of fact, just as they support and explain the "great deference" this Court accords to a district court's resolution of competing inferences after a civil bench trial."); *see also id.* at 169 ("So long as an inferential leap is tethered to the evidentiary record, we will accord deference to the finding.").

The question before the Commission in this case, therefore, is not the burden of proof in a claim of inability to pay. That law remains settled and undisturbed. The question in this case is whether the Judge's inference drawn from the record before her is reasonable. It is.

The Judge's inference with respect to Lewis was reached in two steps. First, she reviewed the financial information provided by Mize with respect to Mize himself. She found:

> I have reviewed the tax returns for the business for years 2007 and 2009 and found the assessed penalties against the corporation to be disproportionate to its size and income. Likewise, having reviewed Mize's individual income tax returns and his personal financial responsibilities from the information provided, I find he does not have sizeable personal net worth and the amount of the penalties proposed is disproportionate to his income.

35 FMSHRC at 417. Consequently, the Judge assessed a total penalty of $1,500 rather than the $13,600 proposed by the Secretary.

As a second step, the Judge considered whether Mize's financial information could reasonably be used to draw an inference regarding Lewis' financial status. Based upon the facts of the case, she inferred that his financial well-being also would be adversely affected by the proposed penalty. As demonstrated in our second consideration of this matter, the records submitted by Mize show that MGQ paid average wages of approximately $13.34/hour equaling approximately $21,500 per year. 36 FMSHRC at 1816. Even considering Lewis was the foreman and presumably paid more than the other miners, twice that average would come to only $43,000 per year. Therefore, under any reasonable scenario, a penalty of $13,600 would be a very substantial portion of Lewis' entire yearly wages.[5] It was reasonable for the Judge to find that a penalty likely to consume so much of a miner's finances for an entire year provides a basis for finding a substantial detriment to Lewis' financial status.[6]

[5] Of course, wages are not the only measure of a person's financial status or ability to pay. Here, the judge observed Lewis during his testimony, knew of his 18 years as an employee in a small quarry, and could determine the average income of quarry employees. In light of this evidence and the financial status of the owner of the quarry, the totality of the record supports a lesser penalty than the penalty proposed for Lewis.

[6] This case is a specific holding based upon exceptional circumstances unlikely to be replicated in future proceedings. It certainly is not a template for failing to submit financial information in a case involving an inability to pay issue. As we advised in a prior remand in this case, if a party fails or refuses to present financial information, a Judge may presume that the failure is an admission of ability to pay.

The body of evidence upon which the Judge found that the owner of MGQ carried the burden of proving inability to pay constitutes sufficient evidence to support the reasonable inference that the financial status of a long-term employee also would be adversely affected by the penalty proposed by the Secretary. We find that the Judge made a reasonable inference based upon substantial evidence in the record and, therefore, did not abuse her discretion.[7]

IV.

Conclusion

For the foregoing reasons, the decision of the Judge is affirmed.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

[7] Any other inference would be highly improbable. It is not the common experience of our society that persons able to pay a $13,600 penalty without severe financial harm would work for 18 years doing exhausting and potentially hazardous work in a tiny quarry during the cold of the winter and the heat of a Georgia summer.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 18, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. LAKE 2008-38 LAKE 2008-142 LAKE 2008-525
v.	
THE AMERICAN COAL COMPANY	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These captioned proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") are before the Commission pursuant to the Commission's partial grant of The American Coal Company's ("American") petition for discretionary review. Subsequent to our partial grant of review, we stayed briefing pending further order by the Commission.

In its petition, American contends that three notices to provide safeguard ("safeguards") that were issued by the Secretary of Labor pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), are facially invalid: Safeguard Nos. 3538483, 7568565, and 7577893. PDR at 2. American requests that the Commission vacate citations issued by the Secretary that allege violations of these safeguards.[1] *Id*.

The Judge concluded that these safeguards are facially valid and denied American's motion for summary decision on the issue. *The American Coal Co.*, 33 FMSHRC 2636 (Oct. 2011) (ALJ). The parties then filed a motion to approve settlement of the citations contingent upon the understanding that American was not waiving its right to subsequently file a petition for discretionary review with the Commission that challenged the facial validity of the underlying safeguards. On November 14, 2011, the Judge issued a decision approving the parties' agreement

[1] A total of four citations are at issue. Citation Nos. 6667312 and 7490989 allege violations of Safeguard No. 3538483. Citation No. 7490559 alleges a violation of Safeguard No. 7568565. Citation No. 7490851 alleges a violation of Safeguard No. 7577893.

to settle the citations. *The American Coal Co.*, 33 FMSHRC 2803, 2833-34 (Nov. 2011) (ALJ). The Judge ordered payment of a total amended penalty of $9,640 in satisfaction of the four citations at issue.[2] *Id*. at 2833.

On August 30, 2012, the Commission issued a decision in a separate case involving American in which we concluded that Safeguard Nos. 3538483, 7568565, and 7577893 are each facially valid. *The American Coal Co.*, 34 FMSHRC 1963, 1972-80 (Aug. 2012). The principle of *res judicata* precludes American from again challenging the facial validity of these safeguards before the Commission. *Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997). Safeguard Nos. 3538483, 7568565, and 7577893 are each facially valid.

We hereby lift the stay in these cases. The Judge's decision approving settlement of Citation Nos. 6667312, 7490989, 7490559, and 7490851 is affirmed.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

[2] The record does not clearly establish the amended penalty amount for each individual citation. The Commission's Procedural Rules require settlement motions to include the amount of the penalty proposed by the Secretary and the amount of the penalty agreed to in settlement for each violation. Commission Procedural Rule 31(b), 29 C.F.R. § 2700.31(b). We remind the parties that compliance with our procedural rules is required.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTHERN ILLINOIS SERVICE COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2011-1029-M A.C. No. 11-02963-263549 Mine: Northern Illinois Service Co. Portable Mine #1 (Blackrock Quarry) Docket No. LAKE 2012-0161-M A.C. No. 11-03104-272174 Mine: Northern Illinois Service Co. Portable Mine #2 (Bedrock Quarry)

DECISION

Appearances: Sean J. Allen, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Peter DeBruyne, Esq., Peter DeBruyne, P.C., Rockford, IL, for Respondent.

Before: L. Zane Gill, U.S. Administrative Law Judge

These cases arise from a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Northern Illinois Service Company's ("NISC") portable rock crushing plants near Rockford, IL, 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"). They comprise 11 alleged violations distributed between the two captioned dockets. The Secretary proposed a total penalty of $6,756.00. The parties presented testimony and documentary evidence at a hearing held in Rockford, IL, starting on January 8, 2013.

Procedural History

Prior to the hearing, docket LAKE 2011-1029, consisting of Citation Nos. 6555758, 555759, 6555760, 6555761, 6555762, 6555763, 6555764,[1] and 6555766, was consolidated with LAKE 2012-0161, consisting of Citation Nos. 8662246, 8662247, and 8662248. The ten remaining citations were litigated at the hearing.

Stipulations

The parties entered the following stipulations into the record at the hearing:

1. Jurisdiction exists because NISC was an operator of a mine as defined in Section 3(b) of the Mine Act, 30 U.S.C. § 803(b), and the products of the subject mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Act, 30 U.S.C. § 803. This issue is not in dispute.

2. This case involves two crushed and broken limestone mines known as Northern Illinois Service Portable Mine No. 1 and No. 2, which is owned and operated by Northern Illinois Service Company.

3. The mines, MSHA ID Nos. 11-02963 and 11-03104, are subject to the jurisdiction of the federal Mine Safety and Health Act of 1977.

4. NISC is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the limestone mine at which the Citations at issue in this proceeding were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

6. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of NISC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuances, but not for the truthfulness or relevancy of any statements asserted therein.

7. NISC's operations affect interstate commerce.

[1] Citation No. 6555765 was issued with the other citations in this docket but was vacated on April 20, 2012. (Resp. Post-Hearing Brief, pg. 1)

8. The exhibits offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein. Additionally, both parties maintain the right to object to exhibits not produced in discovery.

The Citations

- **Citation No. 6555758** (Exhibit GX-1; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a 104(a) violation of 30 CFR § 56.12004, which requires that electrical conductors exposed to mechanical damage be protected. This citation is characterized as unlikely to cause injury, potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $108.00.

- **Citation No. 6555759** (Exhibit GX-3; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts be guarded to protect persons from contacting moving parts that can cause injury. This citation is characterized as unlikely to cause injury, potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $807.00.

- **Citation No. 6555760** (Exhibit GX-5; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 47.44(b), which requires that operators mark temporary, portable containers not emptied at the end of each shift with the common name of the contents. This citation is characterized as unlikely to result in injury, lost workdays, or restricted duty, as potentially affecting a single miner, and arising from moderate negligence. The Secretary proposed a penalty of $108.00.

- **Citation No. 6555761** (Exhibit GX-7; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14100(b), which requires that defects on any equipment, machinery, or tools that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons. This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from moderate negligence. The Secretary proposed a penalty of $1,795.00.

- **Citation No. 6555762** (Exhibit GX-9; Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14132(a), which requires that manually operated horns or other audible warning devices on self-propelled mobile equipment be maintained in functional condition. This citation is characterized as unlikely to be fatal, potentially affecting a single miner, and arising from high negligence. The Secretary proposed a penalty of $1,203.00.

- **Citation No. 6555763** (Exhibit GX-10: Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.14130(i), which requires that seat belts be maintained in functional condition and replaced when necessary to assure proper

performance. This citation is characterized as being reasonably likely to be fatal, S&S, and arising from moderate negligence. The Secretary proposed a penalty of $1,795.00.

- **Citation No. 6555764** (Exhibit GX-13: Docket LAKE 2011-1029) was issued on June 22, 2011, and alleges a violation of 30 CFR § 56.9300(a), which requires that berms or guardrails be provided and maintained on the banks of roadways which drop off enough to cause a vehicle to overturn or endanger persons in equipment. This citation is characterized as being reasonably likely to result in lost workdays or restricted duty, affecting a single person, S&S, and arising from moderate negligence. The Secretary proposed a penalty of $540.00.

- **Citation No. 6555766** (Exhibit GX-15: Docket LAKE 2011-1029) was issued on June 23, 2011, and alleges a violation of 30 CFR § 46.9(b)(5), which requires that training records be kept and include MSHA Form 5000-23, containing a statement by the person designated in the MSHA-approved training plan and certifying that the miner in question has received periodic training as required by the training plan. This citation is characterized as a paperwork violation arising from low negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662246** (Exhibit GX-20: Docket LAKE 2011-0161) was issued on September 27, 2011, and alleges a violation of 30 CFR §56.12006, which requires that electrical distribution boxes have a disconnecting device for each branch circuit which is appropriately labeled so that it can be visually checked to see if a device is open and the circuit is de-energized. This citation is characterized as unlikely to result in lost workdays or restricted duty, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662247** (Exhibit GX-22: Docket LAKE 2011-0161) was issued on September 27, 2011, and alleges a violation of 30 CFR §56.4201(a)(1), which requires that fire extinguishers be visually inspected at least once a month to determine that they are fully charged and operable. This citation is characterized as unlikely to result in lost workdays or restricted duty, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

- **Citation No. 8662248** (Exhibit GX-24: Docket LAKE 2011-0161) was issued on September 28, 2011, and alleges a violation of 30 CFR §56.12028, which requires that electrical grounding system be tested periodically and records be kept for inspection. This citation is characterized as unlikely to result in and injury but the injury could be fatal, potentially affecting a single person, and arising from moderate negligence. The Secretary proposed a penalty of $100.00.

Background Facts

The citations from LAKE 2011-1029 were issued by MSHA inspector Thomas Heft on June 22 and 23, 2011.[2] Those from LAKE 2012-0161 were issued on September 27 and 28, 2011. NISC mines and produces aggregate products from two locations near Rockford, IL. The two mine properties are identified in the record as Portable Mine No. 1 and Portable Mine No. 2. The mines had been idle for some time prior to June 22, 2011, and NISC personnel had just begun the process of examining for items needing attention prior to resuming mining when Heft appeared at the site to conduct his inspection on June 22, 2011.

Analysis

Common Legal Standards

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 carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.,* 4 FMSHRC 1459, 1463-64. *See also, Nacco Mining Co.,* 3 FMSHRC at 848, 850-51(Apr.1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company,* 5 FMSHRC 13 (Jan.1983).

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

[2] LAKE 2011-1029 comprises the following citations: Citation Nos. 6555758, 6555759, 6555760, 6555761, 6555762, 6555763, and 6555764 were issued on June 22, 2011; Citation No. 6555766 was issued on June 23, 2011. LAKE 2012-0161 comprises three citations. Nos. 8662246 and 8662247 were issued on September 27, 2011, and Citation No. 8662248 was issued on September 28, 2011.

practice, but there are considerable mitigating circumstances." *Id.* No negligence is found when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U .S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.,* 5 FMSHRC 287, 294-95 (March 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 673, 681 (Apr. 1987). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.,* 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.,* 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its significant and substantial ("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 (Sept. 1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential 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. l (Sept. 1987).

Significant and Substantial

It is clear in the Mine Act that because negligence and gravity, which are 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 S&S and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders. In order to invoke the enhanced enforcement provisions in Section 104(d), he must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards. If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

Significant and Substantial

In *Mathies Coal Co.,* 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") 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.

In *U.S. Steel Mining Co.,* 7 FMSHRC 1125 (Aug. 1985), 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."

Id. at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is S&S 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 health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC,* 195 F.3d 42 (D.C. Cir. 1999)

Penalty

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

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

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

Discussion

Citation No. 655758

Inspector Heft issued Citation No. 6555758 under 30 C.F.R. § 56.12004 alleging that the operator failed to protect an electrical conductor exposed to mechanical damage. (Tr.1 at 53, Ex. GX-1) Heft testified that he found an orange 110 volt power cable along the scale conveyor. (Tr.1 at 54, 60) The outer jacket of the cable was torn exposing the inner insulated conductors. (Tr.1 at 54) The exposed area of the power cable was approximately one half inch long, and the power cable was thirty inches above the ground. (Ex. GX-1; Ex. GX-2) Heft concluded that the breach in the cable's outer jacket exposed the inner electrical conductors to possible mechanical damage such as "equipment, material, weather, and UV radiation." (Tr.1 at 54; Ex. GX-1) Heft surmised that water could get inside the power cable through the jacket tear, dirt could corrode the cable, rocks could fall from the scale conveyor and strike the cord, clean up equipment such as the skid-steer could contact the cable, or the vibration of the scale conveyor could further damage the cable. (Tr.1 at 56; Tr.2 at 42-43)

Heft concluded that the breach in the cable jacket was a safety hazard because there was only a thin layer of insulating material left on the inner conductors (Tr.1 at 57) which, with further deterioration, could cause pinholes or bare sections to develop in the inner conductors. *Id.* This could expose any miner coming in contact with the cable to electrical shock. (Tr.1 at 57, 61) Also, an exposed inner conductor could energize the conveyor scale's metal frame and possibly shock any miner coming in contact with it. *Id.* Heft testified that a jolt from the 110 volt cable could cause electrical shock, burns, or electrocution, which in turn could result in lost work days or restricted duty. *Id*

Brian Russell testified on behalf of NISC that there was always at least one person loading trucks with the sales loader at Mine No. 1 and Mine No. 2 from April to December each year. (Tr.2 at 131) Russell testified that Mine #1 only crushed product about 15 days per year (Tr.2 at 50, 55-57), but that limestone had been mined and crushed during the period from a year before Heft's inspection to a year after. (Tr.2 at 130-131) Russell confirmed that the crusher, generator, three screens, and four or five conveyor belts were in operation when Heft did his inspection. (Tr.2 at 86) Russell stated that he had visually inspected the power cable in question here, but had not turned it over to see all angles. (Tr.2 at 75-77) Russell looked for cuts, abrasions, and kinks in the cable to make sure the outer jacket wasn't cracked (Tr.2 at 76), but admitted that the compromised portion of the jacket was facing down when Heft found it. (Tr.2 at 88-89)

The Violation

NISC argued that the fact that Mine No.1 was just being resurrected from its winter break should affect my assessment of whether the defect in the 110 volt cable in question here constituted a violation of 30 C.F.R. § 56.12004. (Resp. Brief at 8; Tr.1 at 16) Its argument raises a point of equity not pertinent to the strict liability nature of the Mine Act and its implementing regulations. *See*, *Allied Products Inc.,* 666 F.2d 890, 892-93 (5th Cir.1982). It may well be that time did not allow NISC to thoroughly examine all of its equipment and grounds prior to resuming operations the day before Heft's inspection, or that had they only had another day or two before Heft's inspection, they would have been able to work their way from the most important safety concerns to those a bit lower on their list. But NISC had notified MSHA that they had resumed operations (Tr.1 at 146-147; 208), and Mine No.1 was in partial production on the day of the inspection. (Tr.2 at 332) These factors might weigh against a finding of higher negligence, but they have no bearing on the existence of a violation.

There is no dispute that Inspector Heft found a defect in the 110 volt cable or that the defect exposed the inner, current-carrying cables to ambient conditions. Assuming normal and continuing mining operations, even factoring in the twenty-five or less production days during a normal work year, it is reasonably likely the breach in the outer insulation would cause the insulation on the inner conductors to fail due to the effects of weathering and/or friction. This is a violation of the standard's requirement that "[e]lectrical conductors exposed to mechanical damage [. . .] be protected." 30 C.F.R. § 56.12004.

Negligence

The Secretary argued for a finding of moderate negligence. Moderate negligence requires that the operator knew or should have known of a violating condition, but there are mitigating circumstances, albeit less weighty than what is contemplated in conjunction with a finding of low negligence. Low negligence is defined as the situation in which the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.

Russell testified that he walked along the conveyors and visually checked all power cables, but he did not handle them. (Tr.2 at 75-77) NISC knew (through its management) that it had to check all power cables in the mine for damage. *Id.* Despite this, Inspector Heft found the break in the outer cable insulation that Russell had missed. I credit Russell's testimony that he had checked the cable in question. This is evidence of mitigation. I also consider the fact that NISC had not gotten to every inspection item on its first day of resumed operation, and they gave priority to more pressing inspection issues as further evidence of mitigation. (Tr.2 at 86) I conclude that low negligence is the appropriate category.

Gravity

NISC does not contest Heft's gravity assessment specifically. It does argue that the citation should be vacated because there was no evidence of compromise to the insulation on the inner conductors, and the break in the outer insulating jacket does not make out a violation, or in the alternative, if it could, exposure to the elements does not constitute exposure to "mechanical damage" as specified in 30 CFR § 56.12004. NISC also alleges that over the evening between the first and second days of hearing, Heft came up with an alternate theory of how the "scabbing" he found on the cable jacket amounted to mechanical damage. I see nothing untoward in Heft's additional explanation about his enforcement theory, however, I do see evidence that supports the Secretary's gravity allegation. Heft noted on Exhibit GX-1 that the inner insulation was intact and that the cable was not adjacent to a travel way, but testified that in time the cable could continue to wear from the elements, exposure to moving equipment and falling rocks, and mechanical vibration to the point where current could short to the frame of the scale conveyor. (Tr.2 at 142-43) This is consistent with his allegations in Exhibit GX-1 that it was unlikely that an injury would occur, but that if it did happen, it could result in lost workdays or restricted duty to a single miner. I conclude that the gravity was as alleged by Heft in Exhibit GX-1.[3]

Penalty

The Secretary assessed the penalty for this citation as $108.00. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. Because I have found low negligence instead of moderate negligence, the point calculation in 30 CFR § 100.3 results in a penalty of $101.00. I assess a penalty of that amount.

Citation No. 6555759

Inspector Heft issued Citation No. 6555759 under 30 C.F.R. § 56.14107(a) when he found an unguarded opening on both sides of the Roadstone stacker conveyor's tail pulley,

[3]Heft did not designate this violation as S&S or an unwarrantable failure to comply with the requirements of the standard.

measuring approximately four inches by six inches and situated about 16 inches above the ground. (Tr.1 at 67-69; Ex. GX-3; Ex. GX-4) The Roadstone stacker was in operation, and the tail pulley was in motion. (Tr.1 at 67-68; Ex. GX-3) A person could walk right up to the opening in the guard. (Tr.1 at 69) The opening was large enough for a person's hand to fit through it. (Tr.2 at 92-93) Heft concluded that if a person tripped and fell and a hand were to pass through the opening, it could come in contact with the moving tail pulley, which could pull the hand and arm into the stacker and cause dismemberment. (Tr.1 at 70:6-7) Heft stated that the condition was not open or obvious, but NISC should have known of it because of its duty to affirmatively look for safety and health hazards. (Tr.1 at 71) The guard on the Roadstone stacker was original equipment. (Tr.2 at 92)

The Violation

There was a guard in place on the stacker which did not cover the entire opening to the tail pulley area. The unguarded openings were large enough for a person's hand to pass through. 30 C.F.R. § 56.14107(a) applies to moving parts that may be contacted, "including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros. Coal,* 6 FMSRHC 2094, 2097 (Sept. 1984); (*Thompson* was incorporated by reference for 30 C.F.R. § 56.14107 in *Mainline Rock and Ballast, Inc.,* 693 F.3d 1181, 1186 (10th Cir. 2012)) Heft testified that he was able to walk up to the openings and could have put his hand through them. (Tr.1 at 69-71) Foreman Russell also stated that when he greased the machine, he put his hand through the opening after first turning the stacker off. (Tr.2 at 92-93) A look at the photo of one of the openings in Exhibit GX-4 confirms this.

I find that however unlikely it was that a person would actually get a hand through the unguarded opening, there was still a discernable hazard that exactly such a mishap could occur. NISC should have anticipated this eventuality and taken steps to guard the entire opening. The failure of the existing guard to prevent a miner's hand from coming in contact with the moving tail pulley violates the standard.

The fact that previous inspections had not cited this defect is of no avail to NISC, nor does it require that MSHA give specific prior notice, as argued in NISC's post-hearing brief, before enforcing 30 C.F.R. § 56.14107, as it did here for the first time on this mine property. The test for prior notice of intent to enforce is whether a reasonable person familiar with the mining industry, the protective purpose of the Mine Act and its implementing regulations, and how MSHA disseminates its interpretation of its regulations should have discerned the need to guard the machine part in question here. *See Alan Lee Goodf d/b/a Good Construction,* 23 FMSHRC 995, 1005 (Sept. 2001), *MSHA v. Holcomb & Co.,* 33 FMSHRC 1435, (June 2011) (ALJ Manning), and *Higman Sand & Gravel Inc.,* 24 FMSHRC 87 (Jan. 2002) (ALJ Manning). As pointed out in the Secretary's Post-Hearing Reply Brief, NISC was cited for violations of this same standard seven times in the two year period preceding Inspector Heft's citation here. NISC was or had reason to be aware of MSHA's enforcement intent with regard to this standard. As Judge Manning explained in his decision in *MSHA v. Holcomb & Co.*, "[t]he regulatory history of section 56.14107(a) makes clear that the Secretary provided notice to the mining community that [he] interprets the safety standard very broadly to protect persons from coming into contact

with moving machine parts and that the standard covers inadvertent, careless, or accidental contact." (Internal citation omitted.) 33 FMSHRC at 1439.

Negligence

The citation alleges moderate negligence which requires that the operator knew of should have known of the violating condition, but there are mitigating circumstances. 30 CFR § 100.3(d), Table X. In addition, operators must be charged with knowledge of the Mine Act and have a duty to comply with those provisions. *Emery Mining Corp.,* 744F.2d 1411, 1416 (10th Cir. 1984) (citations omitted); *Central Sand and Gravel Co.,* 22 FMSHRC 779 at n. 4 (June 2000)(ALJ Barbour) ("It is the duty of each operator to have a thorough, working knowledge of the code's contents and applications.")

NISC should have known it was accountable for ensuring that all moving machine parts were guarded. It knew that this tail pulley could be contacted because Foreman Russell had put his hand into the gap in the guard on previous occasions to grease the Roadstone stacker. (Tr.2 at 92-93) However, the fact that the likelihood of a miner accidentally getting a hand or other appurtenant part into the gap in the guard was very remote mitigates against a finding of anything more than moderate negligence. Similarly, any adjustments to change the positioning of the tail pulley were done from a location a foot and a half from the opening. (Tr.2, at 95). I conclude that NISC's negligence was moderate.

Gravity

NISC does not specifically contest Heft's characterization of the gravity of this violation, viz., unlikely to cause injury and potentially affecting a single miner. It does challenge in general the fairness of MSHA issuing citations for conditions that might have arisen over the winter production break and that NISC had not yet gotten around to fixing on its first day of resumed operations. (Resp. Post-Hearing Brief, pgs. 6-7) This violation, however, involves the lack of guarding on a piece of equipment, a condition which did not arise during the winter break. NISC points out in defense of this citation that the guarding on the Roadstone stacker came from its manufacturer in the condition Inspector Heft found. (Tr.2 at 92) NISC also argues that the only time anyone ever inserts a hand into the unguarded gap is to perform periodic lubrication maintenance, which is only done when the entire stacker conveyor is shut down. (Tr.2 at 93) It is not necessary to use the unguarded gap to adjust the tail pulley. (Tr.1 at 242) I am also aware that Inspector Heft noted in his narrative on the citation form that "[t]he condition is not along a regular travel way," and that given the fact that the stacker came equipped as cited, "[t]he operator did not recognize the hazard." (Ex. GX-3) The evidence of the gravity of this violation is consistent with Heft's finding, and I concur.

Penalty

The Secretary recommends a penalty for this citation of $807.00. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of

prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess a penalty of $807.00, as the Secretary has recommended.

Citation No. 6555760

Violation

On June 22, 2011, Inspector Heft issued Citation No. 6555760 for failure to mark a portable container with the common name of its contents. (Tr.1 at 73-78) Heft found an unlabeled, partially full, portable container in the back of a NISC service truck. (Tr.1 at 75) The photo in Ex. GX-6 confirms that the container was not labeled. Heft concluded that because the container was in the bed of service truck on the mine premises, it was available for use. (Tr.2 at 43 and 75) Foreman Russell told Heft he had been driving the service truck for two days. (Tr.1 at 77; Ex. GX-18, pg. 7) Heft concluded that the container was being used to transfer hydraulic oil, not as a permanent container. (Tr.1 at 77-79) Foreman Russell told Heft that the container had been in the service truck since Russell had taken the truck from another site, and that he did not know the container was partially full or unlabeled. (Tr.1 at 79; Ex. GX-5, pgs. 3-4) Heft concluded that the unlabeled container was a safety hazard because a miner could contact a hazardous substance (the hydraulic oil) in the container and would not know what precautions to take. (Ex. GX-5, pg. 3) Heft also believed the container was a safety hazard because it contained hydraulic oil, a petroleum product which could cause skin and eye irritation and result in lost work day injuries. (Tr.1 at 79; Ex. GX-5, pg. 3)

Foreman Russell testified that he had taken the truck to Mine No. 1 for the first time the day before Heft's inspection. (Tr.2 at 80) The truck was owned by NISC. (Tr.2 at 134) The truck was used at this mine site only long enough to start the machinery after the winter pause. (Tr.2 at 137) Russell did not put the container in the truck; a mechanic did. (Tr.2 at 96; 136-137) The container was in the truck at the beginning of Russell's shift on June 22, 2011. (Tr.2 at 136-137) Neither Russell nor the other miner on site used the container before the inspection. (Tr.2 at 96) Russell testified that the hydraulic oil was used on equipment at Mine No. 1. (Tr.2 at 96-97; 134-135)

NISC argues three points against this citation: (1) the cited standard only applies if the contents of the portable container are actually used (Resp. Post-Hearing Brief at 14); (2) the Secretary failed to prove that the hydraulic oil in the container was hazardous (*Id.* at 15); and (3) the truck was primarily used at non-mine locations and was only used by Russell in this case to travel to Mine No. 1 at the beginning of this shift and was parked on mine premises the rest of the time. *Id.*

None of the Respondent's arguments is convincing. First, even assuming *arguendo* that NISC's syntactic logic truly meant that in order for the standard to apply, the portable container must actually be used by a miner, its language would also require that for the labeling requirement not to apply, the miner using the container must not only know the identity of the contents and its related protective measures, he must also leave the container empty at the end of the shift. The purpose of a temporary container is to contain something for a time. Whether the

material in the container is used at all is only a secondary consideration. The gravamen of the standard is that it is permissible to use a portable container for temporary storage, and it need not be labeled if it is left empty at the end of the shift, regardless of whether the contents are used during the shift. The "use" that is central to this standard is the use of the portable container to contain a potentially hazardous material, not whether a miner actually uses the material. This container was not left empty at the end of the previous shift. Therefore, one of the necessary elements needed for NISC's logic to apply was unsatisfied. The container was not emptied at the end of the prior shift – it was found containing hydraulic oil during the inspection shift – which means that one condition necessary for it not to be labeled did not exist. (Tr.1 at 252) It contained hydraulic oil during the shift and on mine premises; it was being used by Russell for its intended purpose, i.e., to temporarily contain something. Russell testified that he knew that the container was in the service truck he had driven for a day or two and that he knew it contained hydraulic oil. (Tr.2 at 96-98) The elements of the standard, written in the negative as it is, that would excuse the obligation to label the temporary container were not present. What remains is the use of an unlabeled temporary container to hold an arguably hazardous material while on mine premises. It is irrelevant whether the contents were used.

Second, Heft testified that hydraulic oil is hazardous. (Tr.1 at 79; 253) In its cross examination of Heft, NISC referred to a document entitled 1999/45/E.C. (Resp. Post-Hearing Brief at 15), which from its context seems to support the notion that hydraulic oil is not hazardous to humans. Heft did not acknowledge the authority of this document, nor was it entered into evidence. As a result, the court may not recognize it for the purpose NISC intended. The only evidence in the record on the issue of whether hydraulic oil is hazardous is Heft's testimony that it is, in his opinion. I find that for purposes of determining whether 30 CFR § 47.44(b) was violated in this case, hydraulic oil is hazardous.

Third, the service truck was on mine premises with the unmarked container in its bed when Heft did his inspection and wrote this citation. (Ex. GX-5) I credit the fact that Russell used the service truck to come to Mine No. 1 from another location and parked it on the mine premises once he got there. (Tr.2 at 81-82) I also credit the fact that the service truck was used at non-mine locations some of the time and had been used at such a non-regulated location during the winter pause. (Tr.2 at 79-80) It is also undisputed that the service truck sat parked close to the mine shop when Russell was not using it to drive around the mine site. (Tr.2 at 81-82) None of this changes the fact that at the time of Heft's inspection, the service truck was on the Mine No.1 premises, which were subject to MSHA regulation and inspection, and it had the unmarked container in its bed. These facts are relevant to the negligence and gravity findings, but they do not obviate the violation of 30 CFR § 47.44(b). I find that a portable, temporary storage container was found unmarked in the bed of the service truck while it was on mine premises and conclude that this makes out a violation of the standard.

Negligence

Inspector Heft appropriately categorized this violation at the level of moderate negligence. Russell had driven the service truck on more than one shift and had brought it onto mine property each time with the unmarked container in the bed. NISC knew or should have

known of the violating condition. As above, the brief time the mine had been back in operation after the winter break mitigates against a higher level of negligence. I concur in Heft's negligence assessment and find that the violation was the result of moderate negligence.

Gravity

Inspector Heft concluded that this violation was "unlikely" to cause injury, and that the potential injury would result in lost workdays or restricted duty and involve a single miner. (Ex. GX-5) Heft testified that the potential injury would be skin or eye irritation. (Tr.1 at 79) Hydraulic oil would most likely not cause a more serious injury if a miner got it on his skin. I concur with Heft's gravity assessment.

Penalty

The Secretary recommends a $108.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $108.00.

Citation No. 6555761

Inspector Heft issued Citation No. 6555761 on June 22, 2011, for an alleged failure to correct a defective acetylene torch gauge in a timely manner. (Tr.1 at 81) Heft found an acetylene torch on the same service truck discussed above. (Tr.1 at 84-85) He observed that the pressure gauge on the acetylene tank read 15 psi (pounds per square inch). (Tr.1 at 85) He released the pressure to the gauge by a process he called "bleeding off," and expected to see the gauge reading to go from 15 psi to zero. (Tr.1 at 86) It did not; it stayed at 15 psi, which Heft interpreted as evidence that the gauge was not functioning properly. (Tr.1 at 85-87) Heft was aware that if pressure in the tank exceeded 15 psi, acetylene could ignite spontaneously without an ignition source. Without a functioning pressure gauge, which would show an excess pressure reading in a red zone on its dial, there is no way a miner would know to take extra precautions to avoid an explosion. (Tr.1 at 89-93) The acetylene torch was not being used at the time of the inspection, but Foreman Russell told Heft that the torch had been used earlier in the day. (Tr.1 at 88-89, Ex. GX-7)

Heft classified this situation as S&S. He believed that it was reasonably likely to result in an injury because: (1) the torch was available for use; (2) it was not tagged out of service; and (3) it had already been used once that day in the defective condition. (Tr.1 at 91-92) Heft also concluded that it was reasonably likely to lead to a fatal injury because there was no way to effectively tell if the pressure because too high, which could cause an explosion. *Id.*

According to the testimony of Foreman Russell, the torch was normally used to cut metal at the NISC recycling plant located off the mine site. (Tr.2 at 98-99) However, Russell also

stated that a mechanic working for NISC had used the torch at the Mine No. 1 site earlier in the day. (Tr.2 at 133-134)

NISC argues that the service truck was only used to transport Russell to the Mine No. 1 site, which somehow means that NISC was not obligated to do a pre-shift examination to determine if it or any of the equipment in its bed needed attention. NISC goes on to posit that since it did not consider the service truck subject to the pre-shift examination requirement, it was not obligated to, nor did it otherwise determine that there was a problem with the gauge on the acetylene torch and tank. As a result, there could be no violation of the standard because the standard requires that defects in "self-propelled mobile equipment to be used during a shift" be "corrected in a timely manner," and NISC could not have detected the faulty gauge since they did not consider it, or anything in or on the service truck, something they should inspect pre-shift. They ask how they could have corrected a defect in the acetylene gauge that they did not know about as a result of their interpretation that they did not have to look for any problems with the service truck.

A more perfectly circular argument is hard to find. NISC's argument is facile; it appears neat and comprehensive only by ignoring the clear mandate created by the standard to pre-shift all self-propelled equipment to be used on the mine site, including this service truck and its contents.

NISC compounds things by pointing out a former decision of mine[4] in which I interpreted two standard*s* in *pari materia* [5] such that the one that required a defective piece of equipment to be tagged out of service not defeat the other which gave the operator the right (and obligation) to discover the defect in a pre-shift examination. In that case, the inspector found a violation before the operator conducted its pre-shift and before the equipment was placed in service. In contrast, NISC argues here that it had no obligation to pre-shift the service truck and thus had no opportunity to discover the defect in the acetylene torch gauge, while at the same time arguing that it was preempted from correcting problem by its own decision not to pre-shift the truck. There, the equipment had not yet been pre-shifted or put in service when the inspection happened. Here, there simply was no pre-shift done or intended, the truck had already been put in service on the mine site, and the faulty acetylene torch had been used on the mine site.

[4] *MSHA v. Wake Stone Corp*., 33 FMSHRC 1205, 2011 WL 2745783. (Currently on appeal to the Commission.)

[5] The general principle of in pari materia, a rule of statutory interpretation, says that laws of the same matter and on the same subject must be construed with reference to each other. The intent behind applying this principle is to promote uniformity and predictability in the law.

The Violation

NISC put the service truck and the acetylene torch equipment in its bed into service without conducting a pre-shift examination. Heft discovered a defect in the acetylene torch gauge. NISC does not contest the fact that the gauge was defective. The service truck was a piece of self-propelled equipment used on a mine site that had to be pre-shifted and wasn't. As a result, NISC did not know, although it should have, about the defective acetylene gauge, and it did nothing to correct the defect before Heft discovered it during his inspection. This is a violation of 30 CFR § 56.14100(b), which requires that defects on any equipment, machinery, or tools that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons.

There can be no doubt that this violation occurred on a mine site and, as such, arose under the Mine Act.[6] Although NISC argues that the fact that the service truck was used most commonly at a facility that was outside MSHA regulation should make a difference in Heft's enforcement decisions, there is no dispute that the defective acetylene torch gauge was located in the service truck bed on the Mine No. 1 site when Heft discovered the defect, and when it was

[6] Section 4 of the Mine Act provides in part that "[e]ach coal or other mine [. . .] shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in section 3(h)(1) of the Act as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface of underground, used in, or to be used in, or resulting from , the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

used earlier that day to cut metal.[7] There is no *de minimus* rule that allows this court to exclude from its review the fact that the violating event happened and was discovered on a mine site subject to the jurisdiction of the Mine Act, no matter how little time the service truck was used at the Mine No. 1 site.

Negligence

Heft rated this violation at the level of moderate negligence. This requires that NISC knew or should have known that the acetylene gauge was defective, and that there were mitigating circumstances. NISC should have and could have known about the defective gauge if it had conducted a competent pre-shift examination of the service truck and the items, including the acetylene torch, in its bed. When the miner used the acetylene torch to cut metal earlier in the shift, NISC had a second opportunity to know of the defect in the acetylene torch. (Tr.1 at 88-89; Tr.2 at 133-134; Ex. No. 7, 3) Heft explained that the proper procedure for maintaining an acetylene torch is to bleed off the hose after each use and check that the gauge shows zero pressure. (Tr.1 at 92-93) Had the miner bled off the hose on the torch, he could have discovered the defect and timely done something to remedy it before Heft found it. (Tr. 1 at 257) Heft did not explain in testimony what he considered to be mitigating circumstances. I do not consider anything that happened on June 22, 2011, as mitigation. Heft's assessment of moderate negligence is appropriate.

Gravity

Heft classified this violation as reasonably likely to involve a single miner in a potentially fatal accident. He explained that since acetylene can become volatile and prone to explode without an ignition source at pressures above 15 psi, the faulty pressure gauge prevented a miner from visually determining if there was excess pressure in the system, thus increasing the likelihood of an explosion. (Tr.1 at 91-92) This is a reasonable conclusion; it is not contested by NISC. I concur that as it was found and assuming it would have continued to be used during normal continuing mining activities, the faulty pressure gauge was reasonably likely to result in a fatality. *U.S. Steel Mining Company. Inc.*, 6 FMSHRC 1573, 1574 (1984).

Significant & Substantial

The Secretary seeks a ruling that this violation is significant and substantial ("S&S"). If an inspector finds, "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," then the violation must be classified as significant and substantial ("S&S"). *National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). To establish that a violation of a

[7] NISC does not contend that the location of the violation was excluded from Mine Act jurisdiction. It does mention that the location where the service truck was most often used and stored was not subject to MSHA jurisdiction. However, since the site where the violation occurred and was discovered is clearly under MSHA jurisdiction, this fact means nothing.

mandatory safety standard is S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard 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 at 3-4.

I have found that NISC's failure to find and remedy the faulty acetylene pressure gauge is a violation of 30 CFR § 56.14100(b). The measure of danger to safety contributed to by the violation was discussed as part of the gravity analysis above, as was the reasonable likelihood that the defective pressure gauge could lead to an explosion from volatile, over-pressured acetylene and result in a fatality. This violation is properly characterized as S&S.

Penalty

The Secretary recommends a $1,795.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I have also confirmed that this violation should be subject to enhanced S&S consequences. I assess the recommended penalty of $1,795.00.

Citation No. 6555762

Violation

Inspector Heft discovered that the horn on the service truck did not work and issued Citation No. 6555762 under 30 C.F.R. § 56.14132(a).[8] (Tr.1 at 96; Ex. GX-9) Heft instructed Russell to test the manual horn on the service truck. (Tr.1 at 84-85) The horn did not work. (Tr.1 at 98) Heft testified that a manual horn is a basic safety device to warn inattentive people not to step in front of the truck. (Tr.1 at 98-99) Heft testified that if a person were hit by a Ford F-700 truck, he could suffer a fatal crushing injury. (Tr.1 at 99; Ex. GX-9) Heft considered the likelihood of such an injury unlikely because of the limited foot traffic at the mine site. (Tr.11 at 99-100)

Russell did not check the horn at the beginning of the shift. (Tr.1 at 100; Ex. GX-9; Tr.2 at 137-138) The truck had been on the mine site for two days. *Id.* Heft testified that Russell should have tested the horn as part of the mandatory pre-shift examination of the service truck. Russell had operated the truck for over six hours before Heft issued the citation. (Tr.1 at 101) If a meaningful pre-shift examination had been done, Heft expected that the faulty horn would be

[8] 30 C.F.R. § 56.14132 (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.

noticed and the truck taken out of service until the horn was fixed. (Tr.1 at 102) Heft also testified that he did not find anything about the faulty horn situation that he considered mitigating circumstances. (Tr.1 at 102)

Russell testified that there was no other equipment operating on the mine site when he drove the service truck onto the site. (Tr.2 at 100) The truck was only driven on the mine site when NISC needed to crush limestone. (Tr.2 at 100-104) Russell did not consider the horn to be a real problem because the other mobile equipment on the site was louder than the horn, and everyone on the site wore earplugs. (Tr.2 at 100-103) On further questioning, Russell conceded that the loudness of the equipment was not an excuse for not having a functioning horn on the service truck. (Tr.2 at 137-138)

NISC argues that, for the same reasons cited in relation to the preceding violation, this citation should simply be dismissed. It suggests that because this service truck was used more at sites not subject to Mine Act regulation, Heft should have regarded it as a personal private vehicle rather than a piece of mobile mine equipment. It is not contested that Russell used it to travel to and come onto the mine site to perform his assigned work tasks for NISC. Heft correctly considered the service truck as a piece of self-propelled mobile equipment, irrespective of the possibility that it saw more used on non-regulated sites.

The Commission laid out a clear rule governing this issue in *Wake Stone Corp*., 36 FMSHRC 825, 828, April 18, 2014, "[S]tandards requiring maintenance in functional condition are enforceable when the cited equipment is not in actual use, unless it has been removed from service." Citing *Ideal Basic Indus.*, 3 FMSHRC 843, 844-45 (Apr. 1981). (Use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation.) *Id.* at 844; *See also Alan Lee Good*, 23 FMSHRC at 997 (reinforcing the rule that equipment not tagged out of operation and parked for repairs must be maintained in functional condition, "whether or not the equipment is to be used during the shift."); *Mountain Parkway*, 12 FMSHRC at 963 (relying on *Ideal Basic* and interpreting the term "used" broadly to include equipment that was parked in the mine in turn-key condition and not removed from service).

I find that the service truck was a piece of self-propelled equipment available for use on the mine site and that its manual horn did not work. This was a violation of 30 C.F.R. § 56.14132(a).

Negligence

The citation alleges high negligence for this violation. High negligence is present for MSHA's enforcement purposes when an operator knew or should have known of the violating condition and there are no mitigating circumstances. 30 C.F.R. § 100.3(d), Table X. The court should consider the following factors in finding a high degree of negligence: (1) was management aware of the condition; (2) was the mine on notice regarding the condition; and (3) was the operator complacent in complying with the standard? *See, e.g.*, *Robert L Weaver*, 21 FMSHRC 370, 373 (Mar. 1999)(ALJ Bulluck); *Sangravl Co.*, 33 FMSHRC __, 2011 WL

2286880 at * 4 (May 2011) (ALJ Barbour) ; *Lebanon Quarry & Mill,* 33 FMSHRC 751, 760 (Mar. 2011)(ALJ Miller).

Russell should have, but did not, conduct a pre-shift examination of the service truck. Had he done so competently, he would have checked the horn (as Heft did) and discovered that it obviously did not work. NISC did not argue that it lacked the notice required to give it knowledge of the faulty horn. NISC is expected, as a mining company, to know the law, including the requirement to do a competent pre-shift examination of mobile mine equipment such as this service truck. *See Emery Mining Corp.* 744 F.2d at 1416. NISC cannot claim that it lacked knowledge of the faulty horn because it failed to conduct a pre-shift exam. *See*, *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997) (stating that "knowing" in the context of section 110(c) includes "deliberate ignorance" and "reckless disregard"). NISC's failure to conduct a pre-shift exam is proof of its complacence about its duty to comply with the standard. Although Russell had used the truck on mine property for two days (Tr.1 at 100), Russell did not even undertake an exam that could have revealed the faulty horn. I find that NISC should have known – and would have known – of the faulty horn had it not ignored the duty to look for defects in the service truck before using it on the mine site. I conclude that Heft's assignment of high negligence was proper.

Gravity

This citation is characterized as unlikely to result in an injury, but if it did, the injury might reasonably be fatal, and potentially affecting a single miner. Due to the fact that the violation occurred in the first days of operation after a winter pause and there was only one other miner on the property at the time (Tr.2 at 100-103), I concur that the lack of a working horn on the service truck was unlikely to result in an injury. I also agree that a truck of this size could cause a fatal accident were it to hit a miner. (Tr.1 at 99)

Penalty

The Secretary recommends a $1,203.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $1,203.00.

Citation No. 6555763

Violation

Inspector Heft found a torn and frayed seatbelt on a Caterpillar 992G front end loader (Tr.1 at 105; Ex. GX-10) for which he issued Citation No. 6555763 under 30 C.F.R. § 56.14130(i). The standard requires that seat belts be maintained in functional condition and replaced when necessary to assure proper performance. The loader was on the mine site and was

in use at the time the citation was issued. (Tr.1 at 107) The photos in Ex. GX-11 show the seat belt tear and fraying. Heft measured the tear to be approximately three-eighths of an inch into the belt. (Tr.1 at 106-107; Ex. GX-11) The frayed portion on the side of the belt was approximately two-and-one-half inches long. *Id.* The belt was a lap belt meant to restrain a person from leaving the seat. (Tr.1 at 108) In Heft's opinion, the seat belt was not functional because of the tear, the thinning from wear, and the frayed edges. *Id.* Heft testified that as he saw it, the seat belt was not in its original manufactured condition (Tr.1 at 108-109), and in the event of a roll-over accident, this degree of wear might be enough to cause the belt to fail to restrain the driver. (Tr.1 at 109) If the belt broke, the operator could be thrown from the loader or bounced around in the cab and fatally injured. *Id.*

Heft felt that the defects in the seat belt made an injury accident reasonably likely. (Ex. GX-10) During continued mining operations, the tear would get worse as shown by the visible tear that had developed in the area where the belt was frayed. (Tr.1 at 109-110) Heft factored in the fact that the loader frequently operated on a ramp near the scale house which was long and fairly steep (Tr.1 at 110:16-17) and that there were other ramps in the quarry the loader used during normal mining operations. (Tr.1 at 110) Heft testified about an MSHA Program Policy Manual source that states that failure to maintain seatbelts is a serious safety hazard and should be cited as significant and substantial under most circumstances. (Tr.1 at 113; Ex. GX-12) Heft testified that the loader operator knew that the belt was torn and frayed, but did not recognize the hazard and did not inform management. (Tr.1 at 120) The tears and fraying were obvious because they were on the main part of the belt which lies on the operator's lap. *Id.*

Russell testified that the seatbelt was still functional because when he drove the same loader on terrain that caused him to bounce around in his seat, he could feel the belt restraining his motion. (Tr.2 at 107:8-11) Russell agreed with Heft that there were 35 to 40 degree slopes at the Mine No. 1 site. (Tr.2 at 107)

NISC argues that Heft should not have determined that the seat belt was non-functional based on the fact that it was not in new condition. It maintains that the Secretary only proved that the belt was somewhat worn, not that it was non-functional. I agree.

The only evidence in the record bearing on the belt's functionality, other than Heft's opinion, is Russell's testimony about the belt holding him in place in the operator's seat as he drove the loader over rough roadways on the quarry site. It is possible that in the event of a rollover accident the belt might fail, but there is no evidence in the record to make that possibility anything more than speculation. The photos in Ex. GX-11 confirm that the belt was frayed and certainly not in factory-new condition, but there is nothing beyond Heft's unsupported conclusion to prove that the belt wear was serious enough to make the possibility of it breaking in a rollover more than conjecture. See, *Ammon Enterprises,* 2008 WL 4190445 at *13 (July 2008)(ALJ Zielinski). (Four inch wide seat belt frayed at edges with a three-quarter inch tear was deemed "functional" by MSHA inspector. Gravity assessment was based on prediction that the belt would fail during a rollover accident. No strength testing done on the belt. Inspector's determinations based solely on his visual examination. Secretary failed to carry burden of proof.)

I conclude that the Secretary failed to prove that this seat belt was non-functional and vacate Citation No. 6555763.

Citation No. 6555764

Violation

Inspector Heft issued Citation No. 6555764 when he discovered that a portion of a berm was missing on the roadway on the west side of the NISC maintenance shop. He noted that there was a drop-off next to the roadway deep enough to cause a vehicle to overturn or endanger persons in equipment that might go over the drop-off. (Tr.1 at 122-123; Ex. GX-13) The photos in Ex. GX-14 show the before and after condition of the edge of the roadway and confirm that a portion of berm was missing. The roadway was approximately twenty feet wide and was used by mobile equipment to access the shop area. (Tr.1 at 125-127) Heft testified that the berm was insufficient along a 36 foot section where the drop-off was approximately five feet. (Tr.1 at 127-128: Ex. GX-13; Ex GX-18) Heft measured the slope of the unbermed area and determined it to be forty percent. (Tr.1 at 129)

Heft characterized the missing berm section as S&S due to the lack of anything along the section of roadway to keep a vehicle on the roadway. (Tr.1 at 131) He concluded it was reasonably likely that a vehicle could go over the edge of the roadway because he observed vehicle tracks within two feet of the edge. (Tr.1 at 126-127; 131; Ex. GX-13) The five foot drop-off and forty percent slope were enough in Heft's assessment to pose a danger to anyone who drove a vehicle over the edge of the roadway. (Tr.1 at 129-130) Heft envisioned a person going over the edge being thrown and banged around inside the vehicle cab (Tr.1 at 130) and suffering cuts, bruises, strains, sprains, and broken bones in the process. (Tr.1 at 130)

There was agreement between Heft and Russell that there had been a berm in this location which had washed away. (Tr.1 at 132; Tr.2 at 111-112; Ex. GX-14) Heft felt that the operator should have known that a berm was required in that area. (Tr.1 at 132), which Russell confirmed when he testified that a berm was needed on this portion of the roadway. (Tr.2 at 139)

Russell testified that he had not yet inspected this portion of the roadway. He had been busy getting the plant started. (Tr.2 at 77; 111) Russell stated that this roadway was not the main roadway in the mine area. (Tr.2 at 62) The roadway was not used by customers of Mine No. 1 and was rarely used by miners. *Id.* Russell explained that because the corner between the maintenance shop and the edge of the roadway was so narrow – about 20 feet – anyone driving on that section would take care to go very slowly – no more than 5 miles per hour. (Tr.2 at 116-117) Nonetheless, the roadway had a speed limit of 10 miles per hour and was open to the public. (Tr.2 at 114) Russell testified that the 9980 sales loader used this roadway (Tr.2 at 115-116) and that it is the largest piece of equipment that traveled the roadway – more than 12 feet wide. (Tr.2 at 139) Russell agreed that if a person drove off the edge of the roadway, he would be thrown around, but would probably not be injured. (Tr.2 at 140)

As with the other citations in this decision, Russell claimed to have intended to get to the missing berm in due course, but had just not gotten that far down his start-up to-do list yet when Heft arrived for the inspection. (Tr.2 at 77; 111) Russell also claimed, based on his experience with ordinary farm equipment, that he had driven equipment down equivalent grades and had not overturned or been thrown around in the cab. (Tr.2 at 112-114)

In defense of this citation, NISC argued that Heft agreed that it would be best when restarting production after an idle period to attend first to those areas of the plant that posed the greatest potential danger to miners, but he had gone against this concept by citing NISC for doing exactly that. (Resp's Post-Hearing Brief at 21) NISC argues further that its prioritization of tasks at the start-up was not negligent and that it should be relieved of any responsibility for the missing berm section because, although Heft testified that according to his understanding of his duty as an authorized representative of the Secretary of Labor if he saw a violating condition, he was obligated to write a citation irrespective of negligence or excuses, it is unfair to NISC to hold it to a strict liability standard.

The standard requires berms or guardrails at any portion of a roadway where there is a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in the vehicle. There is no dispute that there was no berm in the area Heft referred to in the citation documentation and in his testimony. There is also no dispute that the cited area was a roadway used by vehicles on the mine site needing to go to the maintenance shop. (Tr.1 at 127-129) Heft and Russell agree that a person could be thrown around in the cab if the vehicle went over the edge of the roadway at that point. It stands to reason that cuts, bruises, strains, sprains, and broken bones are within the ambit of reasonably likely injuries arising from this violation. Russell acknowledged that the missing berm section needed to be fixed, which confirms the court's view that a reasonably prudent miner would have seen the need to fix the berm and done so post haste. NISC's argument that it just did not have time to get to this item yet does not avail it anything in this strict liability regulatory environment. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10 th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. I conclude that NISC violated 30 CFR § 56.9300(a).

Negligence

Heft rated this violation at the level of moderate negligence. This requires that NISC knew or should have known that the berm was missing on this section of roadway and that there were mitigating circumstances. NISC should have and could have known about the missing berm section. On the first day of resumed activities at the mine site, Russell did not inspect the roadway section in question here, though he intended to get to it as soon as possible. (Tr.2 at 77; 111) NISC does not argue that it should not have known about the missing berm. It argues that its intention was to find and fix all hazards on the mite site, but had not gotten to this one yet. In mitigation, I credit the fact that NISC seems to have been working diligently to find and fix hazards. I concur with Heft's assessment of moderate negligence.

Gravity

This citation is characterized as reasonably likely to result in an injury involving lost workdays or restricted duty, and potentially affecting a single miner. Given the fact that the roadway in question was quite narrow – approximately 20 feet, was used occasionally by vehicles needing to access the maintenance shop, showed evidence of vehicles tracking close to the drop-off, had a drop-off of approximately five feet with a 40 percent grade, I concur that there was a reasonable likelihood of an injury and that the injury could result in lost workdays or restricted duty. It is well within the realm of feasible that an operator strapped into a vehicle such as the sales loader would sustain such injuries in the event he drove over the unbermed edge and got thrown around in the cab, even without the vehicle tipping over in the process.

Significant & Substantial

Heft designated this violation as S&S. Applying the four elements of the accepted S&S analysis discussed above, I conclude that this violation was S&S, as charged. There was an underlying violation of a mandatory safety standard, there was a discrete element of safety hazard, e.g., vehicle roll-over or serious jostling in the cab, rolling over or running off the edge could reasonably result in an injury to the driver, and the injury could involve serious bodily harm, or worse. The *Mathies* S&S elements are satisfied. *Mathies Coal Co.*, 6 FMSHRC at 3-4.

Penalty

The Secretary recommends a $540.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $540.00.

Citation No. 6555766

The Violation

Heft wrote Citation No. 6555766 under 30 C.F.R. § 46.9(b)(5), which requires that training records be kept and include MSHA Form 5000-23, containing a statement by the person designated in the MSHA-approved training plan and certifying that the miner in question has received periodic training, as required by the training plan. Heft asked to see NISC's training records but did not find a Form 5000-23 annual training certificate with the appropriate signature. (Tr.1 at 134-137; Ex. GX-15) Brian Russell was the person responsible for training under the Part 46 Training Plan (Tr.1 at136) but Heft found that the Form 5000-23 had been signed by Will Hoff, NISC's field superintendent. (Tr.1 at 136-137; Tr.2 at 167-169) Hoff was not listed as the designated signatory under the Part 46 Training Plan. *Id.* Hoff testified that he signed the forms for all NISC miners because NISC was in the process of naming a new quarry superintendent and someone with company authority had to certify that the training had taken

place. Hoff did the training for all other types of work as NISC. (Tr.2 at 168-169) Hoff signed the forms at the conclusion of the training course. (Tr.2 at 169)

This is a technical violation of the standard. The training had taken place, and all covered employees got the training. The violation consists of a clerical inconsistency and failure to hue to the letter of the standard. Again, because of the strict liability nature of Mine Act enforcement, Heft was within the bounds of his enforcement authority when he wrote the citation.

Negligence

In 2011, when the training took place, former quarry superintendent Dahm had removed the Training Plan from NISC's premises when he was discharged and a replacement superintendent had not yet been named. (Resp. Post-Hearing Brief at 24) Hoff stepped into Dahm's shoes to sign the training certificates. I agree with NISC's argument that the purpose behind the requirement of having a supervisor sign the training certificates was satisfied. After the quarry reopened for the next production season, Russell was promoted to quarry foreman. Administrator Dagnon prepared a new Training Plan which designated Russell as the training officer. When Heft did his inspection, Russell's name was not yet on the new training plan. Under these circumstances, I conclude that NISC was not negligent.

Gravity

This violation is considered a paperwork violation and does not involve an assessment of gravity.

Penalty

I assess a penalty of $20.00.

Citation No. 8662246

Violation

When he inspected Portable Mine No. 2 on September 27, 2011, Heft found four 110 volt circuit breakers in a circuit breaker panel on the east side of the scale office that were not labeled to show which circuit each disconnecting device controlled. (Tr.1 at 153-157) He cited NISC under 30 CFR §56.12006, which requires that electrical distribution boxes have a disconnecting device for each branch circuit which is appropriately labeled so that it can be visually checked to see if a device is open and the circuit is de-energized. (Ex. GX-20) Heft found the unmarked circuit breakers in a distribution box approximately 100 feet from the scale house. (TR.1 at 154-156) Each circuit breaker was connected to one of four power cables. (Tr.1 at 156) The power cables were used to send current to engine block heaters in the winter. *Id.* Heft was unable to visually determine which circuit breaker controlled which power cable because they were not

labeled. (Tr.1 at 156-157) The breaker box was energized at the time of the inspection. (Tr.2 at 26) The power cables had not been used in four years, according to Russell. (Tr.2 at 120)

NISC argued that this citation should be vacated because no active mining was taking place at Portable Mine No. 2. (Resp's Post-Hearing Brief at 26) However, Heft's inspection field notes show that "man hours" had been reported in a quarterly report submitted to MSHA and relating to Mine No. 2. (Tr.2 at 174-175) No limestone was being crushed at Mine No. 2 when Heft did his inspection. (Tr.2 at 125) However, Russell testified that limestone had been crushed and blasted, and the crushing machine had been used at Mine No. 2 before and after Heft's inspection. (Tr.2 at 143-144) Mine No. 2 was also open to customers to come on site to purchase limestone that had been previously crushed. (Tr.2 at 146; 174-175)

I credit Heft's testimony summarized above and conclude that the lack of labeling on the four circuit breakers and associated power cables was a violation of 30 CFR §56.12006.

Negligence

Heft assigned moderate negligence to this violation, which requires that the operator knew or should have known about the violating condition and there were mitigating circumstances. 30 C.F.R. §100.3(d), Table X. NISC does not argue that it did not know about the lack of labeling on these circuit breakers and cables, but it does argue that the four year period of disuse and its intent not to use the power cables in the future should mitigate against the existence of a violation and be factored into the assessment of both negligence and gravity. (Tr.2 at 27) Heft testified that the standard's requirement of suitable marking is a matter of common knowledge in the industry. (Tr.1 at 160-161) Heft also took into account the fact that the breaker box was located close to the scale house office where management went on a daily basis in his assessment of negligence. (Tr.1 at 154-155) I feel it is appropriate to consider the disuse and lack of future plans to use the power cables as evidence of mitigation. The Secretary's decision to rate the negligence at the moderate level is appropriate.

Gravity

This citation is characterized as unlikely to result in lost workdays or restricted duty and potentially affecting a single person. Heft testified he did not rate the gravity any higher than "unlikely" because there was a master breaker switch located next to the unmarked breaker box which could de-energize all four unmarked circuits. (Tr.1 at 159-160) I concur that the level of gravity assigned to this violation should be "unlikely" and would potentially affect a single miner.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons

affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

Citation No. 8662247

Violation

Inspector Heft issued Citation No. 8662247 on September 27, 2011, because NISC could not provide evidence of monthly inspections for two fire extinguishers located in the scale office. (Tr.1 at 162-165; Ex. GX-22) An annual inspection was done on the two fire extinguishers in June, 2011, but there was no record that the required monthly visual inspection had been done in the interim between the annual inspection and the date of Heft's inspection. *Id.* Heft concluded that no monthly visual inspection had been done because of the missing documentation. (Tr.1 at 165-166) Any written evidence of the monthly inspection would have sufficed, including a note on the inspection tag on the extinguisher itself or any other written record. (Tr.1 at 165-166; Ex. GX-23) The purpose of a monthly visual inspection is to ensure that the extinguisher is charged and operable. (Tr.1 at 163)

NISC argued that Mine No. 2 was closed on September 27, 2011, when Heft issued this citation. (Tr.1 at 162) The mine did not reopen until November 2, 2011. (Tr.2 at 147) Heft testified that if he had inspected Mine No. 2 during the winter shut-down, he would have factored into his thinking that no one from NISC had been on the premises to conduct a monthly visual inspection. (Tr.2 at 28-30) Heft stated that if there were no one on site to check the fire extinguishers, he would not issue a citation for the months when no one was there. (Tr.2 at 31) NISC argued that because no harm resulted from its failure to do the monthly visual inspection, the citation should be vacated.

Heft did not issue a separate citation for every month without a visual inspection record. He issued only one citation for the lack of records of the monthly visual inspections since the annual check. The citation responds to the conditions discovered by Heft on the date of his inspection. No additional liability is attributed to the fact that there were no records for several months. This makes Heft's failure to inquire whether anyone was present at the mine after the annual inspection in June, 2011 meaningless for purposes of assessing strict liability. Although the extinguishers were fully operable at the time of Heft's inspection, there is still a violation of the standard, which clearly requires monthly record keeping.

Negligence

Heft justified the moderate negligence designation because the extinguishers were in the main office where it would have been very easy to do the visual check and note it. (Tr.1 at 168) Heft felt that the blue card on the back of the extinguisher put NISC on notice that monthly visual checks had to be done and recorded. *Id.* The blue card is laid out in columns for the date of inspection and the initials of the person doing the inspection. (Ex. GX-23, pg. 3) Heft spoke to Russell about this citation and learned that Russell was aware that a monthly visual inspection was required, but he did not know that such an inspection had not been done since June, 2011.

(Tr.1 at 170-173; Ex. GX-22) Other mine employees apparently did not know that a monthly inspection was required. (Tr.1 at 168; Tr.2 at 154-155)

I conclude that Heft appropriately considered all evidence relating to this violation in arriving at his determination of moderate negligence. As of the date of his inspection, when NISC personnel were on site and able to make a record of a visual fire extinguisher check, not only was no record made, but Russell was aware that such records were required. I credit Heft's testimony as to what he would have done hypothetically if he had made his inspection during the winter shut-down period as evidence of mitigation. Here there is the necessary combination of knowledge on the part of NISC and appropriate consideration of mitigating circumstances.

Gravity

Heft characterized this violation as unlikely to result in an injury because when he inspected the extinguishers, it appeared to him that they were mechanically sound and in good condition and that the annual inspection had been done just three months before. (Tr.1 at 169) NISC reminds the court that this was a no-harm-no-foul situation. I find that Heft appropriately accounted for the NISC argument in making his "unlikely" gravity assessment.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

Citation No. 8662248

Violation

30 CFR §56.12028 requires that electrical grounding systems be tested periodically and records of the testing be kept for inspection on request. Inspector Heft requested records for four pieces of equipment during his inspection on September 28, 2011, at Mine No. 2: (1) the grounding system of the 40 kilowatt generator ("genset"); (2) the 30 horsepower Flyght submersible pump in the pit; (3) the 110 volt outlets in the scale trailer; and (4) the four 110 volt power cables at the breaker panel east of the scale office. (Tr.1 at 176-181; Ex. GX-24) All four pieces of equipment were in operation at the time the citation was issued. (Tr.1 at 180-181) NISC did not provide the requested records. (Tr.1 at 179) Heft testified that such records are required to assure that continuity and resistance testing is done and can be verified. Since it is not possible to visually determine if an electrical circuit is intact and free of circuit faults, these records play an important role in assuring the safety of electrical equipment. (Tr.1 at 178-182) Heft explained that if the resistance in a piece of equipment is too high, the overload protection

may not work, and if a person were to contact equipment without functioning ground protection, he could be electrocuted. (Tr.2 at 178-182)

Russell told Heft that he believed a test had been done on the genset and pump, but there was no record because it was done by a person who was no longer an employee of the company. (Tr.1 at 183-185; Ex. GX-24) Russell stated that he had observed NISC's former foreman, John Dahm, conduct continuity and resistance testing for the genset and submersible pump during the prior production year. (Tr.2 at 126-127) Russell did not see Dahm do the testing on the 110 volt outlets in the scale house or the power cords at the distribution box. (Tr.2 at 127-128) Russell confirmed that he did not give Heft any records proving that continuity and resistance testing had been done on any of the equipment. (Tr.2 at 142)

NISC argued that Dahm had done the continuity and resistance testing (Tr.2 at 38-40), and that he had taken the testing records with him when his employment at NISC ended. (Tr.2 at 64; 142) NISC points out that Russell told Heft that he was aware that Dahm had done the testing on the pump and genset (Tr.2 at 39-40) and believed that Dahm had done a continuity and resistance test on anything that had a motor at Mine No. 2. (Tr.2 at 127) It also contended that Heft's citation and related documentation did not mention the keeping and production of testing records. (Resp. Post-Hearing Brief at 29)

The thrust of NISC's defense is that the Secretary failed to prove that the testing had not been done. This misses the point. The standard requires that records be kept as proof of testing. Russell's parole evidence about what he saw Dahm do and what Dahm must have done in keeping with his reputation as a conscientious foreman (Tr.2 at 127-128) does not satisfy the requirements of the standard. The record is clear. NISC did not produce the required testing records on request.

The standard is unambiguous. It requires that "[continuity and resistance of grounding system shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative." 30 CFR §56.12028 NISC violated the standard by failing to produce the requested records, which implies that no such testing had been done for the four pieces of equipment identified above. (Tr.1 at 176-181; Ex. GX-24) *See Knaak Sand,* 24 FMSHRC 964, 966 (Nov. 2002)(ALJ Feldman).

Negligence

Heft testified that the operator should have known to do continuity and resistance testing before placing the equipment into operation. (Tr.2 at 182) Russell's testimony that he observed Dahm perform the tests on some of the equipment during the prior production year and his belief that Dahm had tested everything on the motor with an electric motor is confirmation that NISC knew it was obligated to perform the testing. The testimony that Dahm had taken the testing records when he left NISC shows that NISC was aware of the obligation to keep the records. Again, in this strict liability setting, NISC's excuse for not being able to produce the records

does not obviate its duty to comply with the standard. The excuse is, however, an element of mitigation which supports Heft's designating this violation as involving moderate negligence. I concur.

Gravity

Heft issued this citation as unlikely to result in injury because the equipment looked to be in good condition. (Tr. 2 at 182-183) NISC does not offer any argument against this element. I agree that this violation was unlikely to result in a miner injury.

Penalty

The Secretary recommends a $100.00 penalty for this citation. I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected by prior violations, the negligence points, the likelihood points, and the good faith point reductions. I assess the recommended penalty of $100.00.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§820(I), I assess the penalties summarized in the following table for the citations discussed above. NISC is **ORDERED** to pay the Secretary of Labor the sum of $4,874.00 within 30 days of the date of this decision. It is also **ORDERED** that Citation No. 6555763 be **VACATED**.

Citation No. 6555758	$101.00
Citation No. 6555759	$807.00
Citation No. 6555760	$108.00
Citation No. 6555761	$1,795.00
Citation No. 6555762	$1,203.00
Citation No. 6555763	Vacated
Citation No. 6555764	$540.00
Citation No. 6555766	$20.00
Citation No. 8662246	$100.00
Citation No. 8662247	$100.00
Citation No. 8662248	$100.00
	Total: $4,874.00

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 14, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of FRED MCKINSEY, Complainant v. PRETTY GOOD SAND COMPANY, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. SE 2014-344 DM MSHA Case No.: SE MD 14-12 Mine: Great Pit Mine ID: 31-02014

DECISION

Appearances: Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, Representing the Secretary of Labor

Matthew R. Korn, Esq., Fisher & Phillips, LLP, Columbia, SC, Representing Respondent

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by the Secretary of Labor ("Secretary") on behalf of Fred McKinsey ("McKinsey"), a miner, against Pretty Good Sand Company, Inc., a corporation ("PGSC"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

Complainant McKinsey alleged that Respondent unlawfully discharged him in January 2014, after he made a safety complaint to the Mine Safety and Health Administration ("MSHA") on November 25, 2013.

On February 18, 2014, McKinsey filed a discrimination complaint with MSHA. After conducting an investigation, the Secretary found that McKinsey's assertion was not frivolously brought and filed an Application for Temporary Reinstatement on March 26, 2014. Respondent requested a hearing regarding this application on April 10, 2014, via conference call. A hearing was held in Rocky Mount, NC on April 30, 2014. On May 6, 2014, the undersigned issued a Decision and Order Temporarily Reinstating McKinsey to his former position with PGSC.

On June 3, 2014, the Secretary filed a complaint on McKinsey's behalf with MSHA alleging discrimination under Section 105(c) of the Mine Act. On June 16, 2014, the Secretary filed an amended Discrimination Complaint to include the civil penalties assessed by MSHA.

On June 17, 2014, the parties submitted a Joint Motion to Amend Order of Reinstatement. Under the terms of that agreement, McKinsey would be economically reinstated rather than physically reinstated to the mine, retroactive to the date of the Decision and Order. On June 19, 2014 the undersigned issued a decision and order granting the economic reinstatement of McKinsey.

The discrimination hearing was held in Rocky Mount, North Carolina on July 22 and 23, 2014, at which both the Secretary and Respondent presented evidence and testimony. Subsequent to the hearing both parties submitted briefs which have been received and considered in rendering this decision.

For reasons set forth below, I find that the Secretary has presented a *prima facie* case of discrimination, and that the Respondent has failed to present an affirmative defense as it did not present a valid business justification for terminating the Complainant based on an accumulation of poor work performance and insubordination. However, the after-acquired evidence submitted by Respondent supports an independent non-discriminatory basis for the Complainant's dismissal.

I. Stipulations

At the hearing, the Secretary and PGSC entered into the following stipulations (Tr. 9-10)[1]:

a. PGSC is and was at all relevant times through this proceeding the operator of the Great Pit Mine, Mine ID number 31-02014.

b. Great Pit is a mine. The term mine is defined in Section 3(h) of the Mine Act, 30 U.S.C § 802(h).

c. At all times relevant to this proceeding, products of Great Pit Mine entered commerce, are the operations of products thereof affecting commerce within the meanings and scope of section 4 for Mine Act, 30 I.S.C. § 803.

d. PGSC is an operator, as the term operator is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

e. McKinsey was previously employed by PGSC. McKinsey is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. 302(g).

[1] "Tr." followed by a number refers to the appropriate page in the hearing transcript.

f. McKinsey was terminated from PGSC on January 10, 2014.

g. PGSC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case pursuant to Section 105 of the Act, 30 U.S.C. § 815 as amended. (Tr. 9-10).

II. Summary of the Testimony

A. Fred McKinsey

Fred McKinsey began working at PGSC as a general laborer and equipment operator in July 2013. Prior to his employment with PGSC, McKinsey worked as a mechanic for 30 years in various capacities. (Tr. 45-46). The owner/operator of PGSC and Great Pit Mine, Roger Sauerborn ("Sauerborn"), hired McKinsey. (Tr. 25-26). During his initial interview for employment, McKinsey revealed to Sauerborn that he had Asperger's syndrome and detailed the effects it had on his personality and behavior. McKinsey explained that he liked to be left alone and "didn't deal the best in the world with a lot of people situations." [sic] (Tr. 27). McKinsey further explained that he did not like to shake hands or touch people and felt stress when attention was focused on him. (Tr. 27-28). At the conclusion of the interview, McKinsey signed a non-compete clause and began employment with PGSC. (Tr. 28-29; GX1).[2]

McKinsey's starting pay was $15 per hour and he worked an average of 45 hours a week. (Tr. 29). Dennis Cannon was McKinsey's initial supervisor and Cannon provided McKinsey work related instructions, which varied daily. McKinsey remained in this position for approximately two months before Sauerborn promoted him to supervisor. (Tr. 30-31). With the promotion, McKinsey received a raise of $2.75 per hour, which increased his salary to $17.75 per hour. The new supervisory position also increased McKinsey's responsibility, which included managing other employees and ensuring the safety and efficiency of the sand pit. (Tr. 31). McKinsey was required to fill out and review safety worksheets for equipment that the company used in the day-to-day operations. He would also fix machinery that he was able and permitted to fix, while bringing any major repair issues to Sauerborn. (Tr. 32-34; GX 2). McKinsey testified that he was not permitted to make repairs that would cost more than $100-$150 without first consulting Sauerborn. (Tr. 35, 47).

In his position as supervisor, McKinsey would make safety complaints to Sauerborn. Such complaints included issues with the high walls, as well as one incident where individuals were caught rifle-hunting on company property. (Tr. 35-36). McKinsey testified that Sauerborn would frequently deflect the safety complaints. (Tr. 36). Because Sauerborn refused to take action regarding the safety complaints, McKinsey filed a hazard complaint with MSHA on November 25, 2013, by calling a hotline number he found online. (Tr. 77). At the time, McKinsey felt that calling in safety complaints was "generally frowned upon by coworkers and employees," so he did not reveal that he made the call. (Tr. 77-78).

[2] The abbreviation "GX" refers to government's exhibit. The abbreviation "RX" refers to Respondent's exhibits.

McKinsey called MSHA on two separate occasions during which time he complained of "unsafe equipment, high walls and hunting on company property." (Tr. 36-37). The first phone call was on November 25, 2013, and the inspector came to the site the following day. McKinsey made the second phone call while this inspection was being conducted because he testified that he had forgotten to mention the highwall issue in the original complaint call. (Tr. 39-40). Sauerborn closed the site following the inspection and gave the employees time off from Wednesday, November 27, through the Thanksgiving weekend. (Tr. 37, 39).

Upon returning to work the following Monday, December 2, McKinsey felt Sauerborn's attitude toward him had changed. (Tr. 40). McKinsey testified that Sauerborn treated him differently and would single him out and belittle him. (Tr. 38-41, 96).

McKinsey did not remember the precise reasons that he stated led Sauerborn to discriminate against him - whether it was for his Asperger's syndrome or something else- but he felt he was targeted in ways that he told Sauerborn "just don't work with him." (sic) (Tr. 90-91, 93, 96).

McKinsey did not reveal that he was the person who called in the complaint, but he did inquire verbally as to why he was being treated differently after the inspection. (Tr. 81-84). Prior to the inspection, McKinsey testified that he was not formally written up, disciplined or verbally reprimanded by Sauerborn. (Tr. 41, 74-75). After the inspection, Sauerborn began sending e-mails to McKinsey regarding his work performance and the fact that someone called MSHA to report a complaint. (Tr. 42).

The first e-mail was sent December 7, 2013. (Tr. 42; GX 3). The email raised the following issues: cracked mirrors on the D-250, installation of the flashboard on site, clay being improperly dumped in a drain fill area, issues with a berm, mechanical issues with a baby loader, inspection of the site's Suburban vehicle, repair of the site's International Truck and a wheel coming off a dump trailer. McKinsey felt the e-mail was accusatory in nature because it referenced the call to MSHA and asked him "what have you learned from this incident?" which McKinsey understood to be an accusation. (Tr. 48-49).

On redirect examination, McKinsey discussed the content of the e-mail sent December 7, 2013 in more depth. (Tr. 568; GX 3). McKinsey recalled the mirrors on the D-250 haul truck were cracked and Sauerborn said they had been cracked for years. Sauerborn also stated the mirrors were not an issue, and McKinsey could use the truck. (Tr. 568-569). Later, Sauerborn approached McKinsey and told him to park the truck and find replacement mirrors in the boneyard.[3] (Tr. 569). After not being able to locate the proper mirrors, Sauerborn instructed McKinsey to replace them with mirrors that were made to fit other types of vehicles. (Tr. 569-570, 594). Ultimately the mirrors were loose and vibrated when the machine was operated. (Tr. 570).

[3] A boneyard is a place where refuse, especially discarded cars, accumulates or is kept. *The American Heritage dictionary of the English language, 4th edition, Houghton Mifflin Harcourt Publishing Company, 2009.*

The next issue mentioned in the December 7, 2013, email concerned PGSC employees Matt and Josh Lane installing flashboard risers.[4] Matt did not go to the site but Sauerborn and Lane went to repair the flashboard risers and McKinsey was unable to reach either of them by radio. McKinsey did not attempt a phone call to either because in his experience they rarely answered phones at the job site. McKinsey took a vehicle on the path to see where they were.[5] (Tr. 571-572).

McKinsey testified that he did not put clay in the drain fill area as Sauerborn stated in the email. (Tr. 572). McKinsey claimed that he was never in the drain fill area and followed Sauerborn's instructions regarding where to dump the clay. (Tr. 573-575). McKinsey also stated that it was part of everyone's duty to maintain the berms. McKinsey would have completed any berm he was working on had he seen a problem, but he could not be sure to which area the citation referred. (Tr. 575-576).

McKinsey admitted there was a mechanical issue with the WA-300 baby loader but refuted the fact that he said the WA-300 baby loader was going to "break in half" as Sauerborn stated in the email. McKinsey believed Sauerborn exaggerated what was written on the pre-shift sheet in the email and in his testimony. (Tr. 576-577).

In the email, Sauerborn also accused McKinsey of improperly repairing the site's dump trailer. At the hearing McKinsey denied that his repair work was the reason for the wheel coming off the dump trailer. If anything had been wrong with his repairs, the issues would have become apparent when he replaced the brake plate on the axle. (Tr. 578-580).

When Sauerborn asked McKinsey to prepare the Suburban for inspection, McKinsey ran a diagnostic check and discovered the Suburban would require extensive repairs. McKinsey spent all day on the repairs focusing on what he thought was most important to fix and worked six hours of overtime on the vehicle. (Tr. 580-583). At the conclusion of the work, the Suburban was still not ready for inspection and McKinsey informed Sauerborn of the situation. (Tr. 583).

Finally, the December 7, 2013, e-mail referred to the day Sauerborn instructed McKinsey to make the International Truck at the mine site "road worthy." McKinsey did not have the required parts to do so because Sauerborn wanted him to use parts from another truck at the mine. (Tr. 583-584). McKinsey had trouble with the repairs because both trucks were old and both had worn out parts. (Tr. 584). Additionally, once McKinsey began work on the truck, Sauerborn interrupted him several times, making it difficult to finish the job. (Tr. 585).

Sauerborn sent a second e-mail to McKinsey on December 11, 2013, which was the day McKinsey was demoted and Lane was promoted to the supervisory position. (Tr. 52-53, 55; GX 5). At the hearing, McKinsey indicated that the e-mail was sent after Sauerborn reduced his hours, began treating him poorly and sent him home. (Tr. 49-51; GX 4). Additionally, a handwritten note was attached to McKinsey's time card that described Sauerborn's issues with

[4] The last name for the PGSC employee Matt was not used at the hearing.

[5] Sauerborn's testimony stated that taking a vehicle to the job site before exhausting all other means of communication was against company policy.

McKinsey's work performance. McKinsey further testified that he was not sure why he was demoted, but stated that Sauerborn did not reduce his pay in connection with the demotion. (Tr. 55, 85-86).

The third and final e-mail was sent to McKinsey on December 30, 2013. This e-mail referenced prior interactions between Sauerborn and McKinsey on December 20, 2013 that resulted in Sauerborn sending McKinsey home early and McKinsey refusing to leave. (Tr. 54; GX6).

McKinsey testified that he did not end his employment with PGSC voluntarily. (Tr. 56). He claimed he was fired after an incident that occurred on January 10, 2014. From the office, Sauerborn observed McKinsey cleaning up the area around a truck without a raincoat. Sauerborn retrieved a raincoat from the back of his vehicle and instructed McKinsey to wear it. (Tr. 56-57). When McKinsey told Sauerborn "no" because the raincoat was dirty and he did not like to wear other people's clothing, he was instructed to clock out and leave. No other employee was asked to don a raincoat nor did Sauerborn have additional raincoats available for the other employees in the field. (Tr. 57-60, 93-94, 130-131, 592-593).

McKinsey testified that he was unaware of a company policy requiring the use of a raincoat, and the rain was only "barely sprinkling." (Tr. 58, 60). After the encounter, Sauerborn returned to his vehicle and left the area where McKinsey was cleaning. McKinsey attempted to catch up with him and ask why he had to clock out, but was unable to do so because of an injured left foot. McKinsey testified that Sauerborn proceeded to attempt to run McKinsey over with his car. (Tr. 59-60, 94). McKinsey did not report Sauerborn to the police for allegedly trying to run him over with his car. (Tr. 93-94, 130).

On cross-examination McKinsey did not recall telling anyone connected to the Respondent about making the safety complaint, but did admit to telling friends unrelated to the company. (Tr. 98). McKinsey stated that he could not recall whether he mentioned something to Carol Medlin, a temporary secretary. (Tr. 98-99). McKinsey also did not recall telling the Employment Security Commission he was being harassed or discriminated against for the safety complaint he made to MSHA. (Tr. 115).

He admitted to posting a comment to Facebook about his termination and remarking on the discrimination as well as Asperger's syndrome. [6] (Tr. 119, 122-124). Lastly, McKinsey testified that the MSHA inspector informed him he could file a discrimination complaint after being terminated. (Tr. 130).

McKinsey was fired via text message and e-mail on January 13, 2014. (Tr. 61-62; GX 7). McKinsey has been unemployed since his termination and has actively been looking for work.

[6] The Facebook posts in pertinent part stated: ". . . I was fired from a job on 1/13/14 and have literally no means to support myself and at best it's nearly impossible to find a job in my area. Unless it's with someone that I already know is abusive. Where can I go to find help? I'm desperate and so ready for this life to be over." "…In fact yesterday morning I was fired because the boss man refused to recognize that I have a condition beyond what he can understand. In fact the owner of the company regularly picked on me and harassed me." (RX 4).

(Tr. 63-65, 73, 99-100; GX 8). McKinsey does not want PGSC to reinstate him to his prior position. (Tr. 94-95). McKinsey has deferred his house payment and incurred late fees on various bills because of his termination. Additionally, he has accrued legal fees from consulting with a lawyer in connection with his termination. (Tr. 65-67, 125-126; GX 9). McKinsey did not remember the first time he contacted an attorney, but testified that he contacted attorneys "a whole lot," after January 2014 in an attempt to hire one for these proceedings. (Tr. 91-92). McKinsey also testified to being without health insurance from the date of his firing to his temporary economic reinstatement on May 6, 2014. (Tr. 68, 107, 124-125).

B. Roger Sauerborn

Roger Sauerborn testified that he is a consulting forester, a North Carolina real estate broker, and the owner of PGSC, a company that manufactures state approved concrete sand and mortar sand. PGSC also sells topsoil, fill sand, fill clay, sandy gravel and crushed rock. (Tr. 329-330). Sauerborn has owned the company since approximately 1987. (Tr. 330).

During the time McKinsey was employed with PGSC, there were nine employees. The employees' duties included loading trucks, running the plant, weighing the trucks out, invoicing tickets, and sending billings. (Tr. 330). PGSC was a small corporation and its net worth was "about a half million dollars" at the time the discrimination complaint was filed. (Tr. 331).

Sauerborn testified that there was an employee handbook provided to all new employees and the handbook was in effect at the time McKinsey was hired. (Tr. 331-332; RX 9). The handbook discusses types of behavior that are considered inappropriate or unacceptable. (Tr. 332). Sauerborn believes McKinsey received the handbook as part of the hiring procedure; however, McKinsey did not sign an acknowledgment form saying he received it because that was not procedure at the time. (Tr. 334-335).

Sauerborn hired McKinsey in July 2013, as a mechanic. (Tr. 336). McKinsey was hired with the understanding that the company would train him to complete other tasks because he had expressed an interest in learning all facets of the company's operation. (Tr. 337).

At the initial interview for employment, Sauerborn felt McKinsey possessed the skills necessary to perform the job as a mechanic at PGSC and that he would be well-suited for the position given his employment history. (Tr. 337-338). During the interview, McKinsey informed Sauerborn that he had Asperger's syndrome. (Tr. 338). Sauerborn had two nephews with autism and believed that he had some understanding of the condition and that knowledge could help McKinsey focus on his job. (Tr. 339). At the beginning of his employment, Sauerborn found McKinsey to be a good employee. (Tr. 339).

However, Sauerborn began noticing issues with McKinsey's employment sometime in August, 2013, when McKinsey and Dina Davis had a disagreement concerning use of the phone in the office. (Tr. 339). Sauerborn instructed Davis to write a letter regarding her version of the disagreement. (Tr. 339-340; RX 10). Sauerborn testified that the disagreement was over a new procedure that Davis and Dennis Cannon worked out concerning phone communication around Davis' desk. (Tr. 341). McKinsey was not yet informed of the new procedure and he asked to use the phone around Davis' desk. Davis told McKinsey to use another phone and an escalating

confrontation occurred. Sauerborn believes McKinsey swore at Davis. (Tr. 341). Sauerborn testified that he discussed the incident with McKinsey, explained to him that his behavior was improper, and provided him an opportunity to write his own statement, but McKinsey chose not to do so. (Tr. 342-343). Sauerborn considered this conversation to be a verbal warning. (Tr. 342-343).

In September of 2013, shortly after this incident with Davis and after Cannon was terminated, Sauerborn promoted McKinsey to a supervisor position. (Tr. 343). McKinsey expressed interest in the job and Sauerborn believed that he would be a good supervisor. Sauerborn explained that there was a need for a supervisor because he was busy with other business obligations. (Tr. 343-344). McKinsey's promotion resulted in a raise, which increased his hourly pay from $15 to $17.75 an hour. (Tr. 344).

After a week in his new position as supervisor, McKinsey and Davis were involved in a second incident regarding a disagreement over a payroll estimate on McKinsey's new paycheck. During this incident, Sauerborn testified that McKinsey swore and acted "really inappropriate." Davis wrote a letter detailing the events that occurred during the incident. (Tr. 345-346; RX 11). On September 10, 2013, Sauerborn discussed the issue with McKinsey and gave him an opportunity to write a statement, which McKinsey again chose not to do. (Tr. 348). Sauerborn testified that he also considered this conversation to be a verbal warning to McKinsey. (Tr. 349).

Sauerborn recalled two other incidents regarding McKinsey's work performance and referred to the text message record to clarify his testimony. (Tr. 349; RX 25). The first incident occurred in September and involved a bearing that had worn out and stopped production at the plant. (Tr. 351). The bearing needed to be replaced, yet McKinsey could not locate a replacement. Sauerborn testified that it was McKinsey's responsibility to keep an extra bearing available. (Tr. 351). Sauerborn ended up finding a replacement at a nearby store and picked it up on his way back to the pit. When Sauerborn arrived back, he felt that McKinsey was rude to him in front of several other employees. McKinsey blamed Sauerborn for not being able to locate an extra bearing because Sauerborn was "calling every few minutes." (Tr. 351-352). Sauerborn told McKinsey a number of times to praise people in public and say negative things privately. (Tr. 352-353, 355-356). Sauerborn gave a written warning to McKinsey regarding this incident on September 17, 2013. (Tr.353-354; RX 12). McKinsey disagreed with the letter because he felt Sauerborn contacted him too much, thereby inhibiting his ability to locate a bearing. (Tr. 354). Sauerborn did not feel as if he contacted McKinsey too much that day. (Tr. 354-355).

The second incident occurred in December and involved a work truck that required a fuel line cleaning. (Tr. 349). Specifically, McKinsey wanted to perform $3,000 worth of repairs when Sauerborn believed that the truck only needed a $30 replacement piece. (Tr. 350). Sauerborn considered this to be inadequate performance on McKinsey's behalf. (Tr. 350).

On December 7, 2013, Sauerborn created a document detailing roughly a month of McKinsey's performance issues and sent it to McKinsey via email. (Tr. 357-358, 485-488; RX 13). Sauerborn testified that he did not write the e-mail regarding these incidents until December 7, 2013 because he was busy investing his time into his other businesses. (Tr. 366, 369).

The December 7, 2013, email addressed the following issues Sauerborn had with McKinsey's performance. At the hearing, Sauerborn testified about the contents of the e-mail:

- In the e-mail Sauerborn addressed the lack of communication regarding work assignments and the quality of that communication. Sauerborn testified that he thought communication could improve between them and he felt McKinsey needed to communicate more effectively. (Tr. 360-362).

- In the e-mail Sauerborn also addressed an incident when McKinsey was driving a truck with broken mirrors on November 18, 2013. McKinsey failed to indicate the damage on the pre-shift report, which is a guaranteed citation. (Tr. 363). Another argument took place regarding the replacement of the mirror. Sauerborn felt McKinsey did not properly perform his duty as foreman because he failed to replace or report the broken mirror. (Tr. 364-365).

- On November 20, 2013, McKinsey did not follow procedure by ensuring tasks were completed by the employees who were assigned to complete them which Sauerborn addressed in the e-mail. Sauerborn testified that when he followed up with McKinsey two days later he discovered that Matt had a recurrence of a hernia and McKinsey failed to obtain a doctor's note from him and did not inform Sauerborn of Matt's condition as required. (Tr. 367-368).

- On November 21, 2013, McKinsey dumped clay on a tract of land that was being built up for use as a residential property which Sauerborn stated in the e-mail. Sauerborn testified that he instructed McKinsey not to dump clay in the only area a septic tank could be placed. Sauerborn contends McKinsey dumped the clay there despite being told not to do so. McKinsey again dumped clay there the following day and may have destroyed the potential land use. (Tr. 369-372).

- An unknown person called MSHA with five allegations of wrongdoing and then a sixth was called during the inspection on November 26, 2013. The e-mail stated that McKinsey volunteered that he did not call MSHA but suggested it may have been one of his girlfriends or Josh Lane's parents. Sauerborn testified that at the time McKinsey made the statement he did not know which one of the employees called MSHA, but he knew the statements were too specific to come from the public. (Tr. 374).

- The e-mail stated that McKinsey also failed to alert Sauerborn of a "noise" issue with the WA-300 machine, which could have been repaired for $500 and ultimately cost $5,000 to fix because of the fine from MSHA. Sauerborn testified that McKinsey, as a supervisor and mechanic, should have known that repairs were needed and alerted Sauerborn via the office white board. (Tr. 376-378, 429-430).

- The e-mail addressed repair issues concerning a dump trailer that McKinsey cleared for operation but 30 miles of use resulted in the trailer losing a wheel on November 27, 2013. Sauerborn testified that he blamed McKinsey's repairs for the issue and also testified that the issue should have been identified by McKinsey during his inspection of the vehicle before putting it back in service. (Tr. 379-380).

- The e-mail stated that Sauerborn instructed McKinsey to prepare the Suburban on site for inspection around November 20, 2013. (Tr. 380). Sauerborn testified that after charging six hours of overtime to fix the Suburban, McKinsey still had not completed the repairs needed for a passing inspection and Sauerborn experienced issues when driving the vehicle. (Tr. 380-383; RX 14).

- The e-mail referred to a note Sauerborn left on McKinsey's timecard on December 5, 2013, instructing McKinsey to fix the International Truck on site because the steering linkage needed to be swapped. Sauerborn testified that McKinsey ignored his request to fix the International Truck and Sauerborn found McKinsey a half mile away in an area that was "important but unurgent." (sic). (Tr. 385-386). When Sauerborn confronted McKinsey about the International Truck not being operable, McKinsey said he was leaving early and did not fix the issue. McKinsey also stated Sauerborn was not his supervisor and he did not have to inform him when he was leaving early. (Tr. 386-387).

- The last item in the e-mail warned McKinsey that if he disrespected Sauerborn in front of others again, he would be sent home and have his hours cut. (Tr. 388). Sauerborn testified that he did not permanently cut McKinsey's hours but he did reduce them the following Monday after the International Truck incident by telling him to come in at noon the following Monday. *Id.*

Sauerborn did not consider terminating McKinsey after the incidents described in the December 7 email. Rather, he wanted to make allowances for McKinsey's Asperger's syndrome and to articulate that his choices had consequences. (Tr. 388-389). Sauerborn considered his discipline policy as progressive discipline that included verbal warnings, written warnings, time cuts, and sometimes pay-cuts. (Tr. 389, 407).

On December 11, Sauerborn demoted McKinsey from his supervisory role. He did not, however, reduce his pay because McKinsey threatened to quit if his pay was reduced. (Tr. 390, 393). Sauerborn decided to promote Lane to McKinsey's supervisory position. He felt that as McKinsey's cousin, Lane could help steer him in the right direction. (Tr. 408). Sauerborn testified that McKinsey was demoted because he chose to work in the rain despite verbal and written policies not to work in the rain. (Tr. 391). On December 11, Sauerborn also gave a list to McKinsey that contained tasks to complete if it was raining and tasks to complete if it was not raining. (Tr. 392; RX 15). McKinsey did not follow the written instructions on the list and changed a tire on an Explorer in the rain despite shelter being available. (Tr. 394-395).

On December 11, Sauerborn created another list of tasks for McKinsey and was disappointed to see McKinsey had not completed the third item. (Tr. 397; RX 16). McKinsey had damaged the four-wheeler and he did not fix it or report it; therefore, Sauerborn was unable to use it. (Tr. 397-398).

There was also a handwritten letter drafted on December 11, in which Sauerborn addressed communication and performance issues regarding the lists. (Tr. 400; RX 17). Sauerborn testified that policies about working in the rain were in place because during the cold winter months he feared his employees would get their clothes soaked and then need a change of clothes and/or end up getting ill. (Tr. 401). Sauerborn testified that during his 30 years of ownership, he had believed that employees had contracted the flu from working in the outdoor environment. He also testified that he considered a raincoat as being necessary protective garment. (Tr. 402).

The letter to McKinsey also praised his work on a successful reinstall of 330 boom cylinders. (Tr. 403). However, Sauerborn was concerned with McKinsey's choice not to take a lunch or bathroom break because those activities were not on the list. Sauerborn did not think he should have to write those activities down. (Tr. 404). Sauerborn also referenced a phone call between he and McKinsey where McKinsey became upset because he felt Sauerborn hung up on him. (Tr. 405). Due to the phone incident, McKinsey addressed Carol Medlin in a loud voice when Sauerborn was present in a way that Sauerborn categorized as "bullying." (Tr. 405-406).

The letter also stated that during a meeting they had earlier on December 11, McKinsey would not reveal to Sauerborn the name of the lawyer he contacted. Sauerborn testified that McKinsey accused him of discriminating against him because of his Asperger's syndrome (and Sauerborn's disbelief that he had the syndrome), but he never claimed Sauerborn discriminated against him for the safety complaint call. (Tr. 411-412). Sauerborn noted these events in the letter dated December 11, 2013. (Tr. 410; RX 18). McKinsey did not take the opportunity to comment on the letter. (Tr. 413).

On December 20, Sauerborn attempted to say "hello" to McKinsey while he and Lane were driving in the Suburban. (Tr. 413). McKinsey exited the vehicle and told Sauerborn in a loud voice that he was discriminating against him. *Id.* McKinsey then began to advance toward Sauerborn. Sauerborn put up his hands and told McKinsey to clock out for an hour and cool off because the company Christmas party was later that day. (Tr. 413-414, 416-417). Sauerborn noted this event in a letter signed by Lane, dated December 30, 2013. (Tr. 414-415; RX 19).

A second incident occurred when McKinsey and Lane were working on the 300 bushings and Sauerborn again said "hello" to McKinsey. McKinsey once again accused Sauerborn of discriminating against him because of his Asperger's syndrome. (Tr. 418, 493). Sauerborn then asked him to clock out, which McKinsey did not do, so Sauerborn instructed Lane to send McKinsey home. *Id.* Sauerborn asked Lane and Ms. Medlin to document the incident and to put in their own words what they had observed. (Tr. 420-421; RX 20-21). Sauerborn did not fire McKinsey that day because he was still holding out hope that McKinsey would do better. (Tr. 422).

On January 13, 2014, Sauerborn sent an e-mail terminating McKinsey's employment and explaining the reasons for the termination. (Tr. 423; RX 22). Sauerborn drafted the e-mail at 3:15 pm on January 10, 2014. (Tr. 424). Sauerborn testified that he fired McKinsey because of a "progression of action and inaction" on McKinsey's part over the course of his employment. However, there was one particular incident that occurred on January 10, which prompted Sauerborn to terminate McKinsey. When Sauerborn arrived at work there was a "misting" rain, so he retrieved a fresh raincoat out of the break room and asked McKinsey to put it on. (Tr. 425). McKinsey said "no," so Sauerborn instructed him to clock out. Sauerborn testified that at that point, McKinsey became noticeably agitated so Sauerborn got back into his car. As Sauerborn was trying to pull away, McKinsey jumped on the hood of his car and climbed up to the windshield. (Tr. 425-427). Sauerborn stopped the car and reached for his camera phone in an effort to film McKinsey as evidence. When McKinsey jumped off the car and cleared the path, Sauerborn left the premises and later texted Lane to send McKinsey home. (Tr. 425-428). Sauerborn considered McKinsey's response of "no" when asked to put on the raincoat to be an act of insubordination. (Tr. 427). Sauerborn also testified that McKinsey's action of jumping on the hood of the car was part of the reason for termination. (Tr. 433). Sauerborn did not call the police about the incident but informed Lane to call the sheriff if McKinsey did not leave the pit. (Tr. 499-500). After he returned to the pit, Sauerborn had Lane and Rogers Leggett put raincoats on as well. (Tr. 498, 510). Lane also drafted a witness statement about the incident. (Tr. 432; RX 23).

Sauerborn testified that he felt threatened after he contacted Calvin Lynch and heard his description of what happened on December 20, 2013 (discussed *infra*). (Tr. 444). After learning of the events, Sauerborn moved his place of residence. (Tr. 446). He also informed MSHA Special Investigator LaRue of the threat. (Tr. 447). Sauerborn did not directly tell LaRue that he fired McKinsey for insubordination but described the incident on January 10, 2014, as "the straw that broke the camel's back." (Tr. 501).

Sauerborn testified that he encourages employee safety because his brother died trying to save someone from an unsafe condition in the navy. (Tr. 449-450). He further denied firing McKinsey for calling in the hazard complaint. (Tr. 451). The first time he was sure McKinsey called in the complaint was when McKinsey filed EEOC documents. (Tr. 451-452).

On cross-examination Sauerborn acknowledged that when he observed Davis disobeying doctor's orders he wrote her up and gave her the opportunity to explain her side of the situation in writing. (Tr. 461-465; GX 21, RX 10). However, Sauerborn did not write a letter reprimanding McKinsey for the incident regarding the new phone policy. Only a verbal warning was given. (Tr. 466). Sauerborn concedes that he did not know whether McKinsey knew about the new phone rule. (Tr. 467). Sauerborn also never documented in a letter that McKinsey shouted or cursed at Davis during the incident. (Tr. 469). Sauerborn did not afford McKinsey an opportunity to respond in writing to the incident but believes he treated McKinsey and Davis the same way. (Tr. 472).

Sauerborn testified that he gave McKinsey wide latitude in ordering parts and supplies stating that McKinsey could order parts up $300-$400. (Tr. 474, 475).

Sauerborn conceded there was in fact an error with McKinsey's paycheck in September 2013 and he verbally reprimanded Davis for the error. (Tr. 476). Sauerborn also admitted that pursuant to the employee handbook verbal reprimands should be documented, but were not in certain circumstances. (Tr. 477-478, 494).

Sauerborn testified that he considered McKinsey's refusal to follow instructions insubordination and contended the raincoat he brought for McKinsey on January 10, 2014, was not filthy and disgusting. (Tr. 510-511).

C. Roger Ouellette

Roger Ouellette ("Ouellette") was a mine safety health inspector for MSHA who previously worked as a maintenance manager/supervisor for an open pit sand mine, construction demolition landfill and dump truck company. (Tr. 136-137). After receiving an allegation summary, Ouellette contacted McKinsey who asked repeatedly to remain anonymous throughout the investigation process for fear of reprisal from the operator, and Ouellette agreed. (Tr. 140, 169). The reason McKinsey feared reprisal was because of the instruction he was given to tag any defective equipment as being out of service if an MSHA inspector showed up. (Tr. 150, 169) McKinsey also informed Ouellette that he had Asperger's syndrome. (Tr. 142, 169).

On November 26, 2013, Ouellette conducted an inspection of PGSC's sand pit. (Tr. 144). Ouellette discussed the allegation summary with Sauerborn and made notes regarding each of the allegations contained therein. (Tr. 145-147; GX 12). When discussing allegation number 5 of the complaint (gunshots fired on company property) and the issue of who called the allegation in, Sauerborn stated it could have only been two employees, McKinsey or Lane. (Tr. 148-149, 156, 165). Ouellette conducted interviews with all employees on November 26. (Tr. 150). At the conclusion of the inspection, Ouellette issued two citations to Sauerborn for a violation of the berming standard and a documentation violation, all of which were unrelated to McKinsey's allegations. (Tr. 153-154, 160-161; GX 13). Ouellette conducted a close out conference with Sauerborn and completed a close out form after the inspection. (Tr. 154-156; GX 14). Ouellette also agreed that there was another complaint called in by McKinsey at lunch on November 26, and he added it to the list of inspection items. (Tr. 176).

D. Michael LaRue

Michael LaRue ("LaRue") was a mine safety and health inspector for the U.S. Department of Labor, collateral duty special investigator, and collateral duty fatal accident investigator. (Tr. 177). After receiving an initiation process package, LaRue made contact with both parties and informed them of the investigation. (Tr. 180). LaRue testified that he believed a discrimination claim was a possibility after speaking with and taking formal statements from both parties. (Tr. 180-183; GX 16, GX 17). Specifically, LaRue stated that Sauerborn would not directly answer the question of whether he knew who reported the violations, and Sauerborn said he wanted to move on as a company. *Id.* LaRue also took a statement from Joshua Lane via telephone because he did not want to meet in person for fear of reprisal if anyone found out he was meeting with a MSHA investigator. (Tr. 188-189; GX 18).

During his investigation, LaRue found what he believed to be multiple discriminatory acts including demotion, cutting of hours, and termination, all of which were directly related to the protected activities in which McKinsey was engaged. (Tr. 192). Based on Ouellette's report and Sauerborn's comments, LaRue believed that McKinsey was discriminated against. (Tr. 192-194). Additionally, LaRue noted there were no incidents marked in McKinsey's personnel record prior to the safety complaint being filed with MSHA. (Tr. 193). LaRue testified that he felt Sauerborn avoided the question of who filed the complaint and, therefore, asked him three separate times if he knew which employee made the complaint. Sauerborn never directly answered the question. (Tr. 212).

E. Daniel Daughtridge

Daniel Daughtridge ("Daughtridge") was a psychotherapist at an outpatient mental health clinic. (Tr. 258-259). He began to treat McKinsey for anxiety and job related stress in January of 2014. (Tr. 260, 266). The subject matter of the treatment sessions mainly included his termination and the events surrounding it. Daughtridge and McKinsey particularly discussed the incident with the rain coat and the subsequent incident where McKinsey thought he was going to be hit by a car. (Tr. 261).

Daughtridge recommended McKinsey for Asperger's syndrome testing and after discussing the results, he believed the tests confirmed an Autism Spectrum Disorder ("ASD"). (Tr. 262). ASD often affects the way a person sees the world and how they relate to other people and have social difficulties. (Tr. 264).

Daughtridge conceded during his testimony that he did not have the expertise to diagnose ASD, which is why he referred McKinsey for additional testing. (Tr. 266). An intake therapist and colleague of his provisionally diagnosed McKinsey with a mood disorder. (Tr. 267). Daughtridge also agreed that all of the symptoms he observed could have been presented prior to McKinsey's employment with PGSC. (Tr. 268).

F. Calvin Lynch

Calvin Lynch ("Lynch") was a customer of PGSC who had purchased sand from the company on three different occasions. (Tr. 302-303). Lynch purchased sand twice on the morning of December 20, 2013. (Tr. 304; RX 8). On his second trip to purchase sand, Lynch entered the office and described seeing McKinsey upset. Lynch testified that he was scared both for himself and for the woman working in the office. (Tr. 306, 309). Lynch explained that McKinsey was swearing and getting very upset, (he could not recall the name of the person McKinsey was upset about) and that the woman working in the office attempted to calm him down but he continued to be upset. (Tr. 307). Lynch stated that McKinsey kept saying, "they don't know me," and that he had "some type of syndrome." (Tr. 307-308). Lynch further testified that McKinsey was in a rage - saying he was being lied about by the same man and he was going to "…knock him in the head. I will kill him." (Tr. 308, 310). McKinsey apologized to Lynch several times but continued to complain about his treatment at the company including being lied about and losing working time. (Tr. 310-311).

Sauerborn called Lynch in April of 2014, and asked if he recalled the events that occurred on December 20, 2013. (Tr. 311-312). Lynch said that he did remember and agreed to meet with Sauerborn and the Respondent's counsel Matthew Korn regarding the events on that day. (Tr. 313-314). Lynch agreed to testify about the events the best he could recall. That was the end of the interaction between Sauerborn and Lynch. (Tr. 313-315).

Lynch went on to testify that he was initially afraid during the confrontation because he had seen instances of disgruntled employees harming people at the workplace on TV and that is what came to his mind. (Tr. 320). When he went back to the office after loading the sand in his truck, he recalled McKinsey still being upset and shaking. McKinsey proceeded to apologize to Lynch again. (Tr. 321).

G. Dina Davis

Dina Davis ("Davis") began employment at PGSC on February 18, 2013, first as a delivery truck driver and then as an office employee. (Tr. 513). Davis took medical leave effective September 25, 2013, and returned the latter part of January 2014. (Tr. 514). Prior to her leave, she worked with McKinsey at PGSC, and she knew him previously because they went to high school together. *Id.* Davis told Sauerborn that she knew a mechanic (McKinsey) but did not know his work ethic, and was hesitant at hearing to definitively say she recommended him for the position. (Tr. 515).

With regard to the altercation between McKinsey and Davis over his use of the office phone in late August 2013, Davis testified that she wrote a letter describing the incident which stated that McKinsey had a "temper tantrum" and acted inappropriately in front of customers. (Tr. 516, 518, 538; RX 10). Davis testified that she had seen McKinsey act in a similar fashion during high school when he would get confrontational with teachers. (Tr. 520). Sauerborn took Davis' statement and discussed the incident with McKinsey. (Tr. 521, 539-541).

A second incident occurred in early September 2013 regarding an issue with payroll. (Tr. 521). McKinsey felt he should have been paid more pursuant to his supervisor position raise. McKinsey asked Davis for the phone number to ADP -- the payroll company. When Davis explained that he was not authorized to speak to ADP, McKinsey became irate and began yelling and swearing at her in front of other employees. (Tr. 522-523, 527, 539). McKinsey also shared his time card and income information with another employee, which is against company policy. (Tr. 523).

Davis testified about a separate occasion where McKinsey encouraged her to sue Sauerborn for violating HIPPA because he claimed Sauerborn contacted Davis' doctor and tried to get information about her condition. (Tr. 531). Davis also heard McKinsey make various threats against Sauerborn including both suing and killing him. (Tr. 532). Davis testified that she would not feel comfortable if McKinsey were reinstated because she does not trust him and he was a "loose cannon." (Tr. 533).

Davis testified that McKinsey received preferential treatment from Sauerborn such as driving the company truck, taking company product without paying, and receiving work boots that Sauerborn paid for personally. (Tr. 534). McKinsey also got paid for holiday vacation time,

which was against company policy because McKinsey had not worked with the company for the required year. (Tr. 535).

Davis does not believe Sauerborn would terminate an employee for making a safety complaint. Additionally, McKinsey never told Davis he was being discriminated against for making the complaint. (Tr. 535).

H. Alton Lorenzo Moses

Alton Lorenzo Moses ("Moses") began working at PGSC in approximately December 1996. (Tr. 544). At the time of the hearing, he was the acting supervisor, a position he took when Josh Lane left the company. (Tr. 556). When McKinsey began working at PGSC, he informed Moses that he had Asperger's syndrome. (Tr. 546). Moses' interactions with McKinsey were never straightforward. Moses testified that when he addressed McKinsey he could never get a straight answer. Moses explained that he heard McKinsey cursing at work from time to time and he overheard McKinsey call Sauerborn stupid. (Tr. 547-548). McKinsey never told Moses that he was being discriminated against because he filed the safety complaint, but he did say someday he would own the place. (Tr. 548). Moses testified that Sauerborn could be difficult to work with, but he is difficult with every employee at the mine. (Tr. 548-549).

Moses acknowledged that there was a policy in place regarding working in the rain and raincoats were available for employees to use. (Tr. 549-550). Moses further acknowledged that the employee handbook contains company policies and was available to all employees. (Tr. 550).

Sauerborn never indicated to Moses that he believed McKinsey made the complaint to MSHA. Additionally, Moses did not believe Sauerborn would fire someone for making a safety complaint. (Tr. 552). Moses was never punished for reporting safety issues to Sauerborn, and Sauerborn would fix the safety issues whenever they were called to his attention. (Tr. 553).

Moses testified that he heard from multiple employees that Sauerborn terminated McKinsey for an incident that occurred in the rain when McKinsey jumped on Sauerborn's car. (Tr. 554-555).

III. Contentions of the Parties

The Secretary contends that the elements necessary to establish a *prima facie* case of discrimination have been satisfied. First, the Secretary argues that McKinsey was engaged in protected activity when he filed the safety complaint with MSHA and when he made routine complaints to his supervisor, Sauerborn. *Secretary's Post-Hearing Brief* at p. 7. Second, the Secretary argues that adverse action was taken against McKinsey as a direct result of his participation in such activity. *Id*. at 8. The circumstantial indicia of discriminatory motivation including knowledge, hostility, coincidence in time, and disparate treatment have all been established as evidenced by McKinsey's reduced hours, the demotion from his supervisory capacity, repeated harassment by Sauerborn, and ultimately his discharge from PGSC. *Id*.

The Respondent, however, asserts that a *prima facie* case has not been established, as the Secretary failed to demonstrate a nexus between the protected activity and the adverse action. *Respondent's Post-Hearing Brief* at p. 17. Specifically, the Respondent contends that there was a legitimate, nondiscriminatory basis for terminating McKinsey – failing to follow a direct order from a supervisor and inadequately performing job duties – and that PGSC would have terminated him on those grounds alone. *Id.* at 18. In fact, Respondent argues Sauerborn did not know it was McKinsey who filed the hazard complaint with MSHA. *Id*.

However, assuming the ALJ finds a *prima facie* case has been made, Respondent alleges it has successfully rebutted such. *Id*. at 18-19. The Respondent further contends that the proffered reasons for terminating McKinsey are independent and alternative in nature, not cumulative as suggested by the Secretary. *Respondent's Reply to Post-Hearing Brief* at p. 8. PGSC ultimately terminated McKinsey for his refusal to follow direct instructions from his supervisor and then jumping on the hood of his supervisor's car, reasons that are both independently sufficient to warrant termination. *Id*.

The Secretary argues that the multiple reasons offered by the Respondent for terminating McKinsey are cumulative in nature. *Secretary's Post-Hearing Brief* at p. 14. Furthermore, when one of the reasons fails for a lack of credibility, as it does in the instant matter, the entire basis for termination is deemed not credible. *Id*. at 14-24. The Secretary takes the position that both proffered reasons -- poor work performance and failure to don a raincoat -- fail as pretext. *Id*. Specifically, the reasons either did not actually motivate the adverse action or were insufficient to justify termination, and therefore, the affirmative defense must also fail. *Id*. at 14, 21-24.

The Secretary contends, *arguendo* that if the ALJ finds the Respondent successfully put forth an affirmative defense, it must still fail because McKinsey was provoked into committing the conduct for which he was fired and should, therefore, be granted leeway for his actions. *Secretary's Post-Hearing Brief* at p. 24.

The Respondent contends that there was no provocation on the part of Sauerborn because he was simply trying to get McKinsey to wear a raincoat, an act consistent with PGSC policy. *Respondent's Post-Hearing Brief* at p. 26. If however, the ALJ finds provocation, the Respondent would argue either, it was not wrongful under the Mine Act, or to the contrary, McKinsey's response was disproportionate to the wrongful conduct.[7] *Id*. at 27-28.

[7] This Court need not reach a decision as to whether McKinsey's unprotected activity was provoked by the employer's wrongful conduct as the Respondent was unsuccessful in establishing a valid affirmative defense.

IV. Findings of Fact and Conclusions of Law

Section 105(c) of the Mine Act prohibits any discrimination against a miner for exercising a right established under the Act.[8] Pursuant to Commission case law, a *prima facie* case for a violation of section 105(c) is established if the complainant proves by a preponderance of the evidence that (1) he was engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Sec'y of Labor or behalf of Pasula v. Consolidation Coal. Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom*. *Consolidation Coal Co. v. Marshall*, 63 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981).

The Commission will consider the following factors in determining whether the complainant has established a causal connection between the protected activity and the adverse action: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

It is rare for a section 105(c) case to be proven solely on direct evidence. Rather, it is more typical for such a case to be made by relying on indirect or circumstantial evidence. Therefore, it is of no surprise that the Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999)(quoting *Chacon*, 3 FMSHRC at 2510).

Once a *prima facie* case is established, the mine operator is given an opportunity to rebut by showing that either there was no protected activity or the adverse action was not motivated in any way by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the operator is unable to successfully rebut, it may still establish an affirmative defense by proving that the adverse action was motivated by unprotected activity, and it would have taken the action based solely on the unprotected activity. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-2800.

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[8] Section 105(c)(1) of the Act provides in part:

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

A. Protected Activities

In the instant matter, the record clearly establishes that McKinsey engaged in protected activity, thus satisfying the first element of a *prima facie* case under section 105(c). This Court accepts as true McKinsey's testimony at hearing that he not only voiced complaints with his supervisor Sauerborn, but also that he filed a formal hazard complaint with MSHA on November 25, 2013. (Tr. 35-37, Tr. 77-78). As part of his supervisory position, McKinsey was required to fill out and review safety equipment that was used in the company's day-to-day activities. (Tr. 32-34). There were also occasions where McKinsey made specific safety complaints to Sauerborn, including an issue with the highwalls and an incident where individuals were caught hunting on company property. (Tr. 35-36). However, McKinsey testified that Sauerborn routinely deflected his safety complaints. (Tr. 36). Consequently, McKinsey decided to file a hazard complaint directly with MSHA on November 25, 2013. (Tr. 77). Both the internal safety complaints made on equipment check sheets and directly to Sauerborn, as well as the formal hazard complaint filed with MSHA qualify as protected activity pursuant to section 105(c). 30 U.S.C. § 815(c); *see e.g. Sec'y of Labor on Behalf of Munson v. Eastern Assoc. Coal Corp.*, 23 FMSHRC 654, 662 (June 2001); *Descutner v. Newmont USA*, 34 FMSHRC 2838 (Oct. 2012).

B. Adverse Action Motivated by Protected Activity

The record further establishes that the second element of the *prima facie* case has also been satisfied, as McKinsey was terminated by Sauerborn -- the clearest form of adverse action under the Act. *See Driessen v. Nevada Goldfields Inc.*, 20 FMSHRC 324, 329 (Apr. 1998). The Secretary has provided sufficient circumstantial evidence to support a finding that McKinsey was terminated at least in part for his protected activity and/or PGSC's belief that he had engaged in protected activity. McKinsey also suffered less severe forms of adverse action including a demotion, a reduction in hours, and an increase in e-mails that highlighted his allegedly poor work performance. (Tr. 49-53, 55, 388, 390, 393, 400, 423).

a. Knowledge

At hearing, Respondent went to great lengths to show that Sauerborn had no direct proof or actual knowledge that McKinsey was the individual who had made anonymous safety complaints to MSHA. (Tr. 374). However, Commission case law does not require that an operator have positive certainty that a miner had engaged in protected activity. It is enough for the Secretary to establish that an operator suspected a discriminatee had made safety complaints. *See Elias Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1992)(finding "discrimination based upon a suspicion or belief that a miner has engaged in a protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)").

In this case, there is circumstantial evidence that Sauerborn suspected McKinsey of making safety complaints. At the time the safety complaints were made, there were only a handful of employees working at the Great Pit mine. (Tr. 330). McKinsey was a recent hire. (Tr. 25, 336). McKinsey's awkward attempts at denying that he was the whistleblower would have been transparently inculpatory to even the most obtuse operator, much less an individual of

Sauerborn's intelligence and perception. It would not have taken a Sherlockian process of elimination for Sauerborn to have settled upon McKinsey as a prime suspect. The testimony of the Secretary's witnesses, Inspector Roger Ouellette and Special Investigator Michael LaRue, further supports a finding that Sauerborn, despite his assertion to the contrary, believed McKinsey to be the anonymous whistleblower. Specifically, Ouellette testified that when he and Sauerborn were discussing who could have potentially called in the MSHA complaint, Sauerborn stated that it could only have been two employees – either McKinsey or Josh Lane. (Tr. 148-49, 156, 165). Similarly, LaRue testified that Sauerborn was reluctant to answer the question of whether or not he knew who reported the violations to the extent that LaRue had to ask him three different times. (Tr. 180-83, Tr. 188-89; GX 16, GX 17, GX 18).

Having heard and considered the testimony of Respondent's witnesses, Dina Davis and Alton Moses, it is highly unlikely that Sauerborn would have suspected either as being the anonymous source. The same would go, of course, for Sauerborn's daughter. Furthermore, Sauerborn's letter to McKinsey, dated December 7, 2013, when he stated "an unknown person called MSHA with five allegations of wrong doing . . . Most of the allegations were topics you and I discussed and had disagreements . . . I would like you to tell me what you have learned from this incident" appears as a non-subtle accusation by the operator that McKinsey was the anonymous source. (Tr. 48-49).

b. Hostility

Additionally, this Court finds McKinsey credibly testified that Sauerborn's attitude changed towards him after the MSHA complaint was filed. (Tr. 38-41, 96). Following his participation in a protected activity, Sauerborn began treating McKinsey differently by singling him out and belittling him. (Tr. 38-41). Sauerborn began increasingly sending e-mails to McKinsey, listing issues with him, some of which occurred well before the complaint was filed. (Tr. 41). In one of the warnings mention *supra*, issued in a letter dated December 7, 2013, Sauerborn specifically referenced the MSHA complaint and asked McKinsey what he had learned from this incident. A second e-mail was sent on December 11, 2013 in conjunction with a handwritten note that was left on McKinsey's time card, which stated various work performance issues. (Tr. 49-51). On that same day, Sauerborn also demoted McKinsey from his supervisory position. (Tr. 52-53, 55). The third and final e-mail was sent on December 30, 2013. This particular e-mail addressed a prior incident between McKinsey and Sauerborn that occurred on December 20 when Sauerborn unsuccessfully attempted to send McKinsey home early. (Tr. 54). This Court finds that these events, when looked at as a whole, reflect an obvious increase in hostility towards McKinsey after he filed the complaint with MSHA on November 25, 2013.

c. Coincidence in Time

Commission case law has established that a short proximity of time between the miner's protected activity and the adverse action can evidence a discriminatory motive. *See Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). However, the Commission has not set any hard and fast rules for determining when the time between a protected activity and an adverse action is indicative of discriminatory motive. *Sec'y of Labor on behalf of Baier v.*

Durango Gravel, 21 FMSHRC 953, 958 (Sept. 1999); *see also Chacon*, 3 FMSHRC at 2511 (finding complaints filed anywhere between four days and one and a half months prior to the adverse action sufficient to establish a coincidence in time); *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361 (2000)(finding that a period of four months between a safety complaint and termination was sufficient to establish proximity).

The Secretary and Respondent disagree about whether McKinsey was disciplined prior to the hazard investigation. The Secretary contends that McKinsey was never disciplined prior to the safety complaint being filed with MSHA. *See Secretary's Post-Hearing Brief* at pp. 15-17. Respondent asserts there were at least three prior occasions where Sauerborn reprimanded McKinsey either verbally or in writing before the complaint was ever filed. *See Respondent's Post-Hearing Brief* at pp. 3-5. The record, however, clearly reflects a temporal proximity between the time the complaint was filed and the increased discipline of McKinsey which ultimately resulted in his termination. McKinsey filed the complaint with MSHA on November 25, 2013. (Tr. 36-37). Shortly thereafter on December 7, 2013, McKinsey began experiencing a reduction in hours. (Tr. 51). McKinsey was then demoted on December 11, 2013, and terminated on January 13, 2014, only 46 days after the complaint was filed. (Tr. 51-52, 61). This time frame easily satisfies the Commission's requirements for a finding of coincidence in time.

Thus, this Court finds sufficient evidence has been presented that McKinsey engaged in protected activity, that he suffered adverse action, and that there was a nexus between the two, such that a *prima facie* case of discrimination under section 105(c) has been established.[9] Furthermore, the Respondent has failed to successfully rebut the *prima facie* case. Based on the circumstantial evidence presented at hearing, this Court is not convinced the Respondent was not motivated at least in part by the protected activity when it took adverse action against McKinsey.

C. Respondent's Affirmative Defense

When a mine operator is unable to successfully rebut the complainant's *prima facie* case, it may establish an affirmative defense by asserting that the adverse action was motivated by non-protected activity and that it would have taken such action against the complainant for that activity alone. *Robinette*, 3 FMSHRC 803, 817-18. Simply showing that the miner deserved to be disciplined is not sufficient to satisfy the Respondent's burden. *Pasula*, 2 FMSHRC at 2800.

PGSC contends that it would have terminated McKinsey for unprotected activity which included his poor work performance, inappropriate behavior, and his act of insubordination. *See Respondent's Post-Hearing Brief* at pp. 20, 23. Additionally, Respondent argues that

[9] The Secretary contends that there is also evidence of disparate treatment against McKinsey evidenced during the raincoat incident. The Secretary takes the position that Sauerborn had a markedly different response to McKinsey's failure to don a raincoat versus that towards other similarly situated employees. (*See Secretary's Post-Hearing Brief* at pp. 11-12). However, this Court agrees with Respondent that the Secretary failed to present any evidence of other employees who did not obey a direct order from their supervisor and were not terminated. (*See Respondent's Post-Hearing Brief* at p. 23).

McKinsey's refusal to don the raincoat when given a direct order to do so by his supervisor was an act of insubordination that alone warranted his termination. *Id*. at 23; *see also Respondent's Reply to Post-Hearing Brief* at p. 8. When Sauerborn told McKinsey to put on a raincoat, he simply said "no" without offering any explanation for his refusal. (Tr. 93-94, 425). Furthermore, McKinsey failed to produce any evidence of other miners who similarly failed to follow a direct order from a supervisor. Respondent contends these facts support a valid business justification for terminating McKinsey.

At the hearing, both parties gave contradictory versions of various events – the completely differing accounts of the motor vehicle run down episode, which occurred following the raincoat incident, being the starkest example of such. However, after a careful review of the total circumstances, I find that Sauerborn did not attempt to run down McKinsey and that McKinsey did not attempt to jump on Sauerborn's motor vehicle. Rather, I find that the most reasonable and likely explanation of this incident was that Sauerborn accidentally bumped McKinsey causing the miner to fall onto the hood. Thus, the episode was ultimately not a factor in reaching the decision within.[10]

When evaluating an affirmative defense, the ALJ must first analyze the merits of the employer's business justification to make a determination as to whether such justification is merely pretextual in nature. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). If the employer's justification is not "plainly incredible or implausible, a finding of pretext is inappropriate." *Id.* at 1938. Pursuant to *Pasula*, the analysis must focus "on whether a credible justification figured into motivation and, if it did whether it would have led to the adverse action apart from the miner's protected activities . . . [T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner." *Chacon*, 3 FMSHRC at 2516. Moreover, when analyzing an operator's business justification affirmative defense, the judge may not "substitute for the operator's business judgment [his or her] views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.'" *Id.* at 2516-17. Rather, the judge must determine whether a credible justification has been offered by the operator and if that justification "would have led to the adverse action apart from the miner's protected activities." *Id.*

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[10] In attempting to resolve these conflicting narratives, I have proceeded on the bases that neither party was deliberately committing perjury and that most litigants tend to perceive themselves as the innocent party and their opponent as the culprit.

As a young law student, I was once advised by an old professor that to successfully practice law I had to study human nature and the best way to do so was to study Shakespeare. During the hearing – which had more than the usual drama with both sides breaking down – I was struck by how much McKinsey saw himself as a kind of Hamlet terribly wronged by his evil step-father King Claudius (Sauerborn) and how much Sauerborn saw himself as a kind of King Lear grievously injured by the ingratitude of his child (McKinsey). For the reasons described within, I did not, however, find either party to be quite as tragic a figure as they portrayed themselves to be. Given the storm scene when the motor vehicle episode took place, I could go on with the analogy of Lear on the Heath.

It is black letter Commission case law that a judge cannot substitute his own judgment for that of the operator with regard to what constitutes an appropriate business practice. *Id.* at 2516. The Commission has repeatedly held that it "is enough for the operator to show that it had and was motivated by legitimate business reasons for taking the action that it did." *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1925 (Aug. 2012) (citing *Chacon*, 3 FMSHRC at 2516-17).

The Secretary argues that Respondent's affirmative defense should fail because the reasons proffered are pretext. A finding of pretext may be established if the judge concludes that the reasons offered have no basis in fact, the reasons did not actually motivate the adverse action, or the reasons were insufficient to justify the adverse action. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1073 (May 2011). The Secretary takes the position that allegations of McKinsey's poor work performance merit close review for possible pretext as Sauerborn did not begin to criticize his work until after the complaint was filed with MSHA. *See Secretary's Post-Hearing Brief* at p. 15.

Additionally, the Secretary contends the Respondent's argument -- that by directly disobeying Sauerborn's order to don a raincoat, McKinsey was insubordinate and that alone was grounds for termination -- holds no water. *Secretary's Post-Hearing Brief* at p. 21. The Secretary asserts that the applicable rule at Great Pit is to wear a raincoat when it is raining, not to wear a raincoat when given a direct order. *Id.* As such, similarly situated employees who were not wearing a raincoat should have also been disciplined. *Id.* Yet, McKinsey was the only employee told to clock out. *Id*. The Secretary argues this disparate treatment of McKinsey is evidence of pretext.

For the reasons discussed below, this Court finds the Respondent's affirmative defense has failed, as it did not present a valid business justification for terminating the Complainant based on an accumulation of poor work performance and his act of insubordination.

The Secretary contends the Respondent's reasons for terminating McKinsey's employment are cumulative in nature. If the ALJ decides the reasons for termination are in fact cumulative that would mean each individual reason must be a credible basis for discipline. *Pendley v. FMSHRC*, 601 F.3d 417 (6th Cir. 2010). In making such a determination, the judge can look to whether the operator based its decision on all the reasons listed in the notice of termination as well as the operator's testimony. If, however, the judge finds that the reasons given were viewed by the operator as an independent basis for termination, then the "falsity or incorrectness of one may not impeach the credibility of the remaining articulated reasons." *Id.* In contrast, when cumulative reasons are given and the judge finds one to be incredible, it cannot find the other reasons to be sufficient by themselves to support the adverse action.

The Respondent contends the reasons for terminating McKinsey are independent and alternative, as his "failure to follow direct instructions from his supervisor and then jumping on the hood of Sauerborn's car would be sufficient to credibly warrant termination." *See Respondent's Reply to Post-Hearing Brief* at p. 8.

Relying greatly on the testimony of Sauerborn, this Court finds that the Respondent's asserted reasons for terminating McKinsey were cumulative in nature. At hearing, Sauerborn testified that he fired McKinsey for a "progression of action and inaction," basing his decision on McKinsey's insubordination, the incident where McKinsey jumped on the hood of his car, and his history of performance issues and behavioral problems.[11] (Tr. 423-427). Sauerborn further testified that after his history of performance issues with McKinsey, he essentially found the January 10 incident to be the figurative "straw that broke the camel's back." (Tr. 501). This implies there had been a series of events leading up to the climactic event referenced as the final "straw." Furthermore, this Court finds the additional reasons listed in the termination letter given to McKinsey did not play a part in the ultimate decision to terminate him. Rather, they were merely issues Sauerborn had previously intended to discuss with McKinsey prior to reaching this decision. (Tr. 429).

Having made a finding that the reasons for terminating McKinsey were cumulative rather than independent and alternative, this Court must now determine whether each independent reason was in a fact a credible basis for discipline.

An affirmative defense will be found not credible if the complainant is able to establish that the operator's proffered reasons have no basis in fact, the reasons did not actually motivate the adverse action, or the reasons were insufficient to motivate termination. *Nat'l Cement Co. of California*, 33 FMSHRC at 1073. However, the Commission has provided ways that an operator can demonstrate that it would have terminated the alleged discriminatee based on unprotected activity alone, such as by showing "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

At hearing, Sauerborn presented evidence that he terminated McKinsey for issues related to his work performance and insubordination. The record establishes that McKinsey was hired in July of 2013. (Tr. 25). Sauerborn first began noticing issues with his job performance the following month in August when McKinsey was involved in a verbal altercation with a co-worker, Dina Davis. (Tr. 339). Sauerborn testified that he verbally warned and wrote McKinsey up for his behavior. However, despite this incident, Sauerborn promoted McKinsey to a supervisory position sometime in September and testified that he generally found McKinsey's work performance to be satisfactory. (Tr. 473, 479). Shortly after the promotion on September 10, McKinsey was involved in a second altercation with Davis for which Sauerborn testified Mckinsey received another verbal warning and write up. (Tr. 475).

During the time McKinsey was employed at PGSC, the company had a progressive disciplinary policy in place in order to ensure that all employees were treated fairly. The policy included a rule that all disciplinary "warnings, second chances, and any action" taken against an employee needed to be documented. (Tr. 459, RX 9). Yet, Sauerborn testified that following

[11] As discussed *supra*, no credible evidence was submitted regarding the car incident, so this Court did not consider it in reaching this decision.

both incidents between McKinsey and Davis, he did not document or place any type of record in McKinsey's personnel file regarding the alleged warnings. (Tr. 466, 478). Sauerborn did, however, address the first altercation with Davis that very same day in a letter. (Tr. 464). In that letter, Davis was given an opportunity to respond in writing with any comments or thoughts she may have had regarding the discipline and what occurred between her and McKinsey. No such opportunity was given to McKinsey.[12] (Tr. 463-64, 473, 475). According to Sauerborn's testimony, he simply showed Davis' response to McKinsey and considered that to be an appropriate verbal warning and written warning. (Tr. 471).

The second incident was handled in a similar fashion. Sauerborn testified that Davis was given a verbal warning for this altercation and she then drafted a letter detailing her version of the events. (Tr. 477). Sauerborn gave a copy of that letter to McKinsey and testified that it too represented both a verbal and written warning. *Id*. Sauerborn further testified that during his conversation, McKinsey was given an opportunity to write his own statement.[13] (Tr. 348). Sauerborn did not, however, present any evidence corroborating his testimony that he intended the alleged conversations with McKinsey referencing Davis' letters to constitute an actual verbal or written warning. When considering this lack of evidence combined with the fact that McKinsey was not afforded the same opportunity to respond as was Davis, and that neither incident was handled in compliance with PGSC's disciplinary policy, this Court does not find that either one constituted a formal warning that would serve to put McKinsey on notice that future poor work performance could result in more serious consequences.

Throughout his testimony, Sauerborn attempted to establish that a written warning was given to McKinsey by e-mail on September 17 and by text message on November 23. (Tr. 482, 485). However, this Court finds that the evidence presented was insufficient to establish that either incident constituted a valid written warning to McKinsey. Rather, the record reflects that following the second incident with Davis, McKinsey did not receive any formal warnings or discipline from Sauerborn regarding his work performance until after he made a safety complaint on November 25 and MSHA conducted its investigation.

Specifically, as discussed *supra*, Sauerborn issued the first formal written warning to McKinsey by e-mail on December 7, at which time he reduced McKinsey's hours for the upcoming Monday. (Tr. 388). This took place a mere twelve days after McKinsey engaged in

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[12] Sauerborn testified that he did not give McKinsey a written invitation to explain his perspective on the incident with Davis because he did so verbally. (Tr. 466, 471). However, Sauerborn failed to document the warning in either his employment records or McKinsey's personnel file. (Tr. 466, 473, 478, 479). Without any evidence corroborating Sauerborn's testimony, this Court cannot find Sauerborn's testimony that he verbally gave McKinsey a chance to respond and give his perspective on the incident credible.

[13] For the same reasons discussed *supra,* this Court does not find Sauerborn's testimony regarding the verbal warning and McKinsey's opportunity to respond to be credible. Per his testimony, nothing was documented that would indicate whether such events really transpired. (Tr. 477).

protected activity by filing a safety complaint with MSHA. (Tr. 77, 388). The letter addressed numerous issues that had allegedly occurred during roughly a month of McKinsey's work performance at PGSC. (Tr. 357). As the record reflects, the majority of the incidents -- including acts of insubordination -- took place prior to McKinsey filing the safety complaint. (Tr. 364, 366-367, 371, 380). Furthermore, Sauerborn did not issue a warning, suspend, or terminate McKinsey for any of the alleged issues at the time they occurred. Consequently, McKinsey was again not put on notice that adverse employment action could potentially be taken against him for any future acts of poor work performance or insubordination. Therefore, Sauerborn's argument that the January 10 incident of insubordination alone was sufficient to warrant termination fails, as termination would not be consistent with his treatment (or lack thereof) of McKinsey following his prior bad performance.

This Court finds that the Respondent failed to establish that it would have terminated McKinsey for the unprotected activity of January 10 alone. Rather, the evidence presented establishes that Sauerborn's animosity and hostility towards McKinsey for filing the safety complaint played a substantial role in his decision to take discriminatory adverse action against McKinsey.

Within limitations, a business owner should have the right to control the work environment and his or her employees, and this right should not be eviscerated simply because a safety complaint has been filed. But this right cannot allow the facts of the present case and the protections afforded a miner under the Act to be overlooked. Congress intended not only to encourage miners to participate in the Act's enforcement but also to protect them from "any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Congr., 1st Sess. 36 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Res., 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623. Perhaps Sauerborn honestly believed that he had been magnanimous in the past with McKinsey, and that by filing the safety complaint McKinsey showed just how unappreciative he was of Sauerborn's efforts. However, pursuant to section 105(c) of the Act, McKinsey had every right to file the complaint. Unfortunately, it is likely because of his lenient attitude towards McKinsey that Sauerborn failed to give any warnings or discipline McKinsey prior to the safety complaint being made. Given the almost complete lack of prior warnings or discipline in McKinsey's work history for poor performance and insubordination, this Court cannot find the Respondent has successfully established that the cumulative effect of such could have rendered his unprotected activity on January 10 the fatal "straw." *Sec'y of Labor on Behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 961 (Sept. 1991).

As discussed *supra*, when one of the proffered reasons for terminating an employee fails and such reasons are cumulative in nature, the ALJ cannot find the other reasons to be a sufficient basis alone. Respondent argued that it terminated the Complainant for both his poor work performance and his act of insubordination. However, this argument fails as pretext as the evidence supports a finding that the operator was not motivated by a legitimate history of poor work performance when it reached its decision to terminate the Complainant. Therefore, based on the foregoing reasons, this Court finds that the Respondent's proffered reasons for terminating

McKinsey are insufficient, and such action represents unlawful discrimination under section 105(c) of the Act.

D. After-Acquired Evidence

Having found that the Respondent failed to establish an affirmative defense, this Court must now determine whether the remedy afforded McKinsey will be limited due to after-acquired evidence of wrongdoing. The Supreme Court has held that an employee's wrongful conduct would not be an absolute bar to the employer's liability, but could potentially limit the employee's available remedies. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885-86 (1995). Specifically, the Court concluded that reinstating an employee or granting front-pay would not be practical when an employer acquires evidence of wrong-doing that is so severe, it would have warranted termination if the employer had known. *Id*. at 886; *see e.g. Asarco, Inc., Contestant*, 18 FMSHRC 317 (March 1996) (finding that after acquired evidence of an employee inadvertently taking a pre-shift examination card off company grounds would not have warranted termination).

There are also multiple National Labor Relations Board decisions that have applied the after-acquired evidence principal established in *McKennon*. Such decisions not only deny reinstatement but also limit back pay when an employer learns that the employee in question engaged in wrongful conduct for which it would have been terminated. *See La Film Sch., LLC & Its Branch, La Recording Sch., LLC & California Fed'n of Teachers & Brandii Grace*, 358, NLRB No. 21 (Mar. 2012); *see also John Cuneo, Inc.* 298 NLRB 856, 861 (June 1990). Moreover, in another NLRB case, *C-Town*, 281 NLRB 458 (Sept. 1986), the Board reiterated that the conventional remedies afforded an employee in unlawful discharge cases – reinstatement and backpay – are denied when the employee has engaged in "serious misconduct which renders them unfit for future employment with their employer." However, the Board also noted that not every impropriety would cause the employee to be deprived the protections of the Act. *Id*. Rather, such a denial would only occur in the "flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further service.'" *Id*. (citing *J.W. Microelectronics Corp*., 259 NLRB 327 (1981)).

In the instant matter, the mine operator learned from a PGSC customer, Calvin Lynch, during the course of the proceedings that McKinsey had in fact threatened Sauerborn's life and had terrified the customer in the process. Lynch volunteered his time to testify at hearing as to the events that occurred on December 20, 2013. Prior to the incident, Lynch testified that he had never even spoken to Sauerborn and had only been a customer of PGSC on three occasions. (Tr. 302-303). He was completely disinterested in the outcome of the proceedings and as such, this Court finds Lynch to be a very credible witness and that his testimony was extremely reliable.

Lynch testified that he was at the PGSC office that day for the second time purchasing sand. (Tr. 304). When he arrived, McKinsey was in the office and seemed very upset as he was yelling and using profanity. (Tr. 306, 309). A female employee who was also present in the office tried to help calm him down, but was unsuccessful. (Tr. 307). Lynch described McKinsey as being in a rage -- he overheard McKinsey say repeatedly "they don't know me," "I'm going to

knock him in the head…I will kill him." (Tr. 307-308, 310). Lynch testified that he was very scared and could tell the female employee was also terrified based on the expression on her face. (Tr. 309).

Sauerborn did not learn of this incident and the threats made by McKinsey until April 25, 2014. (Tr. 311-312, 446). At that time, Sauerborn called Lynch and asked him to explain what he had seen and heard that day. (Tr. 311-312). After Lynch informed Sauerborn of the details, Sauerborn began to feel very threatened, to such an extent that he moved from his home to a new residence. (Tr. 446).

This Court finds that, despite Respondent's failure to mount a viable affirmative defense based upon the Complainant's non-protected activities discussed *supra*, there is an independent non-discriminatory basis for Complainant's dismissal grounded in the after-acquired evidence of threats made by Complainant on December 20 against Sauerborn and the traumatizing effect of such on Respondent's customer, Calvin Lynch. These threats made against Sauerborn's life, and the traumatizing of a customer, rise to a level that would be considered not only flagrant but also of such a nature as to render McKinsey unfit for future employment at PGSC. As a result, McKinsey's right to backpay is cut-off as of the date Sauerborn learned of the threats and would have been justified in terminating McKinsey on April 25, 2014.

V. Penalty

This Court finds that Fred McKinsey is entitled to an award of back pay in the amount of $12,647.25[14] plus interest[15] from the period of January 13, 2014 until April 25, 2014.[16] This Court further finds that McKinsey adequately attempted to mitigate his damages by seeking new employment following his termination. (Tr. 63-65, 73, 99-100). The Secretary's request for compensatory damages for additional expenses incurred by McKinsey as a result of his discharge has been considered and such request is denied.

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[14] The backpay award calculation was based on McKinsey's regular rate of pay at $17.75 per hour for his 40 hours of work per week, plus five hours of overtime pay at $26.63 per week. This Court considered the average hours worked by McKinsey from the start of his employment until the date adverse employment action was taken against him in response to his protected activity, which occurred on December 7, 2013.

[15] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Secretary on Behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co*., 10 FMSHRC 1493, 1505-06 (Nov. 1988).

[16] The backpay period runs from McKinsey's date of termination until April 25, 2014, the date the after-acquired evidence surfaced, which justified McKinsey's termination from PGSC. In light of the after-acquired evidence, the Secretary's request for front pay is denied as is the request for two hours of overtime pay from May 6, 2014, until the date of judgment.

The Secretary proposed a civil penalty amount of $20,000 against PGSC for its violation of section 105(c) arguing the conduct involved both high negligence and high gravity. When assessing a civil penalty, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six criteria set forth in section 110(i) of the Act; 30 U.S.C. § 820(i). *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). The six criteria include: the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id*.

The Respondent has never had a previous violation under section 105(c). At the time the present violation occurred, Respondent's operation was relatively small with assets totaling approximately $500,000 and it was comprised of only nine employees. (Tr. 330-31).

When applying the negligence criterion, Commission case law has provided that the ALJ must consider whether "the operator intended to commit the violation of section 105(c) rather than whether it intended to chill future protected activities." *Sec'y of Labor on Behalf of Poddy v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1319 (Aug. 1996). However, a finding of intentional conduct does not necessarily lead to a finding of high negligence. *Id.* To find high negligence, the ALJ must make a determination that there was "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1320.

This Court has already determined that the Respondent failed to successfully mount an affirmative defense as it was unable to prove it would have terminated McKinsey based on unprotected activity alone. This determination necessitates a finding that Respondent's actions in violation of 110(c) were intentional. The Secretary contends that this in turn should lead to a determination of high negligence. However, this Court finds that there were mitigating circumstances present at the time Complainant was terminated and these circumstances preclude a finding of an aggravated lack of care. Complainant was facially insubordinate when he refused to put on the raincoat when told to do so by his supervisor. Under different circumstances, this behavior could have contributed to a legitimate termination. Furthermore, although Sauerborn's actions unlawfully stemmed from filing of the complaint, this Court finds that Sauerborn honestly believed that McKinsey's work performance was also worthy of the discipline, and that his primary motive was not to chill his speech or punish him for filing the complaint. Rather, Sauerborn had finally decided to stop cutting McKinsey so many breaks and giving him the benefit of the doubt. In light of these mitigating circumstances, this Court concludes that the Respondent's actions involved a low level of negligence.

When analyzing the gravity criterion, the ALJ must look to both the seriousness of the violation and the importance of the standard violated. In implementing section 105(c), Congress intended to "protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge." *Poddy*, 18 FMSHRC at 1321. A chilling effect is not, however, presumed for every violation. *Id*. To determine whether a chilling effect has occurred, the Commission must look at both a subjective (testimony as to whether there was a chilling effect)

and an objective (whether the adverse action would reasonably tend to discourage miners from engaging in protected activity) standard. *Id*.

This Court does not find that objective evidence has been presented tending to show the discharge would discourage miners from engaging in protected activity. As discussed *supra,* the Respondent's actions were partly motivated by his belief that the Complainant deserved to be disciplined for poor work performance and insubordination. Furthermore, the working relationship between the two had become increasingly strained with each passing day. It, therefore, seems unlikely that Respondent would have retaliated against Complainant but for the particular circumstances of the case. Furthermore, two witnesses, Davis and Moses explicitly testified that they did not believe Sauerborn would fire them for making safety complaints, which indicates they did not feel a chilling effect. (Tr. 535, 552-553). As such, this Court does not find subjective evidence of a chilling effect to be present in the instant matter and that the violation involved low gravity.

The Respondent did not argue at hearing or in its brief that if the operator was assessed a civil penalty in the amount of $20,000 it would not be able to continue in business.

In a discrimination case, the mine operator is not obligated to reinstate an employee simply because the Secretary brings a 105(c) action. However, if a temporary reinstatement order is issued, the operator must comply with such order as a good faith effort in attempting to achieve rapid compliance after receiving notice of the violation. In the instant matter, this Court issued an amended order on June 19, 2014, granting temporary economic reinstatement to the Complainant during the pendency of these proceedings. To date, this Court has not been made aware of the operator's failure to comply with the order. Therefore, this Court concludes that the Respondent has satisfied the 110(i) criterion requiring a good faith effort for rapid compliance.

After applying the 110(i) criteria and reaching the aforementioned conclusions regarding the Secretary's request for a civil penalty assessment, this Court finds that a penalty in the amount of $20,000 is too high and should be reduced to $5,000. The reduced penalty amount appropriately reflects the negligence and gravity of the violation as well as the relatively small size of the operator and its net worth at the time of the violation.

ORDER

It is hereby **ORDERED** that:

1. The Respondent **PAY** Fred McKinsey **$12,647.25** in back pay within thirty (30) days of the date of this decision with interest using the *Arkansas-Carbona/Clinchfield Coal Co*. method.

2. The Respondent **EXPUNGE** Fred McKinsey's employment record of any negative reference to the discrimination proceedings and provide a neutral reference from PGSC.

3. The Respondent **PAY** a civil penalty in the amount of **$5,000**, for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.[17]

4. The 5/6/2014 Decision and Order temporarily reinstating McKinsey, as amended by the 6/19/2014 Order of economic reinstatement, is hereby **DISSOLVED**.

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

Distribution:

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 2014

SECRETARY OF LABOR, MSHA, on behalf of **THOMAS A. SIMPKINS**, Complainant, v. TK MINING SERVICES, LLC, and THE MARSHALL COUNTY COAL COMPANY, formerly known as MCELROY COAL COMPANY, Respondents.	TEMPORARY REINSTATEMENT PROCEEDINGS Docket No. WEVA 2015-99-D MORG-CD-2014-23 Mine ID: 46-01437 Contractor ID: K393 Mine: McElroy Mine
SECRETARY OF LABOR, MSHA, on behalf of **BUCKY THOMPSON**, Complainant, v. TK MINING SERVICES, LLC, and THE MARSHALL COUNTY COAL COMPANY, formerly known as MCELROY COAL COMPANY, Respondents.	Docket No. WEVA 2015-100-D MORG-CD-2014-24 Mine ID: 46-01437 Contractor ID: K393 Mine: McElroy Mine
SECRETARY OF LABOR, MSHA, on behalf of **MATTHEW G. TOTTEN**, Complainant, v. TK MINING SERVICES, LLC, and THE MARSHALL COUNTY COAL COMPANY, formerly known as MCELROY COAL COMPANY, Respondents.	Docket No. WEVA 2015-101-D MORG-CD-2014-22 Mine ID: 46-01437 Contractor ID: K393 Mine: McElroy Mine

SECRETARY OF LABOR, MSHA, on behalf of **JOSEPH A. WHIPKEY**, Complainant, v. TK MINING SERVICES, LLC, and THE MARSHALL COUNTY COAL COMPANY, formerly known as MCELROY COAL COMPANY, Respondents.	Docket No. WEVA 2015-102-D MORG-CD-2014-25 Mine ID: 46-01437 Contractor ID: K393 Mine: McElroy Mine

DECISION AND ORDER OF TEMPORARY REINSTATEMENT
and ORDER DISMISSING DOCKETS NO. WEVA 2015-99-D & WEVA 2015-100-D

Appearances: M. del Pilar Castillo, Esq. and John A. Nocito, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Complainants

Matthew M. Linton, Esq., Holland & Hart LLP, Denver, CO, for Respondent TK Mining Services, LLC

Michael D. Glass, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, PA, for Respondent The Marshall County Coal Company

Before: Judge Rae

DECISION

This matter is before me upon four Applications for Temporary Reinstatement filed by the Secretary of Labor on behalf of Thomas A. Simpkins, Bucky Thompson,[1] Matthew G. Totten, and Joseph A. Whipkey ("the Complainants"), respectively, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(c)(2), and Commission Rule 45, 29 C.F.R. § 2700.45.

A hearing on the four applications was held in Morgantown, West Virginia on November 14, 2014. At the hearing, the Secretary withdrew the Applications for Temporary Reinstatement filed on behalf of Simpkins and Thompson. The parties presented arguments and evidence with regard to the two remaining applications. For the reasons set forth below, I grant the two remaining applications and order the temporary reinstatement of Totten and Whipkey.

[1] The case caption formerly referred to Mr. Thompson as "Kenneth R. Thompson." At the hearing, he informed the Court that his legal name is Bucky Kenneth Ronald Thompson, and he goes by his first name. Transcript at 12-13, 17. The case caption has been amended accordingly.

Agreed Facts

At the hearing, the parties entered into the following ten stipulations of fact:

1. At all times relevant to these proceedings, Respondent The Marshall County Coal Company ("Marshall County Coal") was an operator of the Marshall County Mine, formerly known as the McElroy Mine, Mine ID No. 46-01437.

2. The Marshall County Mine is a mine as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

3. Respondent Marshall County Coal is engaged in the operation of a coal mine and is, therefore, an operator as that term is defined in section 3(d) of the Mine Act.

4. At all times relevant to this proceeding, products of the Marshall County Mine entered commerce, or the operation or products thereof affected commerce within the meaning and the scope of section 4 of the Mine Act, 30 U.S.C. § 803.

5. Respondent TK Mining Services, LLC ("TK Mining") is an independent contractor performing services or construction at a coal mine and is, therefore, an operator as defined in section 3(d) of the Mine Act.

6. Thomas Simpkins was previously employed by TK Mining at the Marshall County Mine. Simpkins is a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

7. Bucky Thompson was previously employed by TK Mining at the Marshall County Mine. Thompson is a miner within the meaning of section 3(g) of the Mine Act.

8. Matthew Totten was previously employed by TK Mining at the Marshall County Mine. Totten is a miner within the meaning of section 3(g) of the Mine Act.

9. Joseph Whipkey was previously employed by TK Mining at the Marshall County Mine. Whipkey is a miner within the meaning of section 3(g) of the Mine Act.

10. Marshall County Coal and TK Mining are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this matter.

Tr. 7-9.[2]

[2] The abbreviation "Tr." refers to the transcript of the November 14, 2014 hearing.

Summary of Evidence

The Complainants were hired in 2014 as general hourly laborers for TK Mining, which provides independent contracting services in underground mines. Tr. 18, 52, 78. In July 2014, Marshall County Coal, which is a subsidiary of Murray American Energy, Inc., hired TK Mining to provide necessary belt maintenance services at the Marshall County Mine (formerly McElroy Mine) in Marshall County, West Virginia. Tr. 11, 107-8. The four Complainants were assigned to work the day shift as a crew shoveling the 5 North #1 belt line at the mine. Tr. 79. The crew's task was to shovel rib rolls and debris on the tight side (or off-side) of the belt to clear a two-foot walking path for fire bosses. Tr. 19-20, 53, 79. They were instructed to start at the #7 crosscut and work their way inby. Tr. 43, 87. The crew leader was Thompson, who holds about two years of underground mining experience. Tr. 17-8, 20.

On August 13, 2014, the Complainants arrived at the mine to begin their shift around 8:00 AM, traveled to the #9 crosscut along the belt line where they would be shoveling that day, and began their work. Tr. 22-3, 54-5, 80-2. Around 11:00 AM, a thick haze of rock dust came wafting along the belt line from inby where the crew was working. Tr. 23-4, 43, 82. The crew donned paper masks and continued working for five to fifteen minutes, but the dust thickened and became too much for the masks to handle. Tr. 56-7, 83-4. Totten explained that at first it was a small amount of dust as if from a can or trickle duster, but several minutes later it became a "solid wall almost of just white" that he presumed was bulk dust from track dusting. Tr. 83-4. The Complainants stopped shoveling and walked outby to the nearby air split at the #8 crosscut, where fresh air was present, because they believed it was unsafe to continue working in the dusty conditions due to greatly impaired visibility and the health hazards associated with rock dust inhalation.[3] Tr. 24, 31, 57-9, 84-6. Thompson testified that the crew waited 35 to 40 minutes for the dust to subside before returning to work, then took their lunch break shortly thereafter and began shoveling again around 12:30 PM. Tr. 25. Whipkey and Totten testified the crew took an early lunch then returned to work when the dust had settled. Tr. 59, 86-8.

Just after 1:00 PM (according to Thompson), or an hour and a half after the miners had resumed shoveling (according to Whipkey and Totten), the dust came up once more and the crew again retreated to the fresh air at the split. Tr. 25, 60, 88-9. While the crew was waiting for the dust to subside, a fire boss passed by, covered in white from the rock dust. Tr. 25-27, 61-3, 90-1. He was coming from the same direction as the dust. Tr. 26, 91. He stopped to clean his glasses and spoke with to the crew briefly, acknowledging the dusty conditions and informing the crew that rock dusting was taking place at the #32 crosscut. Tr. 26, 30, 61-3, 91-2.

Later, while the crew was still waiting at the air split, an unfamiliar man approached and looked at them from the other side of the belt. Tr. 27-30, 63-4, 92-4. Whipkey testified that the

[3] Specifically, Totten, who has about four years of underground mining experience, testified that breathing such dust could cause silicosis. Tr. 84. He further felt that the dust exposed the crew to hazards in that visibility was reduced "to where you can't see what you're doing." Tr. 84-5. Whipkey also testified that the dust reduced visibility and caused coughing, a runny nose, and eye irritation. Tr. 57. Thompson testified that it burned the lungs and nostrils and explained that a miner could be seriously injured by tripping and falling under the moving belt due to impaired visibility. Tr. 24, 31.

man stared directly at him but said nothing, although it was so loud on the belt line that it was difficult to hear. Tr. 63. It was the end of the shift, so the crew began walking out of the mine. Thompson testified that the unidentified man "looked under the belt, looked at me, smiled," and seemed to walk with the crew as they departed the air split, but when he looked back again the man had disappeared. Tr. 28. Totten added that the crew had stopped and waited when they got to the head drive in case the unidentified man needed to talk to them, but the man exited through a man door without speaking to them. Tr. 93. When the crew returned to the surface Thompson prepared a daily shift report stating: "Shoveled 30 feet inby of 8¾ wall and under the rollers at 5 north belt. They started dusting at 11:30 and started back up at 1. Got dusted out." Gov't Ex. 1; Tr. 32-36. Thompson delivered copies of the report to various members of mine management, including Mine Superintendent Eric Lipinski (an employee of Marshall County Coal) and TK Mining's Eastern Operations Manager, Jim Holthouser, who was the crew's direct supervisor and had assigned the four of them to the Marshall County Mine job. Tr. 34, 43-4, 48-50.

Later that same day, Lipinski sent an email to Holthouser stating that the Complainants had been observing sitting and lying down on the job and were performing below standards, and he no longer needed their services at the mine. Tr. 98, 119. Lipinski testified he had sent engineer Paul McGee to investigate the crew. Tr. 116. McGee had reported that the Complainants were making insufficient progress at their assigned task and had walked away when he tried to talk to them. Tr. 116-9.

Holthouser met with the Complainants the evening of August 13 and told them they were suspended pending an investigation into the allegations contained in Lipinski's email. Tr. 36, 66-8, 95-7. According to Totten, the Complainants explained to Holthouser that they had stopped working during their shift because of the dusty, unhealthful conditions; Holthouser assured the crew that he would check the mine records to verify that rock dusting had occurred on their shift, and if so they would keep their jobs. Tr. 97-9. The shift foreman's report confirmed that rock dusting had taken place August 13. Tr. 126. However, Lipinski met with Holthouser and stated that he did not want the four men working at the mine anymore. Tr. 120. Holthouser called the Complainants to the mine and gave them termination letters on August 18, 2014. Tr. 37, 70-1. According to Totten and the MSHA investigator, Holthouser indicated the four men had been fired because of the email from Lipinski. Tr. 98.

Legal Framework and Analysis

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

Section 105(c)(2) of the Mine Act provides: "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the

complaint." 30 U.S.C. § 815(c)(2). Thus, unlike a trial on the merits of a discrimination complaint, where the complainant bears the burden of proof by a preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute to the issue of whether the underlying discrimination complaints were "not frivolously brought." *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990); *see also* Commission Rule 45(d), 29 C.F.R. § 2700.45(d).

A claim is not frivolously brought if it "appears to have merit." *FTS Int'l Proppants*, 34 FMSHRC at 2390, *citing* S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The Eleventh Circuit has explained that this standard is "strikingly similar to a reasonable cause standard" and reflects Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747-8 (11th Cir. 1990).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of the underlying discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in a safety-related activity protected by the Mine Act, and that the adverse employment action complained of was motivated, in some part, by that protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-8 (Apr. 1981). Although the judge may review the elements of the underlying discrimination claim, it is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses during the temporary reinstatement proceeding. *FTS Int'l Proppants*, 34 FMSHRC at 2390; *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). It is sufficient for the judge to find that the Complainant engaged in protected activity, the Respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and the adverse action. *CAM Mining, LLC*, 31 FMSHRC 1085.

In this case, there is no dispute that an adverse employment action occurred when the Complainants were terminated on August 18, 2014. There is also reasonable cause to conclude the Complainants engaged in protected activity on August 13, 2014. The Complainants allege that they engaged in protected activity by refusing to work in conditions that they felt were unhealthful and unsafe when a dense cloud of airborne rock dust permeated their work area. Marshall County Coal's witness, Mine Superintendent Lipinski, confirmed that rock dusting took place in the mine on the day in question. Tr. 126. The Complainants testified that the rock dust was so thick it irritated their eyes, noses, and throats and also greatly reduced visibility in the belt area where they were working, giving rise to trip-and-fall hazards. Tr. 24, 31, 57, 84-5. Totten

testified that inhalation of rock dust can cause silicosis. Tr. 84. Thus, the Complainants were aware that working in rock dust exposed them to health and safety hazards and they refused to work in that environment. Based on the hearing testimony, I find that the Secretary's claim that the Complainants engaged in a protected work refusal appears to hold merit.

Because the claims of protected activity and adverse employment action appear to hold merit, the sole remaining question is whether the Secretary had reasonable cause to claim that the adverse employment action was motivated at least in part by the protected activity – that is, the termination of the Complainants was motivated at least in part by discriminatory intent. The Commission has long recognized that direct evidence of motivation is rarely encountered, and more often the only available evidence of discriminatory intent is indirect. *CAM Mining, LLC*, 31 FMSHRC at 1089, *citing Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence that can serve as indicia of discriminatory intent includes the operator's hostility or animus toward the protected activity, the operator's knowledge of the protected activity, and coincidence in time between the protected activity and adverse action. *Id.*

In this case, the alleged protected activity occurred on August 13, 2014 and the Complainants were fired five days later on August 18, 2014, showing a coincidence in time. The managers involved in the termination decision, Lipinski and Holthouser, apparently had knowledge of the alleged protected activity. Totten testified that the Complainants told Holthouser about the protected activity when he suspended them the evening of August 13. Tr. 97-9. Lipinski subsequently conferred with Holthouser about the incident, and he also had a copy of the Complainants' daily shift report for August 13 stating they had been "dusted out" and was aware that rock dusting had taken place in the mine that day. These factors serve as circumstantial evidence that the Complainants' discharge was motivated by the alleged protected activity.[4] Accordingly, I find that the Secretary had reasonable cause to infer discriminatory intent. Under these circumstances, I find that the discrimination complaints appear to hold merit and were not frivolously brought.

Finally, I note that at the hearing Marshall County Coal questioned whether it could be held liable for temporary reinstatement because it did not directly employ the Complainants. Tr. 109. However, aside from prohibiting retaliatory discharge by an employer, section 105(c) of the

[4] In fact, Lipinski's testimony shows the Complainants' discharge was directly linked to their alleged protected activity, namely, their refusal to work in an allegedly unhealthy and unsafe environment on August 13. Lipinski's discovery that the four men had been sitting in the air split instead of doing work on August 13 was what spurred him to email Holthouser that their services were no longer needed in the mine. Tr. 117-9. Marshall County Coal attempted to elicit testimony from Lipinski that the Complainants' work performance also factored into his decision that he did not want them working in the mine. However, such testimony goes to an affirmative defense, and as noted above, analysis of the operator's rebuttal or affirmative defenses does not fall within the limited scope of this temporary reinstatement proceeding. *FTS Int'l Proppants*, 34 FMSHRC at 2390; *Chicopee Coal Co.*, 21 FMSHRC at 719. In addition, to the extent that the Complainants' work performance was negatively affected by any protected activity in which they may have engaged, firing the Complainants for their work performance might have been tantamount to firing them for their protected activity.

Mine Act also allocates liability to anyone who discriminates against a miner or who *causes* a miner to be discharged or discriminated against due to protected activity. 30 U.S.C. § 815(c)(1). The Secretary theorizes that Marshall County Coal instructed TK Mining to discharge the Complainants and TK Mining carried out the discharge, so both entities can be held liable under the Mine Act. Tr. 110. Lipinski is an agent of Marshall County Coal, and considering his involvement in the termination decision, I find that it was not frivolous for the Secretary to initiate discrimination complaints against both Respondents even though Marshall County Coal was not the actual employer.

ORDER

Because the Secretary has withdrawn the Applications for Temporary Reinstatement filed on behalf of Simpkins in Docket No. WEVA 2015-99-D and Thompson in Docket No. WEVA 2015-100-D, those two dockets are hereby **DISMISSED**.

The Applications for Temporary Reinstatement filed on behalf of Totten in Docket No. WEVA 2015-101-D and Whipkey in Docket No. WEVA 2015-102-D are hereby **GRANTED**. The Respondents are **ORDERED** to immediately reinstate Totten and Whipkey to their positions as of the date of their termination, or to similar positions, at the same rate of pay and with all rights and benefits to which they are entitled. The Court retains jurisdiction over these temporary reinstatement proceedings.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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November 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-413 A.C. No. 15-18639-311429
v.	Docket No. KENT 2013-378 A.C. No. 15-18639-308629
SCH TERMINAL COMPANY, INC., Respondent.	Mine: Calvert City Terminal, LLC

DECISION

Appearances: Willow E. Fort, U.S. Department of Labor, Office of the Solicitor
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Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against SCH Terminal Company, Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This case involves four 104(a) citations issued in response to a fatal drowning accident that occurred on February 26, 2012 at the Calvert City Terminal mine. The Secretary has proposed specially assessed penalties which total **$163,003.00**. On November 20, 2013, I granted the Secretary's motion for partial summary judgment, holding that MSHA had jurisdiction over work activity on barges at the Calvert City riverside loading dock. Order Granting Partial Summary Judgment. The parties presented testimony and documentary evidence at a hearing held in London, Kentucky beginning May 14, 2014 followed by submission of post hearing briefs.

Prior to hearing, the parties agreed to a detailed list of stipulations. Tr. I, 7-8. At hearing, MSHA Inspector Richard Hardison testified for the Secretary. SCH Manager William Rager, Safety Trainer David Hicks, Consultant James Manley and retired MSHA Supervisor Roderic Breland testified for the Respondent. For the reasons that follow, Citation Nos. 7657715, 7657713, and 7657714 are **VACATED**. Citation No. 7657716 is **AFFIRMED** as originally written. For reasons explained below I am assessing a total penalty of **$25,000.00**.

II. BACKGROUND

The Calvert City Terminal is a coal-handling and processing facility located on the Tennessee River in Calvert City, Marshall County, Kentucky. Jt. Stip. 8, 12, 17. The terminal has a land based processing facility and a riverside dock that loads custom blended coal onto customer barges. Order Granting Partial Summary Judgment, 2.

The terminal receives shipments of coal from producers by barge, rail, and truck. Once the coal is received, it is unloaded and stored at the terminal. *Id.* Customers place orders for the amount and desired blend of coal. *Id.* The terminal uses a series of hoppers, belts, and conveyors to blend coal to the customer's specifications on the land portion of the terminal. *Id.* Once blended, the coal is sent onto a series of belts and loaded into rail cars, coal trucks, or barges that are owned by customers or independent contractors. *Id.* Respondent receives barges at the riverside dock facility. Tr. I, 28, 185-86. The barges vary in size and specific configuration and are provided by the customer for Respondent to load. Tr. I, 186, 193-94. The standard coal barge is approximately 195 feet long by 35 feet wide. Tr. I, 193. The outside gunnels of the barges are approximately 8-12 feet above the water prior to loading. Tr. I, 64. The barges lower down to approximately three feet above the water after loading. Tr. I, 64-65. The exterior gunnel walkway of the coal barges is approximately two to three feet wide. Tr. I, 131; Tr. II, 42-43. Some barges have rake ends with platforms 6-20 feet long. Tr. I, 194. Barge interior cargo holds are buffered by a combing that ranges from 36 to 40 inches tall. Tr. I, 195. The gunnel walkway has eighteen inch wing hatches with locking lids used to inspect and pump out the barge wing tanks. Tr. II, 22-24. An independent contractor, Wepfer Marine, maneuvers the barges into position under direction of Respondent's load out operator. Tr. I, 186; GX 8, 4.[1]

Prior to February 26, 2012, the barges next in line were tied off loosely to the fixed barge and maneuvered when needed by tugboats. Tr. I, 71, 198; Tr. II, 96; GX. 3, p. 6. The deckhands stage, draft and pump in-line barges, and then tie the barges to a winch system in order to be loaded. Tr. I, 30, 100-01; GX, 7-8. A deckhand "drafts" a barge by walking out onto the gunnel or platform surrounding the barge's hold. Tr. I, 30. The deckhand then extends a long measuring stick, called a "drafting stick," down to the surface of the water below to determine the position of the barge. *Id*. The drafting stick measurements are relayed to the load-out operator in charge of the chute, which extends out over the barge to load the coal. Tr. I, 30-31.

Prior to February 26, 2012, the Respondent did not require deckhands to use fall protection while drafting the barges. Tr. I, 191-92. The Respondent did require all deckhands to wear a U.S. Coast Guard approved flotation vest. Tr. I, 207, 223. The life-vest in use prior to the accident did not support an unconscious person's head above water. Tr. I, 251. There have previously been instances where SCH personnel fell into the water while working on the barges, but all apparently swam to safety without incident. Tr. I, 75, 247.

[1] Volume 1 of the transcript will be designated as Tr. I, volume 2 as Tr. II. Consistent with the hearing record the Secretary's exhibits will be denoted as GX and Respondent's exhibits RX.

Respondent's Safety Trainer David Hicks provided annual safety training and general fall protection instruction to all SCH employees, including accident victim Kevin Meyers. Jt. Stip. 24; Tr. I, 239. On February 24, 2012, MSHA completed a regularly scheduled E 01 Inspection of the SCH terminal. Jt. Stip. 15. MSHA did not issue any citations regarding illumination, fall protection, or inadequate training at the SCH loading dock during the E 01 inspection. Tr. I, 192, 202; GX 13, 3.

The Calvert City terminal is located in Calvert City, Kentucky in the Central Time Zone. Tr. I, 118. The MSHA Hotline Call Center is located in Arlington, Virginia in the Eastern Time Zone. Tr. I, 117, 119.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. February 26, 2012 Accident

During the night shift of February 25-26, 2012, SCH personnel loaded coal at the riverside dock onto a string of barges. Tr. I, 37; GX 3, 5-6. The air temperature was 26 degrees and the water temperature in the river was approximately 47 degrees. Tr. I, 116, GX, 3, 9. At approximately 1:10 AM CST, SCH load-out operator Matt Kissiar asked deckhand Kevin Meyers by radio to draft the next barge in line. Tr. I, 37; GX Ex. 3, 5. Mr. Meyers crossed over to an empty barge, which was tied off loosely to the fixed loading dock. Tr. I, 53; GX 3, 6. Meyers wore a coast guard-approved life-vest, personal radio, and carried a flashlight and drafting stick with him when he crossed over to the empty barge. Jt. Stip. 18.

At approximately 1:15 a.m., Kissiar asked where Meyers was after Meyers failed to report drafting measurements and was not visible. Tr. I, 37; GX Ex. 3, 4. SCH personnel and Wepfer Marine began searching for Meyers in both the river and within the cargo hold of the barge. Tr. I, 37-38; Sec'y Ex. 3, 7. A Wepfer Marine deckhand spotted and then retrieved Meyers' ball cap from the river at approximately 1:25 a.m. Tr. I, 129, GX 3, 8. At 1:34 a.m., Wepfer Marine requested the US Coast Guard to stop river traffic and also called 911 to request a rescue squad. Tr. I, 115; GX 8, 4. The Marshal County Rescue Squad located Meyers' body floating face down under the rake end of the fixed work barge at 2:36 a.m. Tr. I, 74, 116. Mr. Meyers was pronounced dead at 3:40 a.m. by the Marshall County Coroner. GX 3, 8-9. Meyers' body did not exhibit any signs of broken bones, bleeding or obvious physical trauma. GX 3, 11. The Coroner determined that the cause of Mr. Meyers' death was drowning. Tr. I, 8; GX 3, 13; GX 8, 6.

B. Citation No. 7657715

Inspector Hardison issued Citation No. 7657715 for an alleged violation of 30 CFR § 77.1710(g) on September 18, 2012. Hardison alleged within the citation that:

> Safety belts or lines were not provided to protect miners from falling into the water while performing work on barges. The mine

> operator's failure to provide safety belts or lines contributed to a fatality involving a deckhand on February 26, 2012.

GX 11, 1.

Hardison designated Citation No. 7657715 as a high negligence violation that contributed to the occurrence of a fatal injury. The Secretary has proposed a specially assessed penalty of $52,500.00 for Citation No. 7657715. GX 13, 3.

1. Testimony

Inspector Hardison testified on the basis of his visits to Respondent's loading dock on February 26, 2012 and October 23, 2012. Tr. I, 36. Hardison stated that his observations and interviews led him to conclude that SCH employees were particularly exposed to falling into the river while drafting the barges at night. Tr. I, 78. Hardison was concerned that deckhands had to hold the drafting rod in one hand and use their other hand to point a flashlight down the rod while leaning out over the edge of the barge. *Id.* He testified that deckhands could also fall 8-10 feet into the interior cargo hold before the barge was loaded. Tr. I, 72. Hardison stated that he did not believe it was possible for a deckhand to maintain three points of contact with the combing while carrying both a flashlight and drafting stick. Tr. I, 173-74. Hardison testified that MSHA had previously issued a Program Information Bulletin on July 8, 2010, notifying coal operators that an employee had drowned while wearing a life vest after falling from a barge into cold water. Tr. I, 80-81; GX 5 (PIB No. 10-08). Hardison stated that Respondent should have realized that drafting the barges at night involved inherently dangerous conditions that required the use of fall protection. Tr. I, 76-77. On cross-examination, Hardison conceded that he did not have any prior work or inspection experience on barges. Tr. I, 172-73. He also confirmed that after the accident, MSHA tech support visited Respondent's loading dock, but were unable to provide viable guidelines for a barge based fall protection system. Tr. I, 158.

Respondent's Chief Operating Officer William Rager testified regarding the work conditions at the SCH loading dock. Rager stated that he had worked for SCH for over 29 years and had performed many dockside tasks previously. Tr. I, 185. Rager testified that MSHA had never previously issued any citations regarding fall protection at the SCH loading dock. Tr. I, 192. Rager opined that tying off to a moveable barge was more hazardous than potential falls into the river. Tr. I, 193. He explained that employing a tie-off system on a moveable barge could cause a deckhand to be caught between barges and or the dock. Tr. 192-93. Rager testified that in visiting numerous riverside loading facilities, he had never observed a deckhand use a tie-off system to prevent falls into water. Tr. I, 191. Rager did state that deckhands would use fall protection when working on covered barges above hard surfaces. Tr. I, 217. However, he stated that the interior cargo hold of the open coal barges loaded by SCH were protected by a combing that averaged somewhere between 36 and 40 inches high. Tr. I, 195.

Rager testified that Mr. Meyers had worked with Respondent for over 5 years and spent the majority of his time working as a deckhand. Tr. I, 188. Rager stated that after the accident, Respondent consulted with several engineering companies regarding possible fall protection systems, but none of these companies offered a system designed to prevent workers from falling off the barge into water. Tr. I, 229-233. He testified that following Meyers' accident,

Respondent instituted a number of new safety protocols. Tr. I, 210. These measures included drafting barges from the fixed barge side while attached to the winch system, use of a different type of lifejacket, use of personal locators, and an improvised tie off method designed by Respondent's personnel. Tr. I, 211-15, 221.

Respondent's Safety Trainer David Hicks testified regarding Respondent's fall protection training. Hicks stated that in addition to his normal electrical duties, he had previously worked as a deckhand and drafted barges. Tr. I, 236. Hicks stated that he had always interpreted 30 CFR 77.1710(g) as applying to potential falls onto hard surfaces. Tr. I, 255. Hicks acknowledged that an SCH worker had previously fallen into the river, but swam safely to shore with the use of a lifejacket. Tr. I, 247.

Marine Surveyor James Manley testified for the Respondent regarding industry practices on navigable barges. Manley had worked as marine surveyor for 37 years and owned a fleet of towboats and barges. Tr. II, 8. Manley had previously testified as an expert witness on marine practices in federal admiralty courts. Tr. II, 9. He stated that deckhands never tie off to navigable barges while maneuvering, securing, or drafting barges. Tr. II, 14, 16. Manley explained that tying off to a navigable barge increased the dangers associated with working around loading equipment and other moving barges. Tr. II, 17, 27. He opined that a fall from a barge into water did not present a fall hazard in itself and the use of a lifejacket minimized drowning hazards. Tr. II, 16-17.

Manley did state that fall protection was used at barges when elevated work was performed above a hard surface. Tr. II, 16. On cross-examination, Manley explained that wing hatches on a typical coal barge are 18 inches in diameter and are not large enough for it to be likely for a significant fall or injury to occur. Tr. II, 34-35. He specifically stated that the eighteen inch wing hatches did not present a fall hazard similar to the four foot by seven foot hatch on a covered barge that had been involved in a fatality at a different operator's facility. Tr. II, 32-34. Manley testified that the typical coal barge has a three foot high combing that protects deckhands from falling into the interior cargo and allows workers to maintain three points of contact while walking on the exterior gunnel. Tr. II, 42-43. Manley specifically stated that the exterior gunnel, or wing deck, of an open coal barge is three feet three inches wide. *Id*.

2. The Cited Standard

30 CFR 77.1710(g) mandates that:

> Safety belts and lines (shall be worn) where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Within the same section, 30 CFR 77.1710(h) provides that:

> Lifejackets or belts (shall be worn) where there is danger from falling into water.

The MSHA Program Policy Manual (PPM) states that:

> Paragraph (g) of this section requires that safety belts and lines shall be worn where there is a danger of falling, except when safety belts and lines may present greater hazard or are impractical. In those cases, the standard requires that alternative precautions be taken to provide the miners with an equal or greater degree of protection. Substantial scaffolding with adequate guardrails or safety nets are acceptable alternatives. The objective of this policy is to insure that miners working where there is a danger of falling are always protected.

PPM, Vol. V, p. 208-209.

MSHA's Program policy manual does not provide any specific guidance on 30 CFR 77.1710(h). However, the July 2010 PIB testified to by Inspector Hardison states that:

> MSHA *recommends* the following Best Practices when working at river load out facilities:
>
> > Where possible, install and use lifeline tie-off runs and fall protection.
> >
> > Where fall protection is not feasible, always wear a life jacket when working around bodies of water.

GX 5, 2 (emphasis added).

Neither 30 CFR 77.1710(h) nor the July 2010 PIB require or recommend the use of a particular type of lifejacket when there is a danger of falling into water. 30 CFR 77.1710(h); GX 5, 2.

3. Statutory Interpretation

An operator is entitled to the due process protection available in the enforcement of regulations. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995). When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. *Id.* Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Id.* at 1318. The Commission applies a reasonably prudent person test to determine, "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." *Id*.

A regulation must be interpreted so as to harmonize and not to conflict with the objective of the statute it implements. *Cumberland Coal Res., L.P. v FMSHRC*, 2005 WL 3804997 (D.C.

Cir. 2005). Regulatory language cannot be construed in a vacuum and the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *Northshore Mining Company v. Secretary of Labor*, 709 F.3d 706, 710 (8th Cir. 2013). An agency's interpretation of its own standards should be given deference when the interpretation is sensible and in accord with purposes of the Act. *Energy West Mining Co v. FMSHRC*, 40 F. 3d 457, 460 (D.C. Cir. 1994). However, an agency's interpretation of a regulation is not owed deference if it fails to correspond to the apparent purpose of the regulation and overall placement within the regulation. *Northshore Mining*, 709 F.3d at 711-712 (holding that standard protecting workers from electrocution did not require protection from mechanical movement); *see also Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). MSHA publications such as a PIB and or the PPM may aid the Commission in determining the proper application of a regulation. *Connolly Pac. Co.,* 33 FMSHRC 2270, 2277 (ALJ Miller)(Sept. 2011); *TwentyMile Coal Co.*, 30 FMSHRC 736, 738(Aug. 2008)(split decision upholding Secretary's interpretation when PIB detailed mandatory requirements of regulation).

4. Party Arguments

The Secretary argues that 30 CFR 77.1710(g) is not limited to falls onto a particular type of surface. Sec'y Br., 20. The Secretary contends that deckhands were exposed to falls into both interior cargo holds and the water. *Id*. at 21. The Secretary states that the use of fall protection was feasible at Respondent's loading dock and that SCH management were aware of fall protection systems in use at other loading docks. *Id*. at 22. The Secretary argues that 30 CFR § 77.1710(g) applies to all fall hazards and 30 § CFR 77.1710(h) merely supplements 30 CFR § 77.1710(g) when water presents a hazard. *Id*. at 21-22. The Secretary argues that MSHA's failure to previously issue fall protection violations at the loading dock does not present a viable defense to Citation No. 7657715. Sec'y Br., 17; *Sec'y v. Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug 2012).

The Respondent argues that 30 CFR § 77.1710(g) is a generic standard while 30 CFR § 77.1710(h) is a specific standard that governs work around water. Resp. Br., 7. The Respondent contends that it complied with the applicable specific standard, 30 CFR 77.1710(h), by requiring Mr. Meyers and all other deckhands to wear a U.S. Coast Guard approved life vest during work on the barges. Resp. Br., 7. The Respondent also argues that the three foot high combing adequately protects deckhands from falls into the interior cargo. Resp. Br., 7-8. It contends that the PIB issued by MSHA in 2010 only *recommends* the use of fall protection on barges and specifically states that a life jacket shall be worn where fall protection is not feasible. Resp. Br., 5. The Respondent also argues that MSHA's failure to issue previous citations or notifications deprived it adequate notice of the legal position advanced at hearing by the Secretary. Resp. Br., 8, citing *Clintwood Elkhorn Mining*, 36 FMSHRC 1282, 1287-88 (ALJ Rae)(May 2014)(vacating alleged violation of 77.1710(g) when MSHA failed to issue citations regarding obvious condition prior to fatal fall; *Lanham Coal*, 13 FMSHRC 1341, 1333-34 (1991)(remanding case when ALJ failed to determine whether the 30 CFR 77.1710(g) provided

adequate notice to the operator that the use of fall protection was required under the circumstances).[2]

5. Findings

After reviewing all evidence submitted, I conclude that the Secretary has not shown that the Respondent violated 30 CFR 77.1710(g). As an initial observation, I again note that Inspector Hardison conceded he had no previous work or inspection experience at loading docks. Tr. I, 83, 127. Although Mr. Hardison claimed that he had previously inspected unfamiliar work sites, I found his application of 30 CFR 77.1710(g) to navigable barges vague and unsupported by any published guidance or industry practice. Tr. I, 31-32, 76-77. Furthermore, during cross-examination, I found his testimony evasive and non-responsive to questions regarding the application of the cited standard. Tr. I, 163-64. Additionally, I found the testimony of Mr. Rager, Mr. Hicks, and Mr. Manley straight forward, detailed, unequivocal and credible, and based upon many years of experience at dockside loading operations.

Subsection (g) of 30 CFR 77.1710 mandates that safety belts and lines must be used when there is a danger of falling. 30 CFR 77.1710(g). The Secretary failed to present any evidence that a fall of 8-10 feet into water presents a significant hazard in and of itself. On cross examination, Inspector Hardison conceded that there are distinct differences between a fall into water and a fall onto a hard surface. Tr. I, 159. Indeed, Safety Trainer Hicks testified another SCH worker had previously fallen into the river and swam to safety with the use of a lifejacket. Tr. I, 247.

The Secretary has submitted evidence of incidents at other loading docks where a worker drowned after falling into water and a separate incident in which a worker died after falling into an empty cargo hold through a large unprotected hatch. GX 5 and 7. However, these incidents reinforce this court's finding that the danger of falling into water is drowning while the danger of falling onto a hard surface is blunt trauma. Indeed, although the Secretary has argued that 30 CFR 77.1710(g) applies in situations of varying fall distances, all of the cases cited by the Secretary involve falls onto solid surfaces. GX 19; *Worley Blue Quarry*, Inc., 25 FMSHRC 399, 401 (July 2003) (ALJ Melick); *Cannelton Indust. Inc*., 7 FMSHRC 1077, 1078(July 1985)(ALJ Melick); *Kaiser Steel Corp*., 1 FMSHRC 343, 343 (May 1979).

Furthermore, the language of 30 CFR 77.1710(h) clearly mandates that,

> Lifejackets or belts (shall be worn) where there is danger from falling into water.

30 CFR 77.1710(h).

[2] On remand, the ALJ determined that despite evident hazards, a reasonable person familiar with industry practices would not have realized that tarping a truck required the use of safety belts and lines and vacated the citation. *Lanham Coal*, 13 FMSHRC 1710, 1712 (ALJ Broderick)(October 1991).

Thus, the plain text of 30 CFR 77.1710 specifies that the required means of compliance for a possible fall into water is the use of a lifejacket. 30 CFR 77.1710(h).

Additionally, MSHA's July 8, 2010 PIB explicitly recognizes that the use of a lifejacket on a barge without fall protection is allowable in situations where fall protection is infeasible. GX 5, 2; *see also* PPM, Vol. V, p. 208-209 (stating that alternate means of protection may be used to comply with 30 CFR 77.1710(g) when safety lines are hazardous or impractical). In this regard it is important to note, despite the absence of fall protection, MSHA did not find that the operator had violated 30 CFR 77.1710(g), after investigating the accident upon which the July 8, 2010 PIB was based. MSHA Accident Investigation Report, CAI-2008-30 (investigating drowning that occurred on river based coal barge and issuing one citation for a violation of 30 CFR § 48.31(a)).[3] Indeed, MSHA had not cited *any* coal terminal operators for a violation of 30 CFR§ 77.1710(g) in the five years prior to the issuance of this citation. Jt. Stip. 25.

Thus, MSHA has not previously applied the interpretation of 30 CFR 77.1710(g) advanced by the Secretary at hearing in the instant matter. CAI-2008-30; Jt. Stip. 25. It is well established that a previous inconsistent enforcement pattern by MSHA inspectors does not offer a defense to a correct application of the standard. *Mach Mining, LLC*, 34 FMSHRC 1774. However, in this case, MSHA's previous enforcement history of 30 CFR 77.1710(g) merely reinforces this court's independent finding that the Secretary's instant interpretation of 30 CFR 77.1710(g) is unreasonable and contradictory to the plain text of 30 CFR 77.1710, the PPM, and the PIB. 30 CFR 77.1710 (g)-(h); PPM, Vol. V, p. 208-209; Sec'y Ex. 5, 2.

During cross examination of Mr. Rager, the Secretary's counsel alluded to available fall protection systems but did not submit any exhibits or testimony regarding systems available at the time of the incident. Tr. I, 229-30; GX, 22. Additionally, Rager and Manley consistently and credibly testified that the use of fall protection on open coal barges was highly unusual and increased the likelihood of entrapment and crushing hazards. Tr. I, 192-93; Tr. II, 14, 27. Therefore, I find that the Respondent has credibly demonstrated that the use of fall protection on the coal barge at issue was infeasible at the time of the accident.[4]

I further find that the Respondent has submitted convincing rebuttal evidence that the 36-40 inch high combing adjacent to the gunnel protected workers from falls into the interior cargo hold. Tr. I, 195; Tr. II, 42-43. Finally, I conclude that the Secretary's assertion that 30 CFR

[3] http://www.msha.gov/FATALS/2008/ftl08c30.pdf.

[4] Mr. Rager testified in detail regarding comprehensive abatement efforts undertaken by Respondent after the accident including the use of an improvised tie-off method during drafting. Tr. I, 211-215. This court finds that these remedial efforts, while admirable best management policies, are not mandatory measures required by the current language of the Mine Act or the Secretary's regulations. Indeed, the Respondent adopted several of these measures under duress from MSHA and has credibly asserted that the prohibition on walking the outside gunnel increases the risks of a barge sinking during loading due to undetected damage or imbalance. Tr. I, 196-97. Most critically, it would be inappropriate to rely upon the Respondent's remedial measures following the accident to establish liability under the Mine Act. *Russell Collins and Virgil Kelley v. Secretary of Labor*, 5 FMSHRC 1339, 1352; Federal Rule of Evidence 407.

77.1710(g) imposes additional requirements upon water-side workers who are in compliance with 30 CFR 77.1710(h) is contradictory to both the plain language of 30 CFR 77.1710 and MSHA's official guidance on the two standards. 30 CFR 77.1710(g)-(h); PPM, Vol. V, p. 208-209; GX 5, 2.

Therefore, I find that the interpretation of 30 CFR 77.1710(g) advanced by the Secretary at hearing is undeserving of deference. *Northshore Mining*, 709 F.3d at 711-712. In a situation where the use of safety lines was infeasible, the Respondent provided the statutorily required means of protection for a possible fall into water by requiring all deckhands, including Mr. Meyers, to wear a U.S. Coast Guard approved lifejacket. 30 CFR 77.1710(h); Sec'y Ex. 5, 2. The Respondent also complied with the general requirements of 30 CFR 77.1710(g) by maintaining barge combings that protected workers from falls into the interior cargo hold. Tr. I, 195; PPM, Vol. V, p. 208-209 (stating that the use of guardrails to prevent falls provides an alternate means of compliance for 30 CFR 77.1710(g)). Accordingly, Citation No. 7657715 is **VACATED**.

C. Citation No. 7657713

Inspector Hardison issued Citation No. 7657713 for an alleged violation of 30 CFR § 48.27(a) on September 18, 2012. He alleged within the citation that:

> The mine operator failed to provide task training for employees regarding the use of safety belts or lines where there is a danger of falling. The mine operator's failure to provide adequate training in the use of safety belts or lines contributed to the fatality involving a deckhand on February 26, 2012.

GX 9, 1.

Hardison designated Citation No. 7657713 as a high negligence violation that contributed to the occurrence of a fatal injury. The Secretary has proposed a specially assessed penalty of $52,500.00 for Citation No. 7657713. GX 13, 3.

1. Testimony

Inspector Hardison testified the Respondent's records indicated that Respondent had failed to train employees on the fall protection hazards involved in loading coal barges. Tr. I, 85. Hardison stated that he inspected the training records for Mr. Meyers specifically and did not find any record for instructions regarding fall hazards associated with loading barges. Tr. I, 87. Hardison maintained that the failure to train Meyers in the use of fall protection contributed to his fall and fatality. Tr. I, 93-94. Hardison confirmed that the Respondent employed an MSHA certified trainer to provide safety training to employees. Tr. I, 92.

Respondent's Safety Trainer David Hicks testified regarding the training he provided Mr. Meyers and other SCH employees prior to February 26, 2012. Hicks testified that he had conducted the MSHA required 8 hour annual refresher training at the Calvert City terminal for

over seven years. Tr. I, 236. Hicks stated that he submitted copies of his training plans to MSHA for their approval prior to conducting the refresher class. Tr. 237. Hicks testified that all employees, including deckhands, were provided fall protection training concentrating on methods of avoiding falls onto hard surfaces. Tr. I, 239. He stated that MSHA inspectors had previously sat in on the annual refresher course. Tr. I, 238. Hicks testified that he dedicated one hour of the annual refresher course to fall protection requirements. Tr. I, 239. Hicks stated that he had provided the annual refresher course, including the fall protection section, to Kevin Meyers in 2010 and 2011. Tr. I, 247; RX 1, 2-3.

Hicks testified that new deckhands were trained before being allowed to work on the barges. Tr. I, 241. He explained that deckhands were first taken on a tour of the loading dock and shown trip hazards and pinch points. Tr. I, 241-42. Hicks stated that new employees spent their first shift observing loading operations from the facility shack. *Id*. He testified that once a deckhand received hands on training on the dock, the trainer and the worker signed a form certifying that the training had been completed. *Id*. On cross-examination, Hicks explained that he specifically warned new deckhands to avoid stepping on man hatches, maintain good housekeeping, and keep three points of contact with the gunnel while working on the barge. Tr. I, 255. The Respondent submitted a copy of the syllabus for the annual refresher training, which included sections on slip/trip hazards and fall protection. Tr. I, 237; Resp. Ex. 1, 2-3.

2. The Cited Standard

The cited standard, 30 CFR § 48.27(c), requires that:

> Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, including 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, prior to performing such task.

3. Findings

The parties stipulated that Kevin Meyers participated in an 8 hour annual refresher course on July 22, 2011. Jt. Stip. 24. After reviewing Hardison's testimony it appears that Hardison located task training records for SCH deckhands, including Mr. Meyers, but based Citation No. 7657713 on a failure to instruct deckhands on the use of safety lines during barge loading operations. Tr. I, 88-89. However, I have held above that the Respondent complied with both 30 CFR § 77.1710(g) and 30 CFR § 77.1710(h) through the use of protective barge combings and life vests. Thus, the Respondent was not obligated to provide training on barge-based safety lines not required by the Secretary's regulations.

Additionally, I credit Safety Trainer Hicks detailed testimony regarding new deck hand training and annual-refresher courses provided to all SCH deck hands. Tr. I, 239, 241-42.

Accordingly, I find that the Respondent provided new task training pursuant to 30 CFR 48.27(c) to all SCH deckhands, including Kevin Meyers, regarding possible hazards and appropriate safety measures during barge loading activities. Therefore, Citation No. 7657713 is **VACATED**.

D. Citation No. 7657714

Inspector Hardison issued Citation No. 7657714 for an alleged violation of 30 CFR § 50.10(a) on September 18, 2012. He alleged within the citation that:

> The mine operator failed to contact MSHA in a timely manner after the occurrence of a fatal accident. The operator shall immediately contact without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred.

GX 10, 1.

Hardison designated Citation No. 7657714 as a non-contributory violation but noted that a fatal injury had occurred and alleged that the failure to report the fatality was due to high negligence. GX 10, 1-2. The Secretary has proposed a regularly assessed penalty of $5,700.00 for Citation No. 7657714. GX 13, 3.

1. Testimony

Inspector Hardison testified that load-out operator Matt Kissiar first issued a radio lookout for Kevin Meyers at 1:15 a.m. Tr. I, 113. Hardison stated that a Wepfer Marine deckhand then located Mr. Meyers' baseball cap in the river at 1:25 a.m. Tr. I, 114. Hardison testified that the Marshall County Rescue Squad did not find Meyers body until 2:36 a.m.. Tr. I, 116. Hardison stated that as the river was 47 degrees, the Respondent should have contacted MSHA by 1:40 a.m. fifteen minutes after the Wepfer Marine deckhand located Meyers' ball cap in the river. Tr. I, 120. Hardison testified that the Arlington, Virginia MSHA Call Center report indicated that Respondent first reported Mr. Meyers missing at 2:41:15 a.m. Hardison stated the Arlington Call Center adjusted this time to reflect the Central Time Zone for the Calvert City Terminal. Tr. I, 118. However, Hardison acknowledged that the Arlington Call Center, which is in the eastern time zone, had previously failed to adjust call times to reflect the time zone where an incident had occurred. Tr. I, 118-119. On cross-examination, Hardison confirmed that the MSHA Accident Report on Mr. Meyers' fatality stated that Respondent contacted the Arlington Call Center at 1:40 a.m. Tr. I, 148-49.

The Respondent did not offer direct testimony on Citation No. 7657714. Tr. I, 207.

2. The Cited Standard

The cited standard, 30 CFR § 50.10(a), requires that:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1–800–746–1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine.

30 CFR 50.10 also requires operators to contact the MSHA hotline within 15 minutes for:

> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
>
> (d) Any other accident.

3. Findings

I first find that Respondent did not have reason to know of a death until 2:36 a.m. Central Time when Mr. Meyers' body was recovered unresponsive at the rake of the fixed barge.[5] Tr. I, 116. As such, Inspector Hardison's claim that Respondent failed to contact the MSHA call center until 2:41 a.m. Central Time does not support a violation of 30 CFR 50.10(a). Tr. I. 119.

However, I do find that the Respondent's management was nonetheless obligated by 30 CFR 50.10(b) to contact MSHA within 15 minutes of learning that Mr. Meyers had likely fallen into the river and was exposed to potential serious injuries. 30 CFR 50.10(b); *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997) (holding that an ALJ may adjudicate issues presented at hearing in reference to an alternate standard when the Respondent has appropriate notice). As the Respondent's counsel cross-examined Inspector Hardison regarding the requirements of both 30 CFR 50.10(a) and 30 CFR 50.10(b), I find that the Respondent had adequate notice of the duties imposed upon the operator by 30 CFR 50.10(b). Tr. I, 154-55.

The evidence submitted to this court indicates that a Wepfer Marine deckhand retrieved Mr. Meyers' baseball hat from the river at approximately 1:25 a.m. central time and SCH

[5] Both parties' testimony indicates that SCH workers had previously fallen into the river and swam to safety without injury. Tr. I, 76, 247. As such, this court to declines to find that the Respondent had reason to know of a fatality when Mr. Myers ball cap was spotted in the river by a Wepfer Marine deckhand at 1:25 a.m..

personnel contacted Respondent's management to report Meyers' disappearance within minutes.[6] Tr. I, 129; Sec'y Ex. 3, 8. As such, I find that Respondent's management officials learned of Meyers' disappearance at approximately 1:30 a.m..[7]

The MSHA escalation report indicates that SCH personnel first contacted the Arlington call center at "2:41:15 a.m.," was disconnected due to technical difficulties, and then immediately called back to report a missing worker and possible drowning. Tr. I, 118; GX 2, 1. The escalation report indicates that the caller reported the time of the incident as "1:45" a.m. *Id*. The MSHA escalation report does not specify a time zone for any of the times listed on the report, including the incident time provided by the caller. *Id*.

The MSHA accident investigation report issued on September 17, 2012 states that, "On Sunday February 26, 2012 at 1:40 a.m., the mine operator notified the Mine Safety and Health Administration of the accident." GX 8, 5. The accident report lists the other citations contained in this decision but does not list Citation No. 7657714 as one of the enforcement actions taken in response to the fatality. Thus, Inspector Hardison's claim that the Respondent failed to contact the Arlington Call Center until 2:41 a.m. Central Time is contradicted by the MSHA accident report submitted to this court by the Secretary. Tr. I, 119; GX 8, 5, 9.

At hearing, Inspector Hardison asserted that the Arlington Call Center adjusted the recorded time of the call to reflect Central Time. Tr. I, 119. However, Hardison did not provide any support for that belief and acknowledged that the call center had failed to adjust call times to the appropriate time zone in the past. *Id.* Indeed, as the escalation report recorded the call- time down to the second, it appears that the call-time was recorded automatically. Tr. I, 118, GX 2, 1. As the Arlington Call Center is located in the Eastern time zone, I find that this

[6] Prior to hearing, the Secretary submitted deposition transcripts from SCH personnel involved in rescue efforts on February 26, 2012 for this court's consideration. During deposition, SCH personnel consistently stated that load out operator Matt Kissiar radioed supervisor Matt Foley shortly after a Wepfer Marine employee located Myer's ball cap. According to their depositions, Foley in turn notified assistant terminal manager Jerry Jones who first called the MSHA call center and then notified Dan Bailey of Myer's disappearance. Sec'y Motion for Summary Judgment: Matt Foley Dep. 27-28; Matt Kissiar Dep. 21-22; Jerry Jones Dep., 6,-10.

[7] All testimony and evidence submitted to this court regarding search efforts at the loading dock, including Inspector Hardison's notes, are indicated as approximate times provided by the Respondent's personnel after the occurrence of the accident. From this evidence, I have determined that Respondent's management was notified that an employee was missing and had possibly fallen into the river at approximately 1:30 a.m. Central Time.

automatic time record indicates that the initial call was received at 2:41:15 Eastern Time. [8] Thus, I find that Respondent's management contacted MSHA at 2:41 a.m. Eastern Time, or 1:41 a.m. Central Time.

As Respondent's management learned of Mr. Meyers' disappearance at approximately 1:30 a.m. Central Time and contacted the MSHA call center at 1:41 a.m. Central Time, I find that the Respondent contacted the MSHA call center within 15 minutes of a reportable injury per 30 CFR 50.10(b). Thus, the evidence presented at hearing fails to support a violation of either 30 CFR 50.10(a) or (b). Accordingly, Citation No. 7657714 is **VACATED**.

E. Citation No. 7657716

Inspector Hardison issued Citation No. 7657716 for an alleged violation of 30 CFR § 77.207 on September 18, 2012. He alleged within the citation that:

> Illumination was not adequate to provide a safe walkway in work areas along the perimeter of the barges that were being measured for draft. The barges being measured were away from the main lighting system that was focused on the area where coal was being loaded into the barges. The lack of walkway illumination contributed to a fatality involving a deckhand on February 26, 2012.

Hardison designated Citation No. 7657716 as a high negligence violation that contributed to the occurrence of a fatal injury. GX 12, 1. The Secretary has proposed a specially assessed penalty of $52,500.00 for Citation No. 8436107. GX 13, 3.

1. Testimony

The parties have stipulated that Kevin Meyers was carrying a handheld flash light along with a drafting stick prior to the accident. Jt. Stip. 18. At hearing, Inspector Hardison stated that he issued this citation after interviews with workers who had observed lighting conditions at the loading dock prior to the accident. Tr. I, 96-97. Hardison stated that he determined from these interviews that permanent lighting was focused on the fixed loading dock itself but barges in line for loading were not adequately illuminated. Tr. I, 99. Hardison testified that after Mr. Meyers went missing, Respondent used tugboat lights to search the area around the barges. Tr. I, 106. Hardison stated that after the accident occurred, Respondent installed additional lighting and provided workers with cap lights. Tr. I, 102. Inspector Hardison confirmed at hearing that he did not observe the Respondent's loading dock at night prior to the installation of additional lighting. Tr. I, 104.

[8] This court finds that confusion regarding the time zone of the accident location on the part of the Arlington Call Center is not surprising, given that the state of Kentucky occupies both the Central and Eastern time zones.

Respondent's Chief Operating Officer Rager testified that prior to the accident, the entire loading dock area was lit by both walkway lighting on the fixed barge and dolphin mounted stadium type lighting. Tr. I, 203. Rager also stated that Respondent's loading dock was located next to an industrial park that was extremely well lit. Tr. I, 205. Rager explained that Mr. Meyers and other deckhands used their flashlights primarily to check wing tanks and cargo boxes for water. Tr. I, 204. Rager stated that he maintained an open door policy regarding safety concerns and had never received any employee complaints regarding lighting at the loading dock Tr. I, 203. Rager explained that at the time of the accident, light weight MSHA approved cap lights had only recently become available. Tr. I, 209-10.

Safety Trainer Hicks confirmed that after the accident, Respondent installed additional lighting at the fixed loading dock that pointed upstream and downstream from the fixed work barge. Tr. I, 244. Hicks referenced an inspection photo and marked which lights were added after the accident. [9] Tr. I, 244-45; GX 4, 63. Hicks maintained that the lighting in place prior to the accident was sufficient for loading operations. *Id*. However, on cross-examination, Hicks conceded that prior to the accident it was necessary to use a flashlight to see when drafting on the outside edge of the barge. Tr. I, 252-53.

2. The Cited Standard

30 CFR § 77.207 mandates that:

> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

30 CFR § 77.207.

3. Findings

As SCH deckhands regularly walked the perimeter of upstream barges while drafting, I find that the Respondent was obligated to provide adequate lighting for in-line barges worked on by its employees. Tr. I, 198. As mentioned above, Kevin Meyers was carrying a handheld flash light along with a drafting stick the night of the accident. Jt. Stip., 18. The Commission has previously held that portable handheld lighting may satisfy 30 CFR § 77.207 when such lighting is adequate and safe to use for that situation. *Capitol Aggregates*, 3 FMSHRC 1388, 1390 (June 1981). However, the Commission also clearly stated that reliance on handheld lighting is inappropriate where use would make work unsafe or fail to provide adequate light. *Id*. The Respondent has argued that SCH deckhands could safely walk and work on the barges with a flashlight in one hand and the drafting stick in another, or alternately lay the flashlight

[9] I have not relied upon the addition of new lighting standards after the accident as evidence of a violation. *See* FRE 407. Instead, I have relied upon Safety Trainer Hicks testimony regarding Inspector Hardison's inspection photo to determine which lights were in place on February 26, 2012. Tr. 244-45; GX 4, 63.

down while drafting. Tr. I, 227-28, 252-53. However, the upstream barges were several hundred feet long, loosely tied off to the fixed barge and subject to movement. Tr. I, 193,198, 252-53. As such, I find that the handheld flashlight did not provide sufficient illumination for the deckhands and increased the hazards of working on the barge. Tr. I, 198, 252-53. Accordingly, I find that Respondent was obligated to provide permanent lighting sufficient to illuminate the working surfaces of the upstream barges in addition to the areas of the fixed loading dock.

Inspector Hardison has maintained that interviews with workers immediately after the accident indicated that in-line barges upstream from the fixed loading dock were not sufficiently illuminated by permanent lighting. Tr. I, 96-97. The Respondent has objected to Hardison's testimony as hearsay evidence not corroborated by his inspection notes. Resp. Br., 10. However, after reviewing Hardison's inspection notes, it is apparent that Hardison did record general concerns regarding the need for additional lighting of barges immediately after the accident within his February 26, 2012 inspection notes. GX 3, 17. As hearsay evidence is generally admissible at Commission proceedings, I have considered Hardison's summary of his interviews with workers as support for the Secretary's allegations. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998). Additionally, Hardison's summary and inspection notes are corroborated by Safety Trainer Hick's admission that the outside edges of the barges were not lit and required the use of a flashlight to see properly. Tr. I, 252-253.

Finally, upon this court's review, the photos taken by Inspector Hardison on February 26, 2012 and October 23, 2012 indicate that the lighting in place at the time of the accident was focused on the fixed loading dock and barges immediately alongside the fixed loading dock.[10] GX 4, 26-27, 62-63; Tr. I, 244. Accordingly, I find that the evidence submitted supports Inspector Hardison's reasonable inference that the upstream barge Mr. Meyers was working on at the time of his accident was not sufficiently illuminated. *Mid-Continet Res. Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Thus, Citation No. 7657716 is **AFFIRMED.**

a. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood

[10] The Respondent objected to separate photos contained in GX 4, 28-34 and stated that these photos were of a different facility. Tr. I, 217-28. However, Safety Trainer Hicks confirmed that GX 4, 62-63 were photos of Respondent's fixed loading dock and explained which lights had been added after the accident. Tr. I, 244-45.

that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

I have already held that the Respondent violated 30 CFR § 77.207 by failing to provide adequate illumination for the inline barges. Additionally, this violation contributed to the discrete safety hazard of deckhands not having enough light to recognize and avoid trip, fall, and caught between hazards. Furthermore, as the large barges varied in configuration and were subject to movement, the lack of lighting was reasonably likely to cause a trip, fall, or caught between injury. Tr. I, 193. The failure to light the in-line barges also increased the difficulty of treating and or rescuing injured persons. Tr. I, 106-07. For all of these reasons, I find that the lack of illumination was reasonably likely to contribute to a fatal injury.

b. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

Prior to the accident, Respondent's deckhands regularly drafted in-line barges upstream from the fixed loading dock. Tr. I, 198. The Respondent has contended the lights on the fixed loading dock, dolphin mounted lighting, and ambient lighting from a nearby industrial plant all made the area very well lit. Tr. I, 203, 205. The Respondent has also emphasized that MSHA had never issued any citations regarding illumination at the loading dock and had just finished an annual inspection of the SCH terminal two days before the accident. Resp. Br., 10. However, it is clear that the Respondent's own safety trainer was aware that it was necessary to use a flashlight to see properly at the outside edges of the barges while drafting. Tr. I, 252-253. As such, the Respondent had actual knowledge that the inline barges were not sufficiently lit by permanent lighting. Given the inherent dangers of working on a movable barge, I find that the Respondent has not submitted credible evidence of mitigating circumstances for failing to provide permanent lighting for workers on upstream barges. Therefore, I find that the violation was the result of the Respondent's high negligence.

4. Penalty

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

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013)

A regular assessment of Citation No. 7657716 would have resulted in 110 penalty points and a penalty of approximately $6,115.00. GX 12, 1; 30 CFR § 100.3 Table XIV. The Secretary has asserted that all citations related to fatalities receive consideration for Special Assessment. Sec'y Br., 32-33. However, the Special Assessment Narrative Form submitted by the Secretary merely restates negligence and gravity findings that are already accounted for in a regular assessment, including the occurrence of a fatality. GX 12, 1. As the Secretary has not submitted specific evidence of aggravating factors necessary to support the specially assessed penalty, I have performed the following review of the evidence presented based upon the statutory criteria of Section 110(i).

The Respondent has a low overall violation rate and MSHA had not previously issued any illumination citations at the SCH terminal loading dock. GX 13, 3; 30 CFR § 100.3 Table VI. Exhibit A of the Secretary's Petition indicates that the Calvert City terminal is a small mine and that the Respondent is a small operator with zero tons of coal produced. *Id*. However, the Respondent has testified that it operates at least five different coal handling facilities and it appears that the Calvert City terminal alone processes approximately twelve million tons of coal annually.[11] Tr. 184-85. As such, the Respondent appears to be more appropriately considered a large operator. I have found that Respondent was highly negligent in failing to provide adequate lighting on the in-line barges. In particular, I have noted that SCH safety personnel had actual knowledge of the inadequate lighting conditions on in-line barges. Tr. I, 252-53. The parties have stipulated that the proposed penalty will not affect the Respondent's ability to continue in business. Jt. Stip., 4. The failure to adequately illuminate the in-line barges was a significant and substantial violation that reasonably could have, and apparently did, contribute to a fatal accident. Tr. I, 106-07. Subsequent to Mr. Meyers' accident and the issuance of this citation, the Respondent has provided deckhands with new LED cap lights and installed upstream and downstream lighting standards. Tr. I, 209-10, 244.

After considering all of these factors, I find that a civil penalty of $25,000.00 is an appropriate civil penalty for Citation No. 7657716.

[11] http://www.sch-ces.com/cct.html

IV. ORDER

Based on the findings above Citation Nos. 7657715, 7657713, and 7657714 are **VACATED** and Citation No. 7657716 is **AFFIRMED.** SCH Terminal Company, Inc, is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$25,000.00** within 30 days of this order.[12]

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

Distribution: (First Class U.S. Mail)

Willow E. Fort, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Flem Gordon, Gordon Law Office, 121 W. Second Street P.O. Box 1146 Owensboro, KY 42303

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DENVER, CO 80202-2500
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November 19, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. DELTA CONCRETE PRODUCTS, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2014-117 A.C. No. 50-01783-336602 Mine ID: 50-01783 Mine: Delta Concrete Products Pit

DECISION

Appearances: Sean J. Allen, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80202 for Petitioner

Robert B. Groseclose, Cook, Schuhmann & Groseclose, 714 Fourth Ave., Suite 200, Fairbanks, AK 99707-0810 for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Delta Concrete Products, Inc. at its Delta Junction 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 case includes nine contested violations with a total proposed penalty of **$4,721.00**. The parties presented testimony and documentary evidence at a hearing held in Fairbanks, Alaska on August 12 and 13, 2014. For the reasons that follow, eight of the nine contested citations and orders are **AFFIRMED** with two reductions in the negligence level and one citation is **VACATED**. Respondent will be ordered to pay **$3,807.00** in penalties.

II. BACKGROUND

Delta Concrete Products, Inc., (Respondent) crushes and screens gravel at their mile 267.5 Delta Junction surface pit mine (the "mine") in Delta Junction, Alaska. The mine is

subject to regular inspections by the Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated as follows:

A. Respondent was, at all relevant times, the operator at the Delta Concrete Products Pit, Mine ID: 50-01783.

B. The mine listed above is a mine, as defined in the Mine Act.

C. Respondent is engaged in mining operations in the United States and its mining operations affect interstate commerce.

D. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.

E. The Federal Mine Safety and Health Review Commission has jurisdiction of this matter under the Mine Act.

F. The citations at issue in this matter were issued on the date indicated.

G. The inspector whose signature appears in block 22 of the citations at issue was acting in his official capacity as an authorized representative of the United States Secretary of Labor.

H. The Secretary's proposed penalties for each citation are listed on Exhibit A of the penalty assessment filed in this matter and those amounts incorporated are incorporated by reference herein.

I. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

Secy's Prehearing Report.

At hearing, the Secretary presented testimony from MSHA Inspector Garrett Frey. Inspector Frey has worked as an inspector for MSHA for two years. Tr. 30. He has conducted regular MSHA E01 inspections of approximately one hundred sand and gravel operations and spends ninety five percent of his work time doing so. Tr. 30-34. Inspector Frey received classroom and field training at the MSHA Mine Academy in West Virginia. *Id.* He has also participated in informal weekly training at staff meetings and journeyman training which covered

basic electricity and three-phase electricity systems. *Id.* Frey earned a Bachelor's degree in engineering which included courses on basic electricity and three phase electricity. Tr. 31.

Respondent presented testimony from its President and General Manager, Matthew Walker and electrician Christopher Morley. Mr. Walker has co-owned Delta Concrete Products since 2002, previously worked for a general contractor and prior to that, for approximately 18 years, worked for a logging company performing various functions from running the shop, working on equipment as a field mechanic, operating equipment and cutting down trees. Tr. 298-299. Mr. Morley has owned Morley Electric in Delta, since 2004. Tr. 389. He has been a journeyman electrician since 1998 and an electrical administrator administrating electrical installations ensuring they meet code and job requirements since 2004. Tr. 390. Morley is licensed as a journeyman electrician and electrical administrator with the Alaska Division of Occupational Licensing and a member of the International Brotherhood of Electrical Workers 1547. *Id.*

I have organized my findings by individual docket and detailed my final ruling for each citation within its respective subsection. The Secretary designated the majority of these contested citations as "Significant & Substantial" (S & S) violations. At hearing, Respondent contested the factual representations of the testifying MSHA inspector, the underlying legal basis of the citations as well as the Secretary's gravity and negligence designations.

As such, I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Burden of Proof; 2) Significant and Substantial violations; 3) Negligence and 4) Penalty Assessments. I have followed these guidelines for each of the nine contested violations.

The hearing for these nine citations lasted two days and produced a 517 page transcript with numerous exhibits. The parties also submitted post-hearing briefs articulating their respective positions on the evidence presented at hearing. I have reviewed all of this evidence at length. In the interest of brevity, I have not included a general overview summary of the testimony presented, but rather have cited to the testimony, exhibits, and arguments I found critical to my ultimate ruling within my analysis.

III. STATEMENT OF LAW

A. Burden of Proof

The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc*., 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). The Commission has described the Secretary's burden as:

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence."

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

B. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary does not necessarily have to "prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); *See also Musser Engineering, Inc. and PBS Coals* 32 FMSHRC 1257, 1280-81 (Oct 2010) (PBS).

However, the Commission has recently reiterated that "it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial." *Black Beauty Coal*, 34 FMSHRC 1733, 1740 (August 2012) (upholding Judge's S&S determination that a ¼ mile wide gap in a protective berm created a safety hazard of trucks driving over a steep embankment) (*quoting U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836)(Aug 1984).

C. Negligence

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 and health of miners and to take steps necessary to correct or prevent 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 violation, 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." *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.*

D. Penalty Assessment

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

Although I assess monetary penalties de novo, the Secretary has submitted proposed penalty amounts for each citation contested at hearing. Following 30 CFR §100.3, the Secretary submitted regularly assessed penalty amounts based upon point values corresponding to the six statutory criteria for all citations.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order).

In this matter, there appears to be no dispute that Respondent is a small family owned business. Tr. 301. Respondent has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I have discussed the violation history, negligence, gravity, and abatement efforts pertaining to each alleged violation within my findings for each citation.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW
ELECTRICAL VIOLATIONS

Five of the nine citations adjudicated in this case, 8693966, 8693967, 8693968, 8693970 and 8693978 involve electrical violations. For clarity these citations will be addressed together. It is undisputed that the number of people affected by each violation is one.

Respondent crushes, screens, washes and conveys gravel at their Delta Junction mine facility. The crushing operation is referred to as the "dry side" and the screening/washing and conveying process occurs on the "wet side". Resp. Prehearing Brief. It is undisputed that at the time of the inspection the dry side was "red tagged" and had been out of service since 2012. *Id.* All of the electrical citations in this case were issued for the wet side. At issue is whether the wet side was operational at the time the citations were issued.

A. MSHA's Authority to Inspect the Wet Plant Portion of Delta Junction Mine

Respondent argued that the wet side of the mine should not have been subject to the issuance of citations because it was locked and tagged out and therefore, removed from service. Respondent's president and co-owner, Matthew Walker testified it was his understanding that if a piece of mining equipment was locked and tagged out it could be subject to inspection but not cited. Tr. 366-367. However, Inspector Garrett Frey testified that he appropriately inspected the wet plant portion of the mine according to MSHA's Metal and Nonmetal General Inspection Handbook procedures. Tr. 283-297. The Metal and Nonmetal General Inspection Handbook states,

> [a]t times, inspectors attempt to conduct regular inspections of mines or mills and find, on arrival, that it is not operating or not operating at full capacity and some equipment or machinery is not in operation. In these cases, regardless of whether the mill or mine is operating or only operating with limited capacity, inspectors shall conduct a regular inspection…of the non-producing or non-active section of the mine or mill to assure that potential hazards or risks to miners do not exist.

Tr. 284-286, Sec'y Ex. P-17, Page 35.

Inspector Frey testified that Respondent was continuing to produce material based upon the mine producing material two weeks prior to the inspection. Tr. 286. The inspector observed that Respondent could continue to produce material from the wet side of the mine because the wet plant distribution box was locked out and tagged out only for the purpose of a screen change. Tr. 36-38; 286-287. Frey confirmed that the mine had not produced material for two weeks prior to the inspection based on his conversation with Walker and later verified by production reports. Tr. 36-38. However, the inspector believed that the wet plant could easily be placed back into service. Tr. 36-38. During the hearing, Inspector Frey testified to observing many electrical and non-electrical violations on the wet side of the mine that he believed would continue to exist during continued mining operations. Tr. 286-287.

The operator, Matt Walker testified that the wet side of the mine was "removed from service" because the intention of the lock and tag was to permanently disable that part of the

mine. Tr. 370-371. However, MSHA's Citation and Order Writing Handbook for Coal Miners and Metal and Nonmetal Mines states,

> [t]he term 'removed from service' does not mean that the mine operator stopped using and parked a piece of equipment (e.g., front-end loader, truck) or a mining unit (e.g., portable crusher, screening unit) when it could or can be restarted and easily placed back into service in the same condition which caused issuance of the original citation(s) or order(s). Rather, "removed from service" refers to the action(s) taken by the mine operator or contractor to permanently incapacitate or render inoperable the equipment and eliminate the violation.

Inspector Frey testified that the wet plant was not removed from service because it was locked and tagged out only for the purpose of a screen change as noted on the distribution box tag. Tr. 36-38. He further testified that the wet side was not permanently incapacitated or rendered inoperable because the wet plant could easily be placed back into service in the same condition after the screens were changed for production purposes. Tr. 288-290; Sec'y Ex. P-2, Photo 4. The inspector explained that the wet plant could be returned to service by unlocking the distribution box and energizing the wet plant. *Id.*

Similarly, Respondent argues that at a minimum the cited electrical violations would have been corrected during off season maintenance. Resp. Post Hearing Brief, p. 8. However, this argument presupposes that the wet side of the plant was indeed shut down for the season and was removed from service. A fact contrary to the evidence relied upon by the inspector noted above that the wet side was locked and tagged out only for a screen change; thus, indicating intent or ability to reactivate the wet side as needed for further operation. Nor was there evidence presented by Respondent that, had no citations been issued, a competent individual would have conducted an inspection and tagged the electrical issues for repair given Respondent's admission that had the citations not been issued the electrical issues would have continued on during normal mining operations. Tr. 487.

I find that it was appropriate and necessary for Inspector Frey to inspect the wet plant for safety hazards because (1) MSHA's Inspection handbook allows inspectors to conduct inspections at mines that are not operating at full capacity, and (2) the wet side of the Delta Junction mine was not permanently incapacitated because the lock and tag on the distribution box was marked only for a screen change and material had been run on the wet side of the mine two weeks prior to the inspection based on production reports.

B. Citation No. 8693966

Inspector Frey issued Citation No. 8693966 on August 19, 2013 for an alleged violation of 30 CRF 56.12013. Tr. 39; Sec'y Ex. P-2. The inspector alleged within the citation that:

> A mechanically strong, insulated and sealed splice was not used in connecting a P-136-29-MSHA 6AWG SOOW power cable coming from the wet plant distribution box in the operator's tower. The wet plant has operated using this 480 volt three phase electrical connection of only wire nuts and minimal electrical

> tape approximately 16 inches off the ground immediately in front of the wet plant distribution box. A miner coming into contact with energized 3 phase electrical circuits could experience severe shocks, burns, or other fatal electrical injuries and complications.

Sec'y Ex. 2.

Inspector Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. P-2. The Secretary proposed a penalty of $807.00.

1. Findings

Inspector Frey issued Citation No. 8693966, because he determined that a splice connected to a wet plant distribution box was in violation of 30 CFR § 56. 12013 which mandates that:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
>
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
>
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
>
> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Frey testified that Respondent used wire nuts with electrical tape wrapped around them to connect a 480-volt power cable coming from the wet plant distribution box in the operator's tower. Tr. 44. The inspector's notes designate that the splice was 16 inches off the floor below the wet side distribution box and was located in the travel way of the operator's tower. Sec'y Ex. P-2. Frey stated that the splice violated the standard because wire nuts are not mechanically strong with electrical conductivity as near as possible to that of the original. Tr. 43-46. The inspector also testified that the electrical tape used to wrap around the wire nuts was not bonded in a way to prevent moisture from infiltrating the splice. Tr. 46. He stated that he observed the black, green, red, and yellow inner conductors on the splice which demonstrated that the conductors were not sealed from moisture or adequately bonded to the outer jacket. Tr. 45-47. He also noted that the filler material sticking out of the cables exposed the splice to moisture that could potentially wick down the length of the cable and create a potential shock hazard to miners. *Id*.

Christopher Morley, Respondent's electrical witness, testified that the splice was mechanically strong because the power cords were secure and would not come apart when pulled. Tr. 419-421. Morley believed that the wire nuts wrapped in electrical tape were sealed

to exclude moisture. *Id.* However, he acknowledged the splice was not protected from damage as near as possible to the original because it was missing the outer jacket. Tr. 421. The inspector provided very detailed, specific and compelling testimony regarding the likelihood of moisture wicking down the cables given the location of the splice in the Conex structure close to an open door with evidence of rusting and water tracks on the structure walls. Tr. 44-49. Accordingly, I defer to his reasonable determination and credit his testimony over that of Respondent's electrical witness.

As such, I find that Respondent violated 30 CRF 56.12013 by failing to connect a 480-volt power cable with use of a splice that was mechanically strong and insulated and bonded to a degree that would exclude moisture. Accordingly, Citation No. 8693966 is **AFFIRMED**. However, for reasons explained below the negligence level will be modified from high to moderate.

a. Prior Non-Enforcement of Standards at Delta Junction Mine

Matthew Walker, the operator of Delta Concrete, testified that previous MSHA inspectors had instructed him that there were better ways to splice, but the way Respondent chose to connect power cables was adequate. Tr. 349. Walker testified that previous MSHA inspector's did not inform him to make any changes to the existing electrical splices that were cited by Inspector Frey. Tr. 350. He argued that because they had not previously been cited for any electrical splice connections, the Secretary should be estopped from enforcement of citations dealing with hazardous electrical splices. Tr. 351.

Although such evidence may be weighed when determining the appropriate penalty, the Commission has generally rejected the prior non-enforcement defense to enforcement of a future citation. In *Secretary v. King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (1981), the Commission generally rejected the doctrine of equitable estoppel. However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty. The Supreme Court has held that equitable estoppel generally does not apply against the federal government. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-386 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the *Merrill/Utah Power* doctrine by permitting estoppel against the government in some circumstances. *See United States v. Georgia-Pacific Co*., 521 F.2d 92, 95-103 (9th Circ. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. *See El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty.

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement actions of the Secretary here. However, the Respondent's evidence in this connection will be considered in mitigation of penalty. Citing *Sec'y of Labor, Mine Safety & Health Admin. (MSHA), Petitioner*, 15 FMSHRC 2549 (Dec. 17, 1993).

2. Gravity

Inspector Frey designated Citation No. 8693966 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to connect a 480-volt power cable with use of a mechanically strong and insulated splice was a violation of 30 CFR § 56. 12013. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to remedy the deficient splice that potentially existed since fall of 2011, Respondent exposed miners to possible severe shocks or burns. Tr. 57, 484.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector noted that no documentation of workplace exams identified the defective splice. Tr. 57. Walker testified that the splice probably existed from the fall of 2011 to August of 2013. Tr. 484. Inspector Frey believed that the hazard existed when the wet plant was last run and would likely continue to exist during mining operations because multiple deficient splices were noted over the course of the initial inspection of Delta Concrete. Tr. 57. Further, Walker acknowledged that had Inspector Frey not cited the condition it would have continued to exist into the indefinite future. Tr. 487.

The Inspector contends that a fatal electrocution injury was reasonably likely to occur through one of several different ways. Tr. 49. The inspector testified that a miner could contact the splice by (1) reaching down to open the door to the tower, (2) brushing against the splice while turning on or off the distribution box, (3) grabbing items from the storage hooks next to the splice, or (4) slipping and falling into the splice because the electrical tower did not exclude moisture. Tr. 49-51. Because the splice was located in the travel way of the operator's tower, the potential for an electrocution to a miner was more likely. Tr. 49. I credit the inspector's testimony that the deficient splice was obvious and could be seen immediately when entering the operator's tower. Tr. 63. Inspector Frey testified that the wet plant distribution box was located next to a door where you could see daylight which likely exposed the splice to weather conditions. Tr. 49. Also, Inspector Frey testified no current continuity and resistance test had been performed since March of 2012, which increased the risk of electrical potential taking the path of least resistance. Tr. 56.

Respondent argues that the violation was not reasonably likely to lead to a significant injury because according to electrician Morley, the splice was sufficiently protected against electrical shock Tr. 457. Morley testified that the wire nuts coupled with the electrical tape provided protection from moisture. Tr. 405. The operator, Walker, also testified that he has never had a problem with moisture in the operator's tower and thus there was no increased risk of weather exposure to the splice. Tr. 346. After considering both parties testimony, I find that the state of the splice without adequate protection from the elements and adjacent to a travel way without a protective outer jacket created a reasonable likelihood of contributing to a potentially fatal electrical shock. The lack of a continuity and resistance test and the splice's exposure to

weather conditions increased the risk of a serious injury or death to a miner working in the travel way of the operator's tower. Tr. 56, 49.

The fourth *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that under the right circumstances a miner coming into contact with the splice would potentially be fatal because the power cord was energized up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The inspector stated that the fatalgrams demonstrate that 480-volt electrical systems are dangerous and need to be installed and maintained in order to prevent exposure to fatal amounts of electricity. Tr. 61. Although Respondent argued that the splice was secure and safe to grab while energized, I find that the testimony of the inspector substantiates that the splice was a danger to miners working in the travel way of the operator's tower. Inspector Frey testified that the splice was in close proximity to the door of the operator's tower. Tr. 49. Frey noted that there was evidence of water infiltration in the operator's tower and that moisture increases the risk a miner operating the wet plant distribution box will be shocked. Tr. 51. The inspector also testified that there had not been a continuity and resistance test done that year which increased the undetected risk electricity would take the path of least resistance. Tr. 56. Therefore, after considering the above testimony, I find a reasonable likelihood that an electrical shock coming from the 480-volt splice would cause serious injury or death to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693966 was an S&S violation.

3. Negligence

Inspector Frey credibly and without equivocation in a straight forward, compelling manner testified and noted in his citations that throughout the mine there were similar deficient splices. Tr. 57. The inspector believed that the splices were made this way intentionally and that it was common practice at Delta Concrete to splice using wire nuts and electric tape. Tr. 57. Accordingly, he assigned a high negligence level to the violation at issue.

I find that Respondent was aware or should have been aware of the violation, but there are some mitigating circumstances that must be considered. I credit the inspector's testimony that there was no documentation identifying any electrical hazards and that he believed the hazards would continue to exist during continued mining operations. Tr. 57. He also noted that the deficient splice was obvious upon entering the travel way of the control tower. Tr. 64. Operator Walker acknowledged that the deficient splice would have continued to exist at the mine had Respondent not been cited. Tr. 487.

When determining who was responsible for creating the splices there appeared to be a fundamental miscommunication or misunderstanding between Inspector Frey and Operator Walker. I credit Walker's testimony that his son, Ryan Walker was likely the foreman at the time the splice was made and was, in fact, the person that made the splice. Tr. 335. The inspector testified that based on his conversations with Walker, the foreman was not competent to perform electrical maintenance at the mine. Tr. 64. Frey testified that he considered this

statement when determining the severity of the negligence. Tr. 65. Walker denied telling Frey that the foreman *at the time the splice was made* was not competent to perform electrical maintenance. Tr. 483. He went on to explain that his son, Ryan started doing electrical work at the mine in 2002 and that he worked with a local electrician, Ted Hamilton at the mine until he had the requisite experience to do the electrical work himself. Tr. 336. When his son finished working at the mine in approximately 2011 he went on to work with an electrical contractor at Fort Greely for a couple of years. Tr. 339. Although there is no testimony to suggest whether the electrician, Hamilton knew or had training in MSHA electrical regulations, I credit Walker's testimony that he reasonably believed his son, Ryan, was a competent person to perform the electrical work. I find that the operator reasonably and in good faith believed a competent person was performing the electrical maintenance, and credit his testimony based on his personal observations of Ryan's work with electrician Hamilton.

For all these reasons, I find that Citation No. 8693966 was the result of moderate rather than high negligence on the part of Delta Concrete, as they should have been aware of the violation, but I credit the operator's testimony that he maintained a good faith belief he designated a competent person to perform electrical maintenance at the Delta Junction mine.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $807.00 for this citation. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12013. P-1. Walker testified that Respondent is a small mom and pop operation. They had 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I found a moderate level of negligence because the operator maintained a good faith belief in his son, who had previously performed the electrical maintenance, to be a competent person to conduct repairs. Respondent was negligent because the deficient splice was open and obvious, intentionally made, undocumented, and by Walker's own admission would have continued to exist at the mine had the inspector not issued a citation. Tr. 57, 64, 487. I also found the potential for an electrocution to a miner was more likely and thus S & S because the defective splice was located in the travel way of the operator's tower subject to the risk of exposure to the elements as well as the fact that the spice had existed since at least late 2011. Tr. 49. Although the citation was terminated based upon a seasonal closure and shutdown of the mine, Respondent's electrical witness, Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey. Tr. 389-396.

After considering all six penalty criteria as well as the Respondent's reliance on MSHA pronouncements from prior inspections, I am modifying the Secretary's proposed penalty of $807.00 and assess Respondent a civil monetary penalty of $400.00 for Citation No. 8693966.

C. Citation No. 8693967

Inspector Frey issued Citation No. 8693967 on August 19, 2013 for an alleged violation of 30 CRF 56.12008. Tr. 83. He alleged within the citation that:

> An energized 120-volt electrical cord passing through a cutout in the metal back wall of the operator's station tower is not bushed allowing wear and damage to the outer jacket, insulation, and eventually inner conductors. A miner in contact with the metal tower could become a path to ground in the event of a fault leading to shock and burn type injuries.

Sec'y Ex. 4.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be lost workdays or restricted duty, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. 4. The Secretary has proposed a penalty of $100.00.

1. Findings

Inspector Frey issued Citation No. 8693967, because he determined that a 120-volt electrical cord passing through a cutout in the operator's tower was not bushed. This was in violation of 30 CFR § 56.12008 which mandates that:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The inspector testified that he observed a blue 120-volt electrical cord without a bushing passing through a cutout of the metal back wall of the operator's tower. Tr. 85. Frey stated that the cutout allowed for wear and damage to the cord's insulation and outer jacket. Tr. 85. He also testified that there were multiple cords coming out of the operator's tower and that the blue power cord hung straight down. Tr. 86. I credit the inspector's testimony where he testified that the power cord had some weight on it and that the weather conditions had the ability to degrade the power cord rapidly. Tr. 86. Also, Frey noted that the cited power cord was still energized at the time the citation was issued. Tr. 88.

Inspector Frey explained the standard was violated because the power cord entered a cutout of the operator's tower that was not protected. Tr. 88. The inspector credibly testified that the cutout was not protected because it had burrs and sharp edges on the side that would eventually cut through the power cords insulators and contact the inner conductors. Tr. 88. Morley, Respondent's electrical witness acknowledged that the power cord should have been bushed. Tr. 422. As such, I find that Respondent violated 30 CRF 56.12008 by failing to install a bushing for a blue 120-volt electrical cord where it passed through a cutout in the operator's tower. Citation No. 8693967 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693967 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to install a bushing for the blue 120-volt electrical cord entering a cutout in the operator's tower was a violation of 30 CFR § 56. 12008. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to provide a bushing for the cutout in the operator's tower, Respondent exposed miners to potential shock and burn injuries. Tr. 95.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector testified that the blue 120-volt power cord was damaged where it was going in and out of the metal cutout. Tr. 94. Frey testified that at the time the citation was issued, there was no exposure to the insulation and inner conductor but with continued use the power cord would be damaged. Tr. 94. With continued use, the power cord would continue to degrade and eventually the conductors would make contact with the metal frame of the operator's tower. Tr. 90. If the inner conductor made contact with the metal frame while energized, the power cord would either trip the breaker or potentially bleed electric potential to the area without drawing enough current to trip the breaker. *Id.* Also, the inspector stated that the weather exposure of the cutout increased the risk a miner would be exposed to electrical shock. Tr. 91.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because there was a breaker system connected with the power cord which would allow the cord to short. Tr. 408-419. Morley, Respondent's electrical witness, testified that because the operator's tower is grounded, the power cord would trip the breaker if there were a cut in the jacket. Tr. 409. After considering both parties' testimony, I defer to and credit the inspector's testimony that there is always the potential that the power source will not break and that weather exposure increases the risk of shock to miners working in the operator's tower. Tr. 408-411. As such, I find that the lack of a bushing to protect the power cord entering the cutout made it reasonably likely that a significant injury would occur.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that it is unlikely that a shock from a 120-volt power cord would be fatal, but there was the potential for miners to be shocked or burned. Tr. 94. Frey believed that a potential injury from touching the power cord while it was energized would likely lead to lost workdays or restricted duty depending on severity. Tr. 95. He also noted that the cutout allowed the power cord to be exposed to weather, so there was the potential for moisture to wick up the cord. Tr. 92. Wicking allows electricity to carry up a cord while it is wet, which could cause a serious shock or burn injury. Tr. 92. Therefore, considering the above evidence, there is a reasonable likelihood that an electrical shock coming from 120-volt power cord could cause serious injury to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693967 was an S&S violation.

3. Negligence

Inspector Frey testified that it was likely that the operator or miner had observed the hazard based on similar cords having bushings to protect them. Tr. 96. Frey also acknowledged that at one point the power cord could have had a bushing and worked its way out. Tr. 97. I credit the inspector's testimony that the 120-volt power cord was not terribly easy to see because the cutout was located in the back of the operator's tower which is elevated from the ground. Tr. 97. He also acknowledged that the violation was not an obvious hazard and not terribly easy to see. *Id.*

Frey noted that the ability for the 120-volt power cord to move affected the way he designated negligence. Tr. 97. He testified that the cord had probably been there for a while because it exhibited some damage. Tr. 91. The inspector believed that because the power cord could freely move and was exposed to weather conditions, the cord would likely degrade down to the insulation and inner conductors. Tr. 97. Also, the inspector testified that because this power cord was plugged into the wall there was the potential for water to infiltrate the area and potentially wick up the cord. Tr. 98. I credit Frey's testimony that the risk of an electrical shock was increased because the operator's tower is frequently visited by miners. Tr. 49.

For all these reasons, I find that Citation No. 8693967 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation, but I credit the inspector's testimony in that the hazard was not obvious. Tr. 98. Therefore, the negligence designation for Order No. 8693967 is upheld as moderate.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $100.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56.12008. P-1. After considering all six penalty criteria analyzed earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $100.00 for Citation No. 8693967.

D. Citation No. 8693968

Inspector Frey issued Citation No. 8693968 on August 19, 2013 for an alleged violation of 30 CRF 56.12004. Tr. 107. The inspector alleged within the citation that:

> The 480-volt 3 phase power cable energizing the sand stacker belt drive motor has multiple areas exposed to mechanical damage that have not been protected. The power cable may have been smashed and is deformed near the tail, has a slice that removed approximately 1/2" of the outer jacket exposing the cable to water damage/hazards, and a 1" gash where inner wires are visible and exposed. Inner conductors may be damaged. The damage is at eye level along a travelway. A miner traveling adjacent the sand stacker performing maintenance or production

> duties and contacting a damaged conductor could suffer shock, burn, and other fatal electrical type injuries and complications.

Sec'y Ex. 5.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Delta Concrete's high negligence. Sec'y Ex. 5. The Secretary has proposed a penalty of $807.00.

1. Findings

Inspector Frey issued Citation No. 8693968, because he determined that a 480-volt 3 phase power cable had multiple exposed areas of unprotected damage. This was a violation of 30 CFR § 56. 12004 which mandates that:

> Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.

Frey testified that he observed multiple areas of mechanical damage on a 480-volt power cable that energized a sand stacker belt drive. Tr. 109. The power cord was feeding the drive motor on the sand stacker and Frey observed multiple areas where the cord was cut, gashed, and smashed. Tr. 109-113, Sec'y Ex. P-5, Photos 1-5. In one location the inspector observed a half-inch gash where the inner wires were visible and exposed. Tr. 109. The inspector believed that with continued mining operation the damaged areas would wear down to the inner conductors and expose miners to electrical shock. Tr. 111. Both Mr. Walker and Mr. Morley acknowledged that the cited cable was damaged in the locations cited by Inspector Frey. Tr. 423-426. 487-489.

According to the testimony of the inspector, the standard was violated because the power cord was not protected against mechanical damage in multiple places. Tr. 110. I credit the inspector's testimony where he stated he observed multiple areas of a 480-volt 3 phase power cable that was cut, gashed, and smashed. Tr. 110. As such, I find that Delta Concrete violated 30 CRF 56.12004 by failing to repair a 480-volt 3 phase power cable which had multiple areas that were exposed to mechanical damage. Citation No. 8693968 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693968 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to repair a 480-volt 3 phase power cable that was exposed to mechanical damage was a violation of 30 CFR § 56. 12004. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to repair multiple areas of a power cable, Respondent exposed miners to potentially fatal shock and burn injuries. Tr. 111.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that he observed multiple areas where a 480-volt power cord had cuts, gashes, and smash marks. Tr. 109. In one area of the

power cord, he observed a one-inch gash where the inner wires were visible and exposed. Tr. 109. The inspector also testified that areas where gash marks were observed also contained moisture, dirt, and sections where the entire outer jacket was missing. Tr. 110-111. Frey noted that he observed a part of the power cord that was mashed and deformed. Tr. 109. He also believed that the damage to the 480-volt power cord occurred over multiple instances and not just one. Tr. 110-111. The inspector testified that the damage to the power cord likely occurred over the course of time and if the hazards were recognized they were not fixed or documented. Tr. 112. He believed that the dirt and moisture trapped in the gashed areas of the power cord would, over time, degrade the insulation and further expose the inner conductors. Tr. 113. The expose to moisture and dirt increased the likelihood a miner would be exposed to an electrical injury. Tr. 114. Also, Frey noted that the power cable travels along the side of the sand stacker at eye level and was immediately adjacent to a travelway. Tr. 117. He concluded that a miner performing maintenance, repair, or workplace exams could potentially be exposed to the different hazards of mechanical damage. Tr. 117.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because the wet side of the Delta Junction mine was locked and tagged out and no energy could get to the cable. Tr. 361. Walker, the operator of the mine, testified that no bare wires were exposed on the 480-volt 3 phase power cable. Tr. 362. He testified that the gashed parts of the power cord did not show bare wire, but actually a fiber-type filler that was between the outer jacket and the conductors. Tr. 363. Thus, the operator believed that the damage to the outer jacket of the 480-volt power cable would not cause a miner to be electrocuted. Tr. 364. Respondent also argued that maintenance, like greasing, occurs only when the wet side is non-operational and therefore the exposure to an energized power cord is decreased. Tr. 125. After considering both parties testimony, I find that the cuts, gashes, and smash marks in the 480-volt 3 phase power cord made it reasonably likely that a significant injury would occur to a miner. I defer to and credit the inspector's straight forward and detailed testimony that an injury was reasonably likely to occur because the power cord was next to a travelway where maintenance is performed by miners. Tr. 106, 122-123.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Respondent argued that a miner exposed to the damaged part of the power cord would not be fatal because the primary insulation was still present and that part of the wet plant was locked and tagged out. Tr. 361. The inspector testified that the multiple hazards in the 480-volt power cord made it reasonably likely a miner traveling in the area could be fatally electrocuted if they were to brush up against the exposed hazards. Tr. 113-114,117. Inspector Frey stated that the fatalgrams referenced in Citation No. 8693966 also would apply for this citation as well because a miner coming into contact with a 480-volt power cord would cause serious injury or death. Tr. 121

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693968 was an S&S violation.

3. Negligence

Inspector Frey testified that the multiple hazards he observed on a 480-volt power cable were obvious when he walked along the travelway. Tr. 122-123. The inspector believed that the

operator should have known about the multiple hazards because it was an area where adequate workplace examinations should have been taking place and a frequent area where miners travel. Tr. 122-125. Frey also noted that the mine had no documentation that recognized the electrical hazards and there was no evidence of repair to the 480-volt power cord. Tr. 122.

According to the inspector, an adequate workplace examination did not occur based on the number of hazards identified on the 480-volt power cable. Tr. 123. I credit the inspector's testimony that he believed the electrical damage existed since the last workplace examination of the travelway. Tr. 123. Inspector Frey also stated that Respondent had been operational two weeks prior to the issuance of the citation and in his view there were no mitigating circumstances. Tr. 114-115, 123.

Finally, the inspector factored into account that the operator told him that the foreman performing workplace exams or electrical maintenance was not competent. Tr. 122. Walker testified to the contrary, and avowed that he never told the inspector the foreman was not competent and clarified that the foreman in question was actually his son Ryan Walker who was the last one that had performed electrical work at the mine prior to the inspection. Tr. 335. It is important to note Ryan Walker left Respondent's employment at the mine in late 2011 or early 2012, no less than a year prior to the inspection at issue. While I found Operator Walker's reliance on his son's competence in performing electrical work a mitigating factor in Citation 8693966 above no such mitigating factor exists here because the damage to the 480-volt power cable was open and obvious to anyone that would be travelling along the pathway. Respondent should have noticed the damage and taken immediate action to have the cable repaired. The fact that they failed to do so leads me to conclude that the inspector's high negligence level designation is appropriate.

For all these reasons, I find that Citation No. 8693968 was the result of high negligence. Although the inspector relied partially on his conversation with the operator about the foreman's competency when determining negligence, I find that this testimony is a non-factor for the high negligence designation. I credit the inspector's testimony that the hazard was obvious because it was in a travelway where miners frequently pass. And, adequate workplace inspections would have allowed the electrical hazards to be observed, noted, and repaired. Therefore, the negligence designation for Citation No. 8693968 is upheld at high.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12004. Sec'y Ex. P-1. I upheld the high negligence designation for this citation because the inspector testified that he observed multiple electrical hazards along a 480-volt power cable that was immediately adjacent to a travel way where miners travel and perform maintenance. Tr. 122-125. Although the operator, in good faith, believed a competent person was performing the electrical maintenance, the multiple electrical hazards on the 480-volt power cable demonstrates that adequate workplace inspections were not conducted. Even though the citation was terminated based upon a seasonal closure and shutdown of the mine,

Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey in this docket. Tr. 389-396.

After considering all six penalty criteria analyzed earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $807.00 for Citation No. 8693968.

E. Citation No. 8693970

Inspector Frey issued Citation No. 8693970 on August 19, 2013 for an alleged violation of 30 CRF 56. 12013. Tr. 155. The inspector alleged within the citation that:

> A mechanically strong, insulated and sealed splice was not used in connecting the 480-volt 3 phase well pump to cable that powers it. Additionally the ground wire was not connected and hanging in the open. A miner coming into contact with energized 3 phase electrical circuits could experience severe shocks, burns, or other fatal electrical injuries and complications.
>
> Standard 56. 12013 was cited 1 time in two years at mine 5001783 (1 to the operator, 0 to a contractor).

Sec'y Ex. 8.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 8. The Secretary has proposed a penalty of $807.00.

1. Findings

Inspector Frey issued Citation No. 8693970, because he determined that a splice connected to a 480-volt 3 phase well pump was in violation of 30 CFR § 56. 12013 which mandates that:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
>
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
>
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
>
> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Frey testified that Respondent used a splice to connect a 480-volt 3 phase well pump to a power cord. Tr. 156. The inspector stated that the splice connected the two cords with the use of wire nuts and electric tape. Tr. 156-157. Frey testified that the green grounding wire was not connected to anything and should have been connected to a grounding system. Tr. 157. The inspector testified that the black, green, red, and yellow inner conductors wrapped around the well pump were exposed to mechanical damage. Tr. 158. The inner conductors were not protected by housing and there was no outer jacket sheath. Tr. 157. The inspector stated that the splice violated the standard because wire nuts are not mechanically strong with electrical conductivity as near as possible to that of the original. Tr. 156, 158. Also, the inspector testified that the splice was not bonded in a way to prevent moisture from infiltrating the inner conductors. Tr. 160.

Frey believed that moisture could infiltrate the splice because it was not encased in an outer jacket, outdoor rated housing, or other conduit. Tr. 159-160. I defer to and credit the inspector's testimony that the grounding wire was not properly grounded and that the splice was exposed to mechanical damage. Respondent attempted to address this violation through testimony from electrical witness Morley. However, I found his testimony confusing and focused primarily on the grounding issue stating that the pump was grounded at other points while acknowledging that the green grounding wire was not connected. Tr. 397. Furthermore, Morley acknowledged there was no outer jacket to which the splice could be bonded. Tr. 427. As such, I find that Respondent violated 30 CRF 56.12013 by failing to connect a 480-volt power cable that was mechanically strong and insulated to a degree that would exclude moisture. Citation No. 8693970 is **AFFIRMED**. However, for reasons explained below the negligence level will be modified from high to moderate.

2. Gravity

Inspector Frey designated Citation No. 8693970 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to connect a 480-volt 3 phase well pump to a power cable with use of a mechanically strong and insulated splice was a violation of 30 CFR § 56. 12013. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to remedy the deficient splice that potentially existed since the fall of 2011, Respondent exposed miners to possible severe shocks, burns, or other fatal electrical injuries. Tr. 57, 353.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that the wire nuts and electric tape used to splice the well pump were not mechanically strong and not bonded or sealed to exclude moisture. Tr. 156. Also, the inspector stated that the splice was not insulted equal to its original condition and was not bonded to the cable outer jacket to prevent moisture. Tr. 156-157. Frey testified that water can easily infiltrate the splice through the wire nuts where there are exposed conductors. Tr. 160. Furthermore, Frey noted that the green grounding wire was not attached, and that a continuity and resistance test had not been performed during the year the citation was issued. Tr. 157. The inspector believed that the lack of a grounded wire with no continuity and resistance test made it more likely that if a miner touched the splice they would be the least resistance to ground where electrocution could be fatal. Tr. 156-160. Additionally, the inspector

testified that the splice was an obvious hazard that was in plain sight when he approached the water pump. Tr. 158. Frey stated that the splice was adjacent to a travelway and surge tunnel used by miners. Tr. 162-163. Thus, miners were regularly exposed to the deficient splice. *Id.* Inspector Frey believed that the hazard existed when the wet plant was last run and would likely continue to exist during mining operations because multiple deficient splices were noted over the course of the initial inspection of the mine. Tr. 57. The operator acknowledged that the splice had existed in its cited condition since Ryan Walker installed the splice more than a year before the citation was issued. Tr. 483-484. Finally, Inspector Frey testified that no work place examinations noted the inadequate splices throughout the mine. Tr. 168.

Respondent argues that the violation was not reasonably likely to lead to a significant injury because according to Morley, the splice was sufficiently protected against electrical shock Tr. 457. He testified that the wire nuts coupled with the electrical tape provided a moisture resistant connection. Tr. 405. Also, Morley stated that although the green wire was not grounded, there was a ground bar on the water pipe. Tr. 397. He believed that the generator that powers the 480-volt 3 phase well pump would trip if the splice's inner conductors were exposed to moisture. Tr. 400. Morley also acknowledged that the splice was not protected from damage as near as possible to the original and that he would have enclosed the splice in a raceway or enclosure. Tr. 426-427. I defer to and credit the inspector's straight forward, detailed testimony that it was reasonably likely a significant injury would occur because the deficient splice was an electrical hazard and was in a location frequently traveled by miners.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with the splice would be potentially fatal because the power cord was 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The inspector stated that the fatalgrams indicate that 480-volt electrical systems are dangerous and need to be installed and maintained in order to prevent exposure to fatal amounts of electricity. Tr. 61. Morley, Respondent's electrical witness acknowledged that contact with a 480-volt power cord could be fatal. Tr. 421. Therefore, considering the above evidence there is a reasonable likelihood that an electrical shock coming from the splice would cause serious injury or death to a miner.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693970 was an S&S violation.

3. Negligence

Inspector Frey testified that the splice connecting a 480-volt 3 phase well pump to a power cord was immediately obvious when walking past the well pump. Tr. 167-168. Frey credibly testified and noted that there were multiple deficient splices throughout the mine that were similar to the cited splice. Tr. 57. He believed that the splices were made this way intentionally and that it was common practice at the Delta Junction mine to splice using wire nuts and electric tape. Tr. 57. I find that Respondent was aware or should have been aware of the violation based on the number of deficient splices noted by inspector Frey. Tr. 57. I credit the inspector's testimony when he testified that there was no documentation identifying any

electrical hazards and that he believed the hazard would continue to exist during continued mining operations. Tr. 164-168. When Walker, the operator, was asked whether the deficient splices would have continued to exist at the mine had the operator not been cited, he acknowledged that they would have continued to exist. Tr. 487.

As I noted above in reference to Citation 8693966 I credit the operator's testimony that his son, Ryan Walker, was likely the foreman at the time when the splices were made. Tr. 335. The inspector believed that based on his conversations with the operator, the foreman was not competent to perform electrical maintenance at the mine. Tr. 64. The analysis for this citation mirrors that of Citation 893966. As such, I find that the operator reasonably and in good faith believed a competent person was performing the electrical maintenance, and credit his testimony based on his personal observations of Ryan's work with electrician Hamilton. Walker's reasonable belief is a mitigating factor.

For all these reasons, I find that Citation No. 8693970 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation, but I credited the operator's testimony that he made a good faith effort to assign a competent person to perform electrical maintenance at the mine which constitutes a mitigating circumstance.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12004. P-1. Walker, the operator testified that Respondent was a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations.

Although the inspector designated the citation as high negligence, I found that the mine was moderately negligent because the operator, in good faith, believed a competent person was performing the electrical maintenance. Respondent was negligent because the inspector testified that the deficient splice located on the water pump was obvious, not documented, and would have likely continued to exist at the mine based on the number of electrical hazards cited as well as Walker's admission that the violation would have continued to exist had the inspector not issued a citation. Tr. 57, 64, 164-168, 487. Much like the other electrical citations, there was a reasonable likelihood that a resulting injury would be reasonably serious because a miner coming into contact with the splice could have easily been killed because the power cord was 480 volts. Tr. 59. Although the citation was terminated based upon a seasonal closure and shutdown of the mine, Christopher Morley testified to repairing most of the electrical hazards cited by Inspector Frey. Tr. 389-396.

After considering all six penalty criteria as analyzed earlier in this decision as well as Respondent's reliance on MSHA's pronouncements from prior inspections, I am modifying the Secretary's proposed penalty of $807.00 and assess Respondent a civil monetary penalty of $400.00 for Citation No. 8693970.

F. Citation No. 8693978

Inspector Frey issued Citation No. 8693978 on August 23, 2013 for an alleged violation of 30 CRF 56.12028. Tr. 255. The inspector alleged within the citation that:

> Records of ground continuity testing for Delta Concrete were unable to be reviewed upon request and could not be verified. Grounding systems are in place and have been tested in the past. The last inspector noted that ground testing had been performed in March of 2012. Ground system testing would have identified that the well pump ground wire was not connected as noted during this inspection. A miner that became a path to ground for a three phase 480-volt electrical system as is used at this mine could suffer shocks, burns, and other fatal electrical injuries and complications.

Sec'y Ex. P-12.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 12. The Secretary has proposed a penalty of $807.00.

1. Findings

Inspector Frey issued Citation No. 8693978, because he determined that Respondent had not performed a ground continuity test annually and the operator was unable to provide test records upon request in violation of 30 CFR § 56.12028 which mandates that:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Frey testified that he issued Citation No. 8693978 because Respondent failed to produce a record of a ground continuity test upon request. Tr. 256. The inspector testified that he was able to determine that the last ground continuity test was done in March of 2012 by referencing a previous inspector's notes. The citation was issued on August 23, 2013, which indicates that a ground continuity test had not been performed annually. Tr. 271. Frey stated that he did not personally observe any records of testing. Tr. 260. Additionally, the electrical hazards found at Delta Concrete provided further evidence that a ground continuity test had not been performed annually. The inspector believed this to be the case because the well pump ground wire was not attached to anything and a ground continuity test would have recognized this hazard. Tr. 260. Frey also stated that the other electrical hazards cited at Delta Concrete gave him reason to believe that a ground continuity test had not been performed at all within the last year. Tr. 264.

I credit the inspector's testimony that Respondent failed to produce a record of a ground continuity test upon request. Also, I credit Frey's testimony that a continuity and resistance test was last conducted March of 2012, which is more than one year before the citation was issued on

August 23, 2013. As such, I find that Respondent violated 30 CRF 56.12028 because Respondent failed to produce any records indicating a continuity and resistance test had been performed and that a test had not taken place annually since March of 2012. Citation No. 8693978 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693978 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to provide prior records of a continuity and resistance test and not performing a test annually since March of 2012 was in violation of 30 CFR § 56.12028. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to conduct a continuity and resistance test it is reasonably likely that a miner coming into contact with the energized wire or exposed moisture will become the lowest resistance to ground and be electrocuted. Tr. 59-61.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that he had no reason to believe that a ground continuity and resistance test had been performed based on the electrical hazards found at Delta Concrete. Tr. 261. Frey stated that he was particularly concerned about the non-grounded well pump splice that would not provide a low-resistance path to ground. Tr. 262. Had a continuity and resistance test been performed it would have detected the electrical hazards present at Delta Concrete. Tr. 263. Also, he stated that most of the hazards cited were open and obvious. Tr. 264-265. Frey testified that it is likely the operator would have continued to operate the wet plant without a continuity and resistance test being performed and the various electrical hazards would continue to exist. Tr. 267.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with a defective splice or power cord would be potentially fatal because most of the defective hazards had electrical capacity up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. The operator, Walker, testified that he believed the lack of a continuity and resistance test would not be fatal because the mine was not in production. Tr. 461. I have already addressed Respondent's argument regarding Respondent's operational defense earlier in this decision. Accordingly, I credit the inspector's testimony that it is reasonably likely that contact with 480 volts would be fatal. Tr. 265, P-3.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693978 was an S&S violation.

3. Negligence

The inspector testified that the operator conducted continuity resistance tests in the past and knew the tests had to be completed annually. Tr. 266. Frey also testified that the operator did not meet the standard in providing records of past or present continuity and resistance tests. Tr. 266. The inspector stated that the numerous hazards present during the inspection gave him

reason to believe that a test had not been performed within the last year. Tr. 266. Walker, the operator, also acknowledged that he did not conduct a continuity and resistance test because he was waiting a couple months so he could have more time to conduct the subsequent annual test at a later date. Tr. 459-461.

For all these reasons, I find that Citation No. 8693978 was the result of high negligence on the part of Delta Concrete, as they should have been aware of the violation because the operator knew a continuity and resistance test had to be performed annually and that documentation of previous tests must be available at MSHA's request. I credit the inspector's testimony that no continuity and resistance test had been performed since March 2012 and that no documentation of previous tests was provided to Inspector Frey. Tr. 260-267. Therefore, the negligence designation for Citation No. 8693978 is upheld as high.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 12028. Sec'y Ex. P-1. After considering all six penalty criteria as explained more fully earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $807.00 for Citation No. 8693978.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW OTHER VIOLATIONS

A. Citation No. 8693969

Inspector Frey issued Citation No. 8693969 on August 19, 2013 for an alleged violation of 30 CRF 56.11027. Tr. 134. The inspector alleged within the citation that:

> The handrail on the washplant operator's station has not been maintained. The corner post on the right side of the ladder landing has popped welds and flaps. This corner serves both as a fixed point for the swing gate atop the landing and as the hand hold extending above the working platform when climbing the ladder for access. The working platform is 6 feet from the washplant deck and a fall to the ground would be 20 feet. This area is subject to weather and operational conditions that can make it wet and slippery. A miner falling from this height while accessing or atop the working platform could suffer fatal injuries and complications.

Sec'y Ex. 6.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. 5. The Secretary has proposed a specially assessed penalty of $243.00.

1. Findings

Inspector Frey issued Citation No. 8693969, because he determined that the southwest handrail on the washplant operator's station had not been maintained in good condition and was in violation of 30 CFR § 56.11027 which mandates that:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

Frey testified that the cited handrail was located on the southwest side of the washplant operator's station. Tr. 136, 149. He observed a broken bottom corner post weld that caused the handrail to freely move. Tr. 136. The loose handrail was next to the access ladder, so the handrail would be a point of contact for a miner climbing up the ladder to the operator's station. Tr. 137. The operator's station was six feet down from the wash plant deck and 20 feet from the ground. Tr. 136. Also, the inspector testified that the weld appeared to have popped due to continued vibration. Tr. 136. Walker, the operator, acknowledged that the handrail had a broken bottom corner weld. Tr. 497-498.

According to the testimony of the inspector, the standard was violated because the handrail was not maintained in good condition. Tr. 137. I credit the inspector's testimony where he testified that the broken right corner weld allowed the vertical bar to move up and down and was no longer connected to anything. Tr. 137. He also observed marks on the metal where it was rubbing at the bottom of the railing. Tr. 136. Frey stated that the vertical end piece was hanging below the angle iron where it used to be welded. Tr. 137. As such, I find that Respondent violated 30 CRF 56.11027 by failing to maintain a working platform in good condition. Citation No. 8693969 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693969 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to maintain a working platform was a violation of 30 CFR § 56. 11027. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to repair the handrail on the wash plant operator's station, Respondent exposed miners to a potential fall hazard. Tr. 138.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Both parties testified that the wash plant operator's station is a working platform for miners to operate the wet side screen deck. Tr. 140, 498. The inspector noted that the markings from the vertical bar hitting the angle iron indicated that the wet side screen deck had been operational without the hazard being corrected. Tr. 141. According to the inspector, this indicated that the plant was running at some point after it was broken. Tr. 141. The inspector believed because the handrail was able to freely move, a miner could not safely use it for support while climbing up the ladder or as point of contact without the

potential of falling. Tr. 137-138, 143. Walker, the operator testified that a miner must go up onto the operator's tower to operate the wet plant. Tr. 498. The inspector believed the broken handrail would continue to exist during continued mining operations because the defective handrail should have been noted in a workplace examination but was never documented. Tr. 141. Frey also testified that the washplant operator's station was exposed to weather conditions which increased the likelihood of a miner falling. Tr. 154.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that if a miner were to fall from the top of the wash plant operator's station, the fall would either be six feet down to the washplant deck or 20 feet down to the ground. Tr. 136. The inspector believed that either fall would be potentially fatal. Tr. 153-154. Respondent argued that it would be very unlikely that a miner could fall past the wash plant deck to the ground and that a fall to the wash plant deck would not be fatal. Tr. 466. The inspector testified that if a miner were climbing the ladder it would be more likely that a miner would miss the wash plant deck and fall to the ground. Tr. 138, 153-154. Inspector Frey also testified about two fatalgrams, which showed that miners can be fatally injured from falls of nine feet and sixteen feet. Tr. 144-145. I defer to and credit Frey's straight forward and detailed testimony that there is a reasonable likelihood a resulting injury would be reasonably serious if a miner were to fall from the wash plant operator's station to the ground or wash plant deck.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693969 was an S&S violation.

3. Negligence

Frey believed that the defective handrail was readily apparent because a miner doing a workplace inspection or climbing up to the wash plant operator's station should have noticed the hazard. Tr. 147. The inspector testified that the marks where the vertical bar was rubbing against the platform indicated that the wet side screen deck had been operational without the hazard being corrected. Tr. 141. Also, inspector Frey noted that the broken handrail was not noted in a workplace examination and no safeguards were put in place to indicate it had been identified. Tr. 143,147. Accordingly, he acknowledged that the weld could have broken when the plant was last in operation and considered this a mitigating factor thus assessing the negligence level as moderate. Sec'y Ex. P-6, p. 1.

Respondent argued that a drop down bar connects the southwest railing once a miner reaches the top of the operator's station and manually swings it down. Tr. 152. Inspector Frey testified that because the southwestern bottom corner weld was broken, the drop down bar would not function as intended and would not help a miner climbing up the ladder. Tr. 152. Additionally, the inspector testified that the swing gate for the working platform did not work properly and made the cited condition more obvious. Tr. 143. Again, I find Frey's testimony straight forward, detailed, articulate and persuasive meriting credit and deference over that of Respondent's arguments.

For all these reasons, I find that Order No. 8693969 was the result of moderate negligence on the part of Respondent, as they should have been aware of the violation because the handrail was not maintained and the operator's station is frequently used by miners to operate

the wet side screen deck. Tr. 143. Therefore, the negligence designation for Order No. 8693969 is upheld at a moderate level.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $243.00. Respondent's history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 11027. P-1. Walker, the operator, testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I upheld the moderate negligence designation for this citation because the defective handrail was able to freely move and a miner could not safely use it for support while climbing up the ladder without the potential of falling. Tr. 137-138, 143. The defective handrail created a reasonable likelihood of injury because a miner must go up the ladder onto the operator's tower to operate the wet plant. Tr. 498. According to the record, the citation was terminated based upon a seasonal closure and shutdown of the mine.

After considering all six penalty criteria and relying on my penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $243.00 for Citation No. 8693969.

B. Citation No. 8693974

Inspector Frey issued Citation No. 8693974 on August 19, 2013 for an alleged violation of 30 CRF 56.9303. Tr. 180. The inspector alleged within the citation that:

> The grizzly ramp wall adjacent to the plant feed conveyors is unstable and has multiple concrete clocks in the process of toppling as ramp material thrusts them outward. Miners travel below the wall to maintain and grease the conveyors and as an access to the Surge tunnel. If the wall were to fail, a miner in the adjacent travelway could be fatally crushed.

Sec'y Ex. 9.

Inspector Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's moderate negligence. Sec'y Ex. P-9. The Secretary has proposed a penalty of $243.00.

1. Findings

Inspector Frey issued Citation No. 8693974, because he determined that a grizzly ramp wall adjacent to the plant feed conveyors was unstable where he observed multiple concrete

blocks that were in the process of toppling. He found this condition to be a violation of 30 CFR § 56.9303 which mandates that:

> Ramps and dumping facilities shall be designed and constructed of materials capable of supporting the loads to which they will be subjected. The ramps and dumping facilities shall provide width, clearance, and headroom to safely accommodate the mobile equipment using the facilities.

The Respondent constructed a ramp to a grizzly storage bin where large vehicles dump gravel into a grizzly that funnels the gravel onto a feed conveyor located in a surge tunnel under the ramp. Tr. 183. Frey testified that the grizzly ramp wall was not capable of supporting the weight of the materials above the ramp. Tr. 182. The inspector observed that material was sloughing into the roadway past a stack of ecology blocks which were in the process of toppling and being thrust forward by the material that was falling down the grizzly ramp. *Id.,* Sec'y Ex. P-9. Also, Frey stated that the retaining wall under the ramp was cracked and leaning outward. Tr. 185. The inspector also noted that at the top of the grizzly ramp there was a k-rail highway style divider that was sloughing down the side of the ramp. Tr. 180-185. Frey testified that the ecology blocks and k-rail created a hazard to miners because the material falling down the ramp could cause them to topple down into the walkway. Tr. 182. Respondent denied that the blocks were in the process of toppling and asserted that the blocks were purposefully installed in a toppled fashion to hold the bank down from erosion. Tr. 439, 441-442, Sec'y Ex. P-9.

According to the inspector, the standard was violated because the grizzly ramp wall was unstable and multiple concrete blocks were in the process of toppling as ramp material thrust them outward. Tr. 182-189. I defer to and credit the inspector's testimony that the grizzly ramp was not capable of supporting the loads to which it was subject because the falling material was thrusting hazards outward. The inspector believed that eventually the material would thrust the multiple hazards outward and into the travelway. Tr. 186. The photos taken by the inspector show the toppled ecology blocks with k-rails that appear to have been displaced due to sloughing of ground material. Sec'y Ex. 9. I concur with his belief based on his direct observation and photos of the condition. As such, I find that Respondent violated 30 CRF 56.9303 by failing to stabilize a grizzly ramp wall that was not able to support the load to which it was subjected. Citation No. 8693974 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693974 as an S&S violation. I have already found that the failure to stabilize a grizzly ramp wall was in violation of 30 CFR § 56. 9303 thus meeting element one of the *Mathies* test. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to stabilize the grizzly ramp wall, Respondent exposed miners to crushing injuries from ecology blocks toppling or material sloughing off the ramp. Tr. 182, 191.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to will result in an injury. Inspector Frey testified that miners were exposed to the ecology blocks and sloughing material because they have to access the travel way to perform

maintenance, repair, inspection, cleanouts, and to access the surge tunnel. Tr. 193. The inspector testified that eventually, with continued mining operations, the ecology blocks would topple into the travel way, the k-rails would slough into the travel way, and gravel would slough into the travel way. Tr. 191. Also, Frey stated that there could be a landslide of debris if the retaining wall or ecology blocks failed to hold back the material on the grizzly ramp. Tr. 191. The inspector also testified that the vibration from mobile equipment around the ramp would cause material to move down the ramp quicker and would eventually cause the grizzly ramp to fail. Tr. 191-192. Frey also observed that the grizzly ramp hazard was obvious when he walked up the travel way. Tr. 190. He noted that the ramp hazard would likely continue to exist into the future because the ramp failure was not recognized in any workplace examinations. Tr. 190-193. According to the inspector, the operator was unaware of the state of the grizzly ramp wall. Tr. 190.

Respondent argued that the violation was not reasonably likely to lead to a significant injury because the ecology blocks, k-rails, or gravel material would not slough off in a way that would lead to a significant injury. Tr. 439-446. The operator testified that the ecology blocks were locked in place because of a v-notch at the bottom of every block. Tr. 442. Walker avowed that neither the ecology blocks nor k-rails had moved at all since they were installed to hold back material on the grizzly ramp. Tr. 443. He also testified that even though the retaining wall under the ramp was cracked, it was reinforced with rebar. Tr. 444. I defer to and credit the inspector's straight forward and compelling testimony that it was reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp would lead to a significant injury because his observations are clearly supported by the photos he took. Tr. 194, Sec'y Ex., P-9.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. The inspector testified that he was concerned that a miner could be crushed or struck by an ecology block or k-rail falling down the slope of the ramp. Tr. 194. I share his concern and find it is reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp would lead to fatal crushing injuries. Tr. 193-194.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find that the Secretary has established that Citation No. 8693974 was an S&S violation.

3. Negligence

Inspector Frey testified that he was worried about continued mining operations because the grizzly ramp had probably degraded over time and the hazards were not recognized by the operator. Tr. 193. The inspector believed the hazards on the grizzly ramp had not been recognized because the area was not cordoned off to prevent access and there was no workplace examination identifying the hazards. Tr. 193. Frey also testified that the toppling ecology blocks, sloughing k-rails, and cracked retaining wall were obvious signs that the ramp was failing. Tr. 195. However, he also acknowledged that the deterioration progressed slowly thus "kind of working itself into the background" on not being noticed. Tr. 195.

For all these reasons, I find that Citation No. 8693974 was the result of moderate negligence on the part of Delta Concrete, as they should have been aware of the violation

because the toppled ecology blocks and sloughing material were obvious and next to a travel way where sufficient workplace examinations should have been taking place. Tr. 143. I find the slow progression of the deterioration to be a mitigating factor leading one to believe immediate attention was not necessary. Therefore, the negligence designation for Citation No. 8693974 is upheld at moderate.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $243.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 9303. Sec'y Ex. P-1. Walker, the operator testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that the proposed penalty would affect its ability to continue business operations. I upheld the moderate negligence designation for this citation because the toppling ecology blocks, sloughing k-rails, and cracked retaining wall were obvious signs that the grizzly ramp was failing. Tr. 195. I found that it was reasonably likely the ecology blocks, k-rails, or gravel material sloughing off the ramp could lead to a significant injury to a miner. Tr. 194. According to the record, the citation was terminated based upon a seasonal closure and shutdown of the mine.

After considering all six penalty criteria and noting the penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $243.00 for Citation No. 8693974.

C. Citation No. 8693975

Inspector Frey issued Citation No. 8693975 on August 23, 2013 for an alleged violation of 30 CRF 56.18002a. Tr. 180. The inspector alleged within the citation that:

> A competent person has not been performing workplace exams at least once per shift at Delta Concrete based upon the number of discrete safety hazards found during inspection and the length of time necessary for them to accumulate. A miner performing their duties could be fatally injured if exposed to a hazard that should have been found and corrected in an examination of working places.

Sec'y Ex. 10.

Frey determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Respondent's high negligence. Sec'y Ex. 10. The Secretary has proposed a penalty of $807.00.

1. Findings

Inspector Frey issued Citation No. 8693975, because he determined that a competent person had not been performing workplace exams at least once per shift at Delta Concrete. This was in violation of 30 CFR § 56.18002a which mandates that:

> A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

A competent person according to 56.2 is "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2. MSHA's Program Policy Manual states a competent person is "any person who, in the judgment of the operator, is fully qualified to perform the assigned task. MSHA does not require that a competent person be a mine foreman, mine superintendent, or other person associated with mine management." Sec'y Ex., P-19.

Inspector Frey testified that there was evidence that mining related activities had occurred on days where there was no record of examination. Tr. 214. After inspecting Delta Concrete, inspector Frey stated that the number of hazards identified led him to question the competency of the person performing those inspections. Tr. 214. The operator acknowledged that at the time they were cited, Respondent was not conducting competent person inspections every shift as required by 56.18002a. Tr. 474. The inspector stated that there were missing records of examinations for when work would have been performed based upon looking at production reports. Tr. 217. Inspector Frey noted that most of the hazards cited at the mine were open and obvious hazards that should have identified by sufficient workplace examinations. Tr. 214.

The inspector noted no less than four citations where he believed the operator should have discovered the hazards during a previous workplace examination. Tr. 216. For Citation Nos. 8693966 and 8693970, the operator should have discovered the inadequate splices during workplace examinations because the splices were open and obvious and a competent miner would have spotted the hazard. Tr. 216-219. For Citation No. 8693968, the operator should have observed the damaged 480-volt cable adjacent to a travel way during a workplace examination because the damage had existed for a significant period of time based on the amount of damage to the cable. Tr. 217-218. Lastly, for Citation No. 8693969, the operator should have observed the defective handrail during a workplace examination because a reasonable miner would have noticed it while climbing up to the operator's station. Tr. 219.

I credit the inspector's testimony that the hazards were extensive and had most likely existed for a significant period of time demonstrating that inadequate work place examinations had taken place while the plant was operational. Tr. 215. Respondent argued that there was a communications failure between Inspector Frey and Operator Walker regarding who was responsible for workplace examinations. Walker avowed that as owner operator he was the competent person who was responsible for the exams while Frey believed Crusher Operator Jimmy Hanlon was responsible. Tr. 334-335, 127, 129-130, 217. Respondent further asserted he believed workplace exams were required for operation days only and not maintenance days. Tr.,

473-474. Regardless of the alleged communication issues I find sufficient evidence to conclude that there was a lapse in required workplace exams due to the absence of exam records and the fact that the electrical violations had existed for an extended period while the plant was operational prior to the inspection. As such, I find that Respondent violated 30 CRF 56.18002a because a competent person had not been performing workplace examinations at least once per shift at Delta Concrete. Citation No. 8693975 is **AFFIRMED**.

2. Gravity

Inspector Frey designated Citation No. 8693975 as an S&S violation. I have already found that Respondent failed to have a competent person perform workplace examinations at least once per shift in violation of 30 CFR § 56.18002a. The second *Mathies* element is a contribution to a discrete safety hazard. There were a number of discrete safety hazards that existed at Delta Concrete which included inadequate splices, damaged power cords, and a broken handrail that were not discovered during workplace examinations. Tr. 226-228, P-10.

The third *Mathies* element requires showing a reasonable likelihood that the hazard contributed to was likely to result in an injury. For the electrical citations, the inspector testified that many of the electrical hazards were located in travel ways where miners perform maintenance, repair, inspection, and cleanouts. The inspector also testified that other discrete safety hazards like the defective handrail or grizzly ramp were also in locations where miners frequently work and these hazards were obvious and had existed for a significant period of time while Respondent was operational. Based on the testimony of the inspector, I find a reasonable likelihood that the failure to conduct workplace examinations reasonably contributed to the likelihood a significant injury would occur.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Inspector Frey testified that under the right circumstances a miner coming into contact with a defective splice or power cord would be potentially fatal because most of the defective hazards had electrical capacity up to 480 volts. Tr. 59. The inspector also testified to five separate fatalgrams, each showing that a 480-volt shock can be fatal. Tr. 60. Frey stated that the non-electrical hazards posed a significant risk of injury to miners which included crushing injuries from the grizzly ramp and fall hazards from the defective handrail. I credit the inspector's testimony that many of the hazards cited on August 19, 2013 could lead to fatal injuries and that six out of nine citations were designated as potentially fatal. The failure to identify and address these hazards via workplace examinations significantly contributed to the reasonable likelihood of a serious injury or fatality occurring.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I find the Secretary has established that Citation No. 8693975 was an S&S violation.

3. Negligence

Inspector Frey testified that the negligence designation was high because the operator should have been aware that work place examinations were not being conducted as required by a competent person. Tr. 228. Frey testified that the Walker stated during their conversation that

equipment operator Jimmy Hanlon did not have sufficient training and was not competent to perform some workplace examinations. Tr. 229. Walker testified that his conversation with the inspector was contrary to inspector Frey's testimony, but did acknowledge that Hanlon was not competent to perform workplace examinations for electrical hazards. Tr. 378. Based on both parties' testimony, I credit the inspector's testimony that the number of electrical hazards demonstrates that a competent miner whether it be Hanlon or Walker himself, was not performing adequate workplace examinations. Tr. 233.

Frey also reviewed the workplace examination reports from Delta Concrete and determined that work was performed on days when examinations were not recorded. Tr. 230. Frey stated that when he inspected Respondent, he was not provided with examination records for every day he could substantiate work taking place. Tr. 230. The inspector stated that there were some records of examinations on some days, but there were gaps between days when work was performed. Tr. 215. The mine operator acknowledged that the miners doing workplace examinations did not do examinations on maintenance days if the wet plant was not going to produce gravel, even if the miners worked in the cited areas. Tr. 472-474. He also testified that at the time of the citation, there were competent miners doing the workplace inspections, but it was not on a daily basis. Tr. 473. Based on the testimony from both parties it is easy to conclude there was a fundamental misunderstanding between Frey and Walker about who was responsible for the workplace examinations. Walker ultimately admitted he was the responsible competent person after his son left employment from the mine in 2011 and acknowledged that workplace exams had only been conducted on a shift by shift basis while the plant was operational and not when maintenance only was being performed. However, it is clear from the evidence that at a minimum the electrical violations had existed since 2011, no less than a year and a half to two years prior to the 2013 inspection. A competent workplace exam while the plant was operational during this time should have identified the electrical issues. Therefore, I find the high negligence designation to be appropriate and uphold it.

4. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $807.00. Respondent's past history of previous violations revealed that the mine has a total of seven past violations and no repeated violations of 56. 18002a. Sec'y Ex. P-1. Walker, the operator testified that Respondent is a small mom and pop operation with 15 current employees at the time the citation was issued. Tr. 301. Respondent has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I upheld the high negligence designation for this citation because of the many open and obvious hazards present at Delta Concrete that should have been identified by sufficient workplace examinations. I also found that significant injury was reasonably likely because many of the electrical hazards were located in travel ways where miners perform maintenance, repair, inspection, and cleanouts.

After considering all six penalty criteria and noting my penalty analysis earlier in this decision, I uphold the Secretary's proposed penalty and assess Respondent a civil monetary penalty of $807.00 for Citation No. 8693975.

D. Citation No. 8693977

Inspector Frey issued Citation No. 8693977 on August 23, 2013 for an alleged violation of 30 CRF 56.9300a. Tr. 241. The inspector alleged within the citation that:

> The scale does not have rub rails or any other mid axle height barrier with approximately a 4 foot drop off on either side. Trucks drive across the scales as needed depending upon business. Driving off the scale could cause a truck to turn on its side leading to cuts, bruises, strains, sprains, or broken bones for the driver.
>
> Standard 56.9300a was cited 1 time in two years at mine 5001783 (1 to the operator, 0 to a contractor).

Sec'y Ex. 11.

Inspector Frey determined that the violation was unlikely to cause an injury, the resulting injury would be lost workdays or restricted duty, the violation was not S&S, affected one person, and was the result of Respondent's low negligence. Sec'y Ex. 11. The Secretary has proposed a penalty of $100.00.

1. Findings

Inspector Frey issued Citation No. 8693977, because he determined that the operator's scale for weighing vehicles was in violation of 30 CFR § 56.9300a which mandates that:

> Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Frey testified he observed an operator's scale for weighing vehicles at the Delta Junction mine that did not have rub rails, berms, or guardrails and there was a four foot drop off on either side of the scale. Tr. 243-245. The Commission requires a three-part test for finding violations of 30 C.F.R. § 56.9300: (1) whether the scales are part of a roadway; (2) whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons; and (3) whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self-propelled mobile equipment that travels the roadway. *Lakeview Rock Prods., Inc*., 33 FMSHRC 2985 (Dec. 2011).

Since issuance of *Lakeview* the case that has most fully considered the question of whether an elevated scale is part of a roadway has been *Knife River Corp.,* 34 FMSHRC 1109 (May 10, 2012) . In *Knife River*, Judge Thomas McCarthy applied the Commission's three-part test and provided a thorough analysis in determining that an elevated truck scale with 10-inch rub rails was not part of the roadway. The judge found unpersuasive the argument that the scale is part of a continuous road and therefore, by definition, part of the roadway. 34 FMSHRC at 1121. He noted that because the Commission required in *Lakeview* an initial determination of whether the scale was part of the roadway, the judge must examine the "design, location, and use of the truck scale", in making his determination. *Id.* The judge agreed with the Secretary's

position that the plain language of Section 56.9300 would apply to an area where vehicles must travel, but found that the Secretary in his case failed to establish that the scale constituted such an area where vehicles must travel. *Id.* at 1122. He noted that the scale at Knife River was not located on the main haulage road where all the vehicles entering or exiting the mine were required to travel, but rather was removed on a single-lane access road. *Id.* The only trucks that drove on the scale were those being weighed. *Id.* The judge specifically found that:

> Drivers do not use the scale as one typically uses a road, bridge, bench, or ramp (i.e., as a means of traveling from one point to another)… Rather, the scale is used as a piece of equipment for the sole purpose of weighing vehicles, which slowly move across the scale with intermittent stops before proceeding back on course. The fact that trucks enter one end of the scale and exit on another is completely secondary to the scale's function and use. *Id.*

I find that advancing a functionalist approach, rather than a formal approach that examines the scale superficially, Judge McCarthy allowed the first element of the Commission's test to have meaning. *Citing Lakeview Rock Products, Inc.,* 35 FMSHRC 473, 487, 2013 WL 1385621, at *13-14.

In this case Respondent argued that the operator's scale was not a roadway that vehicles used as an entrance or exit to the mine site. Tr. 437. Respondent's Google image of the Delta Junction mine shows the location of the main roadway used by miners and contractors in red. Tr. 317-319, Resp. Ex. A, Photo 7. Walker, the operator, testified that the main roadway in red ran from left to right, and that the lines depicted traffic flow from the two exit and entrance points. *Id.* Also, Walker testified the location of the scale access point and exit were next to the office and indicated that a miner would not use this access as an entrance to or exit from the mine site. Tr. 318, 437. Walker also testified that the specific purpose of the scale was for weighing vehicles and was not a roadway that miners would regularly use. Tr. 437. Frey testified that he considered the scale to be a part of the roadway because vehicles and trucks would have to drive across the scale twice in order to be properly weighed. Tr. 243-244. First, a truck driver with an empty trailer would have to drive over the scale and then weigh the trailer end. Tr. 243. Second, the truck driver would then drive over it again, after being loaded, to get a heavy weight to determine the saleable amount of product. Tr. 243. Because of the vehicle traffic that the scale road took on, the inspector believed that it was part of a roadway. Tr. 243-244.

After considering both parties' arguments, I find that the design, location, and use of the scale at the Delta Junction mine establishes that it is not part of the mine's roadway. I credit Walker's testimony that the scale road was next to the office and that it was not used as an entrance or exit roadway to or from the mine. Like *Knife River*, the scale was not located on the main travel way road that ran left to right, but rather the scale area was removed onto a single-lane access by the main office. Resp. Ex. A, Photo 7. I credit Walker's testimony that the sole purpose of the scale area was to weigh vehicles and not as a roadway miners used as an entrance and exit. The design and placement of the scale at the mine, based on the Google image of the Delta Junction mine site, clearly demonstrates that a miner wishing to weigh a vehicle would have to pull off the main roadway onto the scale road to be weighed. Resp. Ex. A, Photo 7.

Therefore, I find that the Secretary has failed to prove a violation of 30 CRF 56.9300a because the scale access area was not part of a roadway. Accordingly, Citation No. 8693977 is **VACATED**.

VI. PENALTY ASSESSMENT SUMMARY

The following chart summarizes my findings and the assessed penalties in this docket:

Citations			
Citation No.	**Proposed Amount**	**Judgment Amount**	**Modification**
8693966	$807.00	$400.00	Negligence level reduced from high to moderate
8693967	$100.00	$100.00	
8693968	$807.00	$807.00	
8693970	$807.00	$400.00	Negligence level reduced from high to moderate
8693978	$807.00	$807.00	
8693969	$243.00	$243.00	
8693974	$243.00	$243.00	
8693975	$807.00	$807.00	
8693977	$100.00	$0.00	Vacated
Total	$4721.00	$3807.00	

VII. ORDER

Based upon the findings above, Citation Nos. 8693966 and 8693970 are **AFFIRMED** with modified negligence levels. Citation Nos. 8693967, 8693968, 8693978, 8693969, 8693974, and 8693975 are **AFFIRMED** as written. Citation No. 8693977 is **VACATED**. Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess eight penalties contested at hearing above for a total judgment penalty of $3807.00. Delta Concrete Inc. is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$3,807.00** within 30 days of this order.[1]

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

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 3, 2014

BRODY MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. WEVA 2014-82-R[1] Order No. 9003242; 10/28/2013 Docket No. WEVA 2014-83-R Order No. 7166788; 10/28/2013 Docket No. WEVA 2014-86-R 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

[1] While this case has been before the Commission, MSHA has issued numerous section 104(e) withdrawal orders pursuant to Pattern of Violations Notice No. 7219154. Brody has contested each of the orders. As Chief Judge Lesnick noted in his Order dated January 30, 2014, all such notices of contest have been consolidated in this proceeding.

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

Docket No. WEVA 2014-449-R
Order No. 7166807; 01/15/2014

Docket No. WEVA 2014-450-R
Order No. 7166808; 01/15/2014

Docket No. WEVA 2014-451-R
Order No. 8154104; 01/15/2014

Docket No. WEVA 2014-452-R
Order No. 9005729; 01/13/2014

Docket No. WEVA 2014-453-R
Order No. 9005731; 01/13/2014

Docket No. WEVA 2014-454-R
Order No. 9005732; 01/14/2014

Docket No. WEVA 2014-455-R
Order No. 9005733; 01/14/2014

Docket No. WEVA 2014-456-R
Order No. 9005735; 01/15/2014

Docket No. WEVA 2014-457-R
Order No. 9005736; 01/15/2014

Docket No. WEVA 2014-479-R
Order No. 7166815; 01/23/2014

Docket No. WEVA 2014-480-R
Order No. 7166816; 01/23/2014

Docket No. WEVA 2014-529-R
Order No. 7166817; 01/27/2014

Docket No. WEVA 2014-530-R
Order No. 9005739; 01/27/2014

Docket No. WEVA 2014-531-R
Order No. 9005747; 02/10/2014

Docket No. WEVA 2014-537-R
Order No. 9007544; 02/04/2014

Docket No. WEVA 2014-539-R
Order No. 7166822; 01/28/2014

Docket No. WEVA 2014-561-R
Order No. 9005740; 01/27/2014

Docket No. WEVA 2014-562-R
Order No. 9005742; 01/29/2014

Docket No. WEVA 2014-563-R
Order No. 7166826; 02/04/2014

Docket No. WEVA 2014-570-R
Order No. 9005750; 02/19/2014

Docket No. WEVA 2014-571-R
Order No. 7166824; 01/29/2014

Docket No. WEVA 2014-572-R
Order No. 9005741; 01/29/2014

Docket No. WEVA 2014-593-R
Order No. 9005753; 02/20/2014

Docket No. WEVA 2014-594-R
Order No. 7166831; 02/11/2014

Docket No. WEVA 2014-638-R
Order No. 9005754; 02/24/2014

Docket No. WEVA 2014-639-R
Order No. 9005762; 03/04/2014

Docket No. WEVA 2014-640-R
Order No. 9003274; 03/04/2014

Docket No. WEVA 2014-641-R
Order No. 9005763; 03/04/2014

Docket No. WEVA 2014-672-R
Order No. 9005758; 02/25/2014

Docket No. WEVA 2014-673-R
Order No. 9005756; 02/25/2014

Docket No. WEVA 2014-674-R
Order No. 7166838; 02/24/2014

Docket No. WEVA 2014-675-R
Order No. 7166839; 02/24/2014

Docket No. WEVA 2014-676-R
Order No. 8166840; 02/24/2014

Docket No. WEVA 2014-678-R
Order No. 7166837; 02/24/2014

Docket No. WEVA 2014-679-R
Order No. 9005755; 02/24/2014

Docket No. WEVA 2014-680-R
Order No. 9005757; 02/25/2014

Docket No. WEVA 2014-681-R
Order No. 9005759; 02/25/2014

Docket No. WEVA 2014-715-R
Order No. 8135796; 03/11/2014

Docket No. WEVA 2014-716-R
Order No. 8135797; 03/12/2014

Docket No. WEVA 2014-717-R
Order No. 9001091; 03/11/2014

Docket No. WEVA 2014-718-R
Order No. 9001095; 03/19/2014

Docket No. WEVA 2014-719-R
Order No. 9001096; 03/11/2014

Docket No. WEVA 2014-720-R
Order No. 9005764; 03/05/2014

Docket No. WEVA 2014-722-R
Order No. 9007123; 03/23/2014

Docket No. WEVA 2014-745-R
Order No. 9969627; 03/24/2014

Docket No. WEVA 2014-804-R
Order No. 9005343; 04/03/2014

Docket No. WEVA 2014-805-R
Order No. 9005768; 04/03/2014

Docket No. WEVA 2014-806-R
Order No. 9005769; 04/07/2014

Docket No. WEVA 2014-807-R
Order No. 9005770; 04/07/2014

Docket No. WEVA 2014-811-R
Order No. 9005344; 04/09/2014

Docket No. WEVA 2014-813-R
Order No. 9005772; 04/09/2014

Docket No. WEVA 2014-814-R
Order No. 9005773; 04/09/2014

Docket No. WEVA 2014-819-R
Order No. 9005774; 04/15/2014

Docket No. WEVA 2014-854-R
Order No. 9005778; 04/21/2014

Docket No. WEVA 2014-855-R
Order No. 9005779; 04/22/2014

Docket No. WEVA 2014-856-R
Order No. 9005780; 04/22/2014

Docket No. WEVA 2014-909-R
Order No. 9005347; 05/01/2014

Docket No. WEVA 2014-974-R
Order No. 9005349; 05/13/2014

Docket No. WEVA 2014-975-R
Order No. 9005350; 05/13/2014

Docket No. WEVA 2014-976-R
Order No. 9007426; 05/13/2014

Docket No. WEVA 2014-1012-R
Order No. 9005786; 05/29/2014

Docket No. WEVA 2014-1013-R
Order No. 9005787; 05/29/2014

Docket No. WEVA 2014-1035-R
Citation No. 9005792; 06/12/2014

Docket No. WEVA 2014-1036-R
Citation No. 9005362; 06/11/2014

Docket No. WEVA 2014-1037-R
Citation No. 9005360; 06/04/2014

Docket No. WEVA 2014-1038-R
Citation No. 9005361; 06/11/2014

Docket No. WEVA 2014-1135-R
Order No. 9905374; 07/15/2014

Docket No. WEVA 2014-1138-R
Order No. 9005376; 07/16/2014

Docket No. WEVA 2014-1157-R
Order No. 9009660; 07/22/2014

Docket No. WEVA 2014-1993-R
Order No. 9005384; 07/30/2014

Docket No. WEVA 2014-1994-R
Order No. 9005383; 07/30/2014

Docket No. WEVA 2014-1995-R
Order No. 9005382; 07/30/2014

Docket No. WEVA 2014-1996-R
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Docket No. WEVA 2014-2172-R
Order No. 9003948; 09/08/2014

Docket No. WEVA 2014-2173-R
Order No. 9005393; 09/09/2014

Docket No. WEVA 2014-2174-R
Order No. 9005398; 09/10/2014

Docket No. WEVA 2014-2175-R
Order No. 9005400; 09/10/2014

Docket No. WEVA 2014-2221-R
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Docket No. WEVA 2015-59-R
Order No. 7272454; 10/07/2014

Docket No. WEVA 2015-60-R
Order No. 7272462; 10/07/2014

Docket No. WEVA 2015-61-R
Order No. 7272494; 10/07/2014

Docket No. WEVA 2015-63-R
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Docket No. WEVA 2015-66-R
Order No. 9005705; 10/14/2014

Docket No. WEVA 2015-67-R
Order No. 9006768; 10/14/2014

Docket No. WEVA 2015-68-R
Order No. 9006769; 10/14/2014

	Docket No. WEVA 2015-121-R Order No. 7219154; 10/24/2014 Mine: Brody Mine No. 1 Mine ID: 46-09086
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2013-370 A.C. No. 46-09086-308309 Docket No. WEVA 2013-564 A.C. No. 46-09086-310927 Docket No. WEVA 2013-997 A.C. No. 46-09086-321030 Docket No. WEVA 2013-1055 A.C. No. 46-09086-323691 Docket No. WEVA 2013-1189 A.C. No. 46-09086-326531 Docket No. WEVA 2013-619 A.C. No. 46-09086-342759 Docket No. WEVA 2013-620 A.C. No. 46-09086-342759 Docket No. WEVA 2014-702 A.C. No. 46-09086-344708 Docket No. WEVA 2014-842 A.C. No. 46-09086-347271
BRODY MINING, LLC, Respondent.	Mine: Brody Mine No. 1

ORDER DISMISSING PATTERN CHARGES

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Before: Judge William B. Moran

ORDER DISMISSING THE PATTERN CHARGE AS VIOLATIVE OF DUE PROCESS

Introduction

Imagine, if you will, a contest of any sort. It could be a board game or a card game or, as in this instance, a contest to determine if a pattern of violations exists. One would expect that, before beginning such a contest, the rules would be announced in advance; a flush in a poker game, for example, being established as all five cards being of the same suit, or in a board game, a requirement of owning all the properties on a given street before installing houses. But what if the rules were announced only after the game had been played, after the hand had been played so to speak, and that one party then announced the basis for a winning hand? Perhaps a two or three, not an Ace, King or Queen, was anointed as the superior card, a determination made by the one then announcing the rules and according to the hand that player then had. For most people, one would hope, such a contest would seem patently unfair, almost rigged.

In the field of law, one could assert that such an arrangement violates procedural due process, lacking fundamental fairness. Yet, for the reasons which follow, in this Court's view the Secretary of Labor's procedure for charging a mine operator with a pattern of violations smacks of such after-the-fact rules. Here, not only does the Secretary's elaborate and lengthy regulation, involving a pattern notice, fail to identify what constitutes a pattern, even after the pattern notice was issued and the litigation challenging that notice instituted, the Secretary still

did not identify, beyond general and vague statements, the basis for his pattern claim. Despite the Court's requirement that the Secretary identify the basis for this claim before the hearing commenced, it declined to do so. Like the unfair card game, the Secretary advised that he would be announcing the "rules," not simply after the hearings were concluded, but that he would also wait until after the Court made its determinations as to which of the litigated citations and orders were found to have the significant and substantial finding associated with them. Only then, knowing which violations were identified as "significant and substantial" would the Secretary then announce the basis for his claim of a pattern of violations. Such rules are antithetical to procedural due process.

The Pattern of Violations Provisions

The Mine Act, at 30 U.S.C. § 814(e), provides:

> If an operator has a pattern of violations of mandatory health or 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, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which 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 subsection (c) of this section, 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.

The Pattern of Violations regulations applicable to this litigation were issued as a final rule on January 23, 2013, with an effective date of March 25, 2013. Pattern of Violations, 78 Fed. Reg. 5056 (Jan. 23, 2013). The present version replaced an earlier regulatory version, issued in 1990, addressing the subject of patterns. The process of creating that earlier version began in 1980, and, a decade later, on July 31, 1990, a final rule was issued. Pattern of Violations, 55 Fed. Reg. 31,128 (July 31, 1990). Thus, from the time of enactment of the Mine Act, it took more than 12 years for the first regulation addressing a pattern of violations to be issued and then more than another 22 years for the latest iteration.

The present Pattern of Violations regulation contains 20,108 words, but only 628 of those are devoted to the text of the rule itself and only 182 of those speak to the "Pattern

criteria."[2] While seven criteria are listed, none of them define what constitutes a pattern, nor does any other provision in the rule provide such a definition. Instead, the provision sets out the types of enforcement actions that will be included in the pattern criteria.

Background of this litigation

Brody was issued a pattern of violations notice. Thereafter, upon Brody's challenge to the Pattern regulations, an administrative law judge upheld the facial validity of those rules, and the Commission, on interlocutory appeal, affirmed that ruling, in a decision issued on August 28, 2014. *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 28, 2014). Following the Commission's decision, the posture of the case before this Court was to determine if a pattern of violations had been established and, integral to that determination, which citations/orders, among the 54 constituting the basis for the pattern of violations notice, were established as violations and, among those, which were also shown to significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. The Court analogized the distinction between the decision made by the Commission and the present posture of this litigation as comparable to the indictment phase and a trial phase, with the Commission having concluded that the pattern regulation passed facial validity but that at the trial phase it was now time for the Secretary to establish that a pattern of violations existed. To achieve this, the Court determined that MSHA would need to identify the basis for its claim that the 54 citations/orders

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[2] 30 C.F.R. § 104.2 provides:

> Pattern criteria.
>
> (a) At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:
> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
> (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
> (8) Mitigating circumstances.
> (b) MSHA will post the specific pattern criteria on its Web site.

formed a pattern of violations and then establish that those matters were violations and that they had the "significant and substantial," or "S&S," aspect to them.

Consistent with this evidentiary burden upon the Secretary, the Court directed that, prehearing, the Secretary was to set forth the basis for its contention that those violations created a pattern of violations. This direction was brought about by Brody's filing of a Motion in Limine prior to the hearing concerning the Secretary's definition of a pattern. In that motion, Brody sought to compel the Secretary to identify: (1) what constituted a pattern violations; (2) what number of S&S designations Brody had to prevail upon to defeat the pattern of violations designation; and (3) how the grouping of citations in the pattern notice constituted a pattern of violations. The Court agreed that each of these were reasonable and necessary inquiries, essential for a Respondent to be able to defend against the charge.

Other than expressing generalities about patterns, however, the Secretary failed to set forth the basis for his charge. As noted by Brody, the Secretary only relied upon the same dictionary definition and case law concerning sex crimes and Racketeer Influenced and Corrupt Organizations Act ("RICO") violations (18 U.S.C. §§ 1961–1968), asserting that the determination of whether there exists a pattern of violations at Brody can only be resolved by the administrative law judge following the admission of evidence and determination of whether violations were S&S.[3] Brody's Mem. of Law in Supp. Of Vacating the Notice of a Pattern of Violations at 6 [hereinafter Brody Memorandum] (citing Sec'y's Resp. to Contestant's Mot. in Limine Concerning Definition of a Pattern at 3).

As a consequence of the Secretary's failure to comply with the Court's direction, the Court announced that it would be dismissing the pattern notice.[4] At the hearing which ensued,

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[3] The Court also directed the Secretary to identify, at the beginning of the September 23, 2014, hearing, his definition of a pattern and especially as to the 54 citations in this case, advising that the pattern notice would be dismissed if the Secretary failed to provide that information. When the hearing commenced on September 23, 2014, the Secretary spoke only in generalities, reiterating that a pattern of violations could be as few as two citations, citing the same cases as in his Response to Brody's Motion in Limine. Tr. 44-45. The Secretary did not address how the 40 citations that remained of those identified in the notice of pattern of violations constituted a pattern of violations or how Brody could defeat such designation. Tr. 45-48. Instead the Secretary indicated that a determination of a pattern could not be made until the Court determined which citations were properly designated S&S and upon such determinations, it would then be up to the Court to determine whether those constituted a pattern. Tr. 49-50.

[4] This did not mean that the hearing was cancelled. The Court directed that the hearing would proceed as scheduled so that the 54 citations/orders comprising the basis for the pattern notice would be heard. This decision was made for purposes of efficiency and the promise that challenges to pattern charges would be promptly heard. By hearing the evidence for the underlying alleged violations and determining which of those were established as violations in fact and by further determining which among those were also significant and substantial ("S&S"), the Commission, if it were to disagree with the Court's decision to dismiss the pattern notice, would have all the information before it to determine if those established S&S violations

(continued…)

the Court elaborated on its reasoning, explaining that its dismissal of the pattern notice rested on two grounds: the Secretary's process is inconsistent with procedural due process, and it is also inconsistent with the expeditious resolution of pattern matters. The Court added that one could also view the Mine Act's legislative history as requiring, as an element that the Secretary has to prove for pattern charges, that the other enforcement mechanisms under the Mine Act have been insufficient to deal with the mine's safety and health issues. Tr. 649-650.

Thus, the Court expressed that, on procedural due process grounds, it was an obligation on the Secretary's part to identify, in advance of the hearing,[5] the road map explaining the basis for his claim that the mine has shown a pattern of violations. The Court stated that the Secretary's approach of essentially putting it in the lap of the Commission to determine, on a case-by-case basis and over a period of years, the grounds for a pattern would also be inconsistent with an expeditious resolution of the matter. Tr. 345.

Brody's contentions regarding dismissal of the pattern notice

Brody submitted a Memorandum of Law in support of vacating the notice of a pattern of violations. Preliminarily, Brody notes that on August 28, 2014, the Commission issued its decision on the interlocutory appeal in this matter but that it did not directly address the issue of what constitutes a pattern of violations. Brody Mem. at 3. It observes that the regulations promulgated by MSHA do not define what constitutes a pattern of violations. *Id.* Instead,

> Section 104.2 [of those regulations] only sets out the types of enforcement actions that will be included in MSHA's website criteria, *not the criteria* used to place Brody or any operator on a POV, according to the Secretary. The criteria that MSHA used to place Brody on a pattern of violations are, according to the Secretary, only a "general statement [of] policy." If that is the case (which Brody does not concede), the Secretary does not identify any criteria that can be construed as an interpretation of "pattern of violations."

Id. at 3-4 (citing *Brody*, 36 FMSHRC at 2062 n.8 (Althen, Comm'r, dissenting)).

[4] (…continued)
constituted a pattern of violations under 30 U.S.C. § 814(e). Therefore, over a period of three weeks, the evidence relating to the 54 alleged violations was heard by the Court. The Court's findings relating to those 54 matters are contained in this decision.

[5] The Court reiterated its view that the government made a fatal flaw in proceeding without informing Brody of the basis for its pattern charge and that such an approach is fundamentally unfair on due process grounds. This failure was compounded by not only failing to announce its basis prehearing but also by asserting that, even post-hearing, it would not express the grounds. Instead the Secretary asserted that it would wait until *after* the Court ruled on which violations were proven and were S&S. Tr. 439-442.

"From the very beginning, Brody has sought in this matter to get the Secretary to identify in what way the 54 citations constitute a pattern and how many Brody must successfully defend in order to prevail." *Id.* at 5. It states that, "[b]efore the Commission, the Secretary again asserted that according to the agency, there is no specific number that it has to prove." *Id.* (citing Comm'n Oral Argument Tr. 57). "Rather, the Secretary pointed to the general definition of 'pattern' in *Black's Law Dictionary*. The Secretary asserted that as few as two citations may constitute a pattern." *Id.* (citing Comm'n Oral Argument Tr. 75; 36 FMSHRC at 2061 n.7 (Althen, Comm'r, dissenting)). "In a less than specific comment at oral argument, the Secretary said that Brody could litigate the 54 citations, without explanation as to how Brody could defend itself against the allegation of a pattern." *Id.* at 5-6 (citing Comm'n Oral Argument Tr. 73). "The Secretary also asserted that he has defined pattern as a 'mode of behavior or series of acts that are recognizably consistent.'" *Id.* at 6 (quoting 36 FMSHRC at 2061 (Althen, Comm'r, dissenting)). That vague "definition," Brody observes, "fails to explain how the 54 citations at issue then evidence a pattern." *Id.* As noted above, Brody also observes that the Secretary "relied upon the same dictionary definition and case law concerning sex crimes and RICO violations and asserted that the determination of whether there exists a pattern of violations at Brody 'can only be resolved by the administrative law judge following the admission of evidence' and determination of whether violations were S&S." *Id.* (quoting Sec'y's Resp. to Mot. in Limine at 3).

"Instead of explaining how the current citations in the POV notice constitutes a pattern or giving any indication of how many citations Brody had to defeat," Brody further notes in its Memorandum, "the Secretary asserted that pattern determinations needed to be made on a case-by-case basis once the ALJ made a determination of whether the S&S allegations were valid:

> Now, that recognizes that, even though the Secretary is charging one group of violations as establishing a pattern, what may be left after adjudication may be a different group of violations. And we are not going to know that until after you hear the evidence and you rule on those citations. So I can't tell you a precise number of violations that is going to establish a pattern."

Id. at 7-8 (quoting Tr. 55).

Given the foregoing, Brody notes that "[t]he Secretary apparently believes that once the administrative law judge makes his S&S decisions, *then* the Secretary will decide in what way that constitutes a pattern, possibly after additional briefing." Brody Mem. at 8 (emphasis added). In that regard, Brody observes that "the Secretary even asked that the hearing be bifurcated to that effect." *Id.*

Under such an arrangement, Brody asserts that the Secretary's failure to define a pattern in this case precludes it from presenting a defense. *Id.* According to the Secretary's approach, Brody cannot be informed of the basis for the pattern charge, and therefore the defense it must muster against it, until after the hearing. *Id.*

As a general proposition Brody maintains that the administrative law judge has the authority to vacate or dismiss the pattern of violations notice. *Id.* It notes that, under Rules 53

and 55 of the Commission's Rules of Procedure, the judge has the authority to require the Secretary to provide the information sought here, and if not provided, the power to vacate the pattern notice. *Id.* In addition, under Federal Rule of Civil Procedure 41(b), also applicable under the Commission Rules, dismissal (in this case vacating) is available if a party fails to comply with an order of the ALJ, as the Secretary has done here. *Id.* at 8-9; s*ee Marfork Coal Co., Inc*., 29 FMSHRC 626, 634 (Aug. 2007) (affirming the principle that judge's possess the authority to order dismissals).

Brody also maintains that the failure to provide a definition of a pattern of violations is contrary to law. Brody Mem. at 9. In this regard it asserts that "even in issuing the pattern notice, the Secretary did not actually have a clear concept of what constituted a pattern in this case. Otherwise, the Secretary would have set it out long ago." *Id.* Nonetheless, the agency is obligated to act in accordance with "ascertainable standards." *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199 (1974); *Patchogue Nursing Ctr. v. Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986); *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976); *Holmes v. N.Y.C. Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968); *Burke v. U.S. Dep't of Justice*, 968 F. Supp. 672, 681 (M.D. Ala. 1997)).

As the foregoing illustrates, "the Secretary does not have a definition of a pattern of violations and instead is relying solely on the ALJ to make a determination." Brody Mem. at 10. However, it is important to note that "[t]he issue here is not some evaluation of a single citation or order, but [rather] an evaluation of how a group of citations fit together, in the context of the Act's enforcement scheme and in recognition of the purpose of Section 104(e) to serve as an enforcement tool when other tools have failed." *Id.* In these special enforcement circumstances Brody submits that "something more is needed than what the Secretary has offered."[6] *Id.*

Brody also notes that "Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 provides that '[p]ersons entitled to notice of any agency hearing shall be timely informed of . . . the matters of fact and law asserted.'" Brody Mem. at 11. As the Court of Appeals stated in

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[6] Brody notes, by comparison:

> In other proceedings before the Commission, an operator knows what the Secretary needs to prove to prevail. The words of the specific standard or regulation cited in the citation or order sets out what the Secretary must prove. Here, nothing sets out what the Secretary must prove or intends to prove. The promulgated regulation is not specific and is general in nature. . . . The Secretary has offered no indication of the criteria for a pattern that the Administrator of Coal Mine Safety and Health applied once Brody purportedly met MSHA's published criteria [nor offered] specific information, other than generalities, as to why he believes the remaining 40 citations form a pattern. No party subject to regulation should be required to go to hearing without a clear understanding of what the government must prove to prevail.

Brody Mem. at 10-11.

Bendix Corp v. FTC, 450 F.2d 534, 542 (6th Cir. 1971), "an administrative agency must give clear statement of the theory on which a case will be tried." In this case, Brody asserts,

> the theory of the case includes an explanation of what constitutes a pattern and how the remaining 40 citations meet that definition. It is basic to any hearing for Brody to have such information and the lack of it supports vacation of the pattern of violations notice. Brody does not know what evidence to present concerning a pattern of violations in its defense. It does not even know the basic information of how the Secretary believes the 40 remaining citations constitute a pattern.

Brody Mem. at 12.

As an independent basis, Brody contends that as an operator under the Mine Act,

> [w]here the imposition of sanctions is at issue in a proceeding brought by an enforcing administrative agency, the due process clause of the United States Constitution requires that the regulation sought to be enforced give fair warning to Brody of the conduct it prohibits or requires. If it does not, it is unenforceable.

Id. (citing *Indus. Co. of Wyo.*, 12 FMSHRC 2463, 2471 (Nov. 1990) (ALJ) (citing *United States v. L. Cohen Grocery Co*., 255 U.S. 81 (1921))). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Under these precepts, the Secretary's failure to state what about this grouping of citations constitutes a pattern of violations cognizable under the Act "is contrary to the basic principles of fundamental fairness." *Id.* at 13 (citing *In re Conn. Yankee Power Co.*, No. 50-213-OLA, 2003 WL 21314058 (Atomic Safety and Licensing Board Panel, Nuclear Regulatory Commission, May 20, 2003); *U.S. Procter & Gamble Co*., 356 U.S. 677, 682 (1958)). Thus, Brody asserts that the failure to define a pattern deprives it of due process.

The Secretary has taken the position that such reliance is mitigated by the fact that an operator will have available expedited review of the POV notice upon a contest of the initial Section 104(e) order by an inspector. But this assertion does not square with fundamental fairness, because the process envisioned by the Secretary is a months' (if not years) long process, considering the likelihood of appeals. Brody Mem. at 13. Therefore,

> it hardly constitutes an 'expedited' process to resolve the issues raised by the pattern of violations notice in this fashion. Moreover, it places Brody in a position that it cannot know what evidence, other than the basic defenses to each citation, to counter whatever arguments the Secretary might come up with after he knows which of the 40 remaining citations are designated S&S by the ALJ (and which end up so designated after an appeal process).

Id. at 13-14.

Brody also makes the point that it is not simply about the right to a hearing, such hearing must be meaningful as well. In this regard it observes that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *Id.* at 15 (emphasis omitted) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (internal quotation marks omitted). "The fundamental right to notice and a meaningful hearing at a meaningful time has been recognized in various scenarios." *Id.* (citing *James Daniel Good Real Prop*., 510 U.S. 43 (1993) (seizure of real property under federal forfeiture law)).[7] Accordingly, Brody seeks to have the pattern of violations notice vacated.

Further Discussion

The Commission has affirmed the principle that "[b]efore a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge N. Am.*, 35 FMSHRC 3497, 3500 (Dec. 2013) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). It has also observed that "a statute or standard . . . cannot be 'so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ala. By-Products Corp*., 4 FMSHRC 2128, 2129 (Dec. 1982) (quoting *Connolly v. Gerald Constr. Co*., 269 U.S. 385, 391 (1926)).

Here, the Secretary has failed to define what constitutes a "pattern" of violations. From his response to Brody's Motion to Compel, the Secretary only offered that a pattern can be as little as two violations that are, in some way, related. As the Supreme Court stated in *Martin v. OSHRC*, 499 U.S. 144, 158 (1991), "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties." So, too, the D.C. Circuit has given guidance on how to approach situations where an agency provides no pre-enforcement warning. An agency provides adequate notice in such a situation when, whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform."[8] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

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[7] Other cases were also cited by Brody: *Connecticut v. Doehr*, 501 U.S. 1 (1991) (state ex parte attachment procedures); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of municipal utility service); *N. Ga. Finishing, Inc. v. Di-Chem, Inc*., 419 U.S. 601 (1975) (prejudgment garnishment of bank account); *Fuentes v. Shevin*, 407 U.S. at 67 (1972) (state prejudgment replevin statutes); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. at 337 (1969) (state wage-garnishment procedure).

[8] In what may be considered a useful comparison, in *Wolf Run Mining Co*., 32 FMSHRC 1669 (Dec. 2010), the Commission considered the meaning of the term "exposed," and whether ambiguity of the term violated due process. There it recognized that "[a]n agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty." *Id.* at 1681. In applying the reasonably prudent person test, the Commission stated that a "wide variety of factors is relevant, including . . . whether MSHA has published

(continued…)

In this case, the Secretary has provided only the broadest possible hint of what constitutes a pattern of violations, and even at that, his offering is one which is partially incompatible with the legislative history insofar as that history suggests that § 104(e) pattern notices are to be reserved as a last resort against mine operators, when other enforcement mechanisms under the Mine Act have failed.

Though given several opportunities to explain the basis for his pattern of violation charges, an opportunity extended even up to the start of the hearings, the Secretary remained steadfast in its stance that it did not have to comply with the Court's instructions. Further, even at the conclusion of the hearing, a point in time this Court considered to be too late in any event, the Secretary still asserted that he would wait until the Court issued its rulings on the disputed S&S citations/orders and only then would it announce the basis for its claim of a pattern of violations. This approach is, at bottom, no different than the card or board game analogy made at that outset of this Order, with a predestined outcome.

Yet, inconsistent with his stated position, at times during the hearing the Secretary would suddenly announce that one thing or another was a "pattern," but again without a definition or explanation attached to the claim. The Secretary apparently believed that announcing the conclusion that something is a pattern is equivalent to defining it. A few examples highlight this misconception of the Secretary's due process obligations. At one point, spontaneously, on the second day of the first week of the hearings, Counsel for the Secretary asserted, "There's a pattern there." Tr. 372. The Court noted that "you could have identified it before the hearing began." Counsel for the Secretary replied, "I thought we did." Tr. 372. Further, the Court would note that announcing *a conclusion* that some thing or other is a pattern does not establish such a claim.

At another point during the same week, perhaps sensing the deficiency in its approach, the Secretary made an attempt to introduce notes from a settled citation, for the purpose, as stated by Counsel for the Secretary, of establishing a pattern. *See* Tr. 691-693. The Court noted that such claims should have been cited in advance of this hearing as part of its basis for the contention that a pattern was present. Tr. 691-692. The Court observed that the respondent is put at a due process disadvantage in not knowing of such a claim in advance. Tr. 692. Importantly, the Court added that, at this point in time, with the hearing underway, it was too late to attempt to repair the due process deficiencies. Tr. 692. It added that the "last stop," so to speak, for that train to have established the basis for the Secretary's theory that there's a pattern, was passed at the beginning of the hearings on Tuesday morning. Tr. 692. By not setting forth

[8] (…continued)
noticed informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Id.* (citations omitted). Also, as noted above and illustrative of this duty to provide notice, in *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995), the Court of Appeals found that the EPA did not provide G.E. with fair notice because the regulations and other policy statements were unclear, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished.

the basis for its claim of a pattern of violations, Brody was put at a great disadvantage to defend itself from that charge. Not being forearmed with the knowledge of the theory of the Secretary's pattern of violations, facing the unknown as it were, Brody could not know how to defend itself. It could not, for example, anticipate nor ask questions during the hearing if it has not been informed of the basis for the alleged pattern. In fact, under the Secretary's approach, Brody would not know of the grounds for the pattern charge until *after* the Court made its findings as to which of the citations/orders were affirmed and among those, which were significant and substantial.

The Court's explanation did not deter the Secretary, when in the mood, from lifting the curtain and continuing to make the claim, *but only as a conclusion without explanation*, that it had demonstrated a pattern. As counsel for the Secretary stated at the conclusion of the first week of the hearing:

> [The Secretary] would, for the record, . . . just state that we've now heard—we've heard testimony on 12 violations. There were three others that were submitted and stipulated to as S&S. That makes 15 possible significant and substantial citations. [The Secretary] believe[s] that the 12, including the one [the Court] already announced [its] decision on, were properly designated as S&S. [The Secretary] believe[s] that those 15 violations establish a pattern of violations of these cit[ations] and standards, and [the Secretary] would assert that, based on that alone, the notice of the pattern of violation should be affirmed.

Tr. 814-15. Apparently, the Secretary believes that merely announcing, after the evidence has been presented at a hearing for some citations, even in advance of findings of the significant and substantial element for those by the Court, is sufficient to meet its burden. The Court does not agree.

A last point needs to be made about the pattern of violations charge. The Court is aware that legitimate pressure was placed upon the Secretary to arise from its slumber and utilize the pattern provision after its virtual quietude of some 35 years. However, this can be viewed from another perspective, too. Given that it took MSHA and the Secretary 12 years following the enactment of the Federal Mine Safety & Health Act of 1977 to develop its first effort to produce a regulation addressing a pattern of significant and substantial violations and another 22 years to produce an iteration of a pattern of violations, now 35 years in all, it can hardly be argued that there is now a rush to implement this important provision apart from fairness to those charged with such violations. In this Court's estimation it is more important that the process be fair, and consistent with the principles of procedural due process.

Accordingly, the Secretary's Brody Pattern of Violations Claim is hereby DISMISSED.

FINDINGS OF FACT AND LEGAL CONCLUSIONS RELATING TO THE UNDERLYING CITATIONS AND ORDERS ASSOCIATED WITH THE PATTERN CHARGE[9]

Before addressing the individual matters litigated here, it is important to note the long-established elements to demonstrate that an established violation is also significant and substantial ("S&S").

As recently noted in *Secretary of Labor, Mine Safety and Health Administration, (MSHA) v. Wolf Run Mining Company* 2014 WL 4273427, August 19, 2014, "The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to 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. . . . Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard must be significant and substantial." *Id.* at *2.

The Secretary has conceded that the following citations, originally claimed to be S&S, now are to have that designation deleted:

1. Citation No. 7167412
2. Citation No. 7167474
3. Citation No. 9000309
4. Citation No. 7167473
5. Citation No. 8155925
6. Citation No. 8155936
7. Citation No. 8155926

[9] The parties entered into a number of stipulations. These appear in Appendix I of this decision. It is also noted that the listed dockets includes citations that are non-pattern related. A motion to sever those non-pattern related citations was suggested. For example, regarding Docket No. WEVA 2013-997, that docket contains citations in it which are not part of the POV notice. The Court concluded that severing those citations and creating a separate docket would create a potential for additional confusion and therefor it rejected the suggestion to sever those. The Secretary was directed to provide a list of all those non-POV matters. Tr. 826-827. Finally, without objection, the violation history for each of the contested violations was admitted. Tr. 828-830. Gov. Exhibits 25 C, 26 C, 33 C and 34 C.

8. Citation No. 8155937
9. Citation No. 9000282
10. Citation No. 9002292
11. Citation No. 8139621
12. Citation No. 8125045

In a similar, ostensibly coincidental, fashion, Brody Mining accepted the following citations, as issued, including the S&S designation attached to them:

1. Citation No. 7165680
2. Citation No. 9000305
3. Citation No. 9000286
4. Citation No. 8151320
5. Citation No. 7168801
6. Citation No. 7168899
7. Citation No. 9000277
8. Citation No. 9000278
9. Citation No. 3577965
10. Citation No. 3578036
11. Citation No. 9000312
12. Citation No. 9000311

The alleged violations comprising the Secretary's pattern of violation charge were grouped into three categories: Twenty (20) pertained to emergency preparedness and escapeway hazards; Nine (9) involved conditions and/or practices contributing to roof and rib hazards; Eighteen (18) of these pertained to Ventilation and/or Methane hazards. They are discussed in that order.

I. Alleged Escapeway/Emergency Preparedness Violations; Conditions and/or Practices contributing to Escapeway/Emergency hazards

Before addressing the particular citations/orders involving Emergency Preparedness and Escapeway Hazards as they relate to S&S determinations, the Commission's decision in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), aff'd by the D.C. Circuit, 717 F.3d 1020 (D.C. Cir. 2013), needs to be mentioned. There, beyond establishing the violation, the second *Mathies* element was identified in the context of escapeways as the hazard of miners not being able to escape quickly in an emergency with the related increased risk of injuries due to such a delay. Under this second element the test is whether the violation would contribute to the hazard of miners not being able to escape quickly in an emergency. The S&S analysis in such matters must be evaluated in the context of an emergency but also, with regard to the third *Mathies* element, the test is whether there is a reasonable likelihood that the identified hazard contributed to by the violation will cause injury, *and not* that the violation itself will cause injury. In the D.C. Circuit's affirmance of the Commission, that Court rejected the mine's argument that "the phrase 'could significantly and substantially contribute,' which calls to mind an evaluation of chance, properly accounts for all probability variables in any given significant and substantial evaluation, including the probability of an emergency occurring." *Id.* at *1026.

Citation 8153617 from Docket No. WEVA 2013-370

Brody admitted to the fact of violation for this, but contests the significant and substantial finding. Jack Hatfield, MSHA Coal Mine Inspector, testified for the Secretary. Inspector Hatfield has an extensive coal mining background, both in private mining and with MSHA.[10] Brody employs the room and pillar mining method. Tr. 92. By stipulation, and the Court considers this fact to be important for each of the alleged violations, it is noted that the Brody mine liberates in excess of 1 million cubic feet of methane for a 24 hour period. Stipulation No. 24. During the period covered by the citations in this litigation, September 1, 2012 through August 31, 2013, the mine was on a five day 103 spot inspection cycle. *Id.* Tr. 94. Gov. Exhibits 1A, 1B, 1C, and 54.

On October 9, 2012, Inspector Hatfield, citing 30 C.F.R. §75.1504(a)(2), stated in his section 104(a) citation that "[t]he foreman assigned by mine management to supervise the working crew of the 5 Section Panel (008/011 MMU ["mechanized mining unit" Tr. 202.]) has not traveled the primary intake escapeway from the section to the intake air shaft. During an interview with the foreman it is determined that the foreman has partially traveled the escapeway but not to the air shaft, the primary intake escapeway it's [sic] entirety. In the event of an emergency requiring escape from the section to the shaft, this condition would contribute to the workers being led in a direction other than directly to the intake air shaft." Citation No. 8153617. The cited provision of the standard, acknowledged by the Respondent as being violated here, succinctly provides: "Prior to assuming duties on a section or outby work location, a foreman shall travel both escapeways in their entirety." It was during the course of his inspection that day that the Inspector met Eddie Halstead, who was the section boss on that [5] section. Tr. 102-103. Inspector Hatfield asked Mr. Halstead if he had traveled his primary intake escapeway to the intake air shaft, and Halstead admitted that he had not done that.

The Inspector considered the requirement to be important because Halstead, "in his role as the supervisor over those workers . . . [involved] two sections . . . [and there are] two MMUs and probably 13, 14 men. [Therefore, Hatfield] wanted to be sure that [Halstead] knew how to get to that intake air shaft." Tr. 104. Inspector Hatfield has had experience "in smoke as a section boss. . . . [and has] been there when everybody is hollering and screaming [at him]." Tr. 104-105. Therefore, he has learned firsthand that it is important to know that the foreman has traveled the escapeway. The preamble to this standard notes this too, providing "[t]he foreman is in a leadership position and, in the event of an emergency, is entrusted with the responsibility for leading miners out of the mine safely. To do this, the foreman must have the necessary skills, including complete familiarity with both the primary and the alternate escapeways." Tr. 106.

Inspector Hatfield seconded that expression from that preamble, noting that the foreman will be "the man in charge . . . the leader to get those workers outside and to [ ] safety." Tr. 107. By traveling the escapeway, the foreman will establish landmarks in his mind, noting things such as overcast walls and cribs, and thereby making him familiar with it. In order to get his men out, to travel the escapeway, the foreman must travel it. This knowledge is needed aforehand

[10] This is an appropriate point to take note that all of the witnesses in these proceedings have a significant mining experience background.

because of the emergency conditions themselves and because the situation may well be complicated by having injured workers. The foreman has other responsibilities at that time as well, such as insuring that those within his charge have properly donned their breathing apparatus. A fire, explosion, water inundation and methane gas can all bring about the need to use the primary intake escapeway.

Hatfield then proceeded to identify on Brody's escapeway map, dated October 23, 2012, the Number 5 section, and that the primary escapeway for this, which is in the Number 6 entry. He marked its location on the exhibit. Aiding this, Inspector Hatfield, also marked the areas that the foreman *did not* travel, a failure which brought about the issuance of the citation. Six turns are required in traveling that escapeway route. Broadly characterizing the shortcomings of the foreman, but not distorting it, Inspector Hatfield summed up that the foreman had not traveled about four-fifths of the escapeway.[11] Tr. 119. For emphasis, the Inspector summed up that the importance of complying with the standard is so that the foreman "knows where he's going and [ ] develops familiarity of where that escapeway is in relation to the sections of the intake air shaft to get to the surface." Tr. 122.

The Inspector then spoke to his significant and substantial ("S&S") designation, beginning with the second *Mathies* element, as the first element, violation of the standard, was conceded. Hatfield identified the discrete safety hazard as "being exposed to smoke, carbon monoxide, not being familiar with the turns [along the escapeway route] [and lacking familiarity necessary to] lead [his] crew out [,] in smoke and CO gas." Tr. 122. The contribution to the hazard presented by the violation, was not being familiar with landmarks in the escapeway to get miners safely out. That failure contributed to the risk of exposure to smoke and CO. Tr. 123. The lack of familiarity is heightened by the length of the escapeway itself, about 2 miles, and by the turns and overcasts in that route. Without that familiarity, gained by compliance with the standard, one traveling in smoke may mistake an overcast for a stopping and miss the steps. Further, the lack of familiarity makes it easier to get lost or turned around. Conversely, by knowing the presence and location of overcasts, that knowledge informs where walls are and provides a reference point, which can reassure that one is going in the right direction, towards exiting the mine. The Inspector confirmed that the lack of familiarity, in his opinion and experience, acts to increase the likelihood of an injury occurring. Tr. 125. One may go in the wrong direction as a consequence and that lack of familiarity can lead to panic with the men under his charge perhaps losing confidence in him.

Inspector Hatfield also listed the injury as reasonably likely to be of a reasonably serious nature, marking that as "fatal" on his citation. In this regard, he noted that a short exposure to carbon monoxide ("CO") will kill and all of this is heightened if, as a consequence of lack of familiarity, the foreman makes bad choices, such as leaving the primary escapeway and taking alternate entries, or taking the return, with the effect that the risk of succumbing to CO gas is increased. Tr. 126. While there are things such as a lifeline and reflectors, those are not failsafe devices, as they may only be present in a best-case scenario. He noted that an explosion, for

[11] A point of clarification, the cited violation was not for failing to "examine" the escapeway, but rather for failing to travel it. Tr. 121.

example, may disrupt those things. In terms of injuries, the Inspector expressed that one could succumb to carbon monoxide and smoke exposure.

For negligence, marked as moderate, the Inspector noted that the standard is not complicated and that the operator, through its upper management, should have known that the foreman, who is also part of management, had not traveled the primary intake escapeway. Tr. 130.

Upon cross-examination, it was brought out that miners could use their lifeline in the event of smoke or CO in the escapeway. That miners would also have SCSRs (self-contained self-rescuers), and that reflectors are every 25 feet in the escapeway, was also noted. The Inspector agreed that the foreman had traveled the alternate escapeway, but that was due to the fact that it was the section roadway too.[12] It was also asserted that Mr. Halstead had considerable mining experience. However the Inspector did not buy into the claim that not having traveled the intake escapeway would have no bearing on a foreman's ability to lead miners to safety. In this regard, Hatfield noted that the purpose of the standard is to familiarize oneself with that escapeway, learning for example to recognize turns and landmarks in addition to the condition of the top, where cribs have been built and other conditions such as muddy areas. Tr. 138. The Court concurs with Inspector Hatfield's analysis.

Brody called Mr. Barry Browning in connection with this citation. Browning has been in the mining industry since 1992 and this experience includes acting as a foreman. Tr. 158. Though not presently employed by Brody, he was working at that mine when this citation was issued and the citation was issued to him. Tr. 160. Conceding the violation, Browning countered with the assertion that Halstead had worked in various locations up the intake, had been to the fan, and had been trained on use of the fan and hoist. Tr. 161. Halstead was, however, a new employee, having worked at the Brody mine for only about a month.[13] Browning marked the areas of the escapeway that Halstead traveled. Tr. 164. Browning also referred to SCSR cache signs, signs posted in every entry adjacent to a refuge chamber, reflectors[14] and lifelines, all apparently presented as factors impacting the S&S designation. Tr. 176-177.

Browning was of the opinion that the violation did not present a safety hazard. Tr. 185. This was based upon Halstead's familiarity with *some parts* of the escapeway along with the fact

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[12] One should not conflate the primary escapeway with the alternate. The former is isolated and a fresh air intake. The latter, in contrast, has belt transformers, pumps and high-volt cable in it. Tr. 150-151. Besides, the standard's requirement pertains to the primary escapeway.

[13] In fact, the Court noted that, in its estimation, Halstead's recent employment at the mine heightened the importance of compliance with the standard. Tr. 166.

[14] Browning admitted that, for reflectors, in a smoke-filled atmosphere, one would have to be close to them. Otherwise, in those conditions, one wouldn't see them. Tr. 184.

that it was "well marked and everything."[15] Tr. 186. On cross-examination, Mr. Browning conceded that familiarity with directions makes it easier to go from one location to another and that the foreman is the one charged with getting his crew out to safety in the event of an emergency. He also agreed that not being able to escape a mine quickly in an emergency would be a hazard and that such a hazard would be likely to result in serious injuries. [16] Tr. 188.

Upon review of the testimony, the Court concludes that the violation was S&S and the negligence moderate. The testimony from Inspector Hatfield established the three disputed S&S factors, as the first factor, the violation was conceded. The safety hazard, the risk of miners being unable to escape the mine in the event of an emergency, contributed to by the violation was obvious. Knowing *some parts* of the escapeway route is not a substitute for compliance, nor does it reduce the hazard in an emergency. While the Respondent pointed to a number of other safety provisions, with the idea that those provisions reduced the likelihood of an injury and its seriousness, the focus must remain on whether the hazard contributed to by the violation increases the likelihood of an injury. As the inspector's testimony confirmed, in an emergency situation, the lack of familiarity with the escape route in those conditions could spell disaster.

A few other points need to made. These points, which will be made only once in this decision, but which apply to the other S&S disputes here, speak to two aspects of S&S determinations.

First, a mine operator's raising of putatively ameliorating safety measures, is not part of the appropriate S&S analysis. As the Commission held in *Secretary of Labor v. Consolidation Coal*, 2013 WL 4648491, August 14, 2013, ("*Consolidation Coal*") redundant safety measures have nothing to do with the violation, and they are irrelevant to the significant and substantial inquiry.

More particularly, the Commission there noted that it "categorically reject[ed] Consol's argument that its other safety measures, including rock dusting, carbon monoxide monitors, and fire-fighting equipment reduced the degree of danger and rendered the violation non-S&S. In *Buck Creek*, 52 F.3d at 136, the Seventh Circuit rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation. It stated that the fact that the operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." 52 F.3d at 136; see also *Amax Coal Co*., 18 FMSHRC 1355, 1359 n.8 (Aug. 1996) (rejecting operator's contention that its redundant fire suppression system reduced the likelihood of serious injury); *Cumberland Coal Res. Inc*., 33 FMSHRC 2357,

[15] However, it is noted by the Court that Browning had earlier conceded that smoky conditions impacted such markings.

[16] Mr. Kevin Webb also was presented to testify for the Respondent on this matter, but his testimony was only about a subsequent event, the following year, involving a similar violation, but for which MSHA did not mark it as S&S. The Court, upon objection by the Secretary, ruled that the proposed testimony was not material and not relevant and therefore could not be presented. To preserve the issue and the Court's adverse ruling against the Respondent, an offer of proof was permitted. Tr. 192-194.

2369 (Oct. 2011) (reasoning that adopting the position that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made), aff'd sub nom., *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (stating "because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry"). We agree with the judge that "[w]hile extra precautions may help reduce some risks, they do not … make accumulations violations non-S&S." 32 FMSHRC at 935 at *4.

The second observation, which also has general applicability, is that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995).

Finally, when the Commission considers whether a violation is S&S, and, more specifically, when it evaluates the reasonable likelihood of injury under the *Mathies* test, it "considers circumstances assuming that normal mining operations continue without the intervention of an inspector." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013); *See also, U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (finding that a poorly ventilated face could be reasonably likely to cause injury even if methane accumulation at the time of the citation was nonhazardous); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984) (stating approvingly that the ALJ below, when considering whether a violation was S&S, did not make "any assumptions as to abatement" and instead assumed continued normal mining operations).

This assumes in each instance that a court finds the inspector to have been credible. In this instance the Court finds that Inspector Hatfield was credible and that it is appropriate to afford substantial weight to his opinion. Apart from the determination however, the Court independently finds that the violation was S&S. Familiarity with the escapeway is the key aspect.

The proposed penalty for this was assessed at $4,329. Upon consideration of the evidence and each of the statutory penalty factors, the Court agrees that the assessed amount is appropriate and that amount is hereby imposed.

Citation 7167386 from Docket No. WEVA 2013-370

This citation, issued October 22, 2012, alleges that "[t]he number 5 section primary escape way [sic] life line [sic] is not being maintained as required. The life line was equipped with 2 consecutively installed cones to indicate an up coming [sic] branch line. There is no branch line in this area. This condition exist[s] where two primary life lines connect near the mine fan. Standard 75.380(d)(7)(vii) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor)." Gov. Ex 2A, 2B.

MSHA Coal Mine Inspector James A. Jackson, Jr. testified with regard to this section 104(a) citation. As with Inspector Hatfield, Mr. Jackson has a work background of significant

mining experience. In the cited provision, there is a requirement for two indicator cones to be equipped consecutively with the tapered end pointing inby. Tr. 203. This is to indicate to miners during an escape situation that there is an upcoming branch line. *Id.* The Inspector helpfully referred to Gov. Ex 2C, which illustrates the signs and signals on a lifeline and a branch line. As suggested by the term, a lifeline is "a continuous line leading from a working section to the surface or escapeway, . . . [t]hey're used for escape during a mine emergency." Tr. 205.

Although depicted in the standard itself and copied for Gov. Ex. 2C, at the Court's request the Inspector drew a sketch of the problem he encountered. This sketch is Gov. Ex. 2E, and it shows the two consecutively installed cones along the sole horizontal line in that sketch. Tr. 207. The vertical line in the sketch represents another primary escapeway lifeline to which that the horizontal line was attached. The problem was that this was an escapeway lifeline and not a branch line. Tr. 208. In short, the two consecutively installed cones conveyed misleading information, signifying that there was an upcoming branch line. Such a branch line would have SCSRs or a refuge chamber. That is, the cones advised, incorrectly, that "some type of safety equipment or a safe haven" would be there for miners during an escape. Instead, despite the information conveyed by the cones, miners would come up to a primary escapeway lifeline. Simply stated, the standard requires that the two cones on a lifeline are to indicate a branch line coming up, but here there was no such branch line. Here again, as with the citation next above, Brody stipulated to the fact of violation. Tr. 212, Stipulation 29.

Inspector Jackson then spoke to the hazard this admitted violation presented. The hazard, he stated, was "miners not being able to escape the mine during an emergency in a timely manner." Tr. 212-213. The violation contributed to that hazard by informing miners that they were coming up to a branch line, where they would find SCSRs or a shelter. When they don't find that, confusion and panic can ensue and this will operate to delay their escape, exposing them to smoke and CO. Tr. 213. By thinking, when they come to the vertical line depicted in the Inspector's sketch, that they would be coming to a branch line, they would be traveling about a 100 feet in the wrong direction before discovering that the expected SCSRs or a shelter are not there. This mine, the Inspector noted, has a history of ignitions and methane inundations, a fact which is not in dispute. Thus, taking all this together, the Inspector concluded that it was reasonably likely that this misleading information would cause an injury due to miners panicking and not being able to find their way out of the mine. Tr. 213-214. The Court agrees.

Because of the information they convey, cones play significant roles. Even a cone by itself, with its conical shape, conveys information to an escaping miner. Feeling the tapered end first tells the miner he is heading in the right direction. That tapered end widens on the other end of the cone, so a miner knows that by moving from the narrow end to the wide end, he is proceeding in the correct direction, out to safety. Tr. 215. The safety hazard attendant with this violation is miners not being able to escape during an emergency, as the false indicators would lead them to believe that safety equipment was nearby, when it was not. Tr. 221. Not being able to find that expected equipment would be disruptive to say the least. The Inspector also concluded that this misleading information increased the likelihood of an injury, as by traveling in the wrong direction, and thereby delaying their escape, this would cause panic and confusion. The need for miners to then change direction delays the 12 to 15 men that would be involved in these circumstances. Being tethered, with SCSRs in their mouth preventing oral communication,

and not being able to see one another when in smoke, is another complication attendant to moving in the wrong direction. Fatal injuries could result due to smoke exposure, CO and fire. Tr. 223.

The Inspector marked the negligence as "moderate" for this citation because he concluded that it was an obvious condition. The mine's weekly examiner is to check the lifeline as part of those duties. The moderate designation included consideration that there was some mitigation. Tr. 220.

Upon cross-examination, it was pointed out that the condition existed where two primary lifelines connect near the mine fan and that the mine fan is where one exits the mine. Tr. 224. Brody's counsel asserted that the cited condition was one break, only about 100 feet from the exit. The Inspector agreed that the proximity of the condition to the fan meant that one would feel a lot of air when walking in this area. Tr. 225. However, while conceding that the air would be blowing, that would be true in ideal conditions, and one cannot assume that the fan will be running in an emergency situation. Tr. 225. He added that the fan itself could be an ignition source. Thus, in the Inspector's S&S analysis, it was considered that the fan itself could possibly be on fire, asserting that he considered that to be a reasonable likelihood. Tr. 226. Rather than the branch line foretold to be coming, incorrectly, by the cones, the miners were actually coming up to two lifelines. (See the vertical line in Gov. Ex. 2E). This misinformation caused the inspector to be concerned that the miners could proceed toward the number 2 section instead of going to the exit. Tr. 229. However, the Inspector agreed that within 100 feet of such a wrong turn, escaping miners would come upon the flat end of a cone and then be alerted that they were going in the wrong direction. As noted by Brody's Counsel, if *it were assumed that* the miners came to the same intersection and there had been *no* cones present, there is no requirement for an indicator to direct the miners to the exit. Tr. 230. Thus, under that scenario, miners could take the wrong turn at that intersection. However, the Court notes that the hypothetical falls short in at least two regards. First, the hypothetical presents a situation which *did not exist.* Second, having the wrong information at the point of intersection is worse than having no information at that point and therefore the point attempted to be made by the hypothetical is rejected.

The cross-examination continued with the now-familiar but, as discussed above, rejected, theme of noting other existing safety measures. Escapeway drills were presented as one example of this approach in attempting to show that the violation was not S&S. The inspector agreed that such drills, which are done quarterly, would pass the cited area. Tr. 231. The inspector also agreed that when a miner feels the cited cones, he should then be able to feel another indicator, namely a rigid coil, when arriving at the branch line, which signals that there is a refuge alternative there. His notes did not indicate whether any rigid coil or SCSR indicator was also there as additional misinformation. Tr. 236. Redirect brought forward that in an emergency, if the fan was down, smoke could be traveling in an outby direction and an explosion can cause air direction to reverse. Tr. 237. Further, if the fan was down and miners were in a smoke-filled environment, miners would not necessarily know that they were close to the fan. Tr. 237. Upon inquiry by the Court, the inspector confirmed that in an emergency situation, with smoke and an inability to see, miners faced with those conditions will be in a tense, near-panic, state of mind. The inspector also concurred that it is impossible to predict how individual miners will react upon coming upon cones which mislead them.

In its defense, Brody called Mr. Anthony Gibson Jr. Gibson is presently an outby foreman at the mine. Tr. 243. He also has long coal mining experience. The citation in issue was issued to Mr. Gibson. He confirmed what had been suggested during cross-examination; that the fan cited lifeline portion was about 100 feet from the fan. The slope was approximately 400 feet away. Tr. 247. R Ex. 26.[17] Gibson confirmed what was not disputed, if running, the fan will be producing a lot of air. Tr. 253. Exhibit R 2C, a record of the mine's fire drill, was also identified by this witness. The cited drill occurred on October 18th and this compares with the citation's issuance date of October 22nd of that same year. Gibson also confirmed what the citation notes: there were no refuge alternatives nor SCSRs at the location where the 2 consecutively installed cones indicated an upcoming branch line, and he commented that it would make no sense to have those at that location because it is so close to the fan. The Court would observe however that this absence could heighten the potential for confusion and/or panic, because the cones would be telling the miners something which was at odds with the fan volume, assuming of course that the fan was not down. It is true that there was no spiral coil, another indicator of a rescuer cache or a shelter, but as with the comment just made, that could bring about further confusion. Miners would need to have the presence of mind in an emergency to either ignore the information signaled by the cones or having relied upon them, then disregard what the cones indicated when no spiral coil was located. In the Court's view this is asking a lot for miners to do in the face of an emergency.

Mr. Gibson did not believe the violation was S&S, asserting that, "even in a smoky environment – if the fan was off and I was in a smoky environment that close to the fan, if I had even been there once before, I will know where I was. And . . . even if I did take the wrong direction - - going the wrong direction on the other lifeline, there would be reflectors on the other one. There would be a another cone, with a hundred feet, that I would run into that would show me I was going the wrong way . . . there would be no way that I could - - I could see any confusion." Tr. 258. However, on cross-examination, Gibson conceded that lifelines and indicators, such as cones, have to be accurate so that miners can get out of the mine. Tr. 259. He also agreed that the indicators need to be "dummy proof" so that miners are sure they can escape and that it is a simple matter to be sure that the proper indicators are on the lifeline. Tr. 259-260. In response to a question from the Court, Mr. Gibson acknowledged that in the course of conducting the fire drills, just a few days before this violation was detected, people would have traveled through that area and that, despite the fire drill occurring on three separate shifts, no one for Brody noted the misdirecting cones. Tr. 263-264.

The Court has determined that this violation was S&S. While it is true that, as Brody's Counsel pointed out, no cones were required at the area where the violation was cited, the key is that cones *were* there and that they provided false information. Whether near the exit or not, misleading information, installed by Brody at that location, is inherently dangerous in the context of a mine emergency. That context, a mine emergency, is the means for evaluating whether a violation is S&S. A major deficiency with the Respondent's S&S outlook is that it does not sufficiently account for the conditions when the standard comes into play, and the aspect of panic. Thus, upon review of all the evidence, the Court concludes that there was a discrete safety

[17] Note: This exhibit is out of order in the Respondent's exhibit notebook and therefore may be hard to locate. It is numbered however, as R 26.

hazard contributed to by the violation and a reasonable likelihood that the hazard contributed to will result in an injury. That there would be a reasonable likelihood that the injury would be of a reasonably serious nature cannot be disputed.

The proposed penalty for this was assessed at $16,867. Taking into account all of the evidence, the Court concludes that a penalty of $12,650 is appropriate in this instance.

Citation 7167387 from Docket No. WEVA 2013-370

Inspector James Jackson also testified about this citation. The section 104(a) citation, alleging a violation of 30 C.F.R. § 75.380(d)(7)(vii) states: "The number 2 section primary escape way (sic) life line (sic) is not being maintained as required. The life line was equipped with 2 consecutively installed cones to indicate an up coming (sic) branch line. There is no branch lines (sic) or connecting life lines in this area. This condition exist (sic) at 2-B belt break 7 in the primary escape way. Standard 75.380(d)(7)(vii) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor)." Gov. Ex. 3A.

The Inspector issued this citation on October 23, 2012. There was no stipulation to the fact of violation for this citation. Tr. 278. As with the previous citation for which this inspector provided testimony, he created a simple drawing to depict the violation in this instance. Gov. Ex. 3 F. In this instance, like the previous one, there were 2 consecutively placed cones, but here there was no connecting lifeline or branch line. Tr. 279. The drawing included a dotted line to depict what one *should* expect to find, an upcoming lifeline or a branch line, but no such line was there. Tr. 280. Thus, had the cones been properly placed, that line would have been present. Thus, like the earlier matter testified to by this Inspector, this was another situation where the cones conveyed false information. As two miners were working in that area, the Inspector marked that as the number affected. In the same fashion as the earlier cone violation, the Inspector's concern was miners encountering information, information they are trained to rely upon, but that information was false. Tr. 282-283. This is serious business because the cones tell the escaping miners to start looking for an upcoming lifeline or branch line, but neither was present. It bears repeating that the Inspector believed that this condition was reasonably likely to cause an injury because when the standard applies miners will be in smoke, unable to speak with one another because they are wearing SCSRs, and at risk for panicking. The cones, as noted, will tell them to start looking for something, but they will find nothing is there and this will operate to delay their escape. Tr. 283. The negligence was marked as moderate because this condition was obvious and the operator is required to travel and examine this area weekly. As a mitigating factor, he did take into account the mine's assertion that there used to be a branch line at that location.

Upon cross-examination, it was suggested that there were caches of SCSRs inby of the cited location, but the Inspector could not state the number of such caches, whether one or more. For refuge alternatives, the Inspector could not state if there was more than one. Tr. 288. It was also contended that there was a "space" between the 2 consecutively installed cones, the import of that being that, if such a space was present, that space would indicate that there was no branch line coming up. Tr. 289. The issue of the extent of the space between the cones was part of Brody's defense, although in later testimony from the Inspector he stated that Mr. Gibson never

raised any contention about the presence of a space between the cones.[18] Inspector Jackson stated that a small space, for example ¼ of an inch, would still announce to miners that a branch line a life line was in this area, but a space of 6 inches would be sufficiently apart so as to not mislead miners. Tr. 290. Presented as a mitigating factor, the Inspector could not recall any other conditions outby the cited problem that would tell miners that they were going the wrong way. Tr. 294. Further, the cones were facing in the correct direction. The issue was not one of direction, rather it was of misinformation. Miners coming upon the two cones would expect that a branch line would be present and they would try to find that branch line, an impossible task as it did not exist there. While Brody's Counsel suggested that miners in that circumstance would simply proceed on, the Inspector did not agree. He expressed that the false indicators would slow the miners down and thereby delay their escape, looking for the non-existent branch line. Tr. 295-296. As before, Brody referred to considerations which it viewed as countering the S&S designation, such as that escapeway maps were present at different locations and that the inspector found no deficiency with them.

On redirect, the Inspector noted that *miners are trained* to look for a branch line once they come upon such indicator cones. And this is significant because they will be looking for that branch line and the SCSRs there. Finding them, they might switch out to a fresh SCSR or carry one as a spare as they continue their escape. Tr. 299.

Anthony Gibson testified for Brody on this matter as well. It was his contention that the cones were close but that there was space between them. Later, he stated that the space was about six to eight inches and then added that there was "a little bit of space between them." Tr. 312. A point being made through this witness was that the cones were the only misinformation, in that there were no other indicators, beyond the cited cones, telling miners that a SCSR cache or a refuge alternative ahead. In this instance, Gibson stated, the exit to the slope or to the elevator was around 3500 feet. Considerations similar to those raised with the earlier cone issue were then brought up. These involved things like the presence of up-to-date mine maps. It was Brody's contention that the miners' knowledge of maps shows that those miners would have known about things like the actual location of the SCSRs.[19] Thus, Brody was asserting that the miners would know better and ignore the erroneous information conveyed by the cited cones. The Court is not convinced. In an emergency, especially with limited or no visibility due to smoke, it is more than a stretch to believe that miners would rely upon their

[18] It is noted that the contention that there was a space is at odds with Brody's excuse that there used to be a branch line there. If in fact that was the case, the cones *would not* have been spaced. Also, as stated by the Inspector, in response to a question from the Court, these cones *stay put.* That is, they are locked in place on the line. Tr. 300.

[19] In this regard, with Mr. Gibson noting that there were SCSRs some 10 to 11 breaks inby of the cited location, he agree that was over 1,000 feet away. Tr. 333. Gibson also backed away from the usefulness of maps in an emergency situation with a smoke-filled environment. Tr. 334. Thus, he conceded that the cones, as tactile indicators notify miners of where life-saving materials are located along a lifeline and that coming upon such cones, a miner will be looking for the branch line to SCSRs. Tr. 334-335.

knowledge of the mine maps to tell them where the SCSR caches are, and ignore what the cones told them.

Despite all the other ancillary matters raised, the defense ultimately rested upon the idea that there was a space between the cones and for that reason, the space, miners would not think there was a nearby branch line. Gibson's perspective went further, however, because he did not believe that there was any safety hazard *even if* the cones had no break between them. Tr. 324. His reasoning was that, because just inby the cited area there was a SCSR cache and therefore the miners would realize there would not be another cache so close by. In response to questions from the Court, Mr. Gibson stated that he did not know why the cones were present at the cited location. Tr. 326. Although not mentioned during his direct examination, Mr. Gibson, in response to a question from the Court, stated that he did tell the inspector that there was a space between the cones. He further related that the inspector responded that the cones were too close together. Tr. 328. Gibson agreed that the inspector's notes make no mention that Gibson claimed there was a space between the cones. He also agreed that coming upon the cones, even if six to eight inches apart, would be out of the ordinary. Tr. 331. Also, he agreed that the cones are tactile sensors needed when visibility is limited and that if a miner is confused during an escape that will cause delay. Tr. 342. Diminishing his objectivity, Mr. Gibson maintained that, because of their training, during an emergency situation, even though dealing with poor visibility from a smoke-filled environment, and with the possibility of injuries, miners will not be under stress or duress. Tr. 342-343.

The Court concludes that this violation is also significant and substantial, a conclusion largely based on the reasoning presented in the other cone violation. Missing information is one thing, but imparting incorrect information is, in the Court's estimation, worse. Did the incorrect information present a contribution to the discrete safety hazard and was there a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious injury? Based on the credible evidence, the Court concludes that the answer is "yes." The violation clearly would operate to make matters worse, when evaluated in the proper context: a mine emergency escape.

The proposed penalty for this was assessed at $4,689.00. Taking into account all of the evidence, and applying the statutory criteria, the Court concludes that penalty remains appropriate and it is so imposed.

Citation 7167388 from Docket No. WEVA 2013-370

Inspector Jackson testified for this violation also. For this matter, Brody has conceded the fact of violation and that the violation was correctly determined to be of moderate negligence. Tr. 345-346. The Citation stated that the "primary escape way (sic) life line (sic) for the number one section is not being maintained in a safe condition. The life line along the number 2 belt was equipped with 5 directional cones at intervals not exceeding 100 feet with the tapered section pointing outby. This would give miners the indication that they are traveling in the wrong direction during a mine emergency." Gov. Ex. 4A. Issued on October 29, 2012, the citation listed 30 C.F.R. § 75.380(d)(7)(v) as having been violated. As before, the Inspector made a sketch of the cited condition, as a visual aid. The drawing, Gov. Ex. 4D shows a line,

depicting the lifeline and the inby and outby direction references and the 5 cones, each with the blunt or wide, flat end first, as one would encounter if moving in an outby direction. The cones were therefore facing in the wrong direction, a condition Brody has conceded. To be clear, the flat end should not be encountered first; a miner escaping should feel the narrow end first.

The cones' direction is important, as noted earlier, because a miner trying to escape from a mine in an emergency would encounter the base end of the cone first, not the tapered end. Tr. 349-350. Gov. Ex. 4C. The mine was operating at the time of the citation's issuance, engaged in second, or retreat, mining. Tr. 350-351. As with the other violations of this nature, the Inspector was concerned over the impact of false indicators on the lifeline. In this instance, the cones direction would tell the miners, by their training, that they were moving in the wrong direction, when in fact they were not. Tr. 352. For each of these lifeline citations, one must assume that they are, by their purpose and design, being employed in an emergency. Under such circumstances it must be presumed that there is smoke, making visibility poor to nonexistent, with miners wearing SCSR's and lacking any real ability to communicate orally with one another. In this instance with the five cones facing in the wrong direction, miners would travel nearly two football fields (600 feet) before coming upon a cone telling them that they were in fact traveling in the right direction after all. Tr. 352. Although Counsel for Brody agreed that the assumption in this situation is the presence of an emergency, there was an objection to the fact that this is a gassy mine. The Court overruled the objection however because the mine's gassy nature was raised in the context of the inspector's view that there was a reasonable likelihood of an injury. The Brody Mine is classified in the highest category of methane liberation and for that reason it is on a five-day spot inspection. This means the mine has a methane inspection every five days. The mine has a history both of ignitions and methane inundations. It was the Inspector's view miners not being able to escape in an emergency if they have delays will cause fatalities. Tr. 353.

Of course the Inspector could not predict how each miner would react when coming upon a cone telling that miner he is going in the wrong direction, but he considered an escape to be panic situation and if he came upon such a cone, he would try to find the right direction. In this instance it would tell him to turn around. Doing so, relying upon the cones which are to be relied upon, would send him in the wrong direction. If miners then can't escape due to false indicators on the lifeline and the delays resulting from that, death due to CO poisoning, smoke and fire could be the outcome. Tr. 354.

Upon cross-examination, Brody's Counsel tried to make inroads upon noting that, while the citation refers to five cones facing the wrong direction, that number was not mentioned in the inspector's notes. Tr. 360. However, upon consideration, the Court credits the Inspector's testimony that he found five (5) such cones with the wrong direction indications.[20] Another point made was that escaping miners would have come upon a number of cones correctly indicating the direction to escape. Tr. 356. However, the Inspector did not adopt the suggestion

[20] This is an opportune moment to note that the Court reviewed the transcript carefully and considered all contentions made in connection with this case. That a particular contention may not be expressly this decision does not mean that it was not considered. Instead it indicates that the Court decided that it was unnecessary to speak to some matters.

that one would rely upon the previous cones' information and proceed in the same direction, noting that one would need to travel some 200 feet before encountering the next cone. Tr. 366.

This violation was clearly established as S&S. 5 cones in the wrong direction is a major shortcoming. The Court's previously explained rationale in support of the S&S finding fully applies in this instance.

Upon consideration of all the evidence, and each of the statutory criteria, the Court concludes that the proposed penalty amount of $12,248.00 remains appropriate and it is so imposed.

Citation 7167389 from Docket No. WEVA 2013-370

In this instance, Brody again stipulated to the fact of violation. Tr. 373. The issuing inspector, Inspector Jackson, again testified regarding this citation. The Citation, No. 7167389, issued October 29, 2012, listed the condition or practice as: "[t]he primary escape way (sic) life line (sic) along 2 belt is not being maintained in a safe condition. The up coming (sic) branch line for the SCSR's was not properly identified by the two consecutively installed cones with the tapered ends pointing inby. The primary escape way life line was equipped with four cones with the base sections in contact to form a diamond shape. Standard 75.380(d)(7)(vii) was cited 7 times in two years at mine 4609086 (7 to the operator, 0 to a contractor). Gov. Ex. 5A.

As with the previous citations he addressed, Inspector Jackson again drew a sketch to illustrate the violative condition. Tr. 375. Gov. Ex. 5D. Jackson drew a single horizontal line, depicting the primary escapeway lifeline, with the inby and outby ends marked and four cones, comprising two diamond shapes on that lifeline. Such an arrangement, the dual diamond configuration indicates to miners that they are *on a branch line*, coming up on SCSRs. Tr. 376. Instead, there should have been two directional cones there, not the double diamond arrangement. Tr. 386.

The hazard associated with this is "miners not being able to find their proper safety equipment during a mine emergency for escape." By miners being misled, thinking that they were on a branch line and coming up to SCSRs, confusion and delay would ensue. Such miners' escape would be delayed as they looked for the expected equipment, equipment which they have been trained to look for, upon coming upon the double diamond cones. Tr. 378. Injuries that could occur from such a delay would be CO exposure and smoke inhalation. The negligence was marked as "moderate" because Inspector Jackson considered the condition to be obvious. It occurred on the primary escapeway lifeline and this is required to be examined weekly. Moderate negligence was marked because there was a branch line in the area and the operator had put the diamond cones on the wrong line.

Upon cross-examination, the Inspector agreed that there was a branch line right after the double diamond indicator and that there was a double diamond indicator on that branch line. Tr. 384. However, the Inspector did not agree that if an escaping miner comes upon a double diamond indicator, signaling that there is a SCSR cache, and then, within an arm's length, comes upon another double diamond indicator, such miner would assume he was at the SCSR cache

line. Tr. 386-387. The Inspector reasoned that once a miner comes upon the double diamonds, that miner will conclude that he is on a branch line and that such branch line is connected to SCSRs. In such an event, the Inspector believed that a miner will not reach out for a branch line, they will conclude that they are already on one. This reaction, the Inspector maintained, is how the miners are trained to react. Again, the Inspector's point was that, upon feeling the double diamond, they will think that they are on the branch line itself. That is what the double diamond cone arrangement signifies and what the miners are trained to conclude upon coming to that arrangement. Accordingly, they would not be expecting *another* line connected to that.

In its defense to the S&S designation, Brody again called Anthony Gibson. He was traveling with the Inspector and the citation was issued to him. Gibson agreed with the described diamond configuration of the cones on the lifeline, but added that there was a branch line there, which led to the SCSRs. Further, there was a proper SCSR indicator on that branch line and the line was within an arm's length of the lifeline. While admitting to the problem with the misleading diamond cones on the lifeline, Gibson did not believe the condition presented a hazard. His opinion stemmed from the view that the cones wouldn't tell miners to turn around nor to go in another direction. Tr. 404. Instead, he believed the miners would reach for the branch line that was there. The branch itself, Gibson added, was immediately after the double diamond cones on the lifeline. Further, he stated that a miner, keeping his hand on the lifeline, would immediately feel the branch line. When miners feel a branch line, signified by the double diamond cones, one would then run one's hand along that line to see if the coil is present. Tr. 405. Reflective signs would also be present. Gibson was of the view that the acknowledged violation did not present a hazard because "it wouldn't interfere with anything." Tr. 408.

The Court then asked some questions of the witness. Mr. Gibson agreed that cones serve but a single purpose: to convey information and to convey that information in the context of an emergency. Tr. 408-409. Gibson then agreed that it is essential that cones provide *accurate* information and if cones provide misinformation or inaccurate information, they are not serving their sole purpose. Tr. 409-410.

On cross-examination by the Secretary, Mr. Gibson acknowledged that the foreman for the section is required to examine the area where the condition was found on a weekly basis. Tr. 410. This examination responsibility includes checking to make sure that the lifeline is intact and the indicators accurate. Surprisingly, when asked what the double diamond configuration means to him when encountering cones in that arrangement, Gibson stated that if he "had already traveled a long ways on a primary lifeline, that would not mean nothing to me." Tr. 411.

The Court finds that this citation, along the reasoning presented above, and upon the evidence pertaining to this particular violation, was also S&S.

Upon consideration of the statutory criteria as applied to the credible evidence of record, the Court concludes that the proposed penalty amount of $12,248.00 remains appropriate and that amount is so imposed.

Citation No. 7167393 from Docket No. WEVA 2013-370.

Here also, the fact of violation was stipulated. A section 104(a) citation, issued November 1, 2012, it listed the condition or practice as "[t]he branch line from the secondary escape way (sic) life line (sic) to the number 1 section refuge alternative is not identified. A rigid spiral coil at least 8 inches in length was not provided for the branch line leading to the refuge alternative on the number one section. Standard 75.380(d)(7)(vii)(B) [the standard cited in the citation as having been violated] was cited 3 times in two years at mine 4609086 (3 to the operator, 0 to a contractor)." Gov. Ex. 6A.

As he done before, Inspector Jackson drew a sketch of the violative condition. Gov. Ex. 6D. The horizontal line depicts the secondary escapeway lifeline; an arrow on each end of the line shows the inby and outby directions for that lifeline. The vertical line on the sketch depicts the branch line in the cited area; the words "branch line" were added to make that clear. It was the branch line that did not have the rigid spiral coil. Tr. 415. The coil was to be on the branch line within an arm's length reach of the lifeline. The hazard is miners not being able to find the rescue alternative for safe haven in a mine emergency. Tr. 417. A branch line can lead to a SCSR cache or a refuge alternative. Tr. 434. Miners are trained that, upon coming upon the two consecutive directional cones, they are to look for the branch line. The branch line was present, but the spiral indicator, telling them that was not present. Tr. 417. The spiral indicator, or coil, tells the miners that there's a refuge alternative at the end of the branch line. That refuge alternative will have air, food, water, sufficient to allow the miners to survive for 96 hours. Tr. 419. The Inspector marked the violation as reasonably likely for an injury as the missing coil will cause confusion and along with that, delay in finding it. This can lead to fatal injuries with the miners being exposed to CO, smoke inhalation or simply delay in exiting the mine, which delay itself can have adverse consequences. The negligence was marked as moderate because the Inspector concluded that the condition was obvious. The area is to be examined at least every eight hours. There was a mitigating circumstance, however, as the refuge chamber recently had been moved up with the section. Tr. 420. The refuge alternative and the branch line had been moved up with the section, but the mine did not install the coil back on the branch line after doing that. Tr. 421.

Upon cross-examination, it was noted that refuge alternatives came into existence around 2007, following the Sago and Aracoma mine disasters. Tr. 424. Following the approach taken in earlier cross-examinations, Brody noted that the miners' first goal, if possible, is to get out of the mine. That is to say, being able to exit the mine is a better alternative than resorting to a refuge alternative. It was also noted that the double, diamond shape, cones were present at the branch line and that a miner, feeling those cones, will know that he is coming to a branch line. The Inspector could not agree, however, that if the miners know that the first branch line is for a refuge alternative, then they will know that, regardless of whether the rigid spiral coil is present. Tr. 427. The Inspector responded that he could not assume what miners will think in a panicked environment in that circumstance and that it's been his experience that miners do panic in an emergency. Tr. 427. Brody's attorney suggested that miners might not panic but rather "rise above the situation and behave in an admir[able] fashion." Tr. 429. However, the Court would observe that safety standards, including the one in issue for this admitted violation, are not

designed, nor is it their purpose, to assume that miners will act with wisdom and valor in emergencies. Rising above the situation is certainly not part of the S&S analysis either.

As mentioned, Brody's cross-examination focused on what the court considered to be ancillary matters: that this was the secondary escapeway and miners are trained to go out the primary escapeway, that some miners will have CO detectors on them and, by that reasoning, "that addresses that" (i.e. the hazard of CO). Tr. 430. A theme of Brody's cross-exam was that miners would know better even without a coil present. That is, if the miners knew that the first branch line on the way out was a refuge alternative, coil or not, they would know the refuge was there. However, the Inspector responded that, with no coil, he could not claim to know what the miners would think. Tr. 435.

In its defense, Brody called Derek Morrison, a former employee at the mine. Tr. 436. At that time he was the mine's assistant safety director. Tr. 444. He was issued the citation and agreed the safety coil was not present. Tr. 445. The branch line involved was for a refuge alternative. Through miners' training, Morrison asserted that miners knew there was no other branch line between the section and that branch line. Tr. 445. As before, Brody offered, through this witness, that there is a sign where this branch line connects to the lifeline. Morrison stated that the double cones inform the miners that there is a branch line equipped with either a refuge shelter or a cache of SCSRs. Tr. 447. In effect, Morrison asserted that the absence of the coil would have no effect because the miners were trained that upon coming upon the double cones, they knew there was a shelter. In fact, he agreed that the miners would know this even without any training because they ride by that area every day. Tr. 447.

The Court concludes that this violation is the factors raised by Brody are not pertinent to the *Mathies* analysis. The absence of the spiral coil presents a measure of danger contributed to by the violation, and it certainly contributes to the likelihood of an injury. The absence of the coil cannot be dismissed as a negligible matter, especially when measured by the circumstances, a mine emergency evacuation, to have the expected coil absent. The Court concludes that the violation is S&S.

Upon consideration of all the evidence in this matter and application of the statutory criteria and that the refuge chamber recently had been moved up with the section, the Court concludes that $13,703.00 is an appropriate penalty in this instance and it is so imposed.

Citation 7167405 from Docket No. WEVA 2013-564

Inspector James Jackson also testified regarding this citation, which was issued by him on December 4, 2012. The condition or practice identified in that section 104(a) citation stated that the "secondary escape way (sic) life line (sic) to the number 3 section is not being maintained as required. The life line is equipped with two consecutively installed cones to signify an up coming (sic) branch line. There is no branch line in this area. This location is where the number 3 section secondary connects to the number 2 section secondary life line. Standard 75.380(d)(7)(vii) was cited 6 times in two years at mine 4609086 (6 to the operator, 0 to a contractor). Gov. Ex. 7A. Brody stipulated to the fact of violation.

Inspector Jackson explained that the standard requires two directional cones consecutively installed on the escapeway lifeline to indicate an upcoming branch line. Here, the cones were present, but they should *not* have been there, as there was no upcoming branch line. The Inspector also drew a sketch of the violative condition to help the Court visualize the situation. Per the sketch and his testimony, the cones were present on the secondary escapeway lifeline, and this appears as the horizontal (and labeled) line on the sketch. A vertical line, also representing the secondary escapeway is also part of this drawing. Thus, the two lifelines connect at that intersection but it is all part of the same lifeline. Tr. 458. Gov. Ex. 7D. As noted earlier, a branch line is to lead to either SCSRs or a refuge alternative. Tr. 460. Gov. Ex 7C is also helpful to understanding this admitted violation. At its top, the drawing at Gov. Ex. 7C shows two gloves around the lifeline and the two indicator cones right next to those gloves. The inspector observed the cones, but *unlike* the drawing at Gov. Ex 7C, there was no branch line immediately thereafter. Tr. 460.

Again, the Inspector's safety concern was confusion occurring during an emergency from the false indicators. The indicators, falsely, would tell miners there was a branch line coming up and as a consequence they will be looking for either SCSRs or a refuge alternative. Not finding that will create confusion and delay in escaping the mine. Tr. 461. In this instance, instead of a branch line, the miners would come upon a secondary escapeway lifeline. In the Inspector's opinion the misinformation will cause miners to become confused and thereby delay their escape by diverting time looking for emergency equipment. Tr. 462. Such a delay can result in fatal injuries from smoke inhalation and CO poisoning. It needs to be remembered that, coming to the cones, the miners, not finding the expected branch line, will be confused and they will stop. That is not all. In an emergency situation, when a lifeline is being used, miners are not going to be able to see and the misinformation will cause them to lose their orientation. They will be uncertain which way to proceed. If they take out their mouthpieces to try to communicate with other miners in that situation, they will die. Tr. 462.

The Inspector marked the negligence as moderate because the condition was obvious and in an area required to be examined every eight hours. Examining the lifeline is one of those responsibilities.

Upon cross-examination, the Inspector agreed that this condition was very similar to the violation he found for Citation 7167386. One distinction is that this citation, 7167405, involves a secondary escapeway. Tr. 463. Again, the approach of Brody's Counsel was to consider circumstances that were different from those cited. For example, it was pointed out that if *no cones* had been present, there would not have been a violation issued. Tr. 464. Of course, this ignores what *was* present and the misinformation being imparted by the cones' presence. Consistent with this observation, the Inspector did not agree with the assertion that the presence of the cones did not increase the hazard. Instead the Inspector stated that the cones would cause more confusion brought about by miners looking for a branch line. Tr. 465.

Mr. Scotty Watkins was called by Brody in its defense of the S&S designation. At the time of the citation's issuance Watkins was employed at the mine as an outby electrician. Tr. 471. Mr. Watkins was the individual to whom the citation was issued. Examining Gov. Ex. 7D, after noting an inconsequential error in the sketch, Watkins stated that both lines, the vertical and

horizontal, depicted, were secondary escapeways, an undisputed observation. He agreed that miners working on that section would travel the cited area two times per shift. As with other witnesses for Brody, Mr. Watkins did not believe that the misinformation conveyed by the cones presented a discrete safety hazard *because of the miners' training.* Miners are taught, he said, that if they don't come up to what is expected, they are taught to proceed on. Tr. 477. At the intersection, there is no indicator which way to proceed, right or left. Instead, if the wrong direction is chosen, one will continue until *a cone* informs the miners they are going the wrong way. Tr. 477.

During Mr. Watkins's cross-examination, he agreed that in an emergency escape, the only indicator miners have is the lifeline with the indicators. Tr. 479. He also agreed that delay, that is, the longer one is in a mine during an escape, the more likely it will be that one will be injured. Tr. 479. Nevertheless, it was Watkins position that false indicators would not slow down miners during an escape because of their training. Tr. 480. In response to questions from the Court, Watkins reiterated that if one comes upon false indicators, false information from the cones, miners can ignore what the cones tell them because of their training. Tr. 481. He further agreed that one of the reasons to ignore the cones is because a miner will come up against additional cones and that *those* cones will tell the miner if he is going the correct way or not. This, as the Court pointed out to the witness, creates a contradiction because Watkins was simultaneously asserting *ignoring* the information from the cones in one instance *but to then follow* the information from the subsequent cones. Tr.482-483. To this, the witness asserted that one would be able to rely upon signs and reflectors to orient oneself. Tr. 483. He further agreed that indicators in the mine, other than the cones, are more reliable sources of information. Tr. 483.

For the reasons, rationale and bases already articulated above, the Court finds that this lifeline violation is also S&S and of moderate negligence. Upon consideration of the statutory criteria as applied to the credible evidence of record, the Court concludes that the proposed penalty amount of $18,271.00 remains appropriate and that amount is so imposed.

Citation 7168854 from Docket No. WEVA 2013-997

Inspector Joshua A. McNeely testified for the Secretary regarding this citation. The condition or practice section stated that the "lifeline in the active Beaver Mains primary escapeway is not equipped with two securely attached cones, installed consecutively with the tapered section pointing inby, to signify an attached branch line is immediately ahead for the refuge shelter. 15 miners are working on the inby section. This condition would delay miners trying to escape quickly in an emergency. Standard 75.380(d)(7)(vii) was cited 7 times in two years at mine 4609086 (7 to the operator, 0 to a contractor)." Gov. Ex. 9A.

Brody stipulated to the fact or violation and to the designation of moderate negligence.

The Inspector explained the value of lifelines in getting miners safely out of a mine in an emergency, stating "it's touch. It's -- in an emergency situation, you're probably not going to be able to see good, smoke. You're not going to be able to communicate if there's smoke and dust because you have your SCSR on. And it provides them the feedback, the comfort of knowing

that I've got ahold of this, and it's got the required stuff that I've been trained about, then I can get to the surface. Or get to a safe location safely." Tr. 499.

The section cited by the Inspector requires double indicator cones before branch lines. These serve to make the miners aware that there is a branch line, where there will be refuge alternatives or SCSRs. Tr. 500. On Gov. Ex. 9C the Inspector highlighted, in pink, the required double cones. Similarly, he marked the branch line using the pink highlighting. The spiral coil, having a snake-like appearance, is also depicted on that pink branch line. The same diagram shows another branch line, located right above the word "exit" on Gov. Ex. 9C, and the inspector highlighted that line in blue, adding that it shows the two diamond-shaped cones, indicating a SCSR cache. Tr. 502. The double indicators alert miners that there is a branch line coming up. Therefore, the blue highlighting identifies both the directional cones and the diamond indicators, alerting miners of the nearby SCSR cache. Tr. 504. Referring again to Gov. Ex 9C, the cited violation pertains to the pink highlighted cones on that exhibit. Those cones were not present and, as noted, Brody has stipulated to the violation. This area was about three cross cuts outby the loading point of the section, which was approximately 300 feet. Again, the refuge chamber is intended to provide a short term safe harbor for miners if they are unable to exit the mine. Tr. 507.

Inspector McNeely stated that the missing double cones could cause delay in miners trying to escape or seeking refuge. The hazard is miners not being able to locate the refuge chamber quickly in an emergency. Under such emergency conditions, with smoke and dust, confusion, panic and disorientation can occur. The lack of the equipment, cones here, that miners are trained to rely upon, can cause confusion. The Inspector expressed that if miners using the lifeline don't come upon the double cone indicator, they will simply keep traveling. Tr. 510. There is no guarantee that, with no double cone indicator present, miners will still reach out and feel for a spiral coil. The point made by the Inspector was that *with the double cone indicators present*, as they are supposed to be, a miner will know there is a branch line, and that will tell him there is either a refuge alternative or a SCSR cache present. Tr. 511. Thus the cones alert the miner that nearby he will find the spiral coil and then the refuge or the SCSRs.

On cross-examination, the Inspector acknowledged that the coil was present on the branch line. Tr. 516. The sign indicating the location of the refuge was present as well and the mine maps were up to date, all matters which have a familiar ring to Brody's defense in these matters. However, the inspector could not agree with the conclusion suggested by those things, that in an emergency it was reasonably likely that miners would have passed this first refuge alternative as part of an attempt to get out of the section and the mine. Tr. 519. Panic or injuries might cause miners to go to the refuge shelter first.

Another theme of Brody was that miners would employ judgment in an emergency situation. In this case, it contended that the miners would still feel the branch line and their good judgment would tell them to "at least feel to the right to see what the branch line led to, especially if they were looking for a refuge alternative [ ]." However again the Inspector couldn't predict what feeling the branch line would tell miners to do if they are panicked, scared and can't see. Tr. 521. The directional cone indicators, on the other hand, tells them without any doubt and therefore they don't have to think about it; they will know that there is something

present which will help them. Tr. 521. Later, the Inspector added that in an emergency situation, and with no cone indicators present, it was his view that miners could go right past and not realize there was a branch line. Tr. 531. The Court would add that Brody's theme that miners, because of their training, will think beyond the missing cones may or may not be the case in a given situation, but in neither event is such a consideration a proper part of the S&S analysis. It is worth noting, as confirmed by the Inspector, that the requirement is for both coils and cones. Tr. 533. It should not be lost that these are not alternative requirements.

Brody presented testimony in defense of its contention that the violation was not S&S, calling Kevin Webb, Sr. Tr. 539. The citation, 7168854, was issued to him. Mr. Webb thought there was one directional cone on the lifeline, just before the branch line. He believed that a miner would still know he had come upon the branch line, despite the missing cone, or cones, because he would feel that branch line. Such a miner would then reach over and learn the type of branch line that was there; a coil indicating the presence of a refuge chamber; two diamond cones indicating SCSRs. Tr. 543. In this instance, it would be a refuge chamber and it would be about 400 feet off the section. With some initial hesitancy, he did not believe that the absence of a cone would contribute to a safety hazard, meaning that he did not believe that the violation was S&S, stating: "No. It could - - well, I don't think so." Tr. 545-546. This view was based on the view that "Well, you're always going to escape. I mean, the cone was there to keep you going to the outside." Tr. 546. Nor, did he feel that the violation would create delay, again "because you're going to the outside. Tr. 546.

On cross-examination, Mr. Webb agreed that if miners are in need of a refuge chamber, that is because they are unable to escape and that this could be due to a blocked escapeway or because there are injured miners who cannot be carried out at that time. He also agreed that cones provide tactile feedback and are meant for conditions when miners can't see during an escape. Tr. 548. While repeating that they are trained to go to the outside as quickly as possible, delay in accessing the refuge alternative, when exiting the mine is not an option, can mean the difference between life and death. Tr. 549-550. He also conceded that panic may attend an emergency situation in a mine in the event of fire or an explosion. Tr. 550. The two cones, he agreed, if present, tell escaping miners that there is a branch line ahead. Tr. 551.

The essence of the defense is that miners will be holding onto the lifeline as they escape and even without the cones or with just one cone, they will still *feel* the branch line and therefore they will be informed and no delay will occur. The problem with Brody's defense is that it asks not only that these other safety considerations be taken into account in the S&S analysis, it effectively seeks to negate the purpose of the cones or coil, as the case may be, in the analysis, as if those safety requirements are superfluous. But, in the Court's view, such an analysis sidesteps that the test for S&S is whether the violation *contributes* to the hazard and the Court concludes that by the escapeway not being equipped with two securely attached cones, installed consecutively with the tapered section pointing inby to signify an attached branch line is immediately ahead for the refuge shelter, does so contribute and that there is a reasonable likelihood that the hazard contributed to will result in an injury.

Accordingly, the Court concludes that upon consideration of all the evidence in this matter and application of the statutory criteria, that $5,683.00 is an appropriate penalty in this instance and it is so imposed.

Citation No, 8155914 from Docket No. WEVA 2013-1055.

Inspector Jack Hatfield was recalled for this matter. Issued on April 8 2013 and served to Kevin Webb, Brody mine foreman, the condition or practice section of the section 104(a) citation provided that the "Strata Life Shelter[21] provided for the 1 Section Panel is not being maintained for the miners to safely use during an emergency. Fallen, broken and sharp edged mine roof material measuring 8'[feet] long by 4.5'[feet] wide is found 29'[feet] away from the access door of the shelter. This area of deployment has to be kept clear, according to the clearly observed sign stating, 42' [feet] to be kept clear on the deployment side of the shelter. In a smoke filled entry, the workers would deploy the tent and then rupture the bottom of the tent while trying to enter the shelter without seeing the fallen slate. Standard 75.1506(g) [the standard cited in this instance] was cited 1 time in two years at mine 4609086 (1 to the operator, 0 to a contractor)." Gov. Ex. 11A. There were no stipulations for this matter.

The Inspector's concern was a rupture of the shelter tent. Depending on the size of a rupture, the conditions when it was being deployed, and other factors during an emergency, the shelter may not function effectively, defeating its purpose. Tr. 564. The manufacturer-supplied instructions advise that "where the fresh air bay is positioned should be kept clean and free of any debris that could hinder the unit's deployment." Tr. 565. Inspector Jackson stated that he "observed fallen, sharp-edged mine roof material that had fallen on the deployment end of the refuge alternative." Tr. 567. He found those sharp materials at a location 29 feet back from the initial deployment point, meaning that the tent was exposed to such sharp materials for 13 feet, the remaining length of the tent deployment length. Tr. 569. It was his opinion that when dragging the tent over the sharp materials they would cut the tent floor material as miners in the tent would walk over those materials and, in his view, such sharp rocks would then come up through the bottom of the tent. Tr. 570. The cited condition was abated by Kevin Webb's direction to have a scoop clean up the area.

The Inspector viewed the alleged violation as S&S because it contributed to the hazard of men being exposed to carbon monoxide gas and would delay workers from entering the shelter. The need to remove the sharp rock before deploying the tent and, in doing that, exposing themselves to cuts to hands and wrists in that effort, were other factors of concern. Tr. 572. He marked the injury severity as fatal, on the theory that, unaware that the tent had been cut, miners, having removed their SCSRs once inside the tent, would be subject to CO entering it. In sum, the Inspector considered the violation to be reasonably likely because "there was a confluence of factors, . . . having to pull the tent out over top of the rocks. You're in smoke. I'm looking at it from the standpoint that it's - -you know, it's more than possible . . . [with] that rock left there . .

[21] A life shelter, also referred to as "refuge alternative," is a large life-saving piece of equipment, which contains oxygen, food, carbon dioxide scrubbers to scrub out exhaled carbon dioxide, and water, all sufficient to sustain workers' lives for a minimum of 96 hours. Tr. 558.

. that they would slice their tent . . . dragging a tent over top of [the sharp rock] . . . and then walking inside the tent and stepping on the unseen rock." Tr. 575.

Inspector Hatfield considered the negligence to be moderate, as examining the shelter is part of the preshift check and this includes checking for fallen roof rock. He could not determine exactly how long the condition had existed, but believed it had been longer than since the last preshift and he believed that it may or may not have been something noted in a preshift examination. However, he believed it should have observed. Tr. 578. According to his account, Mr. Webb was eager to get the rock out from in front of the shelter. Tr. 580. The Court inquired as to whether the Inspector noted the number of sharp rocks that were of present concern. He made no count but suffice it to say that there was more than one sharp rock present. Tr. 581.

Upon cross-examination, Brody's Counsel inquired about the inspector's objectivity and the corollary to that, the absence of bias. In that connection, Brody's Counsel directed the Inspector to his notes for that day. *See* Ex. R 9B. This inquiry was met with rapid and intense objection by the Secretary's Counsel. Tr. 584-587. The reason for the Secretary's objections became immediately clear, as those notes included these remarks: "Review of Judge Miller's decision. i.e. erotica. Very satisfied." Tr. 587. The Court then took the opportunity to inform the Secretary's counsel about the very legitimate ground of bias during cross-examination, explaining that bias can be explored apart from the particulars of a given citation. General bias is fair game in cross-examination. Tr. 587- 588.

The Inspector maintained that he was not describing Judge Miller's decision as erotica, rather he asserted that "[t]his had to do with a CLR. And I couldn't spell her name. I mean, her name - - she's got an odd name that - - she had tried to get some respirable dust cases settled, where another operator had tried to settle some S&S determinations on a respirable dust case. And Judge Miller admonished her and wouldn't accept the settlement. . . . ." Tr. 588. The Court stopped the meandering answer, and directed the Inspector to explain what he meant when he wrote "erotica, very satisfied." The Inspector responded, "I meant - - it was regarding in regard to the CLR Hrotica - - Hrotic." Tr. 589. The Court asked, "That was her name?" The Inspector responded "No. . . . Her last name - - her last name R - - HROTICA. Her - - that was her last name. But it was - - it was the decision regarding her - - her determination that the S&S was going to be reviewed - - be thrown out on respirable dust samples. That's what that was about, sir." Tr. 589.

Perplexed by the answer, the Court inquired of the Inspector why that was part of his notes. Inspector Hatfield responded, "I don't have a clue. . . . I don't know why I wrote that in there." Tr. 589-590. He then agreed with the Court's inquiry whether he was just noting his satisfaction that the judge was not willing to eliminate the S&S designations. Tr. 590. The Court observed that "it's odd to find this in the middle of your notes on the day you're doing an inspection." Tr. 590. Understandably, and appropriately, Brody's Counsel pursued the remark further, inquiring of the Inspector if his reference was to the *Marfork Coal* decision at 35 FMSHRC 738, in which Judge Miller chastised a CLR for agreeing to settle several S&S citations, modifying them to non-S&S. Tr. 592. Brody's Counsel argue that this shows bias on the part of Inspector Hatfield towards writing violations as S&S. Tr. 593. That particular

inquiry ended, for the time being, [22] with the Court's observation that it was up to the Court to determine if this demonstrated whether the Inspector was predisposed to find S&S violations wherever possible.[23] Tr. 593-594. However, that was not the end of the exploration of bias regarding this inspector as he was then asked if he wears a hat with Judge Miller's name embroidered on it when he inspects coal mines such as Brody. Again, the Secretary objected and the Court, again, overruled the objection. Tr. 594. Inspector Hatfield acknowledged that he has a hat and that it has the words "WVU" on it. He then added that "it's got Judge Miller on the side." Tr. 594-595. To stop the Inspector from a rambling answer, the Court directed him to simply answer the question about Judge Miller's name on his hat, to which he then answered, "Yes." Tr. 595.

Quite legitimately, Brody's Counsel pressed on with the following exchange:

Q. And you wear the hat with Judge Miller's name embroidered on the side to coal mines like Brody because you want the mine to know that if you write an S&S citation, you're going to beat them; right?

THE WITNESS: A. No, sir.

Q. Well, why do you wear that hat -- . . . -- with Judge Miller's name on it?

THE WITNESS: I like the hat. I like the hat. It's a good feeling. It's a 47. It's a cotton hat. I like the hat.

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[22] Remaining troubled by the remark in the Inspector's notes, the Court later revisited the matter.

[23] The Court revisited this rather troubling revelation when the hearing resumed the following week, on September 29th. The Secretary again objected on the basis that it was not relevant to the issue of bias. As the Court patiently explained the week before, the subject was very legitimately an area for exploration of witness bias as a well-recognized area of cross-examination. The Court believes that it was the harmful nature of the testimony which motivated the Secretary to attempt to keep it out of the record. The Court began by directing Inspector Hatfield to Ex. R 9B, expressing that, while it considered the Inspector to be a decent man, it nevertheless considered having a judge's name on his hat to be an example of bad judgment. The Court acknowledged that the Inspector was no doubt dedicated to his work but that he and all mine inspectors still have an obligation to be objective in carrying out their duties and not become zealots. Moving to the question which caused the Court to raise the matter again, it directed the Inspector to his notes where he wrote "i.e. erotica." The Inspector stated that he was not referring to a person from his office but rather to a CLR, explaining, "[s]he has an odd spelling for her name." Tr. 1002. The Court then asked for the name of the CLR he was alluding to. The Inspector then retreated from the claim about the odd spelling for the CLR's name and instead stated "[t]hat's a nickname I gave her myself, sir." Tr. 1003. He offered that the CLR's name was spelled something like HROVOTIC." The Inspector could not offer why he so nicknamed the CLR. Tr. 1004.

THE COURT: Well, that's nice. Did the hat come with Judge Miller's name already on it?

THE WITNESS: No, sir.

THE COURT: Okay. Well, then, come on. What is -- why do you have Judge Miller's name on the side of your hat?

THE WITNESS: I just had Judge Miller's name put on the side of my hat because she

ruled in the favor of -- on the S&S. But it's just a hat.

THE COURT: Well, it's not just a hat.[24]

Tr. 595-596.

Brody's Counsel then returned to the particulars of the citation. While the cross-examination explored various aspects of the conditions surrounding the citation, the Court considered the questions directed to the tent floor material to be of particular importance. The upshot of this is that the Inspector could not speak with regard to the construction or durability of that material. Tr. 604-606.

In its defense, Brody called Kevin Webb back to the witness stand. Mr. Webb was familiar with the Strata Life Shelter, including the rugged composition of the tent's floor. Tr. 619-622. He also maintained that the fallen pieces of top were "kind of flat." It was his opinion that the tent could have been deployed right over the rock that concerned the inspector. Tr. 624. Upon cross-examination, Mr. Webb conceded that the instructions for the shelter states that foreign material or sharp objects that could damage the tent are to be removed. Tr. 626. It is fair to state that there was a fundamental difference between the Inspector and Mr. Webb on the issue of whether the rock presented a puncture risk if the shelter needed to be deployed. Upon questioning by the Court, Mr. Webb did concede that some of the rocks may have been sharp, but were positioned flat and none of them were sticking straight up, as he recalled. Tr. 630. The Court also inquired, why, if the conditions were as harmless as he represented, was there a need to bring in a scoop to abate them. Tr. 631. Webb maintained it was simply faster to use a scoop although he then conceded that there could have been "somewhat, you know, [of a] potential for puncture." Tr. 632. However, although he still believed that the tent could've been deployed over the rocks, he then spoke of a "big hump in the middle of the tent" but that the miners would probably stay away from the area. Tr. 633. He admitted that the hump did present a possibility of a rupture to the shelter. Tr. 634. In fact, Mr. Webb, to his credit in testifying truthfully, agreed that if he had seen the cited materials on the mine floor, he would've had them removed. Tr. 636.

[24] It was also noted without contradiction that Inspector Hatfield issued approximately half of the citations in the pattern notice litigated in this proceeding. Tr. 598.

The Court concludes that the violation was established, but the government did not prove the alleged S&S nature of it. Upon consideration of the evidence of record and the statutory criteria, the Court imposes a civil penalty of $1,000.00.

Citation No. 9000313, from Docket No. WEVA 2014-0620

Brody stipulated to the fact of violation but the S&S designation and negligence remained in dispute. Tr. 648. Inspector Jack Hatfield was recalled to the witness stand for this matter.[25] The condition or practice section of the section 104(a) citation stated that "[d]uring an inspection of the 4 Section Panel (001/008 MMUs), it is determined that the section foreman assigned the task of supervising this coal crew by mine management has not traveled the primary intake escapeway in it's (sic) entirety. In the event of an emergency requiring escape using the primary intake escapeway, there would be unnecessary delays by this crew of workers while traveling the escapeway and reaching the surface. Standard 75.1504(a)(2) [the standard cited in Citation No. 9000313] was cited 1 time in two years at mine 4609086 (1 to the operator, 0 to a contractor)." Gov. Ex 16A. The citation was issued on July 30, 2013.

The section foreman, Mr. Elkins, admitted to the Inspector that he had not traveled the escapeway in its entirety. Tr. 659. As with the similar violation cited by this Inspector, earlier in the testimony for this proceeding, the Inspector stated that the standard's purpose is because the foreman needs to familiarize himself with the escapeways in order to know the safe routes out, and to become aware of landmarks, turns, and other areas in the event of an escape. For this citation too, the Inspector drew on the escapeway map the route for the primary route. Tr. 662-668, 671-673. Upon completing his markings on Gov. Ex. 16C, the Inspector agreed with the Court's characterization that the foreman had not examined approximately half of the primary escapeway, which translated into a distance of approximately a half mile to a mile.[26] Tr. 668-670.

[25] The Inspector began his testimony with the first day of his E01 inspection at the mine, which was about July 17, 2013, a date two weeks before the citation to be discussed. An objection, on materiality grounds, was made. The Secretary advised that the testimony was offered as "go[ing] to the larger issue [ ] of pattern." Tr. 653. The objection was sustained with the Secretary directed to focus on the particular citation. The Secretary then asserted that it wanted the testimony of the earlier meeting for the purpose of establishing negligence associated with Citation No. 9000313. Tr. 655. A single question was permitted as to whether the individual to whom the citation was served was present on July 17, 2013 and advised by Inspector Hatfield about the S&S nature of violations of 30 C.F.R. §75.1504(a)(2). The Inspector stated that the individual *was not* present, ending that line of questioning. Tr. 656. Subsequently, Ex 14B, which was offered but, per the Court's ruling not admitted, was included in the record, in a separate envelope, for purposes of appeal only. Tr. 689.

[26] There is no need to precisely determine the distance not traveled. Whatever its exact length, it was significant, not inconsequential. Tr. 669-670.

Inspector Hatfield stated that the lack of familiarity would contribute to delays during an escape. The foreman, per the standard's aim, must know of landmarks along the route and know of things such as turns and overcasts, and stoppings with doors, the lack of knowing all of those particulars can create delays during an emergency. Tr. 673. He marked the injuries as permanently disabling because if panic ensues, miners might try to talk and succumb to the smoke and CO. Tr. 673-674.

Upon cross-examination, Counsel for Brody noted that in an emergency miners are to use the lifeline, the point apparently being that knowing the route is superfluous, as one holds the lifeline during that entirety of an escape. Tr. 680-681. Questioning then explored whether, during an escape, sometimes a miner other than the foreman may take charge and that such an individual may in fact *be* familiar with the escapeway.[27] Tr. 683-684.

In its defense of the S&S charge, Brody called Justin Elkins. Elkins is an experienced miner. Tr. 693-695. He testified that he had traveled the intake escapeway at a time *before* became the foreman for that section, when he was part of the section crew. Tr. 698, 700. The escapeway had become longer since then, but he could not state exactly how much longer. On cross-examination, the point was made that when one assumes the duty of foreman, one takes on a leadership position. Elkins could not remember exactly when he had walked the escapeway from the No. 4 unit. Tr. 702. The Court observed that the cross-exam aptly noted that a foreman has a different role and responsibility as compared to one is employed as a roof bolter. Tr. 704. Elkins later agreed that the last time he would have traveled the escapeway, albeit not as a foreman, was in October 2012, some nine months before this citation was issued. Thus, it is fair to state that the escapeway would not have remained static during that considerable period of time. Further, the standard does not speak in terms of equivalencies, where familiarity may have been acquired in segments over time and before one assumed the duties of the section foreman.

The Court finds that this violation, as with the similar violation, is also S&S. Testimony supports the conclusion that there was a measure of danger contributed to by the violation and there is a reasonable likelihood that the hazard contributed to will result in an injury. There can be little doubt that if an injury were to occur in the circumstances of an emergency, it would be of a reasonably serious nature. Brody's various hypotheticals were found to be unpersuasive. Although repeated often during its defense, the Court does not find that the presented putative ameliorating factors, such as mine maps, are not an appropriate part of the S&S analysis.

Nor does the contention that Mr. Elkins examined the escapeway, through piecemeal observations, at times before he assumed the role of foreman, diminish the conclusion that the violation was S&S, as that is not the equivalent of the standard's requirements. Once becoming a foreman, very different responsibilities attach.

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[27] The Court observes that this was no more than another variant of the theme that other safety procedures operate to diminish the S&S characterization and it too is rejected as an inappropriate consideration in that analysis. In the same vein, the existence of multi-gas detectors and maps showing the location of SCSRs and the refuge chamber was raised. Tr. 685-687.

The proposed penalty for this was assessed at $3,405.00. Upon consideration of the evidence and each of the statutory penalty factors, the Court agrees that the assessed amount is appropriate and that amount is hereby imposed.

Citation No. 7165694 from Docket No. WEVA 2014-620

Brody did not stipulate to any matters for this section 104(a) citation. Issued on August 14, 2013, the condition or practice section stated that "[t]he lifeline provided for the #4 Super Section is not located in a manner for miners to use to effectively escape. At crosscut 2 on #2G Belt, directly below the lifeline there is (sic) two broken pallets, rock dust bags, a small wire spool, [The spool was later identified by Brody's witness as measuring about 18 inches tall and 16 inches wide. Tr. 750] and plastic. The pallets measure 5 1/2' [feet] wide and 15″ [inches] high. This condition would hinder/impede miners attempting to utilize the lifeline in a mine emergency and is likely to result in fatal injuries. Standard 75.380(d)(7)(iv) was cited 2 times in two years at mine 4609086 (2 to operator, 0 to a contractor)." Gov. Ex. 17A.

The issuing inspector, Timothy Crawford testified. On that day, the Inspector was travelling with Brody foreman Dave Petry. Inspector Crawford had been about other inspection duties when he noticed the cited materials directly beneath the lifeline. Tr. 715. This lifeline was in the alternate escapeway. In explaining the obvious hazard presented, with miners escaping using a lifeline where visibility would be nil and communication precluded because they would be wearing SCSRs, obstacles with attendant slip and fall hazards cannot be allowed. Tr. 718. As noted in the Citation, the materials were directly below the lifeline. Tr. 718. As the Inspector stated: "Miners attempting to utilize the lifeline being hindered or impaired through the slip, trip hazards with the materials directly below it" was the hazard which he considered to be reasonably likely to cause an injury that could be fatal. Tr. 719. Eleven miners were so put at risk, as they were working inby on the No. 4 super section. Tr. 720-721. With some effort on the Court's part, the Inspector eventually stated that the moderate negligence he marked applies to obvious conditions, such as the slip and fall debris he found in this instance. Tr. 725. The Inspector also stated that in an emergency situation with miners using a lifeline, walking around such materials is not a feasible option.[28] Tr. 727.

Cross-examination suggested that the material had only been there a short time, as the Inspector did not note it on his trip into the mine, and his notes remarked that the condition had likely only existed for 20 minutes. Tr. 732. From this, Brody's Counsel suggested that under normal mining conditions, the obstacles would have been cleared in a short time. Tr. 734. The Inspector could not speak to whether a miner was then on his way to clean up the material, although he did allow that miners might place such material in a travelway if they know it is about to be picked up. Tr. 735. He did not waiver however that the pallets were in a crosscut and below the lifeline. In response to more questions about its exact location, he added that it

[28] The Court did have an inquiry, perhaps misplaced, about the applicability of the standard, because it requires that lifelines be located in such a manner to use effectively to escape, but that the Inspector did not require that the lifeline be relocated. Tr. 728. The Inspector believed that it remained the applicable standard to cite in such circumstances. Tr. 729.

was located at the junction of the entry and the crosscut. The intersection is part of the crosscut and the entry. Tr. 737, 744. Further, the Inspector stated that it is not normal practice to put trash directly below a lifeline. Tr. 742. Also, the Inspector denied that it was his view that all escapeway or lifeline violations are S&S. Tr. 739.

In its defense to this matter, Brody first called Dave Petry, the foreman to whom the citation was issued. Tr. 746. He has long experience in coal mining. He advised that when the citation was issued he "moved it out from underneath the lifeline," a task that simply required him to pull it to a better location. Tr. 750. Mr. Petry stated that the materials had only been at the inappropriate location cited by the Inspector, for about 10 minutes. Tr. 751. Mr. Petry conceded that there was a violation. However, the Court finds, per his testimony at Tr. 752, that Mr. Petry's testimony regarding the short duration of this trash under the lifeline and that it was about to be picked up by a scoop, to be credible. Tr. 753. Mr. Petry disagreed with the Inspector's S&S and negligence determinations for the same reasons; it was about to be picked up and had been there for only a short time. Tr. 756.

Roger, "Dusty," Cook, Brody section foreman, was also called by the Respondent. Mr. Cook stated that he was the individual who put the material in the location identified in the citation and therefore he had first-hand knowledge of the matter. Tr. 767. He then explained the circumstances that led to the material being placed at that location and that it was done in anticipation of it being promptly removed by the scoopman. Tr. 768. Later, he clarified that he anticipated that the material would be removed sometime that day. Tr. 773. He went further however, by asserting that the material was not directly under the lifeline and that he did not believe they presented a hazard. Tr. 769. Upon cross-examination, he admitted that he was not present when the citation was issued and so could not speak to its placement at that time. Tr. 770. He also conceded that the pallets, in a smoke-filled environment, could present a tripping hazard. Tr. 771.

Testimony about the recency of the violation was not pertinent to the S&S analysis but it is relevant to the degree of negligence. Though the continued normal mining operations test typically presumes that the violative condition will continue, in this instance, the credible testimony demonstrated that in fact the trash was to be picked up in a short time. The Court announced at the conclusion of the testimony that the violation had been established **but that it was not S&S.** Tr. 774.

For the above reasons, Citation No. 7165694, was established, but upon review of the evidence of record, and application of the statutory criteria, the appropriate penalty to be imposed is $500.00**.**

Citation No. 7166781 from Docket No. WEVA 2014-842

For this matter, Brody stipulated to the fact of violation. The section 104(a) citation, No. 7166781, issued by MSHA Coal Mine Inspector James Crawford, states in the condition or practice that "[t]he directional cones for the alternate escape way (sic) on 2 D Belt, in by (sic) the SCSR Cache at 20 XC exceed the 100 foot maximum spacing. An area from 20XC to 23 XC has no cones. This is 81 rows of bolts @ 4.0 feet per row, 324 feet total. This presents hazards of

delay in an emergency escape attempt. Conditions such as inability to communicate, low or no visibility and disorientation are reasonably likely in a mine emergency. Miners receive tactile feedback and information from the cones and their configuration. This mine is on a 5 day methane spot rotation for methane liberation. This area of the mine is far from the slope portal and is a difficult, time consuming walk to the surface in clear visibility. The No. 2 section crew is in by at time of citation. Standard 75.380(d)(7)(v) [the cited standard for this citation] was cited 1 time in two years at mine 4609086." Gov. Ex. 18A.

Inspector Crawford also has long experience in coal mining. His testimony supported the underlying facts identified in his citation for this admitted violation. Brody's Kevin Webb was with him at that time. Working with the 324 foot measure meant that two or three of the required cones were missing. He listed 14 miners as affected by this, a number derived by asking how many people are on the section. The mine was running at the time of the citation. The Inspector stated that the missing cones could bring about a delay in an escape situation. Tr. 787. The cones are installed to give the miners information. When not present, neither is the information they provide. Here, also, the section was about 5 ½ miles from the mine portal. Although he personally expressed that he might not panic if there was no cone when his step count told him to be expecting one, but when he went another full distance and there was still no cone, he would have to re-evaluate his circumstance, wondering if something had gone wrong: "Do we - - do [we] get off somewhere?" That is to say, miners would at that point stop and inquire "Are you sure we're going the right way?" Tr. 788. He reminded however that the miners in that emergency situation can't talk with one another, as they will be wearing their SCSRs.

The Inspector also referenced that miners in other mine disasters have gone the wrong way during an escape, although lifelines were not present in those past incidents. (However, it should be noted that the Court made it clear that references to what occurred in other mine emergencies would not be considered in deciding the S&S and negligence issues in this matter. Tr. 801-802) He considered the likelihood of an injury in such circumstances as reasonably likely. Although he frequently encounters the response that a given deficiency is not of great consequence and that it can be fixed, his response is that in an emergency there is no time to make such fixes. Tr. 789. As with the testimony of other inspectors in this proceeding, the Inspector marked the negligence as moderate because it was an obvious condition. Tr. 790. The Inspector also stated that the term "secondary" escapeway is a misnomer, because it "is used about 99 percent of the time [at this mine]."

The Court concludes that on the core issues, S&S and the moderate negligence determinations, the cross-examination did not undermine the Inspector's testimony. Tr. 791-805.

Kevin Webb testified for Brody in defense of the issues remaining for this citation. He stated that there was a cone at crosscut 23 and double cones at crosscut 20, the latter indicating a branch line where SCSRs were located. Tr. 806. The area without cones was "basically level." He did not believe the violation was S&S because the length without cones was "a straight piece of roadway" and because the first thing miners want to do is to get all the way out of the mine. That exit strategy is what the miners are trained to do. Tr. 807-808. He believed that miners would continue traveling straight ahead and he added that the reflectors along would indicate to

them that are going the right way. Tr. 808. However, the Court would note that this speculative and in any event it is not the test for determining S&S. The issue is whether the undenied absence of the cones would contribute to the hazard and based on the Inspector's testimony, it clearly would. Mr. Webb also did not believe that the absent cones would cause delay in escaping. On cross-examination, Webb agreed that the purpose of the cones is to provide reassurance, every 100 feet, that miners are heading in the correct direction, that is, out of the mine. Tr. 812-813.

The Court finds that this violation was S&S. The arguments that other considerations[29] diminished the S&S aspect are rejected. The Court also sensed that Brody discounted problems with the cones, at least in the context of any S&S analysis, regarding their presence, whether they were directionally accurate and the information they are to convey. The test is whether the discrete safety hazard was contributed to by the violation and the Court finds that is clearly the case. As an overall observation, though not controlling in determining any given citation, as each was assessed on its own merit, it did appear to the Court that Brody seemed to discount the significance of cones, the importance of their presence, that they indicate the right direction for escape and, more generally, the importance of the information they are expected to convey.

Upon consideration of the evidence of record and the statutory criteria, the Court concludes that Citation No. 7166781 is affirmed and that the proposed penalty amount of $29,529.00 remains appropriate.

II. Alleged Roof and Rib Control and Examination Violations: Conditions and/or Practices contributing to roof and rib hazards[30]

WEVA 2013-997 Citation No. 8151320. For this, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $9,634.00. Tr. 832.

WEVA 2014-620, Citation No. 7168801 For this too, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $4,329.00. Tr. 832.

WEVA 2014-620, Citation No. 7168899 For this too, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $15,570.00. Tr. 833.

WEVA 2014-620, Citation No. 7167471. This matter was contested.[31] MSHA Inspector James Jackson was called for this citation. Issued March 6, 2013, this section 104(a) citation stated that

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[29] One such example is that as the roadway was essentially straight, it was claimed that miners in an emergency would keep going in the correct direction despite the misinformation.

[30] These matters were addressed during the second week of hearings with all matters for this group heard on September 29, 2014.

[31] Later, Counsel for Brody explained that had the violation been cited as a 75.220 violation, it may have conceded the violation, while still challenging the special findings.
(continued…)

"[a]dditional roof support is needed at the MCI D-Box (S.N. 35966-99895-1-210), located at cross cut (sic) 39 on number 1 belt line. Roof bolts were found to be missing and damaged in this area. Due to the damaged and missing roof bolts areas were found 6 feet to 13 feet 3 inches between roof bolts. This condition exposes miners to hazards related to unsupported top. Miners are required to work and travel in this area. Standard 75.202(a) was cited 9 times in two years at mine 4609086 (9 to operator, 0 to a contractor)."

The "D-Box" referenced in the citation is a power distribution box. Damaged roof bolts referred to conditions where plates were not firmly against the mine roof and some of the plates and bolt heads were snapped off. Tr. 836. This was an area where miners work or travel and they were exposed to unsupported roof. This presented the risk of rock falling and hitting miners, exposing the workers to the risk of a fatality. The unsupported area between the bolts presented the risk of a fatality and the Inspector stated that it has been his experience that even smaller rock falls can have fatal consequences. Tr. 837. Inspector Jackson marked one person as potentially affected as one person would be examining that area each shift and there is also exposure with the weekly electrical examination requirement. People also travel through the area. Tr. 840. A need for maintenance of the D-box in that area or to reset breakers there would also present exposure. Tr. 840. Thus, the hazard was the unsupported area with rock falling, a condition he deemed to be reasonably likely to occur. The Court asked the Inspector to elaborate his view of this hazard. The Inspector advised that the "area was unsupported. The damaged bolts, there's no way to tell how much of the bolt in the hole and the glue were still bonded. I felt that the area was unsupported and unstable, just from my experience in dealing with unsupported top." Tr. 839. The Inspector added that the area's location in or near an intersection added to his conclusion that the violation was S&S. The area had not been dangered off. Negligence was marked as "moderate" because the Inspector considered the condition to be obvious and the examiner should have seen it. Tr. 841. Further, due to the presence of rock dust and rust over the damaged bolts, the Inspector concluded that the condition had existed for some time. Tr. 841. Later, he expressed that the condition had existed for longer than that week. Tr. 850. The violation was abated by setting timbers in the area.

The cross-examination noted that the area was sandstone and the Inspector agreed that generally speaking, such rock is solid. However, the Inspector advised that he has seen sandstone fall. Tr. 843. The Inspector did not retreat from his statement that bolts were missing, even though advised that witnesses for Brody would assert that only plates, not bolts, were missing. Tr. 846. He did allow that it was possible that the bolt *heads* had been snapped off. Tr. 847. However, there is no way of telling how much of a bolt may remain in the roof. The bolts, Inspector Jackson reasserted, were to be on 4 foot centers at the cited location. Tr. 849. Part of the cross-examination contended that the area had been bolted seven years earlier and that the D-Box had been located there for four years. Tr. 850-851. This led to the assertion that in all that time no citation for this had been issued previously. Tr. 852. The point of this was to contend that the area was quite stable and therefore a roof fall unlikely. The Inspector's response

[31] (…continued)

However, as section 75.202 was cited, they challenged the violation itself. Tr. 883. On that basis it believed there is case law to support the view that there is no violation where the evidence establishes that the roof is stable. Tr. 883-884.

was that he didn't "have the privilege of knowing when a roof is going to fall, when it's going to fail." Tr. 853, 855. He added that the roof was unsupported. Exposure, he agreed, would not be from miners using the travelway, as the cited area was not in a travelway. However, those examining the D-box would be exposed. On re-direct, it was brought out that the roof control plan still applies, sandstone or not and that roof falls can happen even where there is no obvious adverse roof conditions. Tr. 860. Upon questioning by the Court, the Inspector, referencing the drawing he created at page 12, stated that he found eight missing bolts. Further, the Inspector confirmed that he found two areas of discrete problems. Tr. 862.

Brody presented Milton Aliff in defense of this matter. Mr. Aliff has long mining experience. He identified the relevant preshift examiner's report relating to this matter, and that his signature appears on it. It was his testimony that exposure to the unsupported roof would be very limited while conducting the pre-shift exam. Tr. 873-876. Mr. Aliff also took issue with the Inspector's assertion of "missing" bolts, asserting that they were only "wide." He also stated that only the bolt plates were missing. Tr. 877. It was his position that such bolts still provide support. He also stated that the roof in this area was sandstone and that it is solid, and that "[t]he top [there] was quite nice." Tr. 880. To his knowledge, no other inspector had raised issues with the roof in this area. However, Mr. Aliff revealed his perspective, when asked if he believed "that the missing and/or damaged bolts constituted a roof-fall hazard that was reasonably likely to injure anyone?" "No," he responded, "[b]ecause of the conditions that were there. [T]he top was still as solid as it was the day it was mined. There's no visible warnings; there's no sounding warnings there to indicate any type of failure in the roof." Tr. 883.

On cross-examination, Mr. Aliff agreed that preshift examiners, weekly examiners and electricians performing maintenance would go to the D-box. And though, for a time miners would be in a man bus, they would not be in the man bus while at the D-box itself. Tr. 884. Aliff also conceded that the missing plates are required to be present and that an unsupported roof presents a hazard. Tr. 885-886. Nor did Mr. Aliff like to go under unsupported roof, even if that roof is sandstone. Tr. 886.

Based upon the credible evidence of record, the Court finds that this violation was established and that it was S&S. The Court finds that the roof bolts were missing and damaged in this area as described by the Inspector. The condition exposed miners to hazards related to unsupported top and as the Inspector noted, he didn't "have the privilege of knowing when a roof is going to fall, when it's going to fail."

Still, notwithstanding the above, when the entirety of the record is considered, and applied to the statutory criteria, the Court finds that $4,000.00 is an appropriate penalty and that amount is so imposed.

WEVA 2014-620, Citation No. 7167473

For this violation, the Secretary announced that it was removing the S&S designation. The parties stipulated to all other aspects of that matter and that the penalty would be derived by application of the Part 100 formula. Tr. 888. The Secretary states that amount is $3,144.00. Accordingly, that amount is imposed.

WEVA 2014-620, Citation No. 7165683

This section 104(a) citation, issued by MSHA Inspector Timothy H. Crawford on July 24, 2013, and citing 30 C.F.R. §75.202(a), states that: "[t]he ribs where persons work and travel are not being adequately supported or otherwise controlled to protect persons from hazards related to rib falls. On the # 3 Section in the # 6 entry adjacent to the section feeder, a loose rib is found to have separated from the immediate rib and is left suspended. The loose top rock rib is measured to be 3' [feet] X 105" X 15" thick. This condition exposes the section miners who work and travel through this area to hazards of being struck by the loose rock and is likely to result in fatal injuries. Standard 75.202(a) was cited 13 times in two years at mine 4609086 (13 to the operator, 0 to a contractor)." Gov. Ex. 24 A and 24 B.

The Inspector noted the large, loose piece of top rock which "didn't appear to be held in place by much." Tr. 890. The cited standard requires that the roof and rib where persons work and travel be adequately supported or otherwise controlled to protect persons from falls of roof or ribs. Upon finding the condition, Inspector Crawford he immediately issued the citation and required that the area be dangered off so that no miners could travel through that area. Tr. 891. The Inspector marked the violation as "reasonably likely" and the negligence as moderate. For the former finding he felt that the hazard of miners being struck by roof or ribs and that the violation contributed to was reasonably likely to result in an accident. He added that this was a heavily traveled area of the mine and that the mine had several prior roof and rib injuries. Tr. 892-893. The size of the rock was sufficient that it would result in a fatal crushing injury. Moderate negligence was marked by the Inspector because, while the condition was not so obvious from one direction, it was fairly easy to detect when traveling outby. Tr. 894. A thin film of dust, where the rock had separated, informed the Inspector that the condition had not just occurred. He also observed two rib bolts in that area but one wasn't holding the loose piece at all and it was located in the separation itself. Only about 1 foot of the other bolt was secured in the mine roof. Neither bolt secured the rib. Tr. 895. Additional bolts were installed in the rib to abate the condition. The Inspector elaborated on the significant number of miners who were exposed to this loose rib. Tr. 897.

During cross-examination the Inspector stated that the rib was in the entry, next to the crosscut. In the Court's estimation, both when it heard the testimony live and again when reviewing the transcript, the cross-examination did not diminish the Inspector's testimony about the condition, as provided during the direct. Tr. 901-922, 924-930, 939-941. The Inspector did allow that the condition may have existed for only a few hours and he considered the negligence to be moderate. Tr. 923. In response to questions from the Court, the Inspector provided additional testimony describing the hazard he found that day. The Court found the Inspector's testimony to be quite detailed and he augmented his testimony by marking on the exhibit the dangerous area. The Court concluded that the Inspector's testimony was very reliable. Tr. 930-93.

In its defense of this citation, Brody called Virgil Hatfield, the individual to whom this citation was served. Tr. 945. He did feel at any point that the rib was in danger of falling. Tr. 947. He held this view because the rib had bolts in it. Tr. 947. Mr. Hatfield also felt that there was very little exposure to miners, expressing that "[n]obody really" travels in that area. Tr. 948.

He also believed that shuttle car traffic would be protected because of the canopies on them. Further, he contended that when he and the Inspector took measurements of the loose rib, they were "right at it," thereby suggesting that it really didn't present much of a hazard. Tr. 949. Virgil Hatfield also believed that the two bolts which were present were still supporting the rib and that it wasn't going to fall. Tr. 950. In sum, Mr. Hatfield's testimony presented a very different take on the cited condition, and he didn't feel there was a need to fix anything. The different recounting included the abatement of it. For that, he stated that the Inspector told them to put bolts in it. However, upon questioning by the Court, he advised that installing ribs was the only way to abate it as a slate bar could not pull it down. Tr. 952. Further, according to him, only two bolts, not five were installed to abate the condition. Tr. 953. The Secretary did not cross-examine Mr. Hatfield.

Upon consideration of the entire record and the making of necessary credibility determinations, the Court finds that the violation was established and that it was S&S. The condition exposed the section miners who work and travel through this area to hazards of being struck by the loose rock and was likely to result in fatal injuries. The Court finds that there was a reasonable likelihood that the cited condition presented a reasonable likelihood that the hazard contributed to will result in an injury and that it would be of a reasonably serious nature.

Upon consideration of the evidence of record and the statutory criteria, the Court concludes that Citation No. 7165683 is affirmed and that the proposed penalty amount of $11,306.00 remains appropriate.

WEVA 2014-620, Citation No. 8155908 and WEVA 2014-620, Citation No. 8155909.

The testimony regarding these citations was presented together as they were based on the same facts.

Citation No. 8155908, a 104(a) citation, issued by Inspector Jack Hatfield on April 4, 2013, to Brody foreman Kevin Webb, states that "[t]he mine roof in the alternate escapeway (mantrip roadway) designated by the operator adjacent to the Co. # 4B Belt is not being maintained effectively controlled (sic) to prevent a roof fall hazard to the workers that work and travel in this area each shift. Supplemental roof support in the form of wooden cribs set by the operator in this area has weathered away from the roof and has been dislodged by mobile equipment traveling in this roadway rendering the supplemental roof support ineffective. This condition creates a roof fall hazard and a hazard of the dislodged cribs falling onto a worker travelling through this area. Standard 75.202(a) was cited 12 times in two years at mine 4609086 (12 to the operator, 0 to a contractor). The negligence was marked as moderate. Gov. Ex. 25 A

Citation No. 8155909, the section 104(a) citation related to Citation No. 8155908, next above, also issued on April 4, 2013 to Brody's Mr. Webb by Inspector Hatfield, states that "[a]n inadequate preshift examination has been conducted and entered in a record for that purpose prior to the workers traveling underground along the mantrip roadway (alternate escapeway) adjacent to the Co. #4B Belt. Supplemental roof support in the form of wooden cribs have been dislodged by mobile equipment and in some instances weathered away from the mine roof. This condition contributed to by the inadequate examination creates a roof fall hazard or the wooden

cribs falling onto a passing worker. The record entered in the book on the surface shows no hazards nor violation noted. Standard 75.360(b)(11)(i) was cited 1 time in two years at mine 4609086 (1 to operator, 0 to a contractor)." Negligence for this citation was listed as moderate. Gov. Ex 26 A.

Testifying first to **Citation No. 8155908**, Inspector Hatfield stated that while traveling up the mantrip roadway he noticed a dislodged crib. A crib provides supplemental support, installed to assist the primary roof support. Upon examining it, he found that it was leaning and it was not in contact with the roof. He then noted that the roof in that area had cracks in its slate top. In this area, he stated, there had been roof control problems and it was an area of high concern about the roof. Tr. 963. The Inspector stated that he then found three other places with cribs leaning. He pointed out the cracks in the roof to Mr. Webb. These observations led him to conclude that it was reasonably likely that there would be a roof fall from any of those four locations, which fall could injure a miner. The cited conditions were in a travelway, which also serves as the alternate escapeway. Tr.965. Suffice it to say that the Inspector identified various work activities which would occur in this area and thereby create exposure to the cited condition. Tr. 966-967. Thus, he concluded that the violation contributed to the hazard of a roof fall to those who work and travel in that area. The Inspector also listed a permanently disabling injury as expected injury. In terms of his S&S listing, the Inspector noted the confluence of factors: multiple places with cribs leaning and the roof conditions in that area. Tr. 967-968. He added that he observed roof fall material in the areas of the problematic cribs, but his greater concern was with the cracks in the roof. Tr. 969. Marking the negligence as moderate, the Inspector believed that it was obvious that the cribs had been struck by equipment. He considered the fact that the mine had made efforts to control the roof in this area, including input from MSHA's Tech Support division, as mitigation. However, the Court's reaction to this was that it was generous to consider those efforts as mitigation. Instead, the problems in the area could be viewed as requiring heightened vigilance. As reflected in his notes, the Inspector provided details about the location of the problematic cribs. Tr. 971-973. To abate the conditions, some cribs were repaired but some required replacement.

On cross-examination, it was asserted that there were a lot of cribs in this area but the Inspector could not affirm that there 80 sets of cribs in that area.[32] The cribs cited by the Inspector were at breaks 9, 12,13,and 17. Although the Inspector testified about broken roof over the cribs and rock on the ground, he did not include that in his notes, asserting that he would not normally include such information. Tr. 981. Clarifying his earlier testimony, the Inspector stated that three of the cribs had been hit with mobile equipment and one had simply deteriorated over time. Tr. 982. Among the three leaning cribs, a portion, one corner, of them was tight against the roof but they were leaning and he believed that if they were hit again they would come down. Tr. 982. The Inspector could not recall if he had been in the same area the day before. Tr. 984. Evidence consisting of notes from Brody's Mr. Webb tends to support that the

[32] The cross-examination point being that problems with 4 cribs in an area with 80 cribs is a small number of problematic cribs. Tr. 979-980.

Inspector was in that area the day before he noted the problem with the cribs but the Inspector could not recall if he observed the cited conditions on the previous day.[33] Tr. 985-987.

A separate challenge to the Inspector's recounting involved why he permitted four days to abate the condition, if it was as serious as he contended. The Inspector speculated that the four days could be attributable to the end of his 40 hour work week. Tr. 989. The Inspector agreed that a large number of miners used the roadway where he cited the condition. Given that abatement time he allotted, he was asked how he concluded that the condition was S&S. The Inspector responded that he did not consider it to be an imminent danger. Tr. 991. The Court interceded, noting that the question posed by Brody's Counsel was fair and basic, given that many miners would be traveling in the cited area and given that he considered it to be S&S, how was it that he allowed four days for abatement. Tr. 993. The Inspector responded that a big percentage of those exposed would be on mantrips and he thought that the mine had begun steps to correct the problems right away. Tr. 993-995. The Court observes that the Inspector's response did not explain the inconsistency between the conditions he observed, their severity and the response time he allowed. As the Court stated at that time, "[the inspector] has not come up with a good answer for this." Tr. 995.

Inspector Hatfield then testified with regard to the second, related, citation, **No. 8155909.** The Inspector stated that the same conditions he noted with regard to Citation No, 8155908 led him to issue the second citation. As noted above, this second citation deals with the preshift examination requirement and the Inspector believed that the examiner should have noted the condition. In this regard, the Inspector referenced the "rules of nine" which pertains to nine standards that should be included in preshift exams, as those standards were often linked to fatalities. Tr. 1007. After finding the alleged violative conditions, the Inspector later checked the preshift exams but found no listing of those conditions. Tr. 1009. The Inspector believed that the inadequate roof exam contributed to a roof fall hazard that the preshift examiner should have detected and recorded in the record book. He marked the violation as S&S because it contributed to the exposure to the hazard of falling roof in the area where the cribs were dislodged. Tr. 1010. He also considered the obvious nature of the cribs warranted a moderate negligence finding.

As noted, as the citations were discussed together, the cross-examination pertained to both matters as well. When asked the basis for concluding that the cribs were dislodged at the time of the preshift exam, the Inspector stated it did not look to be recent and that, more likely, it had existed for a couple of days. He again stated that he did not observe the condition the day before or he would have cited it at that time. He did not agree with the contention that an examiner could have simply missed three or four cribs among 80 in that area, though he did not observe the problem the day before. His explanation for this was that he would've been focusing on other concerns the day before, such as looking at ventilation controls. Tr. 1014.

In its defense to these matters, Brody called Kevin Webb back to the stand. Stating that the cited conditions were in an area of about 800 feet, Mr. Webb described the cribs as

[33] The Inspector denied telling Mr. Webb that he had indeed seen the conditions the previous day and wanted to see if the mine would notice them. Tr. 988.

"weathered." Tr. 1020. They were located next to the travelway, but he maintained that only one of them was dislodged. Tr. 1021. Importantly, from his perspective, three of the four points of the crib were still supporting the top. Tr. 1022. He estimated that there were between 60 to 80 cribs in this eight break span where the problems were found. The cribs were part of supplemental roof support installed in this area.[34] Tr. 1023. Mr. Webb then proceeded to identify a number of supplemental roof supports that were installed in the cited area. This prompted the Court to inquire whether this line of inquiry was helping, *or actually hurting*, the Respondent's defense. After all, those supplemental supports, in the Court's view, tended to show how problematic things were in the cited area. Tr. 1029.

Questioning then turned to Mr. Webb's notes of April 3, 2013. Ex. R 16 D. The notes were offered to show that the Inspector had been in the area the day before he issued these citations. Tr. 1031. The Inspector made no mention of any problems in that area on that day prior to issuing the citations. Webb also stated that it was possible that the one dislodged crib could have occurred after the preshift was done. As for the three cribs he described as "weathered," Webb asserted that it would be easy to miss those conditions. Tr. 1035. Importantly, Mr. Webb stated that the Inspector advised him that he had noticed the problematic cribs the day before he issued the citations and that this was the reason he stopped that day to check on their condition. Tr. 1036. The cited conditions were abated in about a half hour and Webb confirmed that four days were given to abate them. In that interval the area was not required to be dangered off. Webb agreed that the cited area was in fact heavily traveled. Tr. 1038. Mr. Webb did not feel that the conditions were S&S because there were so many other things there to support the roof. Tr. 1039. He also stated that there was no loose rock present. Tr. 1040.

On cross-examination, Mr. Webb was directed to Ex. R 16 E and its notation that states: "see cribs, need cribs . . . recapped, 4B." Tr. 1041. Webb acknowledged this was noted once he and Inspector Hatfield had gone outside the mine. Upon further questioning, this time by the Court, Mr. Webb agreed that the reference in that exhibit to "need cribs" was written after the citation for an inadequate preshift. Tr. 1043. However, Webb maintained that this was written *after* the inadequate preshift citation was issued and that it did not reflect that the condition had been noted before it. Tr. 1044.

Brody then presented a second witness regarding these two citations. Mr. Jay Heiss, a fire boss at Brody testified. Heiss was the individual who made the relevant preshift examinations for these citations. He stated that examining the cribs is part of his responsibility for a preshift. Tr. 1051. Heiss stated that he did not observe any weathered cribs at the time he did his preshift exam on April 4th. He also did not agree there was a dislodged crib. Tr. 1052. Heiss stated that he saw no hazardous roof conditions during that preshift exam. Tr. 1053. Upon cross-examination Mr. Heiss stated that he was not with the Inspector nor Mr. Webb when the citations were issued.

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[34] Although photographs, taken by Mr. Webb, per Exhibit R 15C were introduced, showing some of the cribs along the 4B belt line, they were not admitted into the record because they were taken only two months before the hearing and consequently long after the citations involved here were issued. Tr. 1023.

At the conclusion of the testimony for **Citation No. 8155909**, the Court announced that it was dismissing that citation alleging an inadequate preshift examination. Tr. 1055.

As for Citation No. 8155908, the Court finds that the violation was established but that the S&S characteristic was not demonstrated. This necessarily involved credibility determinations as well. Upon consideration of the entire record, the Court also finds the negligence to be low, and taking into account the statutory criteria, a civil penalty of $800.00 is imposed.

The proceeding then moved to other matters. Citation No. 8155925, pertaining to WEVA 2014-620, Gov. Ex. 27, was announced as settled. The citation was modified to a **non-S&S** matter and accordingly to "unlikely" with the penalty adjusted per the Part 100 formula. Tr. 1056. Pursuant to that Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 1304.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155926, also within WEVA 2014-620, was also modified to a **non-S&S** violation, with the penalty to again be calculated per the Part 100 formula. Gov. Ex. 28. Tr. 1056. Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 688.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155936, again within WEVA 2014-620, Gov. Ex. 29, was also modified to **non-S&S**, with the penalty to again be calculated per the Part 100 formula. Tr. 1057. Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 3144.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155937, within WEVA 2013-1189, Gov. Ex. 30, was also modified to **non-S&S**, with the penalty to again be calculated per the Part 100 formula. Tr. 1058. Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 1658.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2013-1189.

Order No. 9000277, within WEVA 2014-0619, Gov. Ex. 31, a section 104(d)(2) order, alleging an unwarrantable failure, was settled, and affirmed in all respects, but with a penalty reduction from $66,142.00 to $52,913.60. Although initially accepting the proposed reduction, the Court later instructed that additional information would have to be provided to justify the proposed reduction. Tr. 1060. The Secretary has complied with the Court's direction, supplying sufficient additional information so that the Court can meet its statutory obligations pursuant to Section 110(k) of the Mine Act. The settlement is therefore approved.

Order No. 9000278, within WEVA 2014-0619, is the related preshift to **Order** No. 9000277 and was also settled. The original proposed penalty was $18,742 and the agreed

penalty is $14,993.00.[35] Tr. 1061. The parties have agreed to resolve this Order for the same reasons and based on the same circumstances as set forth in the settlement of Order No. 9000277. Accordingly, the Secretary has complied with the Court's direction, supplying sufficient additional information so that the Court can meet its statutory obligations pursuant to Section 110(k) of the Mine Act. The settlement is therefore approved.

Order No. 9000304, within WEVA 2014-0619, Gov. Ex 33, and Citation No. 9000307, within WEVA 2014-620, Gov. Ex. 34, were disputed matters. MSHA Inspector Jack Hatfield testified regarding these matters.

A section 104(d)(2) order, No. 9000304, issued July 24,2013, stated: "An inadequate preshift examination has been conducted and recorded on the surface prior to the workers traveling underground to the new 1 Section Panel where workers are observed performing work on this day. The record of the examination states that 'section moving under construction'. On this day hazards of loose unsupported slate and broken rock/coal brows are found on the new 1 Section Panel. These adverse roof conditions are obvious and required dangered off or correction immediately. Equipment has been moved to this new panel and work was being performed for the beginning of second mining. This panel has set for an extended time with no evidence of rehabilitation prior to moving mining equipment to the new section. This inadequate examination exposes the workers to roof and rib falls while performing work. Four of the thirteen disabling accidents reported to MSHA from this mine this year have been from roof falling onto the workers. This action exhibits conduct which falls below a standard of care established by the Mine Act to protect the workers against the risks of harm. This mine operator has engaged in aggravated conduct constituting more than ordinary negligence by not conducting an adequate examination and correcting these roof and rib fall hazards. This citation is unwarrantable failure to comply with a mandatory standard. Standard 75.360(b)(11)(i) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard." Gov. Ex. 33A.

The Order marked the negligence as "High," with the gravity as S&S and fatal, with one person affected. Inspector Hatfield issued the Order to Brody foreman Jamie Lester. Tr. 1063. The Inspector stated that, during the course of his E01 inspection he could not find anything to show that a preshift examination had been conducted for the area where they were moving, called the new 1 section. He found information for July 23rd, but nothing for July 24th. In this area, as the mine started pillaring back, they decided to put belt in that panel and pull pillars

[35] Settled Order No. 9000278, issued June 5, 2013, states: "[a]n inadequate preshift examination has been conducted and recorded in a book for that purpose on the 3 Section Panel. The approved roof control plan is found on this day not being followed on the 3 Section Panel. The bolt spacing for installed primary support (6′ resin rods and 6′ torque tension rods) and supplemental roof support (10′cable bolts) is not as required. Numerous areas measured greater than the 36" with cable bolts installed in the intersections or the cable bolts being installed further than every other row of roof bolts. The mine roof on this section is found broken laminated slate and sandstone with a coal rider seam within 7′. This area, although not a high stress area, is West of Pond Fork with a coal rider seam present contributing to a hazardous roof condition. This examination is conducted by an agent of the operator is exhibited by the record.

there. Tr. 1064. Hatfield, upon checking on the surface, found no record that a preshift had been done for that area. Tr. 1064-1065. The Inspector then traveled to that section and found that they had produced coal there on the day shift. This conflicted with the preshift report which only indicated that the section was moving. Tr. 1065. Jamie Lester, evening shift foreman, accompanied the Inspector. Upon arriving at what the Inspector called the new 1 section, which was located third right off of 4 south, he found problems with the roof. He observed broken ribs, and the roof was broken. He found bad roof conditions, loose, broken roof, slate and a "monster" rock brow[36] at the No. 8 entry. The Inspector expressed that the mine failed to do rehab work before moving up there but just went ahead. Tr. 1066. The Inspector stated that the broken roof was "just about everywhere." Tr. 1070. It was his opinion that the mine had done nothing to try to scale the rock and no spot bolting had been done either. In terms of the size of the cited area, the Inspector said it covered approximately eight entries. He observed miners working in the cited area. Tr. 1073-1074. He did not observe workers at the monster brow however. While Inspector Hatfield had quite a tendency to ramble in his answers, his point was that the mining activity he observed and the problems with the roof he found were not recorded in the preshift examination. In terms of the evidence that mining was ongoing, the Inspector stated that the miners were hanging cables and the continuous miner had been moved from the move up box to where it was positioned to start mining coal. Tr. 1076. He explained his S&S finding as based on a confluence of factors, with so many things wrong on the section that it was reasonably likely that an accident would occur. Tr. 1076-1077. He added that the problems he found went beyond the roof conditions. Tr. 1077. He believed that the preshift exam should have noted ventilation problems. Although the Order doesn't include it, when asked if the preshift should have included issues regarding emergency access, such as a first aid kit or shelter, the Inspector responded: "The shelter should have been noted in the - - in there. And the escapeway, the alternate and primary escapeway, markings, your lifeline and that, should have been in [the preshift examination book]." Tr. 1079. Despite the detours to other issues, the Inspector returned to the roof conditions as his primary concern. Tr. 1079-1080. He considered the failures to list the problems to be unwarrantable failure, aggravated conduct with no mitigating factors. The matter was abated by moving the workers off of the panel and by marking the areas needing scaling.

The direct examination then proceeded to the related violation so that the cross-examination could cover both issues together. Accordingly, Inspector Hatfield was next directed to Gov. Ex 34. The related Citation, citing 30 C.F.R. §75.202(a), requires that roof and ribs be adequately supported to protect miners from rib or roof falls. Inspector Hatfield believed that the roof conditions he observed presented a roof fall hazard for those working on that section that evening and that a fatal accident could reasonably be expected. Tr. 1084. It was noted that the Inspector issued this alleged violation five days after the related preshift violation. Though hard to follow, the Inspector essentially stated that he would have issued the 75.202 violation sooner but that the situation was "so ugly" that he "brain locked" and that this accounted for his delay. Tr. 1088. Regrettably, the Court finds that this explanation dubious. In attempting to better understand his testimony, the Court learned from the Inspector that when he issued the 9000307

[36] A brow is part of coal or rock that has broken from the coal pillar. It is loose, but self-supporting, standing by itself. Tr. 1069.

citation some of the roof problems had been corrected when it was issued. Tr. 1089. By 1530 on July 29, 2013, all of the roof issues had been abated. Tr. 1090.

In the cross-examination, it was revealed that, at least in part, the decision to issue the Citation No. 9000307 roof violation was the product of a discussion between the Inspector and his supervisor. Tr. 1095-1096. However, the Court views this as a non-issue. The citation either stands or falls based on the Inspector's testimony of the conditions he observed and the Court's evaluation of that testimony along with the testimony of other witnesses regarding that matter. In other cross-examination matters, regarding the alleged preshift exam violation, Brody noted that the section was being moved. An issue was whether work was being done in what was referred to as the old No. 1 section or the new No. 1 section. It was Inspector Hatfield's position that the preshift exam documents were confusing and that Brody could not show him where the workers were at the time of that exam. Tr. 1100. Directed to that preshift exam, dated July 24, 2013, Respondent's Exhibit 17 D, performed by Brody's John Pauley, Inspector Hatfield agreed that was the preshift exam he deemed to be inadequate. Tr. 1101-1102. Hatfield did not speak with Pauley before issuing the alleged preshift violation. Tr. 1104. The point Brody was urging was that, in the process of a section move, areas where miners work or travel is constantly changing and that a preshift examiner might not, in such circumstances, be able to anticipate all the areas the miners might be in that process. Inspector Hatfield, somewhat hesitantly, agreed. Tr. 1106. However, it was the Inspector's position all the equipment involved used the same pathway from the old to the new section, and that Brody could not show him the dates, times, and initials to establish that a preshift was done prior to the miners coming up to the new section. Tr. 1106. The Inspector agreed that the move to the new section had not been completed. Tr. 1109. He asserted that the continuous miner was at the new section and the belt was installed, and that 4 MRS units, a roof bolter and three shuttle cars were there but there was no power center yet. Tr. 1109, 1113. Hatfield maintained that the broken roof and broken rock brows where in the area where the equipment had been moved. Tr. 1114. While the continuous miner might have been parked in a safe location, the Inspector maintained that it had to past the hazardous area to arrive at the safe location. Tr. 1114-1115.

Inspector Hatfield acknowledged that Brody's Dave Morris told him that he was making an exam of the area where the order was issued. Morris agreed with the Inspector that the area needed some work. Tr. 1116. He agreed that Morris was using red spray paint, marking off dangerous areas. Tr. 1118. Hatfield was of the view that Mr. Morris was not conducting a supplemental examination of the area, but rather was conducting an on-shift exam. Tr. 1119.

In response to the suggestion of Brody's Counsel that not was going to be performed yet up on the new part of the panel, the Inspector disagreed, stating that they "were hanging cables with anticipation of moving the feeder and the transformer up onto the section, and the equipment had already been moved up there." Tr. 1121. Miners told the Inspector that they were hanging cables and moving equipment. Tr. 1123. To the suggestion that Mr. Morris had already performed an examination of the areas where the miners had been working, the Inspector responded that if that was the case there was no evidence of such an exam by his certification with dates, times and initials. Tr. 1124. Hatfield stated that if work has been planned, you can't do a supplemental exam; a preshift exam is required in such circumstances.

Brody called James Allen Lester, shift foreman, in its defense of these matters. He recalled the events associated with them and he traveled with Inspector Hatfield at that time. Tr. 1136. Mr. Lester maintained that he saw dates, times and initials to show that the area, the new No. 1 section, had in fact been examined prior to miners entering it and that they were the initials of Eddie Puckett. Tr. 1137. He then added seeing the initials of Willis Dickens in the area before one turned up on the new section. Tr. 1137. The Secretary posed no questions of the witness.

The Court finds that these violations were established, but that neither was S&S, nor was there an unwarrantable failure established. It must be remembered that the burden of proof is on the Secretary. It is found that, under the preponderance standard, matters were unclear as to the state of mining, whether a preshift was done and as things evolved whether a supplemental shift was underway. Credibility determinations, partially adverse to the Secretary, played a role in the Court's determinations too.

For Order No. 9000304, within WEVA 2014-0619, the alleged inadequate preshift examination, the Court finds that the preponderance of the evidence supports that this Order was properly issued but that the findings of unwarrantable failure, high negligence, S&S, reasonably likely, fatal and one person affected are supported were not. A civil penalty of $5,000.00 is assessed. As a further consequence, the citation is modified to a section 104(a) citation.

As for Citation No. 9000307, within WEVA 2014-620, a section 104(a) citation, which is based on the same essential facts, a $4,000.00 penalty is assessed.

Additional matters which were settled by the parties:

Citation No 7167412, Gov. Ex. 8A was settled, with the Secretary agreeing to delete the S&S designation. The citation was accepted as otherwise written and the penalty agreed to be the amount derived from application of the Part 100 regulations. Tr. 488. That amount is $5,080.00.

Citation No 7167474 from WEVA 2013-997, with the Secretary agreeing to delete the S&S designation. The citation was accepted as otherwise written and the penalty agreed to be the amount derived from application of the Part 100 regulations. Tr. 553.

Citation No. 9000286 from WEVA 2014-0620, a section 104(a) citation, relating to an intake escapeway not being properly maintained, was settled as issued, including accepting the S&S finding and paid at the proposed amount of $3,405.00. Tr. 643.

Citation No. 7165680, WEVA 2014-0620. Brody accepts this citation, as issued, including the S&S finding. This includes agreeing to pay the proposed penalty of $29,529.00. Tr. 644.

Order No. 9000305, WEVA 2014-0619. Brody accepts this violation as issued, including the S&S finding but with mitigating factors, the penalty was reduced from $53,858 to $43,086. That violation cited section 75.1506(c)(1) requires refuge alternatives to be maintained within a thousand feet of the face and that the section was being moved at the time of the Order's

issuance and the mine had not resumed production. Tr. 646. The Secretary presented adequate justification to the Court for the reduction in the proposed penalty.[37]

Citation No. 9000309, WEVA 2014-620. For this 104(a) citation the Secretary agreed to delete the S&S finding. Brody otherwise accepted the citation as issued and the parties agreed that the penalty will be the amount derived Part 100. Tr. 647.

The following citations/orders were presented during October 7th through October 9th, the third week of the hearings in these matters.[38] Several of the citations/orders set for the third week of the hearings were settled and the terms of those settlements were later stated on the record.

Also addressed were settled matters from the first two weeks of the hearing: They are as follows:

First is Citation No. 7167412. That is contained in docket No. WEVA 2013-997.
The parties agree to modify that **to delete the S&S finding**.

The next is Government Exhibit 10, in citation No. 7167474 contained in docket No. WEVA 2013-997. The parties agree **to delete the S&S finding** for that one.

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[37] The Secretary explained the basis for the penalty reduction: MR. WILSON: Yes, your Honor. The standard cited requires that refuge alternatives be maint[ained] within 1,000 feet of the face or areas where mechanized equipment are being installed. The section was moving from one location to another. They hadn't started production yet. So the company would argue that those were mitigating circumstances. Taking that into account, taking into account that the company has agreed to accept the violation as issue including the S&S finding, we've agreed to the modest penalty reduction.

THE COURT: Okay. And -- and this is not giving you a poke -- maybe a little. I would just note on the record how easy that was for the [S]ecretary to provide the court with the information that is required under the statute. It was not onerous, as I read in some filings in other matters. Very easy to provide the minimal information, as opposed to just saying, we've looked at this [Federal Mine Review] [C]ommission and it's good. Now it's your [i.e. the Commission's] job to bring out the stamp. Okay? So that -- I don't want to -- I don't want you to offer a rebuttal to that.

MR. WILSON: I wasn't planning on it.

THE COURT: And I just wanted to note for the record, it took you less than 30 seconds to justify the reasons for the reduction. Tr. 645-646.

[38] At the outset of the third week, the Court ruled on Brody's Motion to enforcement a claimed settlement, pertaining to matters in this litigation, denying the Motion. The reasons for the denial are set forth at transcript pages 1155-1156.

The next is Government Exhibit 12, in citation No. 9000286. That is part of penalty docket WEVA 2014-620. Brody agreed to accept that one as issued, including the S&S finding.

The next is Government Exhibit 13, in citation No. 7165680, contained in docket No. WEVA 2014-620. Brody agreed to accept that one as issued.

Next is Government Exhibit 14, citation No. 9000305, contained in docket No. WEVA 2014-619. And the company agreed to accept that one as issued.

Government Exhibit 15, citation 9000309, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding** on that one.

Government Exhibit 19, citation No. 8151320, contained in docket No. 2013-997. The company agreed to accept that as issued.

Government Exhibit 20, citation No. 7168801, docket No. WEVA 2013-370. The company agreed to accept that as issued.

Government Exhibit 21, citation No. 7168899, contained in docket No. WEVA 2014-620. The company agreed to accept that as issued.
Government Exhibit 23, No. 7167473, contained in docket WEVA 2014-620. The Secretary agreed to **delete the S&S finding.**

Government Exhibit 27, citation No. 8155925, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding**.

Government Exhibit 28, citation No. 8155926, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding**.

Government Exhibit 29, citation 8155936, contained in docket WEVA 2014-620. The Secretary agreed to **delete the S&S**.

Government Exhibit 30, No. 8155937, contained in docket WEVA 2013-1189. And that is to be modified to **delete the S&S**.

Government Exhibit 31, citation 9000277, contained in WEVA 2014-619. The company agreed to accept that as issued.

Government Exhibit 32, citation No. 9000278, contained in docket WEVA 2014-619. The company agreed to accept that one as issued.

In terms of penalty assessments, Brody has stipulated that it is a very large mine and the government has submitted R 17 reports for each of the matters litigated. Tr. 1166.

All of the following exhibits pertain to assessed violation histories:

Government Exhibit 1-D, pertaining to citation 8153617

Government Exhibit 2-F, pertaining to citation 7167386.

Government Exhibit 3-G, pertaining to citation 7167387.

Government Exhibit 4-E, applies to two citations, 7167388 and 7167389, which were both issued on the same day, so the same history applies to both.

Government Exhibit 6-E, relating to citation 7167393.

Government Exhibit 7-E, pertaining to citation 7167405.

Government Exhibit 9-D, relating to citation 7168854.

Government Exhibit 11-E, pertaining to citation No. 8155914.

Government Exhibit 16-D, pertaining to citation No. 9000313.

Government Exhibit 17-C, pertaining to citation No. 7165694.

Government Exhibit 18-C, relating to citation No. 7166781.

(Government Exhibits 1-D, 2-F, 3-G, 4-E, 6-E, 7-E, 9-D, 11-E, 16-D, 17-C, and 18-C, were all admitted. Tr. 1168.)

III. Alleged Ventilation and Methane Violations; Conditions and/or Practices contributing to Ventilation and Methane Hazards

For the third week of the hearings, the citations/orders all involved alleged ventilation hazards. It was noted that in some instances a given inspector may have marked an alleged violation as a safety hazard but that health issues may attend those as well, as reflected in the inspectors' notes. The Secretary moved to amend those citations to conform to the evidence. In response, the Court expressed that it did not intend for a clerical omission to override the attendant facts, but that any final ruling would have to await consideration of any objections that Brody may raise. Tr. 1172.

The proceeding then addressed settlements reached by the parties for some matters as follows:

Citation No. 8125045 in Docket No. WEVA 2013-997. Government Exhibit 35, was settled. The Secretary has agreed **to drop the S&S**, to modify the gravity from reasonably likely to unlikely, to reduce the penalty from 21,442 to 4,329. That penalty was calculated on the gravity, if you reduce the gravity from reasonably likely to unlikely, that knocks 20 penalty

points off the regular assessment, which this was. Brody agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $4,329.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2013-997.

Citation No. 8139621 in penalty docket No. WEVA 2014-620. Government Exhibit 36 was also settled with the Secretary agreeing to **drop the S&S** and reduce the gravity from reasonably likely to unlikely. Tr. 1173-1177. Brody agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $1,944.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Order No. 8154782, from Docket No. WEVA 2014-619

The first contested **Alleged Ventilation and Methane Violation** matter for week 3 was Order No. 8154782, issued June 5, 2013, from Docket No. WEVA 2014-619. Gov. Ex. 37A. MSHA Inspector Timothy Workman, the issuing inspector for this matter, testified. The condition or practice listed for this states: "The Approved methane dust control portion of the ventilation plan was not followed on the 004-0 MMU Section. The plan requires 8500 cfm of air to be maintained behind the exhausting line curtain where the continuous miner is operated in the face, when checked by the inspection party the 216 continuous miner was mining in the #2 entry and only 3259 cfm of air was present behind the exhausting curtain. The distance from the face to the last row of bolts measured approximately 27 feet. This violation of a mandatory standard contributes to hazards of methane ignitions, explosions, and hazards associated with exposure to dust that is reasonably likely to result in fatal injuries. The exposure to this measure of danger includes but may not be limited to: The 13 persons that worked on the section this shift when the violation was observed. This is a 5 day, 103i, methane spot mine. The operator was also cited for failure to maintain cutter drum bits (reference citation 8154784). This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in that the violative condition existed for a period of time. The section foreman had reason to know of the condition in that, the foreman was aware that ventilation controls had been altered on the section approximately 20 minutes prior to MSHA arriving on the section, by removing a solid curtain between the # 5 and # 6 entries, short circuiting the air on the dual MMU #3 Section where the 005-0 and 004-0 MMU's operate. The foreman did not notify the continuous miner operator to turn off the equipment when the ventilation controls were altered and did not ensure that proper ventilation was maintained in the # 2 entry during and after the alteration to the ventilation curtain. The mine has been cited 63 times in two years for violation of 75.370(a)(1) and should be on heightened alert for this type condition. Standard 75.370(a)(1) was cited 63 times in two years at mine 4609086 (63 to the operator, 0 to a contractor)." Gov. Ex 37A.

Inspector Workman was at the mine on that date during a section 103(i) spot or "impact" inspection. Such inspections are designed to be intensified with the idea of trying to see the actual mining conditions. Tr. 1183. The primary purpose of a spot inspection is to check things associated with methane liberation and ventilation. Tre. 1185. This mine is on a 5 day spot because it liberates more than 1 million cubic feet of methane in a 24 hour period. The Inspector

stated: "As I approached the No. 2 entry, where I could hear a continuous miner operating, I observed dust coming back into the intersection of the entry as the continuous miner was leading the shuttle car. And when I viewed the dust, I approached the miner, and the shuttle car left. I told the continuous miner operator I wanted to take an air reading." Tr. 1186. Elaborating, the Inspector stated that he "was traveling across the section, through the crosscut, and observed that dust [was] coming out on the entry w[here] the continuous miner was loading." Tr. 1187. He saw "dust traveling out of the entry back into the intersection. And the dust was about the consistency of fog." The fog of dust covered an area between the curtain and the rib, where the shuttle car and the continuous miner operator was." Tr. 1187

Upon viewing the dusty conditions, the Inspector approached the continuous miner operator, who turned off his machine. He advised that he was going to take an air reading. Tr. 1188. The methane monitor on the machine had a readout of 0.4 at that time. Tr. 1189-1190. He found the continuous miner towards the working face and the curtain was with the outspacing towards the curtain and the rib. This meant that the continuous miner was to the Inspector's right, towards the face and the curtain was hung on the left rib. Tr. 1190. The curtain was 35 inches away from the left rib. Twenty-seven feet had been taken out of the cut. Tr. 1191. By his estimation, they were approximately two-thirds done with that cut. Tr. 1192. The Inspector's "air reading was taken between the curtain and the rib on the exhausting side of the curtain, at the end of the line curtain." Tr. 1192. He described in detail the method he employed in taking his anemometer reading. The readings are reflected in his Order, No. 8154782, which is quoted above.

Once he had taken his reading, the Inspector informed Brody's Shannon Dolin of the results, who then began taking his own air reading. Tr. 1200. At the same time, he saw that some miners began taking corrective actions on the curtain, by tightening it up and extending it. Tr. 1200. Even with those actions, Dolin's reading was 5723, which was still low. The Inspector made it clear that the corrective actions, undertaken as Dolin was taking his own reading, would have helped increase the air reading he obtained. Tr. 1201.

Inspector Workman stated that he had several hazard concerns associated with the condition he observed: accumulations of methane due to the diminished ventilation and exposure to dust, which presented health and safety issues. Tr. 1201-1202. With low air, the ability to sweep out methane is diminished. Tr. 1205. If methane levels reach 1 % the operator is required to take additional steps. Tr. 1205-1206. Those levels were not present, but a point of the ventilation requirements is to prevent them from developing. Methane liberations, he explained, are not consistent and one can't predict how quickly accumulations of methane can develop. Tr. 1207. It was mentioned again that the Brody mine is a high methane liberating mine. Spot inspections, intended to deal with such issues, can be at 15, 10 or 5 day intervals. As noted, the Brody mine inspections occur with the highest frequency, at 5 day intervals.[39] Tr. 1210.

[39] Although not directly part of this Order but worth noting, the Inspector issued another citation at the same time because the methane gas detector used by the continuous miner equipment operator wasn't functioning properly, to the point that it was useless. That methane detector is apart from the detector on the continuous miner itself. Such readings are done within (continued…)

The Inspector stated that when he came to the entry, immediately before he issued Order No. 8154782, the continuous miner was operating in the No. 2 entry in the location where he found the low air. Tr. 1216. That low air was traveling up into the cut where the continuous miner was working and then being exhausted behind the line curtain. There were ignition sources identified by the Inspector: electrical equipment, the continuous miner itself, and the shuttle car were named. The condition of the cutter drum bits on the continuous miner were of concern too, as an additional ignition source and a citation was issued for that. Tr. 1218-1220. Citation No. 8154784, Gov. Ex. 37 E, Tr. 1222. (The cutter bit issue, while related and admitted to the record as part of the broader picture for Order No. 8154782, is not part of the Secretary's pattern claim. Tr. 1223.) Among the approximate 81 bits, because there is some bit redundancy in the cutting drum, not every one of them has to be perfect, but in this instance several bits were missing in a general location and such a condition increases the likelihood of an ignition, if methane was encountered. Tr. 1220-1221. Thus, a concern was, with the low air, and the issue with the bits, matters were made worse. Tr. 1221-1222.

Regarding the Inspector's marking the Order as S&S, he expressed that the low air he found contributed to the measure of danger related to the methane hazard. A methane ignition would be reasonably likely to result in an injury and such injury would be of a reasonably serious nature. Tr. 1231. Thirteen miners, as noted in the Order, were exposed to that risk in the cited area. Tr. 1232. Under certain, limited, situations, namely at a shift change, that number could double. In sum, the Inspector found, within the same general time frame, the low air, the 0.4 (i.e. one half of one percent) percent methane, the defective methane detector, and the cutter bit issue. Those were the factors which the Inspector considered to be in confluence. Tr. 1234-1235. However, the Court expressed that the defective methane detector, while an important concern, was not properly part of the S&S analysis for this matter. Tr. 1236. Continuing with the Inspector's testimony, Workman stated that the dust he encountered itself contributed to the hazard of a methane ignition, as coal dust itself can ignite or explode. The hazard is only increased with the presence of methane. Tr. 1237. Further, an explosion can occur in such circumstances, even where the methane has not reached the explosive level range. Tr. 1237. There was also, in the Inspector's estimation, a visibility hazard present. Here, there was dust coming into the area where the shuttle car and the continuous miner operator were working. The dust created a visibility issue and increased the risk that the miner operator could be struck by the shuttle car operator.[40] Tr.1241-1242.

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[39] (…continued)
5 feet of the face and must be done every 20 minutes. Tr. 1211-1213. Gov. Ex. 37 D. Thus, methane is such a concern, with its potential for an explosion, that backup measurements, such as this are required to be taken.

[40] Inspector Workman noted that the continuous miner operator does his job remotely. He is not physically on the continuous miner. However, as he is standing apart from the machine he is remotely operating, he is subject to being struck by other equipment, such as the shuttle car operator, a risk heightened by the dust reducing the visibility. It is fair to state that the dust impaired the visibility but that there was not a complete impairment; one could from 20 feet
(continued…)

The Inspector affirmed that his S&S finding was based on two, independent, grounds: safety and health concerns. Tr.1243. For the latter, he was concerned about the exposure to respirable dust and how such dust can lead to lung diseases. Tr. 1243-1244. Both the continuous miner and the shuttle car operators were exposed to that dust. This mine is also subject to a reduced dust standard. The usual dust standard is 2.0 but the reduced dust standard in that area is set at 0.9. This lower standard is used where quartz silica is present. Quartz makes respirable dust significantly more hazardous to inhale. The concern is lung disease from such exposure, silicosis and pneumoconiosis, disabling and fatal consequences. Tr. 1244-1248.

To abate the low air problem, several steps were required, as adjustments to the line curtain did not solve the issue and other ventilation controls were required. Tr. 1248-1249. It was discovered that ventilation controls had been moved in order to move equipment in the area but that it had not been reestablished. Tr. 1250. The Inspector marked the violation as an unwarrantable failure because the mine failed to install the fly pads properly and the condition had not just occurred. The ventilation controls had been knowingly removed by the section boss. Production should have been shut down until the controls had been reestablished. Further, it was not a simple fix; it took an hour to get things right. Tr. 1251-1252.

Upon review of the cross-examination, addressing things such as that continuous miner methane monitor was working properly, that no issues were encountered during the inspector's imminent danger run, the location of the continuous miner to the right rib, that about two-thirds of the cut had been completed, that a shuttle car was being loaded when he entered the area, attempts to claim that the face was idle at the moment the inspector observed the problem, subsequent air readings, the suggestion that the low air existed for no more than 20 minutes, that the inspector did not actually see the bits striking the face when he issued the citation for that problem, and the communication between the continuous miner operator and the shuttle car operator, among other topics, it is the Court's opinion that such questioning did not diminish the Inspector's testimony on direct examination. (Tr. 1254-1291). The subsequent redirect and the re-cross examination did not alter the Court's view of the testimony. Tr. 1291-1301.

In its defense of this matter, Brody called Shannon Dolin, shift foreman. He was present with the inspector at that time. Dolin stated that the miner was backing out of the No. 2 entry at the time and was not cutting coal at that moment they arrived, nor was the shuttle car being loaded. Tr. 1305. Instead, he maintained that the miner was preparing to go to another entry. Thus, there was a direct conflict in the testimony on this point. The difference in the accounts matters, as the air need only be 3,000 when not cutting or loading. Dolin considered such circumstances to be an idle face. Tr. 1307. He also stated that the odd manner in which the Inspector took his air reading caused him to act as if he were a regulator, albeit a human regulator, but with the effect of blocking the air. Tr. 1309. Dolin also stated that the continuous

[40] (…continued)
away, at least make out the presence of things at that distance. The Inspector's analogy to fog was reasonable. Tr. 1240-1241. Importantly, one must remember that, in a coal mine such as this, visibility is not great to start. It is limited under the best of circumstances. The dust, when struck by a cap lamp or the light on machinery, also has a reflective effect and that too diminishes visibility. Tr. 1242.

miner's position was not sitting straight as it would be if it were mining and loading. Tr. 1310. Thus, Dolin's testimony was that because they weren't cutting coal and because the measurement itself was compromised in the way it was taken, there was no violation. Tr. 1311. In addition, Dolin's own measurement, taken right after, and with no ventilation changes yet made, was 5500. Tr. 1312. The air reading taken before any coal was cut that day was 9,310. R's 19 C. Tr. 1314. A production sheet report for June 5th reflects that coal was mined from 8:40 to 10:00 a.m. that day, with the next cut occurring from 12:20 to 1:20 p.m. R 19 E. Dolin stated that, though permitted, no deep cuts were being made on that day. He stated that the cuts had been shortened to control the top better. Tr. 1316. The shorter cuts allowed them to get in faster so that bolting could occur sooner. Further displaying the divergent testimony between the Mr. Dolin and the Inspector, Dolin stated that there was no dust in the area when the Order was issued. Tr. 1318. To address the Order, Dolin stated that they "just hung a check curtain - - a couple check curtains across the fly pads." Tr. 1319. That had to be done, he stated, because of the way the continuous miner was positioned. Once that was done, the air issue was resolved. Tr. 1320. Dolin stated that it is easy for a fly pad to become torn down on a corner by a shuttle car or other equipment or even by a person walking on it. Tr. 1320. Consistent with the thrust of his testimony, Mr. Dolin didn't know anything about ventilation changes occurring 20 minutes before the Order was issued nor about any curtain being taken down between the No. 5 and 6 entry. Tr. 1321. As for the damaged drum bits and the contention about water sprays, Mr. Dolin agreed that those are routine maintenance items. Tr. 1322.

On cross-examination, Mr. Dolin, agreed that Ex. R 19E reflects that coal was being produced between 12:20 and 1:20 that day, but that the record of the times "may not have been correct" because he insisted the mining was done. Tr. 1323. Dolin then agreed that the continuous miner would still have been in the entry at 1:20. Tr. 1324. Dolin repeated that the mining was completed and that the miner was backing out of the entry, not producing coal, a status that he viewed as idle, not active mining. Even if miners are still in the entry, and even if the miner is not de-energized, Mr. Dolin considered the face to be idle, as coal was not being produced. Tr. 1325-1327. He did acknowledge that some bits on the cutter needed to be replaced, but this was done to make the coal cutting faster. He did not know if the worn bits increased the risk of sparking or arcing. Tr. 1334. In terms of the different air readings between the Inspector and his reading, Mr. Dolin didn't know how to explain the difference, other than perhaps that they were positioned differently when taking the measurements. Tr. 1336. As for any notes he may have taken, Dolin was sure that he did take notes, but could not recall the person to whom he gave them. Tr. 1339. Brody, he stated, asks that its employees take notes when they travel with inspectors. Tr. 1340.

The Court concludes that the Order is affirmed in all respects. The violation was clearly S&S and the proposed penalty of $70,000.00 is appropriate when measured by application of the statutory criteria and it is so imposed. The Court's determinations necessarily involved credibility determinations which are reflected in the Court's findings and penalty imposition.

Citation No. 8146352, from Docket No. WEVA 2013-997

For this matter, Brody admits to the fact of violation but disputes the S&S finding. The stipulation included the inspector's air readings, including the manner in which it was taken and the mean air velocity. Tr. 1348-1349. So too, the degree of negligence (low), and the number of persons affected (2), were part of Brody's stipulation, leaving only the S&S issue. Tr. 1350.

MSHA Inspector James Jackson testified about this matter. The citation for which the S&S issue is involved is found in Gov. Ex. 38A. The condition or practice section of this 104(a) citation states that "[t]he operator is not following the approved methane dust control portion of the ventilation plan on the 011-0 MMU on the number 5 section. The Fletcher roof bolter was bolting in the number 2 entry without the required 45 MEAV air. ["MEAV" stands for mean entry air velocity. Tr. 1354, 1356] The number 2 entry was found to have only 35.6 MEAV air while the bolt machine was in operation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 times to the operator, 0 to a contractor)."

The Inspector walked into the number 2 entry and noted that the air didn't feel right. He took a reading and found that the air was low. MEAV refers to the velocity on the wide side of the curtain. Tr. 1354. Brody's methane dust control plan requires an MEAV of 45. When asked if he still believed that the violation was serious, given that the reading he obtained was 80% of the required amount, the Inspector affirmed that he did consider it to be serious because the equipment is operating on that wide side. The velocity is important because it is removing the gas and dust away from the miners and putting it behind the curtain, all with the purpose of preventing prolonged exposure to that gas and dust. Tr. 1359-1360. The Inspector, at the Court's suggestion, drew a sketch to help with the understanding of the cited condition. Gov. Ex. 38 D. Tr. 1360-1369. Brody's Barry Browning was with the Inspector at that time and a roof bolting crew of two men was then installing bolts there. Tr. 1372. The Inspector's concerns were methane and respirable dust. Thus, his concerns had two aspects. The low air moving through the entry being insufficient to get rid of the methane should a methane pocket be encountered. Tr. 1373. Though he found no methane at that time, he noted that the mine is on the 5 day spot inspection regime, reserved for the highest methane producing mines. Methane can arise all at once or levels can slowly increase. The roof bolting machine, in the process of performing that task, provides an ignition source. Tr. 1375.

The Inspector considered the violation to be S&S because the required level of 45 represents the *minimum* safe level, as per the Mine's plan. Tr. 1378. Here, the level was "well below" that minimum. He did state that not every level below the minimum would be S&S, but at least here, with a reading 20% below the minimum, he considered it to be that. Tr. 1379. Should a methane ignition occur, burns and possibly fractures could result. Tr. 1379.

Inspector Jackson did state that the foreman and the roof bolt operators told him that there was sufficient air when they started. However, he could not account for anything that would cause the claimed reduction after they started. Tr. 1381.

Turning to his other concern, that of dust, the Inspector stated that with the low air, the roof bolt operators will be exposed to the dust as they perform their task. This dust is right above

where the roof bolt operators are doing their work, though it is not constant during that work, occurring when the hole is started and if the drill steel gets clogged. Tr. 1383. While he did not actually see dust when he found the violation, his knowledge of dust occurring during such work is based his experience in operating a roof bolting machine. Such dust creates the hazard of black lung silica being inhaled. Tr. 1385. The Court commented at the conclusion of the direct testimony that it could be viewed as a situation where the Secretary, concerned about the S&S quality of the alleged violation, decided to add the health S&S claim. Tr. 1388-1389. Although there was an oblique reference in his notes that "encountering methane, prolonged exposure to dust with low visibility" (Tr. 1388), the Inspector did not mark it as a health violation, marking only "safety" for the citation.

Upon cross-examination, it was noted that Brody employees asserted that they had 6,195 CFM at the start of the bolting and if that were accurate, the condition found by the Inspector would have existed for less than 30 minutes. Tr. 1389-1390. The Inspector's notes themselves reflect "[t]his condition just happened" and the Inspector stated that was why he marked the matter as low negligence. Tr. 1390. A factor beyond simply the low reading in the Inspector's decision to mark the violation as S&S was that the miners were not done with the face; they were continuing to advance. As they continue to advance, more air will be lost as they cut further. Tr. 1396. However, the Inspector admitted that he did not know how much work remained for them to finish bolting that entry. Tr. 1397.

On re-direct, elaborating on his S&S determination, the Inspector reaffirmed that the gassy nature of the mine was a factor. Tr. 1399. Also, roof bolters can encounter pockets of methane and an explosive level could occur. Tr. 1400. The Inspector did acknowledge to the Court that he was not suspicious of the operator's claim that the air reading was fine thirty minutes earlier. Tr. 1401.

At the conclusion of the testimony, the Court expressed reservations about whether this violation was S&S. Upon further review, it adheres to that view. In the Court's estimation, the third *Mathies* element was not established. The Court concludes that safety, not health concerns, were the basis for this citation. Given the short duration both of the condition and the time it would continue, the third element was not established. The proposed penalty was $1,657.00 and upon consideration of the statutory criteria and the absence of the S&S element, the Court imposes a civil penalty of $1,000.00.

Citation No. 7167400, from Docket No. WEVA 2013-1055

As with the citation just addressed, Brody challenges only the S&S finding associated with this. Tr. 1409-1410. For this admitted violation the condition or practice section states that "[t]he operator is not following the approved ventilation plan on the number 3 section (006-0 MMU). The air was found to be reversed in the number 1 and 2 return entries. The air was moving Inby (sic) into the gob area. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, 0 to a contractor)." Gov. Ex. 39A. The 104(a) citation was issued by Inspector James Jackson to Kevin Webb, Brody foreman.

The Inspector stated that he was at the mine on an E02 spot inspection and had started his imminent danger run when he discovered that the air was reversed in the return. Tr. 1411. Gov. Ex. 39 B, is a drawing depicting the air reversal found by the Inspector. Tr. 1413-1424. The Inspector marked the exhibit to reflect the violation, again which Brody does not dispute, where he took his readings, and the incorrect air flow location. The Court then asked the Inspector to explain the significance of the incorrect flow. He stated that "[t]he air flowing in the wrong direction is putting all the methane from the return back over the top of the miners and back over the top of the equipment while it's running, while they're pillaring." Tr. 1426. Elaborating, he stated that "[t]he return air would be coming onto the section with methane [and that] was my concern, bringing the methane over the top of the miners and the equipment." Tr. 1428. Inspector Jackson confirmed that there was an active continuous miner up on the pillar line at the time he was present, that is to say, it was taking out pillars and producing coal. Tr. 1428. Methane was the hazard about which the Inspector was concerned. Tr. 1429. With his handheld methane detector, he had a reading of .05 percent methane. He also took bottle samples at that time. Lab results from those samples showed .11 percent methane. Tr. 1430. Gov. Ex. 39 D. The Inspector had no concern with the return air going out through the gob, nor with any methane ignition back at the gob. Tr. 1431. However, a methane ignition could potentially affect any miners working on the section. Tr. 1432.

Upon cross-examination, the Inspector acknowledged that his notes reflected that "[t]his condition could expose eight miners to hazards of the return air course reversing back to the gob area" and that "[i]t is reasonably likely that this condition would cause an accident if it were allowed to exist" and that ".05 percent [i.e. one half of .1 percent, per Tr. 1452.] CH4 was detected in the return at citation time" and that "[t]his condition would cause a permanently disabling injury if an accident were to occur. This would be from the return reversing and leading [ ] up the gob area with methane and having an ignition." Tr. 1436-1437. It was then noted that the Inspector's notes make no mention of air leaving the return entries and migrating over to the section. Tr. 1437. Instead, his notes reflect only a concern of air going backward in the return entry and then to the gob. Tr. 1439. Although the Inspector conceded that, by its nature, there is no equipment in the gob, he still stated that there can be ignition sources there. This can occur when a roof collapses and roof bolts can spark when they break off during such an event. Tr. 1440. The Inspector agreed that he could not dispute testimony that air will go into the gob in this location and exit through the return air shaft at the old Jupiter mine. Tr. 1441. Again, the Inspector conceded that his notes only refer to air exiting into the gob. Tr. 1442. In Gov. Ex. 39 B, the shaded area represents the gob. (The words "positive pressure" appear over that shaded area; the area above that, with the L's represents the bleeder system itself.) The Inspector agreed that, at least based on his notes, there is no mention of air leaving the returns and migrating over to where miners were working. Tr. 1450. He never checked to determine if the air was flowing over towards the miner but with the air reversed it will make its way towards the strongest pull. Tr. 1451. The Inspector then agreed that the area where he found the air reversed is examined every four hours. Tr. 1453. However, it was the Inspector's contention that in order for the reversed air to get into the gob, it will travel through the working section. Tr. 1456, 1463.

When questioned by the Court and relying upon R's Ex. 21 C, and assuming that the preshift exam reflected there is accurate, and its indication that the condition cited by the

Inspector did not then exist, the Inspector agreed that the reversed air existed for 3 ½ hours at most. Tr. 1459.

Though prolonged in the examinations, the essence of the violation was that being return air, which by definition is air that has been used and therefore is no longer fresh air, such air is supposed to go away from the miners, but with the reversal he found, and which reversal the operator acknowledged was present, the bad air goes back to the miners. Tr. 1466. Upon questioning by the Court, the Inspector agreed that the discrete hazard was used air with methane going back over the miners working at the face and then onto the gob. Tr. 1470-1471. The Court then inquired what the reasonable likelihood was. Inspector Jackson responded that, but for his finding the reverse air problem, "that condition would continue to exist and continue to allow methane to come up - - up those entries and over on the miners. [He could not] say that [the methane is] always going to be .05 or .11 percent methane. It may increase; it may decrease [but he has] got to look at the worst. And to me, it was reasonably likely at this mine, since they are on methane spot for liberating a lot of methane, that the methane is going to continue to accumulate in that return and come up over top of the[] miners. And the [continuous] miner itself is an ignition source. When they're cutting the rock, you know, cutting the sandstone, th bits cause sparks and that we have had ignitions from [continuous] miners recently." Tr. 1471-1472. In further redirect, the Inspector restated that the discrete safety hazard was the air reversal bringing methane across the section and back into the gob. Tr. 1474.

In its defense, Brody called Kevin Webb to the stand again. As noted, he was with Inspector Jackson at the time this citation was issued. Mr. Webb stated that there was no equipment in the gob, nor ignition sources, nor power sources. Air which enters the gob goes into a bleeder system and then exits to the outside. Tr. 1478. Webb agreed that Exhibit 39 B basically shows the way air would be moving in the No. 3 section at the time of the citation. Regarding the central controversy, Mr. Webb stated "not to [his] knowledge" would any return air be migrating over to the section on that day. Tr. 1483. He asserted that it was not possible for the reversed air in the 1 and 2 entries to migrate over to the working sections. Tr. 1484. He based this view upon the 1 and 2 entries being separated from the pillar section by permanent stoppings. Because of this, he maintained that the air, however it was flowing, would either go out one return shaft or the other return, which was the main return. Tr. 1485. He also stated that those entries would be examined ever four hours. With that statement, Webb was then directed to the on-shift records for that day, with the implication that an exam would have occurred shortly thereafter, and that the reverse air problem would have been noted and corrected. Tr. 1486. Speaking to the S&S issue, Mr. Webb did not feel that the reverse air was reasonably likely to result in a reasonably serious injury because it was return air which was separated and would exit, as he stated earlier, through one of the two returns. Tr. 1488.

On cross-examination, Webb did not agree with the assertion that that were genuine ignition sources in the gob. Tr. 1489. Subsequent cross-examination did not shed light on the S&S issue. Tr. 1490-1503. As Mr. Webb characterized the admitted violation as a "paper" violation, the Court inquired about the basis for that opinion. Webb agreed that, because of the presence of the permanent stoppings, the violation was technical only, as the air was still return air and would exit as he previously explained. Tr. 1507-1508. Thus, he asserted that, "it would be impossible for the air to go back toward the section because of the intake air pressure." Tr. 1508.

At the conclusion of the testimony for this citation, the Court noted that if it were to find Mr. Webb's testimony credible it would be difficult to find that the violation was S&S. Tr. 1517. Having reviewed the record and the contentions of the parties, the Court does find Mr. Webb to have been a credible and persuasive witness for this citation. The admitted violation was not S&S, as the second, third and fourth elements were not established per the burden of proof on the Secretary. Given the Respondent's credible testimony, and upon application of the statutory criteria, a civil penalty of $2,000.00 is imposed.

Citation No. 8155960, from Docket No. WEVA 2014-620.

Inspector Jack Hatfield testified for the Secretary. That Inspector issued the section 104(a) citation on May 29, 2013 to Brody foreman Virgil Hatfield. The condition or practice section of the citation stated: "The Approved Ventilation Plan is not being followed on the 005 MMU. When measured with a calibrated anemometer, the blades of the anemometer would only barely turn behind the end of the line curtain in the #7 entry where the scoop is found. Four tenths of one percent methane is found in the working place where the scoop has cleaned one rib. This condition would contribute to an ignition of methane while operating the scoop in the working place. This mine is on a 103(i) five day spot inspection for excessive methane liberation. Standard 75.370(a)(1) was cited 63 times in two years at mine 4609086 (63 to the operator, 0 to a contractor)." Gov. Ex. 48 A.

Inspector Hatfield stated that he was on the 005 MMU that day, traveling up into the No. 7 entry up to the face where he found 4/10ths of a percent methane. Tr. 1526. That reading was taken within 12 inches of the face. The area was roof bolted to the face and a scoop was present, preparing to scoop the right rib, as it had just scooped the left rib. Virgil Hatfield got the same methane reading on his own device. Tr. 1529. The Inspector then took an air reading of the air flow behind the end of the line curtain, and found that the anemometer blades would just barely turn. Tr. 1530 and the Inspector's sketch of the scene he encountered. Gov. Ex. 48 D. Virgil Hatfield then began yelling to the scoopman about the ventilation issue. He did not challenge the accuracy of the Inspector's attempt to measure the air flow, or more accurately, the lack of air flow. Tr. 1531. The minimum required air is 3,000 cfm. Gov. Ex. 48 B and Tr. 1532. As for the cause of the air shortage, the Inspector learned that the curtain was pinched against the rib, blocking air. In tacking up the curtain so that the scoop can clean, one must do that in a manner so that air will still flow. This is done by creating a tunnel in the curtain for the air to travel. In this instance the tunnel was incorrectly done, causing it to be pinched and blocking the air. Tr. 1542.

The Inspector believed that with the pinched curtain, and the 4/10ths of 1 percent methane present, this indicated that methane was starting to accumulate. Yet, the scoop still had to clean the right rib and he was concerned about that machine's continued operation under those conditions. Tr. 1542. Thus, the scoop itself, with its battery terminals, the wiring, a light on a scoop, and batteries themselves, all presented an ignition source, according to the Inspector. However, he did not find any safety issues with the scoop then being used. Tr. 1543. Yet, the

Inspector still believed that scoops, by their nature and through their normal operation duties, present possible problems and by those, ignition sources. Tr. 1544-1545. Methane was the hazard that worried the Inspector. Tr. 1545. While the 4/10ths of 1 percent was not an explosive level, he was concerned that the methane level would rise, given the lack of ventilation. Tr. 1549. Inspector Hatfield stated that he couldn't know how long it would take for an explosive level of methane to develop. Tr. 1550. He then stated that it could develop in a short while from as little as 20 minutes. The Inspector then estimated that the scoop would need to remain in that area for another 30 minutes to clean the right rib and then to apply rock dust. Tr. 1552. He stated that it was reasonably likely that sufficient methane could accumulate during that period of time to cause an electrical arc, which, at a minimum could result in burns. He added that an explosion was reasonably likely by the time the scoop finished cleaning the area. Tr. 1552. That the area had not been rock dusted and the accumulation of materials on the rib's right side, also contributed to that hazard's occurrence. The Inspector marked the negligence as moderate because he had discussions with mine employees, including foreman Virgil Hatfield, about how to ventilate and because the mine operator was in the best position to make sure the ventilation was proper. Tr. 1554. This involved making sure that the ventilation "tunnel" was properly installed to ventilate the face. Tr. 1555. In response to a question from the Court, the Inspector ultimately agreed that once the scoop had finished the cleanup and the area had been rock dusted, the risk was over. This entailed a period of about 30 minutes. Tr. 1558-1559.

During cross-examination, the inspector agreed that after the scoop finished its task, a new air reading would be required before cutting resumed. Tr. 1560-1561. The abatement required that the curtain be pulled away from the rib and re-tacked properly to it. No defects were found on the scoop that day, though the Inspector stated that he did not inspect it either. Tr. 1564. The face was considered to be idle at the time of the citation, with the consequence that 3,000 cfm was required at that time. Thus, the Inspector could not state that the air remained insufficient once the continuous miner resumed its work. Tr. 1565. The Inspector also agreed that the continuous miner in the process of cutting coal sprays water and that accounted for the Inspector's acknowledgment that the coal along the rib was damp. Tr. 1567. As a consequence, at least sometimes the coal spillage from the shuttle car will also be damp from that earlier spraying. Tr. 1568.

The Court concluded that this matter came down to an analysis of S&S in the context of 30 minutes of time, and after hearing the testimony from the government, announced that it found that it was not shown to be S&S. Tr. 1571-1572. Given the short duration of the window of concern, the dampness of the coal, the minimal amount of methane found, the absence of any problem with the scoop, the S&S characteristic was not established by the government. Upon consideration of the evidence, a civil penalty of $3,000.00 is imposed.

Citation 8155954 from Docket No. WEVA 2014-620

Citation No. 8155954, a section 104(a) citation, was issued on May 21, 2013, by Inspector Jack Hatfield and served to Brody foreman Kevin Webb. The condition or practice section of that citation states: "The Approved Ventilation Plan is not being followed on the 005 MMU. When measured with a calibrated anemometer, a mean air velocity [i.e. mean entry air velocity or MEAV. Tr. 1579] of 40 is found in the #5 right break where the roof bolt crew is

observed installing roof bolts. This condition contributes to the exposure of excessive dust, including respirable dust while drilling the mine roof and coal ribs. The Approved Plan requires minimum mean air velocity of 45 to be maintained at the end of the line curtain. This active MMU is on a reduced standard of 1.2 mgm3 due to excessive quartz. Standard 75.370(a)(1) [the standard cited for this citation] was cited 62 times in two years at mine 4609086 (62 to the operator, 0 to a contractor)." Gov. Ex. 47A. In preparation for his testimony, the Inspector drew a sketch of the condition he cited in order to aid in the understanding of the violation. Gov. Ex. 47D. Brody admitted to the violation, challenging only the S&S designation. Tr. 1576-1577.

A factor in the Inspector's S&S determination rested upon the mine being on a reduced dust standard due to its excessive quartz. No dust sampling was done that day but the key finding for the Inspector was the lack of the required mean air velocity. The mine's ventilation plan requires a MEAV of 45 and that is the minimum requirement. Tr.1579-1580. The Inspector stated that without the minimum required air, miners are exposed to dust from bolting and he stated that there is also a hazard of methane accumulation. Tr. 1583. For the methane issue, the Inspector stated that the mine bolts ribs and that process creates sparks as they drill. When he arrived at the scene, there was still more bolting required to be done, a tasks that he estimated would take another 30 minutes or so. The entire task of bolting the area would take, he estimated, about 50 minutes to an hour. Tr. 1584. The Inspector took his air reading and that number is not challenged by Brody. However, he also took a methane reading, but found no methane at that time. He believed there was still a methane hazard however because the bolting process was not finished and the mine is on the 5 day, high methane, spot inspection regime. Tr. 1585. The air reading below the minimum contributed to the risk of a methane ignition. This factor was coupled with the bolter drilling process which creates an ignition source. Tr. 1586-1587. The risk of encountering methane is chiefly during drilling ribs than the roof. Tr. 1593.

When asked if the fact that since the minimum air at 45 and his reading at 40 were close, was a factor in determining the S&S characteristic, Inspector Hatfield responded, "No." Tr. 1586. Hatfield believed that there was a reasonable likelihood that the violation, when considered with the hazard of methane, would contribute to an injury. He added that severe burns would be the expected injury to result. He did not see any dust at the time he noted the violation, though normally dust is created during the roof bolting process. Tr. 1588-1589. However, the drill has a vacuum component to capture dust, though it does not capture all dust. Tr. 1589-1590.

Upon cross-examination, the Inspector went over the procedure he employed in taking his air reading and also agreed that he found no methane at that time. Tr. 1595-1597. The CFM behind the end of the line curtain was 4,473, which amount exceeded the plan minimum. Tr. 1597. Hatfield did not know, as represented by Brody's Counsel, whether his velocity reading of 40 translated into a 12 percent insufficiency. Tr. 1598. He disagreed with the suggestion that, as there was no methane found, that there was no likelihood that methane could accumulate in the 30 minutes remaining for the bolting process to be completed. He based this view upon one never knowing when methane will be encountered. Tr. 1600. Though he didn't observe any dust, the Inspector noted that the bolters had stopped their work when he arrived and he stated that there was dust on the mine floor, though his notes did not record that. Tr. 1602. He did not believe that the mean air was sufficient to remove any dust the drillers could encounter. Tr.

1602. He acknowledged that he did not know if there was any impermissible amount of dust in the air at that time. Also, he did not know what the air level was before he arrived at the location. Tr. 1604. He did agree that the bolting in that area would have been completed in 25 to 30 minutes. Tr. 1606. To the suggestion that a new air reading would be taken when the bolter goes to the next entry, the Inspector stated that he did not know if that was a requirement at the Brody mine but could not dispute it. Tr. 1607.

In response to the Court's inquiry, the Inspector stated that if he had found a reading of 44 he would also have concluded that the violation was S&S. Tr. 1609. Anything below the minimum, because of the quartz, would be S&S, as far as the Inspector was concerned. Also, as noted by the Court and acknowledged by the Inspector, when the citation was issued, the Inspector did not list any safety concerns. Tr. 1613. Though later contradicted in testimony by another inspector in these proceedings, Inspector Hatfield asserted that his computer program did not allow him to check both safety *and* health concerns when filling out the citation. However, he stated that glitch had since been corrected. Tr. 1614. The Court noted that there was no barrier to the inspector including *both* safety and health concerns in the body of the condition or practice section of the citation. Tr. 1615.

In its defense, Brody recalled foreman Kevin Webb, the individual to whom the citation was issued. Mr. Webb stated that before a cut is made with the miner in place, an air reading is taken behind the line curtain and also the mean air reading is done before a cut and before bolting. This is done by the section foreman. Tr. 1618. Webb also stated that he did not observe any dust when the citation was issued that day. Air readings are taken every time a roof bolter moves into a different entry or crosscut and this occurs before bolting starts. Mr. Webb also identified the pertinent on shift report, which reflects no methane was present that day. Tr. 1621.

On cross-examination, Mr. Webb acknowledged that he doesn't personally know that these air readings are always done and that he presumes that the foreman will be doing those readings as it is part of that person's job.[41] He also stated that the low MEAV was caused by a line curtain which needed to be tightened up. Tr. 1623. He acknowledged that it is possible that the line curtain became loose right after the on-shift exam occurred. Therefore it was at least possible that the low air existed the entire time the roof bolters were in that area. Webb also agreed that the roof bolting machine generates dust and that if there is inadequate ventilation in the area, that would contribute to the hazard of dust exposure and that the same inadequacy can contribute to a methane accumulation. Tr. 1624. Mr. Webb also agreed that a roof bolter could encounter a pocket of methane as he is working. However, he also pointed out that, in his view, there was still sufficient air behind the line curtain to keep the methane out. Tr. 1625. Upon further questioning, Mr. Webb did agree that any amount below the required air *contributes* to the hazard of a methane accumulation. Tr. 1626. He also agreed that the normal roof bolting process creates ignition sources, and sparking, arcing, friction and heat. Tr. 1629.

[41] The Court asked additional questions about this because it was concerned that if Brody had no requirement to write the information about the air velocity and the mean air velocity, it had no means to be sure that people were complying with the requirement. Mr. Webb could only respond that it is part of such individuals job duties to take those air measurements. Tr. 1627-1628.

This violation was originally assessed at a proposed $8,893.00. The Court notes that the Inspector did agree that the bolting in that area would have been completed in 25 to 30 minutes. Also, as noted by the Court and acknowledged by the Inspector, when the citation was issued, the Inspector did not list any safety concerns. On the basis of the evidence, only the health concern was genuinely in issue. Given that the drill has a vacuum component to capture dust, and even though it does not capture all dust, when coupled with the unrefuted insufficiency of 12 percent and the short period of possible exposure, the Court concludes that the S&S element was not established in that the third and fourth *Mathies*' elements were not established according to the burden of proof required of the Secretary. Given this finding, the Court has determined that a $4,000.00 is appropriate upon consideration of the statutory criteria and it so imposed.

Citation 9000282 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 49A, was settled. **The Secretary has dropped the S&S designation** and modified the gravity from reasonably likely to occur to unlikely.

Citation 9000311 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 50A, was settled. Brody has agreed to accept the citation, as issued, including the S&S designation and to pay the proposed penalty assessment.

Citation 9000312 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 51A, was settled. Brody has agreed to accept the citation, as issued, including the S&S designation and to pay the proposed penalty assessment.

Citation 9002292 from Docket No. WEVA 2014-702

This Citation, per Gov. Ex. 52A, was settled. The Secretary has **dropped the S&S designation** and modified the gravity from reasonably likely to occur to unlikely.

Citation 8137713 from Docket No. WEVA 2013-997

The Secretary called Inspector Timothy Crawford for this section 104(a) citation. Issued October 9, 2012, to Brody foreman Willard Bourne, the condition or practice section of the citation stated: "The Approved Methane and Dust Control Plan is not being complied with on the 005-0 MMU at this mine. When checked with an approved calibrated anemometer, the quantity of air at the end of the line curtain in the #7 Entry where the roof bolter is operating is found to be 561 cfm. This condition exposes the roof bolter operator's (sic) to hazards associated with excessive dust which can result in permanently disabling illnesses and crushing injuries due to limited visibility and can also result in a methane build-up in the working face, etc. This mine is on a 5 day 103(i) spot for methane liberation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, 0 to a contractor)." Gov. Ex. 40A.

Both the safety and health boxes were marked by Inspector Crawford on this citation. Upon arriving at the 005MMU, the Inspector heard the roof bolter running. As he did so, he

noticed air in the intersection blowing and the fly pads were blowing. Tr. 1641. Those fly pads, designed to direct air to the working face, were blowing straight up, and this allowed air to bypass the No. 7 face. To help explain the condition he encountered, the Inspector drew a sketch. Gov. Ex. 40E. The Inspector took his air reading behind the curtain. The end of the line curtain was marked on the sketch. Tr. 1647.

The Inspector explained why he wrote the citation: "After I noticed that the air was moving through the fly pads, I decided to take an air reading. The -- both bolter operators were around their drill pots. They weren't actively drilling holes or in the process of bolting while I was there. So I went up and took the air reading behind the curtain." Tr. 1648. He added that the air was bypassing the No. 7 entry. The fly pads are to direct the air towards the working face. As a result, the air was directing the fly pads, whereas the purpose is for the flypads to direct the air. Tr. 1650. While the roof bolters were not bolting at that moment, the machine was running and its pump motor was running. As he recalled, one rib bolt had been installed and this location was marked on Exhibit 40 E. While the Inspector's citation is listed as served to Willard Bourne, he did not believe that Mr. Bourne was present when he took his air reading nor when he issued the citation. He thought that Mr. Bourne arrived after that. The Inspector then went into some detail about his air measurement, and how and where he took it. Tr. 1654-1657. Upon doing so, he had a reading of 34 feet per minute. This was used in making his calculation which yielded a quantity of 561 cfm (cubic feet per minute). Tr. 1657. In contrast, the ventilation plan requires 4,000 cfm during roof bolting operations. Gov. Ex. 40B, Tr. 1658.

Upon his reading, he told the roof bolters of the results and that he was issuing a citation. It was about that time that foreman Bourne arrived and the Inspector repeated the same information. The foreman's response was to challenge the citation because he contended that the bolting had not started. Tr. 1662. At that point the Inspector showed the foreman the clean bolt the crew had just installed. Once Bourne saw that he dropped his challenge. Tr. 1662.

In terms of his concerns over hazards associated with this violation, the Inspector stated he was concerned about methane ignitions. It is common, he stated, for sparks to occur in the bolting process. He also was concerned about respiratory problems and reduced visibility. While he found no methane at that time, it can arise at any moment. Also, right after a cut is mined, methane will often leak from the ribs and floor and in a situation as this, involving 30 to 40 feet with no ventilation, methane could build up. Tr. 1664. He estimated the time for the miners to bolt the area to be from 45 minutes to an hour and fifteen. He believed that, all things considered, it was reasonably likely for an explosive accumulation of methane to have developed. In part, this view was based on the observation that one never knows when one will hit methane. Tr. 1665. The Inspector also identified multiple ignition sources on the roof bolter itself, though he did not examine the bolter that day. Asked how the low air contributed to the hazard of methane accumulation, the Inspector summed up his concern: "The 561 CFM was, in my eyes, substantially lower than 4,000. If you don't have the air that's required to sweep out the methane -- I mean, that's the routine of the system. The ventilation system is to sweep the methane and dust from the working places." Tr. 1666-1667.

The Inspector also spoke to the likelihood of the contribution to an injury. "Q. Now, the hazard of a methane accumulation, is it reasonably likely that would contribute to an injury?

A. Yes. Q. How would it contribute to an injury and what kind of injuries? A. If you have an ignition, best case scenario, I mean, is -- I hate to refer to it as a best case, but you would only get burns sustained in the miner or is likely to -- you'd only get burns. If it ignited the coal dust, it could be quite a bit more catastrophic." Tr. 1667.

Though he didn't observe dust at the time of the violation, normally roof bolters do encounter dust when installing bolts. As the roof bolting is done at the top, there will be more silica and "stuff" from the rock. With the dust not being swept away as required by the plan, the dust will linger longer around the bolt operators. He did not believe that 561 cfm was sufficient to sweep away the dust. Tr. 1669. Additionally, normally dust is generated during bolting, and inadequate ventilation would make matters worse. The scoop operator may also have reduced visibility in such circumstances of substantially reduced air levels and possibly hit a bolter. With the inadequate air, he also had health concerns, as the bolters would have prolonged exposure to the dust. Such exposure subjects miners to the risk of developing pneumoconiosis, silicosis, or as it is commonly called, black lung. The Inspector's marking the negligence as moderate was primarily based on the standard having been cited 57 times in two years. Another factor was the obviousness of the violation. Also the fly pads issue was obvious. The foreman should have noticed the issue. Tr. 1673. The condition was abated to deal with the problem of the air not being directed to the working face.

The cross-examination covered the usual bill of fare with matters such as that there was no methane detected by the Inspector at the time he found the violation, that his imminent danger run found no issues; that no continuous miners were running at the time of the violation; and that the inspector was not running dust sampling that day. Tr. 1675-1685.

In response to the Court's question whether the Inspector considered the health concern or the safety concern to be S&S, he responded that it was both, with the stronger of the two being the safety hazard. Tr. 1685.

In its defense, Brody called Willard Baxter Bourne, the foreman who was served the citation in issue. Mr. Bourne is presently employed by Brody, working as a fire boss. His mining work history is extensive, covering some 44 years. At the time of this citation's issuance, Mr. Bourne was a section foreman. Though his name appears on the citation, he stated that he was not the person served with the citation. He stated that he did take an air reading before the continuous miner went into the No. 7 entry and that there was sufficient air at that time. Tr. 1693. He then went on to other duties but upon returning to the right side, he was told by the miner operator that he had damaged a rib bolt. Tr. 1694-1695. He then ordered repairs but again took an air reading and found, again, sufficient air. Tr. 1695. Mr. Bourne contended that "everything looked good" and that the air he measured was okay as well. Tr. 1697. However the Inspector stated that the air was insufficient but Bourne's contention was that the workers were replacing the damaged rib bolt, the implication being that the section was down at that time. Tr. 1698. Bourne also stated that he saw no dust in the area and that there was no hazardous methane level present either. He further contended that the inspector wouldn't let them lower the curtain, at least that is what his operators told him, and that to abate the condition all they had to do was lower that curtain. Tr. 1704.

Upon cross-examination, Mr. Bourne stated that he took notes of the incident and turned them in to Mr. Morrison with the mine's safety department. The notes were to be returned to Bourne, but they never were. Tr. 1706-1707. Even without his notes, Mr. Bourne seemed to be able to recall the events with great detail, including air measurements. Tr. 1708-1711. He maintained that he ordered the rib bolt to be replaced and then, once that was completed, they would re-establish the air. Tr. 1714. To make the repair, the curtain had to be rolled up. Tr. 1714. In fact, Bourne stated that he helped them roll up the curtain. Tr. 1715.

However, Mr. Bourne agreed that the ventilation plan requires 4,000 cfm of air behind the curtain when installing the rib bolt. Tr. 1720. In response to questions from the Court, Mr. Bourne initially acknowledged that he did not dispute that the Inspector got an air reading of 561 cfm and that such a reading is below the required amount, but he then stated that the reading was not in fact right. Tr. 1721-1723. There were moments of confusion as to what the witness was contending about the matter, though the confusion may have been on the Court's part. Still, pursuing the matter further, Mr. Bourne stated that the fix he ordered for the rib bolt would not have caused any reduced air flow. Tr. 1724. In sum, Mr. Bourne stated that he could not account for any reason to explain the reduced air flow claimed to exist by the Inspector. Tr. 1725.

In further cross-examination by the Secretary, Mr. Bourne acknowledged that something could have happened in the interval of time between 6:25 and 7:45 to account for the diminished air reading. Tr. 1727. Thus, to restate Mr. Bourne's position, the curtain had to be raised up to deal with the rib bolt problem and then to abate the citation, the curtain needed to be rolled back down. Tr. 1727. Bourne also contended that there was no work site established where the Inspector took his reading and he denied that there was any issue with the fly pads. Tr. 1731-1732. He did methane could suddenly arise during a roof bolt installation but that it could reach an explosive level only if there is no ventilation. He also agreed that roof bolters generate ignition sources when they are installing bolts and that having only 561 cfm would contribute to the hazard of a methane accumulation and that the injuries of an ignition would include burns. R. 1732-1734. He did not feel that dust could be an issue because the roof bolting machine has a vacuum to draw in such dust. Mr. Bourne summed up his perspective of the citation by stating if the inspectors had not shown up, the roof bolters still would have dropped the curtain after the repair, checked the methane and taken an air reading and then re-established themselves 15 feet inby to start a new work site. It is fair to state that his remarks were supported with his additional testimony concerning his view.[42] Tr. 1735-1736. Sensing perhaps that Mr. Bourne's testimony had been damaging to the Secretary's contentions,[43] Counsel for the Secretary then

[42] During additional testimony on redirect, Mr. Bourne explained the basis for his view that the Inspector took his reading from an incorrect location in that it was not taken at the established workplace. Tr. 1743-1746. Bourne's position was that the established workplace was the location where the rib bolt repair was being done and that there was 4,000 cfm at that location. Further cross-examination, at Tr. 1746. The Secretary opted not to provide testimony in rebuttal. Tr. 1748.

[43] In fact, the Court later commented openly and favorably about its view of Mr. Bourne's testimony, remarking that it found it both credible and honest. Tr. 1742.

raised objections about not being provided with Mr. Bourne's notes, which the witness had referenced as having been taken near the time of the citation but that he no longer knew of their whereabouts, though he turned them in to Brody. Suffice it to say that the Court addressed this concern but that the entire issue of notes and the parties' obligations to deliver them to each other, was disputed. Thus, the late-raised issue *did not* lead to the conclusion that Brody had behaved improperly. Tr. 1739-1741. The Court directed Brody to look for any and all notes related to these citations and, subsequent to the hearing it did so. However, the Court was not about to have the delivered notes turn into a new subset of disputes over interpretations about remarks in those notes.[44]

The Court has concluded that, based on all of the testimony, the Secretary did not establish this alleged violation, **Citation 8137713,** and therefore it is **DISMISSED**.

Citation 7165682 from Docket No. WEVA 2014-620

For this matter, Brody admits to the fact of violation and all other aspects except for the S&S issue. Tr. 1749. This section 104(a) citation, No. 7165682, issued July 24, 2013 by MSHA Inspector Timothy Crawford states, in the condition or practice section that: "[t]he Approved Ventilation Plan is not being followed on the 005-0 MMU at this mine. The Methane and Dust Control portion of the plan states that a minimum of 8,500 CFM will be maintained at the end of the line curtain and a minimum of 85 MEAV will be maintained during the mining cycle. When checked with an approved calibrated anemometer, the air quantity in the #6 Face, where the C/M is cutting/loading, is measured to be 6,840 CFM and 50 MEAV. This condition exposes miners on this section to hazards associated with inadequate ventilation such as methane ignitions, silicosis, CWP, etc. This mine is on a 5 day 103(i) Spot Inspection for methane liberation. Standard 75.370(a)(1) was cited 68 times in two years at mine 4609086 (68 to the operator, 0 to a contractor)." Gov. Ex. 41A.

[44] In an email response to this issue, dated October 16, 2014, the Court advised the parties as follows: "Here is what the parties should know: I have, presently, more than sufficient information to decide each of the contested matters. Absent a "smoking gun" passage from the notes, and by that I mean to include a note which is not capable of argument as to its meaning and effect, the whole business of the notes will not impact my decisions. Pick any citation, as a hypothetical example. To be considered beyond what I already have from the testimony and exhibits, (again I am offering this as a hypothetical example) a note would have to say something on the order of Brody saying "they got us on this one, as it is clearly S&S" in order for me to reevaluate what I have. So, absent something of that order, let's not go down a "cul-de-sac" if you remember my analogy using that term at the hearing. Consistent with the above, and with the briefs due as scheduled, I will give the Secretary until next Tuesday to, as Attorney Moore suggested, "argue that specific notes should be added to the record . . . then they should have to make a showing why any set of notes are relevant." But again, I ask the Secretary to step back and make sure that in the frenzy he is not engaging in what ultimately may be a waste of time and effort."

In testimony about the citation he issued, Inspector Crawford stated that when in the cited area he notice dust suspended in the air, rolling back from the miner in the No. 6 entry and this prompted him to determine if there was sufficient air to the face. Tr. 1751. For this conceded violation, the Inspector drew a sketch to illustrate the conditions he found. Gov. Ex. 41 D. The Inspector stated that the hazards that concerned him for this violation were the methane ignitions, silicosis, health issues, and impaired visibility from the dust, risking miners being struck by mobile equipment. Tr. 1753-1754. The citation marked both health and safety concerns for the violation. While Crawford did not record any methane, the miner loading in the No. 3 face detected .3 percent methane. However, the violation was found in the No. 6 face. Tr. 1754. The miner had just started his cut and the time to finish it would be about an hour and forty-five minutes. Tr. 1755. Contributing to the violation, the Inspector stated that the miner, when cutting or loading, will throw sparks. Also, typically, methane will be liberated from the ribs and floors during the mining cut. If a methane ignition were to occur, burns to the miner man and the shuttle car operator would be likely. Tr. 1757. The Inspector also spoke to the dust hazard he perceived. He analogized the dust level to driving into fog. The ventilation plan's design is to sweep away methane and dust generated during the mining cycle. One will not typically see dust he observed when the ventilation is sufficient. The low visibility created by the dust posed the risk of individuals being struck by mobile equipment. Tr. 1759-1763. While the fog was not so thick as to block all visibility, the Inspector did state that it was sufficient to hinder it. Tr. 1763. With 8,500 cfm being the required minimum air, the Inspector asserted that the 6,840 he found was low enough to create the visibility reduction he observed. Tr. 1763. Injuries from such a machine to person impact would include severe crushing and amputation. The dust also presented a health hazard from silica by increased exposure. Further, the dust compounds the methane hazard with the analogy of the methane being the wick and the dust serving as the dynamite. Tr. 1765. He added that while the dust doesn't add to the likelihood of a methane ignition, it would contribute to the severity of one, should that occur. Tr. 1765.

During cross-examination the Inspector stated that the dust he observed was likely the product of the shale rock that had fallen from the top that was being cut up at that time. In the Court's estimation, the cross-examination did little to dispel the Inspector's testimony concerning the basis for his S&S finding. Tr. 1767-1780.

In its defense, Brody called Virgil Hatfield, the foreman who was issued the citation. Mr. Hatfield acknowledged that the Inspector had an air reading of 6840 but that his own reading was 8768. Tr. 1787. However, Mr. Hatfield *could not recall* if his measurement was taken after abatement measures had been done. Tr. 1789. In attempting to rehabilitate that response, Mr. Hatfield stated that very small changes, such as the way one holds one's wrist, can impact the air readings. Tr. 1790-1791.

During cross-examination, Mr. Hatfield acknowledge that his own notes reflect a mean air reading of 64 but that 85 is the required amount, confirming that there was a violation, as Brody admitted. Tr. 1799-1800. To abate the condition, Hatfield stated that they "fixed the line curtain." Tr. 1803. He also agreed that they stopped the continuous miner from operating because the air was low and he didn't want them operating in the hazard of low air. Tr. 1804-1805. He also acknowledged that no one can know when methane issues can arise and that continuous miners create sparks sometimes as they work. Hatfield also stated that the miner's

scrubber hose will suck up the methane, along with dust, if a miner is run long enough. Tr. 1807-1808. However, Mr. Hatfield did not agree with the required air CFM. He felt that 6,840 was sufficient, noting that *used to be* the required level. The change was prompted because Brody "got a little bit on the dust pumps. When we [were] out of compliance on our dust pumps." Tr. 1810. He did not agree that the admittedly low air contributed to the hazards of dust and methane. Tr. 1812.

Although the Court concludes that the safety basis for the S&S claim was not established, the health basis was established, based upon the Court's determination that the Inspector's testimony was more persuasive and credible. Accordingly, the Court concludes that that S&S element was proven for each of the two disputed elements. The proposed assessment for this was $8,893.00 and the Court concludes that, upon application of the statutory criteria, that amount remains appropriate and is so imposed.

Citation 7168841 from Docket No. WEVA 2013-1055.

Citation 7168841, a section 104(a) citation, issued November 26, 2012 by Inspector Joshua A. McNeely to Brody's Aubrey Hartman, foreman, states: "The approved ventilation plan is not being complied with. The continuous miners being operated in the #5 entry of the Beaver Mains section does not have the required amount of ventilation. The miner is loading the shuttle car and only 4,620 cfm is provided. The plan requires 8,500 cfm . Dust is visible in the entry around both operators. This condition exposes miners to hazards related to respirable dust and other hazards related to dust. This is a 5 day 103i spot inspection mine due to CH4 liberation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, O to a contractor)." The Inspector marked "safety" in the box next to violation, box 9. Gov. Ex. 42A. For this violation, Brody stipulated to the fact of violation and the moderate negligence designation, and all other aspects, including items such as the air readings, leaving only the S&S designation in dispute. Tr. 1814-1817.

Inspector McNeely stated that when he came upon the scene in the entry, the continuous miner was loading the shuttle car and "there was visible dust around it, kind of stagnant looking air . . ." Tr. 1819. The miner was at that time at the end of its cut, with cut taking approximately 30 minutes to an hour. He observed dust in the area where the men were working and it was "all around them." Tr. 1820. The dust was sufficient to affect visibility. Tr. 1820. He stated that multiple hazards are associated with this. The less air one has, the more dust will be present and there is a greater chance for methane buildup. Equipment operators have a greater risk of hitting personnel under such conditions too. He did take a methane reading at that time and it did not detect any methane then but the continuous miner's display did read 0.1 percent methane. Tr. 1822. However, he noted that this mine liberates great quantities of methane, which is the reason it is on a five day spot inspection. At this mine a pocket of methane can arise at any time and an explosive level can develop in seconds. Tr. 1823. Related to this, the continuous miner itself is an ignition source itself. The low air and methane risk go hand in hand as the less air, the greater chance for a methane buildup. A methane ignition can result in burns and if coal dust is added, fatalities may occur too. Tr. 1825. The dust he observed was either dust from mine rock or coal dust and occurs in the cutting process. Dust doesn't make a methane ignition more likely but it could contribute to the damage if an ignition occurred. The dust also creates a safety hazard of

an accident occurring between the shuttle car operator and the continuous miner operator. Tr. 1829. The Court takes note that other witnesses for MSHA testified during the course of these hearings to the same effect about the safety hazards attendant to dust reducing visibility. The Inspector affirmed that the level of dust he observed was consistent with those safety concerns. As he expressed it, "It was a pretty good bit of dust." Tr. 1830. The related dust issues on health were also part of previous testimony from MSHA witnesses and this Inspector's testimony echoed those expressions. Tr. 1833-1835. Ventilation controls were repaired and installed and five men and two foremen were involved in that effort. Tr. 1836.

The cross-examination again reviewed familiar territory: that an imminent danger run had been conducted previously; that no methane was then encountered; etc. The Inspector acknowledged that the cut was almost finished and that the miner would then move to another entry. Tr. 1838. After that, the bolting crew would move in and take an air reading to determine if there was sufficient air. The Inspector had no indication that the miner's scrubber was not working, however, he added that he couldn't say it was working properly given the amount of dust. His concern was not over the miner's scrubber; his focus was on the amount of dust he encountered. Tr. 1840. The Inspector, in his notes, marked that Shanon [Dolin] the section foreman, told him that he had an air reading of 10,000 CFM *prior* to the cut. Tr. 1841, 1850. Still, while not directly challenging that assertion, the Inspector focused instead on the fact that it took 55 minutes to make the corrections and provide the required amount of air. Tr. 1842. The Inspector did not assert that the dust was so thick that the miner operator or the shuttle car operator could not be seen. Tr. 1846.

Brody did not call any witnesses in its defense of this citation.

Upon review of the record and arguments, the Court finds that this admitted violation was S&S. The Court finds that the Inspector's credible testimony about the safety hazard attendant to the scene he encountered for this admitted violation, established the remaining three *Mathies* elements. Given the nature of this mine's high methane liberation characteristic, an additional, independent, basis for concluding that the violation was S&S exists on the record evidence. On those twin safety-related bases, it is unnecessary to reach a conclusion about a health basis for an S&S finding, though such a finding, if it were needed to be made, would not be unreasonable. The proposed penalty for this was $7,578.00 and upon review of the record, the Court concludes that upon application of the statutory criteria, that penalty amount remains appropriate penalty and is so imposed.

Citation 7168866 from Docket No.WEVA 2014-620

Inspector Joshua A. McNeely again testified for the Secretary regarding Citation No. 7168866, issued January 14, 2013 and served to Brody's Derek Morrison. The Citation states: "The approved ventilation plan is not being complied with on the active #4 section 011-0 MMU. The roof bolter is installing primary roof supports in the #4 entry without the minimum amount of air. Only 3,276 cfm with a MEAV of 24 is being supplied to the end of the line curtain. This condition exposes miners to respirable dust, and methane build up hazards. Standard 75.370(a)(1) was cited 60 times at mine 4609086 (60 to the operator, 0 to a contractor)." Gov. Ex. 43A.

Brody admitted to this violation and stipulated to all related facts, including items such as the air reading obtained by the Inspector, except for the S&S designation. Tr. 1855-1856.

Inspector McNeely stated that in traveling on the active No. 4 section he found that the ventilation plan requirements weren't met at the roof bolting machine. Tr. 1857. At that time, the roof bolter was installing roof supports. The bolter was then at about 110 feet deep, so he was near the end of that, leaving about 20 to 40 feet remaining before moving to another section. The minimum amount of air required is 4,000 CFM, and an MEAV of 45, but the Inspector found only 3,276 cfm with a MEAV of 24. Tr. 1859. The Inspector revisited the same safety concerns which he expressed in the citation just discussed, next above. Essentially that concern is that with less air comes more dust and the opportunity for methane buildup. Reduced visibility, a safety concern, and respirable dust, a health concern, were again the hazards identified by the Inspector. Tr. 1860. No methane was detected but in the adjacent entry the miner displayed 0.3 percent methane. Tr. 1860. Given this mine's enormous liberation of methane every 24 hours, the Inspector noted that there is "always a chance for methane liberation with any piece of equipment in any face." Tr. 1861. The roof bolter presents an ignition source and the Court notes that this essentially an undisputed fact, based on the testimony during these hearings from both sides. The expected injuries, also as previously testified to numerous times, were the same as well. The Inspector also stated that "there was some pretty good dust in the area." This dust covered the area of the roof bolter and "past it a little." Tr. 1864. As noted before too, a methane ignition could propagate a dust explosion, as the dust would ignite. A safety concern related to the dust, the scoop would come within 3 feet of the roof bolters and this again would present the risk of crushing-type injuries. The violation was abated in about 20 to 24 minutes, but the Inspector expressed that the repairs were "fairly extensive" with five miners participating in the corrections. Tr. 1870.

During cross-examination, the Inspector stated he was working under the assumption that the miners were exposed to the low air for the entire time they were bolting that area, a time period for which he made an approximation. Tr. 1883-1884. He agreed that when the bolting was done, the bolters would move to the next entry and that another air reading would then be done in that next entry. In terms of the concern that a scoop might strike a bolter operator, the Inspector agreed that the scoop would stop about 10 feet from the bolters' physical location at their machine. Tr. 1893. When it was suggested that as the air was only 724 CFM below the required amount, the Inspector responded that was an amount below the minimum. Tr. 1897. He did not agree that he would deem 1 CFM below that minimum as significant but only that 724 was.

Brody did not present any witnesses of its own for this citation.

The Court concludes that the violation was established as S&S, and that while both safety and health concerns were S&S, the stronger of the two claims in this instance was the health concern. The proposed assessment was $8,209.00 and the Court concludes that amount remains appropriate upon application of the statutory criteria and it is so imposed.

Citation 7168913 from Docket No. WEVA 2014-620

This section 104(a) citation, No. 7168913, which was also issued by Inspector Joshua A. McNeely, and issued on February 13, 2013 to Brody foreman Josh Anderson, states: "The approved ventilation plan is not being complied with. The energized continuous miner on the active #1 section is in the #2 face without the minimum required ventilation for the 001-0 MMU. When checked, the air behind the line curtain measured 6,648 cfm. The plan requires at least 8,500 cfm for this miner. This is a 103i 5 day methane spot inspection mine. The condition exposes miners to hazards related to methane build-up and dust hazards. Standard 75.370(a)(1) was cited 61 times in two years at mine 4609086 (61 to the operator, 0 to a contractor)." Gov. Ex. 44A. The Inspector marked "safety" in the section 9 of the citation.

The Inspector stated that he came upon the area and observed the continuous miner operator cutting coal. Tr. 1903. He added seeing embers, that is to say, sparks, coming from the miner's cutter, when rock is cut. Tr. 1904-1905. Arcs were seen coming from the bits. Tr. 1911. Brody then stated that it was not disputing that the Inspector found 6648 cfm behind the curtain. Tr. 1909. The air requirement of 8,500 minimum applies when mining or loading. Tr. 1911. The same concerns expressed by the Inspector for the similar violation he testified about, obtained here and there is no need to repeat those. To abate the violation, loose parts of the curtain had to be tightened up to the mine roof or to the seams of curtain that were together and some holes in the curtain were patched. This took about 40 minutes to accomplish. Tr. 1929. The negligence was marked as moderate because the condition was obvious and foremen were in the area and they were required to do preshift exams. Tr. 1929.

The Court asked the Inspector to explain his reasoning regarding his testimony for a similar violation, where he observed dust and considered the violation to be S&S, and for this violation, where he did *not* observe dust, but still marked it as S&S. The Inspector stated that it was his view that, had he not found the violation, the mining would have continued just as it was, with no tending to the diminished air and so the air would not have gotten better, but for his citation. Tr. 1933. As he saw it, with continued normal mining operations, the air would have worsened, but for his intervention, issuing the citation. Tr. 1934. The Court agrees with the Inspector's analysis.

As with each of the citations, the entire transcript was reviewed by the Court. The absence of specific comment to every point raised, either on direct or cross-examination, does not suggest to the contrary, but rather reflects that many points were made repeatedly for like violations and in other instances the Court made the judgment that a point did not rise to a level that warranted comment. Though multiple attempts were made to suggest that the miner was not actually mining but merely set up to mine, the Inspector was adamant that they were mining. See, Tr. 1941, 1943, among other examples on this point. The Court finds the Inspector entirely credible on this issue.

In its defense for this matter, Brody called Joshua Anderson, the section foreman to whom the citation was issued. Mr. Anderson stated that the citation was issued on the No. 1 section. The Inspector either was in front of or behind him that day as they traveled into the

mine, but the Inspector arrived at the face before he did. Tr. 1955. Anderson maintained that there was no mining going on, no cutting coal at that time at the number 2 entry. Tr. 1955-1956. "Preop" activities were going on, not mining. He had not yet taken an air reading. Tr. 1958. The preshift report dealing with the time just before this citation reflected no problems including no problems with the ventilation, nor any methane problems. Tr. 1959-1960. Anderson also completed the on-shift report for that time, and he stated that it reflects there was no mining going on in the No. 2 entry. He acknowledged that the continuous miner was set up there. Tr. 1961. The miner had power on the cable but he maintained that it was not running at that time. Tr. 1962. Anderson offered that while the miner was set to go, his explanation as to why they didn't mine in the number 2 entry, as follows: "I think one reason might have been the kettle bottom we observed on the on-shift exam -- or just the general examination of the area. And No. 1 was -- it's more of a -- it's easier to get your ventilation in No. 1 entry. There's less chance of taking down a back-up curtain. It's a lot easier to get ventilation in No. 1." Tr. 1963.

During cross-examination by the Secretary, Mr. Anderson continued to state that no mining had been done in the No. 2 entry since the face had not been cut. Tr. 1974. However at the time the Inspector was taking his air reading, Anderson deenergized the miner. When asked why he would do that, if there was no mining, he stated that it eliminates any hazard with no power on the machine. Tr. 1975. He did not dispute the Inspector's reading, only the assertion that they were mining. He also contended that because of the kettle bottom, the continuous miner would not have been operating until after that was supported. Tr. 1978. Mr. Anderson did not aid his credibility however when he asserted that the minimum amount of air to safely dilute methane was excessive in that he believed that 6648 cfm was sufficient and in fact that 5,000 would be enough as well. Tr. 1980-1981. Asked if agreed with the mine's ventilation plan, he answered plainly, "No." Tr. 1981.

This citation presented a two-pronged S&S claim of safety and health. The cross-exam was ineffective. The fact that dust sampling did not show a violation does not refute the S&S nature of this violation. MSHA's central contentions here was that the low air, the ongoing work of the continuous miner, and the extremely gassy nature of this mine, establish the violation's S&S nature. I credit the Inspector's version of the events due in part to the Court's assessment of his credibility and certainty of his recollections, when contrasted with the Court's evaluation of the conflicting testimony.

The proposed assessment for this violation was $8,893.00 and the Court, upon application of the statutory criteria to the record evidence, concludes that amount remains appropriate and is so imposed.

Citation 3577965 from Docket No. WEVA 2014-620

This matter, noted in Gov. Ex. 45A, was settled. Brody accepts the citation, as issued, including the S&S finding and the full amount of the proposed penalty. Tr. 1991.

Citation 3578036 from Docket No. WEVA 2014-620

This matter, noted in Gov. Ex. 46A, was settled. Brody accepts the citation, as issued, including the S&S finding and the full amount of the proposed penalty. Tr. 1992.

CONCLUSION

The matters in this litigation having been addressed, the foregoing constitutes the Court's decision. **So Ordered.**

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

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APPENDIX I

STIPULATIONS

The parties entered into the following stipulations at the hearing:

1. Brody Mining, LLC (hereinafter “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 Citations/Orders at issue in these proceedings were issued.
2. The Brody Mine No. 1, an underground bituminous coal mine at which the Citations/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 appear in Block 22 of the Citations/Orders at issue in these proceedings were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Citations/Orders were issued.
5. True copies of the Citations/Orders at issue in this proceeding were served on Brody as required by the Mine Act.
6. 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.
7. 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:
>
> 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).

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).

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).

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. **[The Court points out that the reader should not be confused by this stipulation as it only recounts what *the Notice alleges*.]**

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.

8. Citation No. 7166783, listed in POV Notice 7219154, was vacated by MSHA subsequent to the issuance of the POV Notice.
9. Citation No. 7166784, listed in POV Notice 7219154, was vacated by MSHA subsequent to the issuance of the POV Notice.
10. The regulations on which MSHA relies to issue the notice of pattern of violations became final on March 25, 2013. See Fed. Reg. § 5056 (January 23, 2013).

11. The POV 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.
12. MSHA based its POV determination on a 12-month period ending August 31, 2013.
13. 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, who wrote the rule, 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.
14. In keeping with the rule, the screening criteria were not subjected to notice-and-comment procedures. The parties disagree as to whether such notice-and- comment procedures were required by the Administrative Procedure Act.
15. 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.
16. The rate of S&S issuances at the Brody Mine No. 1 was 8.41 per 100 inspection hours during the screening period.
17. 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.
18. Each of the citations/orders listed in POV Notice 7219154 have been contested by Brody.
19. 24 citations/orders referenced in the pattern notice were issued before March 25, 2013. 28 citations/orders referenced in the pattern notice were issued after March 25, 2013.
20. 16 of the citations were referenced in the pattern notice were issued before January 1, 2013.
21. 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 hour would be below the 8.0 S&S per 100-hour criteria. The Secretary contends that the 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.
22. 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.
23. 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.
24. According to MSHA's sampling, the Brody Mine liberates in excess of 1,000,000 cubic feet of methane per 24-hour period during the time frame from September 1, 2012 through August 31, 2013 and was on a 5-day spot inspection cycle pursuant to Section

103(i) of the Mine Act.

25. Joint Exhibit J-1is an accurate mine map of the Brody No. 1 Mine as of July 31, 2013.
26. Government Exhibit 1-A is an authentic copy of Citation No. 8153617, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
27. Brody admits the fact of the violation cited in citation 8153617 but contests that the violation was properly designated as significant and substantial.
28. Government Exhibit 2-A is an authentic copy of Citation No. 7167386, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
29. Brody admits the fact of the violation cited in citation 7167386 but contests that the violation was properly designated as significant and substantial.
30. Government Exhibit 3-A is an authentic copy of Citation No. 7167387, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
31. Government Exhibit 4-A is an authentic copy of Citation No. 7167388, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
32. Brody admits the fact of the violation cited in citation 7167388 but contests that the violation was properly designated as significant and substantial.
33. Government Exhibit 5-A is an authentic copy of Citation No. 7167389, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
34. Brody admits the fact of the violation cited in citation 7167389 but contests that the violation was properly designated as significant and substantial.
35. Government Exhibit 6-A is an authentic copy of Citation No. 7167393, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
36. Brody admits the fact of the violation cited in citation 7167393 but contests that the violation was properly designated as significant and substantial.
37. Government Exhibit 7-A is an authentic copy of Citation No. 7167405, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
38. Brody admits the fact of the violation cited in citation 7167405 but contests that the violation was properly designated as significant and substantial.
39. Government Exhibit 8-A is an authentic copy of Citation No. 7167412, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

40. The Government stipulates that Citation No. 7167412 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
41. Government Exhibit 9-A is an authentic copy of Citation No. 7168854, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
42. Brody admits the fact of the violation cited in citation 7168854 but contests that the violation was properly designated as significant and substantial.
43. Government Exhibit 10-A is an authentic copy of Citation No. 7167474, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
44. The Government stipulates that Citation No. 7167474 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
45. Government Exhibit 11-A is an authentic copy of Citation No. 8155914, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
46. Government Exhibit 12-A is an authentic copy of Citation No. 9000286, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
47. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000286.
48. Government Exhibit 13-A is an authentic copy of Citation No. 7165680, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
49. Brody stipulates that it will accept the significant and substantial designation for Citation No. 7165680.
50. Government Exhibit 14-A is an authentic copy of Order No. 9000305, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
51. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000305.
52. Government Exhibit 15-A is an authentic copy of Citation No. 9000309, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
53. Brody admits the fact of the violation cited in citation 9000309 but contests that the violation was properly designated as significant and substantial.
54. The Government stipulates that Citation No. 9000309 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern

of Violations, Notice 7219154 issued on October 24, 2013.

55. Government Exhibit 16-A is an authentic copy of Citation No. 9000313, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
56. Brody admits the fact of violation cited in Citation No. 9000313 but contests that the violation was properly designated as significant and substantial.
57. Government Exhibit 17-A is an authentic copy of Citation No. 7165694, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
58. Government Exhibit 18-A is an authentic copy of Citation No. 7166781, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
59. Brody admits the fact of the violation cited in citation 7166781 but contests that the violation was properly designated as significant and substantial.
60. Government Exhibit 19-A is an authentic copy of Citation No. 8151320, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
61. Brody stipulates that it will accept the significant and substantial designation for Citation No. 8151320.
62. Government Exhibit 20-A is an authentic copy of Citation No. 7168801, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
63. Brody stipulates that it will accept the significant and substantial designation for Citation No. 7168801.
64. Government Exhibit 21-A is an authentic copy of Citation No. 7168899, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
65. Brody stipulates that it will accept the significant and substantial designation for Citation No. 7168899.
66. Government Exhibit 22-A is an authentic copy of Citation No. 7167471, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
67. Government Exhibit 23-A is an authentic copy of Citation No. 7167473, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
68. The Government stipulates that Citation No. 7167473 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

69. Government Exhibit 24-A is an authentic copy of Citation No. 7165683, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
70. Government Exhibit 25-A is an authentic copy of Order No. 8155908, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
71. Government Exhibit 26-A is an authentic copy of Citation No. 8155909, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
72. Government Exhibit 27-A is an authentic copy of Citation No. 8155925, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
73. Brody admits the fact of the violation cited in citation 8155925 but contests that the violation was properly designated as significant and substantial.
74. The Government stipulates that Citation No. 8155925 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154 issued on October 24, 2013.
75. Government Exhibit 28-A is an authentic copy of Citation No. 8155926, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
76. The Government stipulates that Citation No. 8155926 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
77. Government Exhibit 29-A is an authentic copy of Citation No. 8155936, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
78. Brody admits the fact of the violation cited in citation 8155936 but contests that the violation was properly designated as significant and substantial.
79. The Government stipulates that Citation No. 8155936 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
80. Government Exhibit 30-A is an authentic copy of Citation No. 8155937, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
81. The Government stipulates that Citation No. 8155937 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
82. Government Exhibit 31-A is an authentic copy of Citation No. 9000277, with all modifications and abatements, and may be admitted into evidence for the purpose of

establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

83. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000277.
84. Government Exhibit 32-A is an authentic copy of Citation No. 9000278, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
85. Government Exhibit 33-A is an authentic copy of Citation No. 9000278, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
86. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000278.
87. Government Exhibit 34-A is an authentic copy of Order No. 9000307, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
88. Government Exhibit 35-A is an authentic copy of Citation No. 8125045, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
89. Brody admits the fact of the violation cited in citation 8125045 but contests that the violation was properly designated as significant and substantial.
90. The Government stipulates that Citation No. 8125045 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
91. Government Exhibit 36-A is an authentic copy of Citation No. 8139621, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
92. The Government stipulates that Citation No. 8139621 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
93. Government Exhibit 37-A is an authentic copy of Citation No. 8154782, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
94. Government Exhibit 38-A is an authentic copy of Citation No. 8146352, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
95. Brody admits the fact of the violation cited in citation 8146352 but contests that the violation was properly designated as significant and substantial.
96. Government Exhibit 39-A is an authentic copy of Citation No. 7167400, with all modifications and abatements, and may be admitted into evidence for the purpose of

establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

97. Brody admits the fact of the violation cited in citation 7167400 but contests that the violation was properly designated as significant and substantial.
98. Government Exhibit 40-A is an authentic copy of Citation No. 8137713, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
99. Government Exhibit 41-A is an authentic copy of Citation No. 7165682, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
100. Brody admits the fact of the violation cited in citation 7165682 but contests that the violation was properly designated as significant and substantial.
101. Government Exhibit 42-A is an authentic copy of Citation No. 7168841, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
102. Brody admits the fact of the violation cited in citation 7168841 but contests that the violation was properly designated as significant and substantial.
103. Government Exhibit 43-A is an authentic copy of Citation No. 7168866, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
104. Brody admits the fact of the violation cited in citation 7168866 but contests that the violation was properly designated as significant and substantial.
105. Government Exhibit 44-A is an authentic copy of Citation No.7168913, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
106. Government Exhibit 45-A is an authentic copy of Citation No. 3577965, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
107. Brody stipulates that it will accept the significant and substantial designation for Citation No. 3577965.
108. Government Exhibit 46-A is an authentic copy of Citation No. 3578036, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
109. Brody stipulates that it will accept the significant and substantial designation for Citation No. 3578036.
110. Government Exhibit 47-A is an authentic copy of Order No. 8155954, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

111. Brody admits the fact of the violation cited in citation 8155954 but contests that the violation was properly designated as significant and substantial.
112. Government Exhibit 48-A is an authentic copy of Order No. 8155960, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
113. Government Exhibit 49-A is an authentic copy of Citation No. 9000282, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
114. Brody admits the fact of the violation cited in citation 9000282 but contests that the violation was properly designated as significant and substantial.
115. The Government stipulates that Citation No. 9000282 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
116. Government Exhibit 50-A is an authentic copy of Citation No. 9000311, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
117. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000311.
118. Government Exhibit 51-A is an authentic copy of Citation No. 9000312, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
119. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000312.
120. Government Exhibit 52-A is an authentic copy of Citation No. 9002292, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
121. The Government stipulates that Citation No. 9002292 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
122. Government Exhibit 53 is an authentic copy of the POV Notice issued to the operator on October 24, 2013, which may be admitted into evidence for the purpose of establishing its issuance and not for the accuracy of any statements asserted therein.
123. Each of the alleged violations involved in this matter were timely abated in good faith.
124. Brody accepts the negligence, injury/illness, and number of persons affected designations on the twelve (12) citations listed herein that the Government has stipulated were improperly designated as significant and substantial. Likewise, Brody accepts the negligence, injury/illness, and number of persons affected designations on the twelve citations listed herein that Brody has stipulated were properly designated as significant and substantial.

125. For those citations listed herein that the Government has stipulated were improperly designated as significant and substantial, Brody will pay a penalty commensurate with the penalty amount prescribed under Part 100 given the deletion of the significant and substantial designation.
126. For those citations listed herein that Brody has stipulated were properly issued as significant and substantial, with the exception of Citation Nos. 9000305, 9000277 and 9000278, Brody will pay the assessed penalty.
127. Brody will pay a $43,086 penalty for Citation No. 9000305.
128. Brody will pay a $52,913 penalty for Citation No. 9000277.
129. Brody will pay a $14,993 penalty for Citation No. 9000278.

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November 4, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2012-760-M-A A.C. No. 10-00088-283636-02
v.	Docket No. WEST 2012-986-M A.C. No. 10-00088-289913
HECLA LIMITED, Respondent	Lucky Friday Mine

ORDER DENYING MICHAEL MAREK'S REQUEST TO INTERVENE

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hecla Limited, 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"). Michael Marek, through counsel, filed a letter seeking to intervene in the cases as an "affected miner" as that term is used in Commission Procedural Rule 4(b)(1). 29 C.F.R. § 2700.4(b)(1). For the reasons that follow, his request is denied.

On April 15, 2011, there was a fall of ground at the Lucky Friday Mine. Marek was injured by the accident and his brother, Larry Marek, was killed. After completing its investigation, MSHA issued a citation under section 104(d)(1) of the Mine Act and three orders under that same section. The citation and orders all reference the fall of ground and were presumably issued as a result of the fall of ground. These matters were duly contested by Hecla in the present cases. A hearing is scheduled to commence on November 18, 2014.

Marek is represented by Edward B. Havas in a civil action brought against Hecla as a result of the accident. Marek would like Havas to represent him in the present cases. In his letter seeking intervention, dated October 16, 2014, Marek contends that he is entitled to intervene as a matter of right under Commission Rule 4(b)(1) because he is an "affected miner." Marek states that he was present when the accident occurred and was injured by the fall of ground. Marek further argues that these cases are "quite important to [him]; there can be little doubt that [he] is an affected miner entitled to exercise his rights." (Letter Requesting Intervention at 1).

Hecla filed a response in opposition to the notice of intervention. Hecla argues that Marek is not an affected miner. Section 3(g) of the Mine Act defines a miner as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Although Marek worked at the Lucky Friday Mine at the time of the accident, he is no longer employed at the mine. As a consequence, he is not entitled to intervene as a matter of right because a person "seeking to intervene must be working as a miner at the time a Notice of Intervention is filed." (Hecla Resp.at 3). It points to Commission case law concerning the walkaround rights of miners. Hecla contends that an

affected miner must be working in a mine, exposed to the hazards of mining, and employed by a mine operator. Marek is not working at the Lucky Friday Mine so he is not exposed to the potential hazards at the mine.[1] Hecla also argues that Marek's interests will be adequately protected by counsel for the Secretary, who has the same interests as Marek, citing *Dana Mining*, 29 FMSHRC 1102 (Dec. 2007) (ALJ).

Marek filed a response to Hecla's opposition. Although Marek is no longer employed at the Lucky Friday Mine, he is employed as a full-time miner at another mine. Marek also argues that "as the lone survivor of the mine collapse at issue in these proceedings, and suffering permanent effects from that collapse, it would be ludicrous to the point of incredulity to claim that [he] is not now and was not then affected by the events, and will not be affected by these proceedings." (Response at 3). Marek also notes that he will be a witness at the hearing. In the alternative, Marek seeks to intervene under Rule 4(b)(2) "Intervention by Other Persons."

The parties presented further argument during a conference call. The Secretary did not file any written response to the request for intervention, but the Secretary's counsel stated during the call that she supports Marek's request to intervene.

Commission case law is silent on this issue. Although the Commission considered who is a miner in the context of walkaround representation and training requirements, it has not discussed Rule 4(b)(1). Marek stated that he does not seek to intervene as a "representative of miners," but rather as an affected miner and he would like Havas to act as his counsel. The preamble to the Commission's Rule 4 focuses on Rule 4(b)(2) but it also sheds some light on the intent behind Rule 4(b).[2]

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[1] In *Cyprus Empire Corp.*, 15 FMSHRC 10, 14 (Jan. 1993), the Commission held that striking miners were not entitled to a walkaround representative during MSHA inspections because they were not working in a mine during the strike.

[2] The preamble states:

> The proposed rule added new procedures dealing with intervention and amicus curiae participation at the trial level. The Commission received a number of comments on these proposals and has modified the proposals. Paragraph (b)(2) provides that motions to intervene made by persons other than affected miners or their representatives shall be filed before the start of a hearing on the merits, unless the judge, for good cause shown, permits later filing.
>
> Some commenters suggested that the proposed criteria for intervention were too restrictive, and urged the Commission to permit intervention on the basis of an interest in the issues involved in a proceeding. The Commission has determined that interest in issues is too broad a criterion for intervention. Such a standard could serve to deprive the parties of control over the litigation and could

(continued…)

As discussed below, I find that Marek is not an affected miner as that term is used in Commission Rule 4(b)(1). An "affected miner" may intervene in a Commission proceeding, but the meaning of "affected miner" is not clear. Miners who are currently employed at the mine where the citations or orders were issued and who will be exposed to potential hazards of mining at that mine could potentially be affected by the proceeding.[3] In the preamble to Rule 4, the Commission made clear that a person having an "interest in issues is too broad a criterion for intervention." 58 Fed. Reg. at 12160. The Commission further stated that such a broad "standard could serve to deprive the parties of control over the litigation and could encumber the Commission's simple administrative trial process." *Id.* Although this statement was directed at Rule 4(b)(2), it demonstrates the Commission's intention that intervention should not disrupt the hearing process.

Marek argues that he is an affected miner because (1) he survived the fall of ground and is "suffering permanent effects from the accident" and (2) he is employed at a mine and is therefore a miner. Marek is employed as a miner but he is no longer employed by Hecla and he does not work at the Lucky Friday Mine in any capacity. He is no longer exposed to any hazards of falling rock or roof falls at the mine and these proceedings cannot affect his future employment or safety. As a consequence, my adjudication of the issues will not affect Marek. Under Marek's logic, any miner who suffers a serious injury at a mine and continues to work in any mine could intervene as a matter of right in a Commission proceeding involving MSHA enforcement actions arising from the injurious accident. I do not believe that was the intent of Rule 4(b)(1). The roof fall underlying these proceedings affected Marek, but he is not an "affected miner" under Rule 4(b)(1).

I also find that Marek is not entitled to intervene under Rule 4(b)(2). Although Marek has an interest in the events that are the subject of the proceeding, he has not demonstrated "why such interest is not otherwise adequately represented by" counsel for the Secretary. 29 C.F.R. § 4(b)(2)(B). The Secretary is represented by two attorneys in the Office of the Solicitor with experience litigating cases under the Mine Act. In addition, I find that Marek's presence as an intervenor will "unduly delay or prejudice the adjudication of the issues." 29 C.F.R. § 4(b)(2)(C). His counsel indicated that he was planning to question witnesses at the hearing, which would likely delay the completion of the hearing. Marek's only demonstrated interest in this proceeding

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[2] (…continued)
encumber the Commission's simple administrative trial process. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (December 1989)(discussing criteria for non-party standing to appeal a Commission judge's decision to the Commission). In denying a motion to intervene, however, a Commission judge may alternatively permit the movant to participate in the proceeding as amicus curiae (§ 2700.4(c)).

58 Fed. Reg. 12158, 12160 (Mar. 3, 1993).

[3] I do not hold that every miner currently employed at the Lucky Friday Mine is an affected miner under Rule 4(b)(1). I only state that a miner whose future safety could be affected by the proceeding is more likely to be an affected miner than Marek.

not otherwise represented by the Secretary relates to the civil suit he has brought against Hecla as a result of his injuries. This interest does not concern the Mine Act and can only unnecessarily interrupt the completion of the hearing. If Marek is an intervenor, moreover, he will be entitled to remain in the courtroom during the entire hearing. I sequester witnesses until after they testify to avoid the risk that their testimony will be tainted.

The Secretary supports Marek's request to intervene. The Secretary's position on this issue is due some consideration. During the conference call, counsel for the Secretary stated that Marek and his counsel helped her develop the Secretary's case and that Marek's presence as an intervenor at the hearing will assist her. It is important to understand, however, that Marek will be a witness at the hearing and Marek's counsel is free to attend and confer with counsel for the Secretary whether Marek is an intervenor or not. If invited, Marek's counsel as well as Marek after he testifies may sit with counsel for the Secretary at the hearing and suggest questions to ask witnesses. If he desires, I will also permit Marek to file a post-hearing amicus brief or memorandum of law following the hearing.

For the foregoing reasons, Michael Marek's request to intervene in these cases is **DENIED.**

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

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November 5, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF GARY KITTELSON, Petitioner v. NORTHERN AGGREGATE INC., Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2014-597-DM MSHA Case No. RM-MD-14-13 Mine: Portable Crusher Mine ID: 21-02623

ORDER GRANTING SECRETARY'S MOTION TO ENFORCE ORDER OF TEMPORARY REINSTATEMENT

This case is before me pursuant to an Application for Temporary Reinstatement brought under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c), *et. seq.* (the "Mine Act."). On August 12, 2014, the undersigned issued an Order temporarily reinstating Gary Kittelson to his position in the mine. On October 13, 2014, the Respondent terminated Kittelson's employment in violation of the Order Approving Temporary Reinstatement. Therefore, on October 23, 2014, the Secretary of Labor filed a Motion to Enforce the Order of Temporary Reinstatement, as well as a second Application for Temporary Reinstatement, LAKE 2015-80-DM. A conference call between the parties and the undersigned was held on November 3, 2014, wherein the parties agreed to economically reinstate Kittelson according to the terms to be determined by the parties.

It is **ORDERED** that Kittelson shall be economically reinstated from his October 13, 2014 termination.

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

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November 7, 2014

SCOTT MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER GRANTING MOTION TO QUASH SUBPOENA

This matter is before me based on a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.[1]

I. Background

During an October 28, 2014, telephone conference, the parties represented that, through discovery, the Complainant's wife Alicia McGlothlin produced e-mails concerning her husband's Part 90 status and his discrimination claim, with the exception of those e-mails that were claimed to have been previously deleted and those privileged or properly redacted. Mrs. McGlothlin is an employee of the Russell County, Virginia, Treasurers Office. Among the e-mails sought were those sent from her office computer.

On October 15, 2014, in an effort to determine whether spoliation has occurred, Dominion served a subpoena on the Russell County, Virginia, Treasurers Office seeking to obtain e-mails sent by Mrs. McGlothlin from its e-mail account server, including all archived and

[1] Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

hard drive backup data.[2] McGlothlin has filed a motion to amend this subpoena to, in essence, limit the information produced to only those e-mails already provided by Mrs. McGlothlin (again excluding privileged e-mails and those appropriately requiring redactions). I construe McGlothlin's motion to amend the subpoena as a motion to quash the subject subpoena.

II. Discussion

The general principles governing the analysis of discrimination cases under the Mine Act are well settled. In order to establish a case of discrimination under section 105(c) of the Act, the complainant has the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 817, 818 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by factors unrelated to the miner's protected activity and that it would have taken the complained-of action in any event for the unrelated factors alone. *Pasula, supra*; *Robinette, supra*. *See also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Thus, the issues in this discrimination proceeding are whether McGlothlin engaged in protected activity, and, if so, whether the adverse action complained of by McGlothlin was, in any part, motivated by McGlothlin's protected activity. Dominion may affirmatively defend by demonstrating that the adverse action complained of was taken solely for factors unrelated to any protected activity.

Commission Rule 56(b) provides that a party may obtain through discovery "any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Dominion has already obtained e-mail documentation from Mrs. McGlothlin through discovery. As the issues in this proceeding are whether McGlothlin engaged in protected activity and Dominion's motivations, Dominion has not shown that the forensic recovery of the e-mails reportedly deleted by Mrs. McGlothlin, if retrievable, will lead to relevant evidence. In reaching this conclusion, I note that the commonly expressed argument that a document's relevance cannot be determined until it is seen is unavailing as it would result in limitless discovery.

[2] My office routinely provides blank, signed subpoenas for the parties' appropriate use during discovery and in preparation for witness testimony. The provision and ultimate service of such subpoenas is not demonstrative of any acquiescence that they were properly served.

Notwithstanding the issue of relevance, Commission Rule 56(c) limits discovery, when appropriate, to relieve a person or entity from "oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). In applying this limitation, it is noteworthy that Commission Rule 1(b) provides that on procedural matters not explicitly addressed by the Act's statutory provisions or the Commission's rules, the Commission's Judges may look to "any pertinent provisions of the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b). Federal Rule of Civil Procedure 26(b)(2)(B) provides specific limitations on the discovery of electronically-stored information. This provision limits the discovery of such information when it is "not reasonably accessible because of undue burden or cost." Rule 26(b)(2)(C)(i) of the Federal Rules of Civil Procedure also limits discovery when the information "sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

In the final analysis, it has not been shown that the information sought to be retrieved from Russell County, Virginia, Treasurers Office's database can be reasonably expected to lead to relevant evidence. Moreover, the retrieval of such information is precluded by Federal Rules of Civil Procedure 26(b)(2)(B) and 26(b)(2)(C)(i) because it would be unduly burdensome and duplicative.

ORDER

In view of the above, **IT IS ORDERED** that McGlothlin's motion to quash the subpoena as served on the Russell County, Virginia, Treasurers Office **IS GRANTED**. **IT IS FURTHER ORDERED** that Counsel for McGlothlin provide a copy of this Order to the Russell County, Virginia, Treasurers Office within ten days of its issuance.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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November 14, 2014

SCOTT MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER DENYING RECONSIDERATION OF ORDER QUASHING SUBPOENA

This matter is before me based on a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.[1]

Alicia McGlothlin, the wife of the Complainant, is an employee of the Russell County, Virginia, Treasurer's Office. The Respondent seeks reconsideration of a November 7, 2014, Order quashing a subpoena it served on the Treasurer's Office. The subpoena sought to obtain e-mails concerning this discrimination matter sent by Mrs. McGlothlin from her office computer that were reportedly deleted. Specifically, the subpoena sought to obtain the deleted material from the office's e-mail account server, including all archived and hard drive backup data.

The November 7, 2014, Order, which is incorporated by reference, determined, *inter alia*, that the information sought was unreasonably cumulative and duplicative in view of the fact that the Complainant provided available e-mails sent by Mrs. McGlothlin through discovery. Moreover, the Order, citing pertinent Commission rules, as well as the Federal Rules of Civil Procedure, concluded that seeking to forensically recover database information from the

[1] Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

Treasurer's Office was unduly burdensome. *See* 29 C.F.R. §§ 2700.56(b), (c); Fed. R. Civ. P. 26(b)(2)(B), (C)(i).

The Respondent filed a Motion to Reconsider the Order Granting Motion to Quash Subpoena on November 12, 2014. In support of its reconsideration request, Dominion represents that it has been unable to ascertain when and how "[McGlothlin] filed his Part 90 election." In further support of its Motion, Dominion now represents that during the course of discovery it determined that an MSHA investigator had made reference to an e-mail received from Mrs. McGlothlin: which has not been produced; which may have been deleted; and which may be relevant to determining the date of McGlothlin's Part 90 application.

As an initial matter, Dominion's assertion that a deleted e-mail may be relevant to determining the date of McGlothlin's Part 90 application is speculative and does not outweigh the burden of the Treasurer's database retrieval. Moreover, the attorney-client privilege protects confidential client communications. The criteria for attorney-client privilege are met when:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

SECRETARY OF LABOR O/B/O CHARLES SCOTT HOWARD, COMPLAINANT v. CUMBERLAND RIVER COAL COMPANY, RESPONDENT, 34 FMSHRC 311, 314 (jan. 2012), citing *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998)

While not an attorney, the role of an MSHA investigator is to provide an opinion on the merits of a discrimination complaint which is provided to the Solicitor's Office in contemplation of potential litigation. Consequently, the MSHA investigator may be deemed to be a "subordinate" of an attorney, whose communications with a prospective complainant are protected under the attorney-client privilege.[2]

[2] I do not view previous e-mails to MSHA produced during discovery, if any, as a waiver of the attorney-client privilege. This privilege applies regardless of whether the communications are made directly to the MSHA official, or by a spouse on the complainant's behalf.

ORDER

In view of the above, **IT IS ORDERED** that Dominion's reconsideration request of the November 7, 2014, Order quashing the subpoena **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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November 18, 2014

MONA KERLOCK, Complainant, v. ASARCO, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2014-851-DM RM-MD 14-10 Ray Mine Mine ID: 02-00150

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION & ORDER DENYING MOTION TO CERTIFY FOR INTERLOCUTORY RULING

Before: Judge Miller

This case is before me on a Complaint of Discrimination brought by Mona Kerlock, on her own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). On October 22, 2014 Respondent, Asarco, LLC, filed a Motion for Reconsideration of Respondent's Motion to Dismiss, or in the alternative, Motion to Certify for Interlocutory Review. On November 3, 2014 Complainant filed a statement in opposition to both of Respondent's motions. For reasons that follow, I **DENY** both of Respondent's motions.

Asarco argues first that the court should reconsider Respondent's August 12, 2014 motion to dismiss given that Complainant is no longer a pro se litigant and new information has come to light which indicates that Complainant is unable to return to work. In the alternative, the court should certify for interlocutory review its decision denying Respondent's motion to dismiss. Conversely, Complainant argues that her pleadings met the burden to survive a motion to dismiss for failure to state a claim, and the change in her status from a pro se litigant to a represented party is not a basis for reconsideration. Further, the parties are actively engaged in discovery, dismissal at this time would be inappropriate, and the court should deny Respondent's request to certify this matter for interlocutory review because there is no basis for immediate review.

On March 31, 2014 Complainant, Mona Kerlock, filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration. MSHA investigated the complaint and, based upon its review of the information gathered, determined that there was not sufficient evidence to establish that a violation of section 105(c) occurred. Subsequently, on June 17, 2014, Complainant sent to the Commission a letter stylized as a "Request for Appeal" in which she sought to proceed pursuant to section 105(c)(3) of the Act. On August 12, 2014 Respondent filed a motion to dismiss for failure to state a claim. Complainant, who was a pro se litigant at the time, did not file a response. On August 27, 2014 this court issued an order denying Respondent's motion to dismiss. *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404 (Aug. 2014) (ALJ). There, in treating Respondent's motion to dismiss as a motion for summary

decision, I found that Complainant had properly alleged that she engaged in a protected activity and suffered an adverse action, and that material facts were in dispute. *Id*. at 2405-2406. Specifically, I noted that Complainant alleged that she, along with others at the mine, had complained about dust in the area of the 2 Shovel and 5A Dump, and that, subsequently, Complainant had been placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine. *Id*. at 2406. I also found that the original complaint and subsequent Request for Appeal satisfied the minimal burden for pleadings in 105(c) proceedings. Finally, I found that the Complainant's status as a pro se litigant afforded her certain protections from Asarco's challenge to the adequacy of her pleadings. *Id*.

Asarco first asserts that, because Complainant is now represented by counsel, her pleadings should no longer be held to the lower standard that the court applied in its order denying the motion to dismiss. As a result, Respondent contends that the court should review its conclusion that Complainant alleged a protected activity since Complainant only reported personal health problems, and "complaints regarding a personal illness are not protected activity[.]" Asarco Mot. at 3-4. Further, Respondent argues that the court should review its conclusion that Complainant alleged an adverse action given that she admitted during her workers compensation deposition that she is unable to work, and communications with physicians show that Complainant is unable to return to work. *Id*. at 6-9. Therefore, Respondent asserts that the facts demonstrate that there was no adverse action, and placing Complainant on short term disability was a legitimate business decision.

The fact that Complainant is no longer a pro se litigant does not change the court's finding that Complainant satisfied the Commission's requirements for pleadings in a 105(c) proceeding. First, a dismissal is a drastic remedy not favored by the Courts. Next, although Asarco argues that there is new evidence to show the pleadings are insufficient, I disagree. Not only is there minimal change from the first motion to dismiss, there is nothing to show that the pleadings are inadequate. In addition, material facts remain in dispute, and, therefore, summary dismissal of this proceeding is inappropriate at this time.

Complainant's pleadings satisfy the Commission's minimal burden for pleadings in a 105(c) proceeding. The Commission's procedural rules require that a discrimination complaint need only "include a short and plain statement of the facts, setting forth the alleged . . . discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. This court, in the original order denying the motion to dismiss, found that Complainant had satisfied the burden for pleadings in a 105(c) proceeding. *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2406 (Aug. 2014) (ALJ). Specifically, the court found that the pleadings appropriately alleged that Complainant engaged in protected activity and suffered an adverse action, and requested relief. The finding was based on a review of the pleadings, and was not dependent on Complainant's status as a pro se litigant at the time. The original order denying the motion to dismiss is clear that the denial is based not just on the pro se status, but the sufficiency of the pleadings themselves. In fact, the decision makes reference to the Complainant's status as a pro se litigant as it relates to the sufficiency of the pleadings only after the discussion finding that the Commission's procedural rules had been satisfied. While Complainant's status certainly bolstered the argument for finding that the pleadings were sufficient, that finding was not dependent upon Complainant's pro se status. Rather, the court would have reached the same

conclusion if Complainant had been represented by counsel at the time. Accordingly, I reiterate my earlier finding that Complainant's pleadings satisfy the Commission's procedural rules.

Complainant has alleged material facts which contradict those offered by Respondent and, therefore, a dispute of material fact exists and summary dismissal is inappropriate. In order to establish a prima facie case of discrimination a complaining miner must show that they engaged in protected activity and suffered an adverse action that was motivated at least partially by the protected activity. *Id*. at 2405. This court, in the original order denying the motion to dismiss, found that Complainant alleged "that she, along with others at the mine, complained about dust in the area of 2 Shovel and 5A Dump, and that, subsequently, she was placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine." *Id*. 2405-2406. While Respondent again asserts that no protected activity occurred, I again find that Complainant, in alleging that she filed a safety complaint regarding dust at the mine, has alleged a protected activity.[1] *See Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996) (Complainant properly alleged protected activity when he pled that he complained to the mine that, due to medical problems, his operation of a truck posed a safety hazard to both himself and others).

While Respondent asserts that new information contained in doctor's notes and Complainant's deposition testimony in a workers compensation proceeding necessitate reconsideration of the court's finding that an adverse action was alleged, I disagree. [1] Although Respondent asserts that Complainant, in her deposition testimony for her workers compensation proceeding, admitted that she is unable to work, I find that this conclusion cannot be clearly drawn from the testimony. As noted above, and in the original order denying the motion to dismiss, Complainant alleged that she was placed on medical leave, without full pay. This certainly is an allegation of an adverse action. Respondent has the ability at hearing to raise the defense that the adverse action was a justified business decision, but there is nothing in its motion that would lead me to believe that Kerlock failed to allege an adverse action. While Respondent asserts that the action was motivated by legitimate business reasons, Complainant alleges that it was motivated by the complaint she made. Asarco's motion seeks to have this matter dismissed for Complainant's failure to *prove* her case based on her pleadings. However, Complainant is not required to do so, and, rather, is simply obligated to meet the Commission's minimal pleading requirements, which she has done. At this point, a dispute of material fact remains regarding both the complaint made by Kerlock, and the circumstances surrounding the adverse action. Accordingly, I reiterate my earlier finding that material facts are in dispute and that summary dismissal of this proceeding is inappropriate at this time.

Finally, Asarco argues that, in the event the Court denies its motion for reconsideration, it should certify the issue of the adequacy of Complainant's pleadings for interlocutory review. Asarco argues that a controlling question of law exists on the issue of whether its motion to

[1] Respondent asserts that the court, in denying the original motion to dismiss, relied on a statement that was not contained in the motion. To the extent that the language in the order denying the motion to dismiss was not clear, the court clarifies here that it intended to draw attention to the fact that Respondent has acknowledged that a truck driver who suffers a reaction due to exposure to something in the mine atmosphere could be a hazard to not only themselves, but also to others at the mine.

dismiss should be granted, and particularly that Complainant did not adequately plead a protected activity and adverse action. Asarco asserts that the motion to dismiss would have been granted had the court been aware of the most recent communications from Complainant's physicians and Complainant's deposition testimony, and Complainant had not been a pro se litigant at the time the motion was filed. *Id*. Respondent avers that immediate review of this matter will materially advance the case since a favorable finding would bring the case to a close, and the parties would be able to avoid further negotiation, discovery, trial preparation and expense. *Id*. at 11. In addition, review could help to expedite the discovery process and any settlement. *Id*. I find no merit to Asarco's assertion that interlocutory review is appropriate in this case.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id*. at § 2700.76(a)(1)(i).

I find that this matter does not involve a controlling question of law. The question in this matter involves the sufficiency of the Complainant's pleadings. This issue is not novel nor does it involve an unresolved question of law as relevant to case. As discussed above, in the original order denying the motion to dismiss, and in Commission case law, there is a minimal burden for pleadings in 105(c) matters. *Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996). Here, the pleadings were sufficient when Complainant was pro se, would have been sufficient had Complainant been represented by counsel at that time, and remain sufficient at present. Accordingly, I find that there is no controlling question of law at issue.

I find that immediate review will not materially advance the final disposition of this matter. Respondent has not exhibited any sense of urgency which would accompany the need for immediate review. The court issued the original order denying Respondent's motion to dismiss on August 27, 2014. Rather than properly seek interlocutory review of that order as required by the Commission rules, Respondent filed a petition for discretionary with the Commission on September 26, 2014. While the petition was timely filed exactly 30 days after the issuance of my order, the Commission's October 2, 2014 order denied Respondent's petition because a final decision ending my jurisdiction over this matter had not been issued. *Kerlock v. Asarco, LLC*, 36 FMSHRC __, slip op. (Docket No. WEST 2014-851-DM) (Oct. 2, 2014). Rather than immediately file a motion for certification of interlocutory review, Respondent waited until October 22, 2014 to file the instant motions. Based on the timing of Respondent's filings, I am not convinced that there is an urgent need to have this motion put before the Commission.

While Respondent asserts that a favorable ruling by the Commission on interlocutory review would avoid further need for negotiation, discovery and trial preparation, the same could be said of most every case in which a judge has denied a party's motion to dismiss. There is nothing unique about this case that warrants the need for immediate review of my interlocutory ruling on the pleadings. As Complainant points out, the parties are actively engaged in discovery, with both sides awaiting additional disclosures. It would be a disservice to both parties for the

court to halt this matter so that the Commission can review a motion for summary dismissal in a case where discovery is still in its infancy, the record is far from being complete, and the court believes it unlikely that Respondent will succeed in its attempt to have the case dismissed. This case is presently set for hearing on January 21, 2015, just over two months from now. I find that certification of this matter for interlocutory review is more likely to delay the final disposition of this matter than materially advance it.

Accordingly, based on my above findings, Respondent's Motion for Reconsideration of Respondent's Motion to Dismiss is **DENIED**. Further, Respondent's Motion to Certify for Interlocutory Review is also **DENIED**. This case remains set for hearing on January 21, 2015. The court encourages the parties to continue to engage in necessary discovery and settlement discussions.

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

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November 26, 2014

BRODY MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. WEVA 2014-82-R Order No. 9003242; 10/28/2013 Docket No. WEVA 2014-83-R Order No. 7166788; 10/28/2013 Docket No. WEVA 2014-86-R 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

Docket No. WEVA 2014-449-R
Order No. 7166807; 01/15/2014

Docket No. WEVA 2014-450-R
Order No. 7166808; 01/15/2014

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Order No. 9005729; 01/13/2014

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Order No. 9005731; 01/13/2014

Docket No. WEVA 2014-454-R
Order No. 9005732; 01/14/2014

Docket No. WEVA 2014-455-R
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Docket No. WEVA 2014-456-R
Order No. 9005735; 01/15/2014

Docket No. WEVA 2014-457-R
Order No. 9005736; 01/15/2014

Docket No. WEVA 2014-479-R
Order No. 7166815; 01/23/2014

Docket No. WEVA 2014-480-R
Order No. 7166816; 01/23/2014

Docket No. WEVA 2014-529-R
Order No. 7166817; 01/27/2014

Docket No. WEVA 2014-530-R
Order No. 9005739; 01/27/2014

Docket No. WEVA 2014-531-R
Order No. 9005747; 02/10/2014

Docket No. WEVA 2014-537-R
Order No. 9007544; 02/04/2014

Docket No. WEVA 2014-539-R
Order No. 7166822; 01/28/2014

Docket No. WEVA 2014-561-R
Order No. 9005740; 01/27/2014

Docket No. WEVA 2014-562-R
Order No. 9005742; 01/29/2014

Docket No. WEVA 2014-563-R
Order No. 7166826; 02/04/2014

Docket No. WEVA 2014-570-R
Order No. 9005750; 02/19/2014

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Order No. 7166824; 01/29/2014

Docket No. WEVA 2014-572-R
Order No. 9005741; 01/29/2014

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Order No. 9005753; 02/20/2014

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Order No. 7166831; 02/11/2014

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Order No. 7166837; 02/24/2014

Docket No. WEVA 2014-679-R
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Order No. 9005757; 02/25/2014

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Order No. 8135796; 03/11/2014

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Order No. 9001091; 03/11/2014

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Order No. 9001095; 03/19/2014

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Order No. 9005344; 04/09/2014

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Order No. 9005774; 04/15/2014

Docket No. WEVA 2014-854-R
Order No. 9005778; 04/21/2014

Docket No. WEVA 2014-855-R
Order No. 9005779; 04/22/2014

Docket No. WEVA 2014-856-R
Order No. 9005780; 04/22/2014

Docket No. WEVA 2014-909-R
Order No. 9005347; 05/01/2014

Docket No. WEVA 2014-974-R
Order No. 9005349; 05/13/2014

Docket No. WEVA 2014-975-R
Order No. 9005350; 05/13/2014

Docket No. WEVA 2014-976-R
Order No. 9007426; 05/13/2014

Docket No. WEVA 2014-1012-R
Order No. 9005786; 05/29/2014

Docket No. WEVA 2014-1013-R
Order No. 9005787; 05/29/2014

Docket No. WEVA 2014-1035-R
Citation No. 9005792; 06/12/2014

Docket No. WEVA 2014-1036-R
Citation No. 9005362; 06/11/2014

Docket No. WEVA 2014-1037-R
Citation No. 9005360; 06/04/2014

Docket No. WEVA 2014-1038-R
Citation No. 9005361; 06/11/2014

Docket No. WEVA 2014-1135-R
Order No. 9905374; 07/15/2014

Docket No. WEVA 2014-1138-R
Order No. 9005376; 07/16/2014

Docket No. WEVA 2014-1157-R
Order No. 9009660; 07/22/2014

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Order No. 9005384; 07/30/2014

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Order No. 9005383; 07/30/2014

Docket No. WEVA 2014-1995-R
Order No. 9005382; 07/30/2014

Docket No. WEVA 2014-1996-R
Order No. 9005380; 07/30/2014

Docket No. WEVA 2014-2172-R
Order No. 9003948; 09/08/2014

Docket No. WEVA 2014-2173-R
Order No. 9005393; 09/09/2014

Docket No. WEVA 2014-2174-R
Order No. 9005398; 09/10/2014

Docket No. WEVA 2014-2175-R
Order No. 9005400; 09/10/2014

Docket No. WEVA 2014-2221-R
Order No. 9007439; 09/17/2014

Docket No. WEVA 2015-59-R
Order No. 7272454; 10/07/2014

Docket No. WEVA 2015-60-R
Order No. 7272462; 10/07/2014

Docket No. WEVA 2015-61-R
Order No. 7272494; 10/07/2014

Docket No. WEVA 2015-63-R
Order No. 9005704; 10/14/2014

Docket No. WEVA 2015-66-R
Order No. 9005705; 10/14/2014

Docket No. WEVA 2015-67-R
Order No. 9006768; 10/14/2014

Docket No. WEVA 2015-68-R
Order No. 9006769; 10/14/2014

Docket No. WEVA 2015-121-R
Order No. 7219154; 10/24/2014

	Mine: Brody Mine No. 1 Mine ID: 46-09086
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BRODY MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2013-370 A.C. No. 46-09086-308309 Docket No. WEVA 2013-564 A.C. No. 46-09086-310927 Docket No. WEVA 2013-997 A.C. No. 46-09086-321030 Docket No. WEVA 2013-1055 A.C. No. 46-09086-323691 Docket No. WEVA 2013-1189 A.C. No. 46-09086-326531 Docket No. WEVA 2013-619 A.C. No. 46-09086-342759 Docket No. WEVA 2013-620 A.C. No. 46-09086-342759 Docket No. WEVA 2014-702 A.C. No. 46-09086-344708 Docket No. WEVA 2014-842 A.C. No. 46-09086-347271 Mine: Brody Mine No. 1

ORDER DENYING SECRETARY'S "EMERGENCY" MOTION TO STAY

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
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Before: Judge William B. Moran

The Secretary has filed what it has characterized as an "Emergency Motion to Stay," ("Motion"), seeking to have this Court stay its November 1, 2014, Order, dismissing the Secretary's pattern of violations action against the Respondent. A response was filed by Respondent, Brody Mining, LLC. Upon consideration, for the reasons which follow, the Secretary's Motion is DENIED.

The Secretary's Motion

In its Emergency Motion to stay,[1] the Secretary begins by noting, correctly, that this Court's November 1, 2014, Order precludes MSHA from issuing any further withdrawal orders under Section 104(e) of the Mine Act, which is the "pattern of violations" provision. 30 U.S.C. § 814(e).

The motion observes that four factors are to be evaluated in deciding whether a stay is appropriate: "(1) the likelihood that the movant will prevail on the merits of its appeal; (2)

[1] Despite its characterization that its motion is an "emergency," the Secretary relates that it will take "perhaps several weeks" to draft the documents in its effort to obtain interlocutory review. Motion at 2. Therefore, it seeks a stay of the Court's Order until it files for such review, a route which will first entail a ruling by the Court.

irreparable harm to the movant if the stay is not granted; (3) absence of adverse effects on other interested parties; and (4) a showing that the stay is in the public interest." Motion at 2.

Speaking to the first factor, the Secretary the asserts that it has "at least four reasons" making it likely that it will prevail:

> (a) the Court did not have jurisdiction to dismiss the POV "charges"; (b) even if the Court did have jurisdiction, its due process analysis is erroneous; (c) the Mine Act does not require the Secretary to define "pattern of violations"; and (d) the Secretary provided both: (i) a definition of "pattern of violations," and (ii) fair notice to Brody of the basis for his POV determination.

Id.

Each of these will now be briefly discussed. Regarding the Secretary's claim that the Court did not have jurisdiction to dismiss the POV charges, he notes that Brody has appealed, on an interlocutory basis, the Commission's "jurisdiction to adjudicate—[and his decision] uphold[ing]—the validity of the POV Rule itself and the POV notice" to the D.C. Circuit Court of Appeals. As the circuit court's jurisdiction is exclusive, per Section 106(a) of the Mine Act, 30 U.S.C. 816(a), the Secretary contends that this Court "did not have jurisdiction to adjudicate the validity of the POV notice or, as the Court referred to it, the POV 'charges.'" Motion at 3.

In its Response, Brody notes that the Secretary never made such a claim in the weeks leading up to the hearing nor during the three consecutive weeks of hearings in which the citations constituting the alleged pattern were heard. Response at 7-8. It points to the Secretary's July 17, 2014, position statement in which he acknowledges that "[s]hould the Commission agree with the Secretary's view, then a hearing on the citations listed in the POV Notice *and whether those citations establish a pattern of violations* would be appropriate." Sec. Position Statement at 10 (emphasis added). Until now, with this Motion, the Secretary has acknowledged that a POV notice can be challenged.[2] Pointing to a number of indicia, among those, Brody notes

[2] The Secretary is apparently flummoxed by the Court's use of the term "POV charges," which it describes as a "vague term." It is observed that, if the Court's reference to "POV charges" is vague, it is not nearly as vague as the term "pattern of violations." It is ironic that the Secretary has failed to define its own vague term even in the face of litigation asserting the presence of a pattern. And yet one would think, and hope, that there had to have been some sort of thought process, internally, that led the Secretary to assert that the violations constituted such a pattern in order for them to make that claim and not that it simply grouped some violations dealing with escapeways, roof control, and ventilation, and left it at that. That observation aside, the Secretary reads into the Court's use of term "POV charges," suggesting that, by employing it, the Court knew it did not have jurisdiction to adjudicate the validity of the POV notice. Motion at 3. To clear up any confusion, the Court advises that it employed that term simply as an alternative, short-hand expression for expressing that the Secretary's burden before the Court was for him to first lay out *the basis* for its claim that the groups of violations "taken alone or together, constitute a pattern of violations of mandatory health and safety standards," and then to

(continued…)

that, during the hearing, the Secretary would at times pop up to assert that, albeit as a conclusion only, that a pattern had just been shown, as evidence that he knew that the POV notice and a pattern were in issue.[3] Response at 8.

As for the claim that because there is an appeal before the United States Court of Appeals, challenging the Commission's interlocutory ruling, Brody notes that the matters before this Court are distinct from those before the federal court of appeals. Response at 9. The Court agrees[4] and would note, apart from that observation, that the *particular violations* forming the underlying basis for the POV notice, *and whether such violations as were proven were also significant and substantial*, have a life untethered to the distinct matters before the Court of Appeals.

The Secretary also contends that, even if the Court has jurisdiction, its due process analysis was erroneous, because neither the POV notice, nor a withdrawal order emanating from such a notice, is punitive. Motion at 4. As the Secretary sees it, a withdrawal order is merely a "remedial enforcement action designed to protect the safety and health of miners working in mines whose operators have inspection histories of chronic violations of safety and health standards." *Id.* Although the Secretary oddly avoids use of the term, the "remedial enforcement action" to which he is referring, is the pattern of violations charge. Besides, the Secretary continues,

> Brody had fair notice of what it had to do to comply with the law: comply with existing mandatory safety and health standards. Nothing in the POV Rule, the POV notice, or the POV withdrawal orders affected Brody's pre-existing obligation to comply with such standards. On the contrary, both the Rule and the

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[2] (…continued)
establish that the 54 citations/orders, undergirding these particular POV charges, in fact had the significant and substantial characteristic. The Secretary failed, despite the Court's instructions, to identify *the basis* for his claim of a pattern of violations. Had the Secretary complied, at the conclusion of the evidentiary hearing for the disputed citations/orders, the Court would then have been in a position to rule upon the Secretary's basis underlying the bald phrase "pattern of violations" and then to apply that determination to those violations established as having the significant and substantial element.

[3] However, as the Court had previously noted, in its November 1st Order, the Secretary apparently believes that asserting, by fiat, that something is a pattern is enough and that there is no need to look beyond that assertion for it to explain how a given number of violations constitute such a pattern.

[4] Thus, the Court agrees that the issues before the Court of Appeals are the validity of the rule and MSHA's website criteria, which were the same, limited issues that were before the Commission. In addition, as Brody notes, that appeal does not include all of the pre-penalty contest docket numbers, which include "the ones used by the Secretary in its Position Statement and Prehearing Statement." Response at 9. As each of those contests raised the issue of the validity of the pattern notice, at a minimum, the exclusivity argument does not apply to those.

notice provided Brody with fair notice that its next S&S violation would trigger a withdrawal order.

Id.

This analysis by the Secretary conflates the obligation to comply with mandatory safety and health standards, with a pattern of violations claim, as if they are the same thing. They are not. Further, the analysis suggests that a POV notice, by itself, establishes a POV, a conclusion supported by the Secretary's very next statement that, by giving such a POV notice, that act of notification "provided Brody with fair notice that its next S&S violation would trigger a withdrawal order." *Id.* The Secretary's position cannot withstand scrutiny, and his stance highlights the concern expressed by the Court in its Order dismissing the POV charges, as it exposes the Secretary's apparent belief that it need only issue a pattern of violation notice to prove a pattern, all without ever having to state how the violations constitute a pattern.

The correctness of the Court's interpretation is evident with the Secretary's next claim in his motion, a claim that the Mine Act "does not require the Secretary to define 'pattern of violations.'" *Id*. To support the claim that he need not define a pattern, the Secretary notes that Section 104(e)(4) requires only that "[t]he 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." *Id.* However, to note that the provision requires only "such *rules* as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists" is not the same as suggesting that the Secretary is completely excused from articulating what constitutes a pattern at all. Accordingly, though *the rules* for establishing such criteria may be optional, in the context of litigation, the obligation to state *the basis* for the pattern in the POV notice in a given case is not optional.

Though the Secretary bypasses it, Brody reminds that the Commission has acknowledged that a mine operator has a substantial interest, as each section 104(e) order results in a mine closure. Response at 10. In addition, the Court notes that the Secretary, unburdened with any definition of a pattern, has moved forward in the face of nearly half (25 of 54) of the violations constituting its pattern notice having been lost as a consequence of the hearings that have been held.

In maintaining that it did provide "a *definition* of [a] 'pattern of violations,'" the Secretary asserts that, by identifying the 54 citations and orders that constitute its pattern claim, and by further dividing those citations into four groups, that identification, perforce, establishes patterns of violations. Motion at 5. Although the Secretary then acknowledges that only 29 of the 54 citations and orders were upheld, it then contradicts its assertion that it did provide a definition, stating that "[w]hether those 29 S&S violations suffice to establish a pattern is a matter for the ALJ's judgment, guided by the definition of a "pattern" and case law concerning patterns under other statutes." *Id.* Covering ground which has already been addressed by the Court in its November 1, 2014, Order, the Secretary repeats that a "mode of behavior or series of acts that are recognizably consistent" is a pattern and that this can mean two violations sometimes and more than two at other times, reasserting that it is for the Court to apply the Secretary's "definition" and decide if a pattern was established. Motion at 5-6.

Moving to the three remaining factors, the Secretary contends that irreparable harm will result if the stay is not granted. Motion at 6. With no definition of a pattern as applied to the 54 citations/orders, the Secretary asserts that "Brody's inspection history shows that the safety and health of its miners has not been adequately protected by non-POV measures." *Id.* Turning around that he did not prevail on 25 of the citations/orders composing his pattern claim, to note that he won on 29 of them, without explanation, the Secretary asserts that the 29 left standing support its POV notice. *Id.* The Secretary then jumps to a matter unrelated matter *to his POV notice*, asserting that "*since* the POV notice was issued, MSHA has cited Brody for scores of new S&S violations, two of which contributed to the deaths of two miners on May 12, 2014." Motion at 6 (emphasis added). Putting aside for the moment that those matters have not been litigated and therefore that there is only a claim that those newly alleged violations contributed to deaths, those subsequent charges are completely immaterial to the issues in the Motion and do not in any way establish "irreparable harm." The Secretary addresses the "public interest" element for a stay by asserting that the same reasons advanced to show irreparable harm, also establish that the stay is in the public interest. *Id.*

In further support of this conclusion, on November 6, 2014, in what was, in effect, a supplemental comment to its Motion, the Secretary, via email, acknowledged, in response to the Court's inquiry, that all the section 104(e) withdrawal orders, save one, have been abated. E-mail from Jason Grover, Co-Counsel for Trial Litigation, Mine Safety and Health Division, to William Moran, Michael Small, Michael Cimino, R. H. Moore, and Robert Wilson (Nov. 6, 2014, 05:26 PM EST). The Secretary then contended in that email that his concern was directed at future violations, asserting that the "issue is about the Secretary's ability to issue new Section 104(e) orders as the need arises. The need could arise today, tomorrow, or the day after. We construe the 11/3 order to effectively preclude MSHA from issuing a new Section 104(e) withdrawal order." *Id.*

Neither contention has merit. First, the Secretary is correct that the Court's Order effectively precludes MSHA from issuing any new section 104(e) withdrawal orders. But it is not as if a pattern of violations notice is its only enforcement tool, a fact recognized in the past 35 years since the Act's enactment. For example, apart from any S&S component, a section 104(a) citation's issuance will bring about a withdrawal order if the cited condition is not abated within the time allowed by the issuing inspector.[5] Thus, upon issuance of a citation under section 104(a), an operator will face an order issued under section 104(b) for a failure to abate a violation cited under section 104(a), and section 104(d) citations and orders are issued when a mine operator commits an unwarrantable violation. When appropriate, imminent danger orders are also available. The point is that the Mine Act provides a variety of enforcement tools, all of which have been in use since the 1977 Act.

[5] In order to establish the validity of a Section 104(b) Order, the Secretary has the burden of proving by a preponderance of the evidence the existence of the initial underlying citation, including a reasonable time for abatement; the expiration of the abatement time; the failure to abate the cited violative conditions; and that the abatement time should not be extended. *Paramont Coal Co. Va., LLC*, 35 FMSHRC 1118 (Apr. 2013) (ALJ) (citing *Clinchfield Coal Co. v. UMWA*, 11 FMSHRC 2120, 2135 (Nov. 1989)).

The Court concludes that, due to the availability of other enforcement tools available to MSHA, the Secretary's claim of irreparable harm and the claim that a stay is in the public interest are not meritorious.

Last, the Secretary declares that "[n]o other parties will be adversely affected by a stay." Motion at 7. The Secretary adds that "the costs of avoiding a POV withdrawal order exist independent of the POV Rule and the POV notice; they are simply the costs of complying with the existing mandatory safety and health standards under the Mine Act." *Id.* But Brody will most certainly be adversely affected by the stay, and the Secretary's request for a stay, while preparing the inevitable motion for interlocutory review and a determination on that by the Court and ultimately by the Commission, demonstrates that the mine operator's challenge to the POV Notice will be anything but expeditious. This protracted process conflicts with MSHA's promise in the Final Rule that the Pattern of Violations review process for mine operators would be expeditious.[6]

Accordingly, the Secretary's Emergency Motion to Stay is DENIED.

SO ORDERED.

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

[6] As MSHA observed in its Final Rule for pattern of violations, "The Supreme Court has held that adequate post-deprivation procedures are sufficient to satisfy due process where public health and safety are at stake. . . . The Mine Act guarantees due process for mine operators subject to MSHA enforcement actions. A mine operator may seek expedited temporary relief under section 105(b)(2) of the Mine Act from a pattern designation provided a withdrawal order is issued under section 104(e). Operators must have at least one withdrawal order in order to contest the pattern designation. Requests for temporary relief are reviewed within 72 hours and assigned to a Commission Administrative Law Judge as a matter of procedure, provided the request raises issues that require expedited review. The Mine Act's expedited review procedure satisfies the Constitution's due process requirements. " Pattern of Violations, Final Rule, 78 Fed. Reg. 5056, 5061 (Jan. 23, 2013) (citations omitted).

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