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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-427
v.	:	A.C. No. 11-03141-180760-02
MACH MINING, LLC	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Commission, by sua sponte review, directed the parties to address whether the Administrative Law Judge correctly determined that an escapeway violation[1] was not significant and substantial ("S&S").[2] 33 FMSHRC 2428, 2435-36 (Oct. 2011) (ALJ). Mach also filed a petition for discretionary review contesting the Judge's high negligence finding associated with the escapeway violation. The Commission granted the petition. For the reasons stated herein, we affirm in result the Judge's S&S determination, and we affirm the Judge's high negligence determination.

[1] The standard at issue, 30 C.F.R. § 75.380(d)(4)(ii), requires that "[w]here the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency."

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

I.

Facts and Proceedings Below

During a February 12, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that one of the primary escapeways of Mach #1 Mine had been narrowed to 26 inches in width. 33 FMSHRC at 2433. This had been done by closing the regulator on the entryway. A regulator is a concrete wall with a hole knocked out of it to control the amount and velocity of air going to the section. *Id.* at n.9. As a result, the inspector issued a citation for a violation of section 75.380(d)(4)(ii), alleging that the escapeway was not at least four-feet wide. *Id*. at 2433.

After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(4)(ii) had occurred. *Id*. The Judge found that the violation was not S&S. *Id*. at 2435-36. The Judge concluded that Mach's level of negligence was "relatively high" because Mach's president and mine superintendent, Anthony Webb, was aware of the violative condition for a number of weeks prior to the citation and was subject to a high standard of care as a supervisor. *Id*. at 2435 n.11, 2437-38.

II.

Disposition

A. S&S

On the S&S issue, both parties agree that the violation is not S&S. Based on the record, we affirm the Judge in result.

B. Negligence

The Commission reviews a Judge's negligence finding, which is a component of a penalty assessment, to determine whether the factual findings are supported by substantial evidence[3] and are consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

We conclude that the Judge's finding of relatively high negligence is supported by substantial evidence. The record demonstrates that the mine president and superintendent,

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[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Anthony Webb, had knowledge of the narrowed regulator, and that the condition had existed for approximately two months. 33 FMSHRC at 2437-38; Tr. 81, 86-88. Like the Judge, we reject Mach's contention that, because an MSHA inspector had previously traveled through the regulator at issue, Mach's negligence should be mitigated. 33 FMSHRC at 2437-38.

We are not persuaded by Mach's assertion that the negligence level should be reduced based on Webb's mistaken good faith belief that the regulator could be reduced to less than 48 inches in the primary escapeway, if the narrowed regulator passed a stretcher test.[4] As the Judge stated, Webb must exercise a high standard of care because of his supervisory role, and therefore Webb's testimony that he was not aware of the width requirements provided only "slight mitigation." *Id.* at 2438. The Commission has held that supervisors "[can]'not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance.'" *Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (citation omitted). Accordingly, in *Prabhu Deshetty*, 16 FMSHRC 1046, 1051, 1053 (May 1994), the Commission affirmed a high negligence determination despite the manager's claim that he was not aware of whether the cited conditions were prohibited under the law. *See also Rushford Trucking*, 23 FMSHRC at 793 (adhering to the general principle that "ignorance of the law is no defense.")

In sum, we affirm the Judge's relatively high negligence determination as supported by substantial evidence in the record.

[4] 30 C.F.R. § 75.380(d)(4)(iii) provides that an *alternate* escapeway may be less than four feet wide if a "stretcher test" is met. The Judge noted that a successful stretcher test was held by MSHA in an alternate escapeway that had been narrowed to 24 inches. 33 FMSHRC at 2435 n.11. However, this stretcher test provision does not apply to the primary escapeway at issue here.

III.

Conclusion

For the foregoing reasons, we affirm in result the Judge's determination that the escapeway violation was not S&S and affirm the Judge's finding of relatively high negligence.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Cohen, concurring:

I join my colleagues in affirming the Judge's determination that Mach Mining's violation of the safety standard in 30 C.F.R. § 75.380(d)(4)(ii) was the result of relatively high negligence, and also the conclusion that the violation was not significant and substantial ("S&S"). I write separately to point out certain fundamental errors in the Judge's application of the *Mathies* criteria to his analysis of the S&S issues in this case.

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1),[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 by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission set forth a four-step test for the analysis of whether a violation is S&S:

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

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

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[1] Section 104(d)(1) provides, in pertinent part,

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, . . .* he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1) (emphasis added).

In the present case, the Judge concluded that the Secretary had proved the first two *Mathies* elements, but had failed to prove the third element. 33 FMSHRC 2428, 2435-36 (Oct. 2011) (ALJ). In this regard, the Judge stated that the evidence did not establish "the reasonable likelihood of an injury-producing event". *Id.* The Judge's analysis is erroneous under *Mathies* in two important respects.

First, the Judge failed to define or articulate the discrete safety hazard which is necessary for analysis under both steps two and three of *Mathies*.[2] The description of S&S in section 104(d)(1) of the Mine Act is centered on a "mine safety or health hazard*"*. Our cases illustrate that a Judge is required to articulate a discrete safety hazard in order to determine whether the violation has contributed to it under step two and whether it is reasonably likely to result in an injury under step three.[3] *See, e.g., Black Beauty*, 34 FMSHRC at 1741; *Consolidation Coal Co*., 35 FMSHRC 2326, 2328, 2333, 2335-36, 2338, 2345 (Aug. 2013) (noting, with respect to five separate violations, how the judge described the discrete safety hazard and approving the Judge's articulation of the hazard). The failure of a judge to clearly articulate the discrete safety hazard in an S&S case impedes the Commission's ability to perform its review function under section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C).

Second, the Judge's analysis under step three of *Mathies* was flawed. In concluding that the evidence did not show a reasonable likelihood of an injury producing event, the Judge relied on two separate lines of testimony – (1) the absence of any obstacles to walking, the fact that the lifeline was in good shape, and the fact that it was not necessary to raise one's foot in order to go from the surface of the overcast through the regulator, and (2) the MSHA inspector's testimony that an emergency was not likely to occur as of the time of the inspection, and that "he did not indicate the specific events or conditions that would be reasonably likely to occur with the continuance of normal mining operations that would make an injury producing emergency evacuation reasonably likely to occur." 33 FMSHRC at 2435. The Judge's reliance on the absence of conditions likely to create an emergency was in error. The mandatory safety standard at issue, 30 C.F.R. § 75.380(d)(4)(ii), sets forth requirements for escapeways in bituminous and lignite coal mines. Because an evacuation standard was at issue, the *Mathies* test does not require consideration of whether an emergency was likely to occur. *See Cumberland Coal*, 33 FMSHRC at 2366-67 ("[t]he Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of

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[2] Regarding the first element of *Mathies*, the Judge correctly found that Mach Mining violated the safety standard when it narrowed the escapeway through the regulator from 48 inches to 26 inches. 33 FMSHRC at 2433.

[3] The Commission has described a safety hazard (i.e., the "measure of danger to safety", as stated in *Mathies*) as "the dangerous situation that the mandatory safety standard anticipates." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741 (Aug. 2012) (citing *Cumberland Coal Res*., *LP*, 33 FMSHRC 2357, 2366 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013); *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

evacuation standards are S&S"). As succinctly stated by the Court of Appeals for the D.C. Circuit in affirming *Cumberland Coal*, "the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard." 717 F.3d at 1027.

Although the Judge erred in his S&S analysis, I would affirm his ultimate conclusion that this violation was not S&S. The safety standard in 30 C.F.R. § 75.380(d)(4)(ii) states that "where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency." The regulator involved in this case is a permanent ventilation control within the meaning of the regulation. As stated by MSHA inspector Bobby Jones, the discrete safety hazard under step two of *Mathies* was that "the narrow opening through the regulator would impede miners escaping rapidly." Tr. 28.

I conclude that the record does not contain substantial evidence to support a conclusion that the violation at issue would contribute to a failure of miners to escape quickly in an emergency. The inspector testified that he believed that in an emergency if an injured miner had to be transported out of the mine on a stretcher, miners carrying the stretcher would be delayed or injured trying to navigate the stretcher and the injured miner through the narrowed escapeway. Tr. 32, 35-36, 48. However, the inspector failed to describe with any detail how the narrowed escapeway would functionally impede the passage of miners with a stretcher. In particular, the inspector was unaware of the width of the stretchers used by Mach Mining, or how their width compared with the width of the escapeway as it passed through the regulator. Tr. 70-71. Furthermore, the inspector testified that he did not observe any obstructions in the walkways on either side of the overcast, on the stairs, or on the overcast itself, and that the lifeline was in good shape. Tr. 64-65.

Moreover, as the Judge noted, Anthony Webb, the president of Mach Mining, testified that the mine had previously conducted testing at the request of and in the presence of MSHA inspectors, and had determined that miners carrying a stretcher were able to navigate through a 24-inch escapeway without difficultly. 33 FMSHRC at 2435 n.11; Tr. 98-99. He explained that the stretchers used by the operator are constructed with handles or hand holds at either end of the stretcher. This enables the stretcher carriers to walk in front and behind the stretcher rather than beside it. 33 FMSHRC at 2435 n.11; Tr. 98-99. This testimony was uncontradicted.

Because the record lacks any evidence that the violation of regulator width would contribute to a hazard of miners being unable to escape quickly in an emergency, the Secretary failed to sustain her burden of proof under step two of *Mathies*. In *Cumberland Coal*, the Commission noted that not every violation of an evacuation standard would be S&S, even though such violations are viewed in the context of an emergency. 33 FMSHRC at 2369. We observed that if violations of an evacuation standard are "relatively minor in nature and scope, a fact-finder may well not [find] that the violations contributed to the hazard of miners being delayed in escaping from the mine in an emergency". *Id*. at 2368. This is such a case.

The Judge's conclusory statement that the second element of the *Mathies* test was satisfied lacks evidentiary support. Therefore, the violation was not significant and substantial.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 13, 2014

SECRETARY OF LABOR,	:	Docket Nos. WEST 2008-788-R
MINE SAFETY AND HEALTH	:	WEST 2008-1093-R
ADMINISTRATION (MSHA)	:	WEST 2008-1094-R
	:	WEST 2009-333
v.	:	WEST 2009-579
	:	WEST 2009-1174
TWENTYMILE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

DECISION

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

These consolidated proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The case originally involved a number of citations and orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Twentymile Coal Company at its Foidel Creek Mine in Colorado. 32 FMSHRC 1431, 1432 (Oct. 2010) (ALJ). Remaining at issue before the Commission are two orders that alleged accumulations of coal dust in violation of 30 C.F.R. § 75.400,[2] as well as a citation issued in connection with one of the orders, alleging an inadequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1). 32 FMSHRC at 1439-48, 1451-56, 1448-51. The specific issues presented on appeal are whether the Judge properly found that all three violations were significant and substantial ("S&S") violations of the Mine Act, and that the violations underlying the two orders were attributable to Twentymile's unwarrantable failures to comply with the standard.

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[1] Commissioner William I. Althen is recused in this matter.

[2] Section 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." While Twentymile did not contest the existence of those violations, it did contest the special findings in the orders and the Secretary of Labor's proposed penalties.

For the reasons that follow, we affirm the Judge's two unwarrantable failure determinations and one of his S&S findings, and vacate and remand his other two S&S findings.

I.

Order No. 7622426

A. Factual and Procedural Background

1. MSHA's Inspection

On March 12, 2008, MSHA Inspector Art Gore visited the Foidel Creek Mine for a methane spot inspection of its longwall area there. 32 FMSHRC at 1451-52. The mine is considered to be "gassy," in that it liberates large quantities of methane.[3] *Id*. at 1444. Consequently, the mine is usually on a 10-day spot inspection cycle. *Id*. at 1444 & n.3.

While he found no methane problems that day, Inspector Gore observed that the longwall tailgate was black with dark float coal dust.[4] Gore found that the conditions extended 1700 feet outby the No. 1 Entry return, with heavy coal dust concentrations on the floor, ribs, and the "cans" used for supplemental roof support,[5] as well as into the crosscuts. He also determined that the trickle duster in the tailgate, which should have been blowing rock dust into the air current so that it would mix with any coal dust, was not working at that time. 32 FMSHRC at 1452, 1454 n.7; Tr. 284-87. According to Gore, the float coal dust he observed was heavy and triple the amount necessary to establish a violation. 32 FMSHRC at 1452.

In order to determine whether a withdrawal order under section 104(d)(2) of the Mine Act should issue, Inspector Gore reviewed weekly examination records, preshift examination

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[3] Section 103(i) of the Act provides in pertinent part that a coal or other mine liberating in excess of one million cubic feet of methane or other explosive gases during a 24 hour period is subject to a minimum of one spot inspection every five working days, and a mine that liberates in excess of five hundred thousand cubic feet of methane or explosive gases during a 24 hour period is subject to a spot inspection every 10 working days at irregular intervals. 30 U.S.C. § 813(i).

[4] "Float coal dust" is defined as "coal dust consisting of particles of coal that can pass a No. 200 sieve." 30 C.F.R. § 75.400-1(b). This is in contrast with ordinary "coal dust," which is defined as "particles of coal that can pass a No. 20 sieve." 30 C.F.R. § 75.400-1(a); Tr. 205-06. Thus, float coal dust is much finer than ordinary coal dust. Inspector Grosely testified that when he scraped the float coal dust into a pile and touched it, "it flowed like water, a very fluid material, a very fine-grain material." Tr. 127. For this reason, it is more explosive than ordinary coal dust, and hence more dangerous. Tr. 147-48, 201.

[5] The "cans" are steel tubes, filled with aerated concrete. Tr. 285.

records, and the "dates, times and initials" he found on the various cards or boards in that area of the mine indicating that examinations had been done. *Id*.; Tr. 289-90, 296-97. The weekly examination book stated that, as of a shift on March 8, 2008, the entire tailgate area for the No. 1 Entry needed rock dusting. Tr. 291. However, Gore noted that the corrective actions taken in the ensuing three days did not include the area he found to be black with coal dust. 32 FMSHRC at 1452; Tr. 291-92, 294-95; Gov't Ex. 21. Because Twentymile had continued mining between March 8 and 12 and the trickle duster was not operating at the time of his inspection, Gore issued an order alleging that the coal dust accumulation violated section 75.400, was S&S, and was attributable to Twentymile's unwarrantable failure to comply. 32 FMSHRC at 1451-53; Tr. 296-99, 301. The Secretary later proposed a penalty of $70,000. 32 FMSHRC at 1452.

2. The Judge's Decision

The Judge concluded that the Secretary had established that the violation was S&S. *Id*. at 1454-55. He found that float coal dust is highly explosive and at its most dangerous when suspended in the mine atmosphere. The conditions cited therefore posed a discrete safety hazard contributed to by the conceded violation of section 75.400, particularly given the amount and concentration of the dust that had accumulated. *Id*. at 1443-44 (relying on his findings in the other accumulations violation on review here); 1454. He further found that it was reasonably likely that a significant methane ignition in the longwall face would cause the float coal dust in the tailgate to go into suspension. *Id*. at 1454. He found a reasonable likelihood that such a methane ignition would occur during the life of the mine, and that the hazard contributed to by the violation would result in a serious injury or fatality. *Id*. at 1454-55.

The Judge also concluded that the Secretary had established that the violation of section 75.400 was attributable to Twentymile's unwarrantable failure, in that it was the result of a serious lack of reasonable care and aggravated conduct on the part of the operator. *Id*. at 1455-56. The Judge's conclusion was based on his findings that the violation was serious, that it had existed over a large area of the tailgate over the course of several shifts, and that Twentymile management was aware of the accumulations and had been put on notice that greater efforts to comply with section 75.400 were necessary. *Id*. at 1456. Consequently, the Judge assessed a penalty of $50,000. *Id*.

B. Disposition

1. Significant and Substantial

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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). 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. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Twentymile contends that the record does not support the conclusion that there was a reasonable likelihood of a fire or methane explosion spreading to the tailgate, and thus substantial evidence does not support the conclusion that the third element of the *Mathies* test was satisfied in this instance. Twentymile argues that the Judge's reliance on methane ignitions occurring at the face at some point in the future is misplaced, both because there is no history of such ignitions at the mine in question, and because there is no evidence that the accumulation of coal dust would continue to exist for the life of the mine. T. Br. at 30-31.

Our review of the record discloses that substantial evidence supports the Judge's conclusions regarding the S&S nature of the accumulations violation at the Twentymile longwall tailgate.[6] Contrary to Twentymile's position, the record supports the Judge's conclusions that, notwithstanding the mine's history, there was ample reason to fear the occurrence of a methane ignition at the face. As Inspector Gore detailed in his analysis of the S&S nature of the violation, the mine is considered to be "gassy." Tr. 299. The Judge's finding that a sudden release of methane in such a mine can occur without warning is consistent with Commission case law. *See U.S. Steel Mining*, 7 FMSHRC at 1130.

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[6] When reviewing an administrative law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Gore testified about the methane ignition sources that existed at the face and the likelihood of such an ignition. Tr. 299. In particular, he discussed the sparks produced by the operation of the longwall shearer and the shearer possibly cutting the quartz present in the mine's roof, the fire from the torches used by miners during maintenance shifts, and the sparking that could occur from roof bolts breaking during a roof fall. Tr. 305, 318. The Judge specifically credited Gore on this issue (32 FMSHRC at 1454), and nothing in the record gives us reason to overturn the Judge's credibility determination.[7]

We can likewise discern no basis to overturn the Judge's crediting of Gore over Twentymile's witnesses on the issue of the concentration of the rock dust. As it did below, Twentymile continues to argue that rock dust had mixed with the float coal dust in sufficient quantities to prevent an explosion. T. Br. at 30-31. In so doing, it ignores the Judge's findings that the coal dust accumulations were "heavy" and that rock dusting had not been effective in the area covered by the order. 32 FMSHRC at 1454.[8] In addition, Inspector Gore testified that the coal dust had accumulated in the cited area to a thickness that was "triple" that which he considered to constitute a violation of section 75.400. Tr. 286-87.

Finally, we reject the notion that the Judge's analysis is only reliable if the cited accumulations remain unaddressed until such time that a methane ignition actually occurs. In cases involving violations which may contribute to the hazard of methane explosions or ignitions, the Commission has held that the likelihood of an injury resulting from the hazard only depends on whether a "confluence of factors" exists that could trigger an explosion or ignition. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (Apr. 1988). To the extent that Twentymile argues that a coal dust accumulation can only be S&S if it is shown that the specific cited condition will continue to exist until a methane ignition actually occurs, we do not read our precedent to erect such a high bar for the violation of section 75.400 to be S&S. It would be particularly inappropriate to do so in this case, where the mine may have allowed the conditions to exist for as many as eight production shifts, with the longwall cutting coal at the face. 32 FMSHRC at 1454; Tr. 291-92. Accordingly, Twentymile's argument is without merit.[9]

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[7] The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

[8] Twentymile also argues that the Judge erred in failing to take into account the humidity in the tailgate area. Its witnesses' testimony was that in such an environment, dust would not travel as far as in a less humid environment. Tr. 330. However, that analysis focuses on the dust produced during the mining process and not whether the humidity would prevent coal dust from being suspended by a methane ignition. Consequently, we are not persuaded that it was error for the Judge to do no more than acknowledge the humid conditions, which he did. *See* 32 FMSHRC at 1454.

[9] As discussed *infra*, the mine in question had a history of accumulation violations, and (continued...)

2. Unwarrantable Failure

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

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.,* 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Twentymile takes issue with three of the factors the Judge relied upon in concluding that the operator's conduct had been aggravated in this instance. First, it continues to disagree with Inspector Gore as to the gravity of violation, citing the testimony of its witnesses who did not view the accumulations in the cited area to constitute a hazard. However, the Judge found Gore to be much more persuasive than the Twentymile witnesses regarding how heavy the coal dust was and the extent, if any, to which it had been diluted by rock dust. 32 FMSHRC at 1455. Moreover, we have affirmed the Judge's S&S finding. Consequently, we remain unconvinced that there are grounds to disturb the Judge's finding that the violation was serious.

Twentymile also maintains that the Judge erred in finding that it had been put on notice that greater efforts on its part to comply with section 75.400 were necessary. T. Br. at 23-26, 33-34. We disagree and find that the record and Commission precedent amply supports the Judge's

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[9](...continued)
there was evidence of inconsistent notations of the need to rock dust coal dust accumulations. Moreover, Twentymile chose to start spreading rock dust on the tailgate area accumulations outby, when the heaviest accumulations were inby. Tr. 301. Given that, we are not persuaded that the cited accumulations should not be considered S&S because Twentymile would have addressed them before a methane ignition could occur.

conclusion. The Secretary relied on previous citations to the operator for violations of the standard. While the evidence does not specifically identify which of those citations prior to March 2008 may have been for float coal dust accumulations, the Commission has rejected the notion that cited accumulations must be of the same material as in previous instances to be relevant to the question of whether the operator had been put on notice that greater compliance efforts were necessary. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Moreover, Inspector Gore testified that he had had multiple prior discussions with Twentymile management about accumulations at this mine. Tr. 302.

Moreover, float coal dust is considered so dangerous that it is specifically mentioned in section 75.400 as a material that an operator must not permit to accumulate. We do not see why the previous citations under the standard should be discounted in the consideration of a subsequent serious violation.[10] The operator could have drawn a distinction demonstrating an anomaly but failed to rebut the Secretary's contention that the prior violations did, in fact, put the operator on notice.

Finally, we reject Twentymile's contention that the Judge's finding of aggravated conduct is erroneous in light of the evidence that the operator was preparing to rock dust the cited area. T. Br. at 33. The Judge discussed the operator's rock dusting efforts, outby the cited area, that were undertaken after the March 8 notation in the examination book regarding the need for rock dusting. 32 FMSHRC at 1455. He also credited the testimony of the operator's witnesses that before rock dust could be applied by hand in the cited area, Twentymile first had to install a second row of cans as supplemental roof support along the center of the entry (Tr. 351-54), and that preparations for that project were underway. *Id*. However, the Judge rejected the contention that this evidence outweighed the other evidence of aggravated conduct. The evidence of aggravated conduct included the previously discussed seriousness of the violation; the geographic extent of the accumulated coal dust; the fact that the condition had been in existence for at least several shifts, if not longer; the fact that management had been aware of it since at least March 8; and the fact that management had been put on notice that greater efforts to comply with the standard were necessary.

In deciding whether an unwarrantable failure has been established, a Judge may determine that some factors are less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351. Because Twentymile does not dispute the Judge's findings on a number of the other unwarrantable failure factors, and substantial evidence supports those findings as well as the findings which Twentymile does dispute, no basis exists to second guess

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[10] Our decision in *Enlow Fork* also disposes of Twentymile's contention that 45 accumulation citations over the course of the 15 months prior to May 2008 (Tr. 155) did not provide a sufficient basis to put the operator on notice. In that case, the Commission found that 60 accumulation citations in over two years put the operator on notice that it needed to make a greater effort to comply with section 75.400. 19 FMSHRC at 16-17.

the Judge's ultimate conclusion that aggravated conduct on the part of the operator had been established.

II.

Order No. 6686312 and Citation No. 6686313

A. Factual and Procedural Background

1. MSHA's Inspection

The order and citation were each issued on May 6, 2008, by MSHA Inspector Barry Grosely. 32 FMSHRC at 1439, 1448. His review of the mine's preshift examination books at the outset of his inspection disclosed entries from the operator regarding accumulations, including entries from earlier in the week with regard to the No. 3 Entry, the mine's main conveyor belt entry. *Id*. at 1439, 1446; Gov't Ex. 13.

The inspector testified that coal was being produced when he arrived at the mine that morning, but that there had been minimal production on the previous shift. *Id*. at 1439; Tr. 115, 140-41. His physical inspection of the mine began on the surface, in the transfer building and the drive building, which resulted in the issuance of three citations for accumulations of float coal dust and coal fines. 32 FMSHRC at 1439. From there, the inspector traveled into the mine through the portal for the belt entry. *Id*. Grosely testified that he immediately noticed accumulations of float coal dust and, as he traveled further inby, the accumulations became "more pronounced." *Id*.; Tr. 122-23. He estimated that the coal dust had accumulated to a depth of 1/16th of an inch in some locations, and he described the dust as very fine, and that atop electrical installations it "flowed like water" when touched. 32 FMSHRC at 1440; Tr. 126-27, 134-35.

The inspector determined that the accumulations extended some 3,400 feet, to Crosscut 34, and were heavier in the crosscuts. 32 FMSHRC at 1439. Grosely explained that with the entry being on intake air at a rate of 350 feet per minute, most of the rock dust that was being injected into the entry traveled down the belt line instead of into the crosscuts. *Id*.

Consequently, Grosely issued Order No. 6686312, alleging an S&S violation of section 75.400 that was attributable to Twentymile's unwarrantable failure. *Id*.; Gov't Ex.10. The order describes the accumulations as present over the ribs, roof, floor, belt hardware, pipes and hoses, drive motors, belt structures, and electrical control boxes in the belt entry. 32 FMSHRC at 1439, Gov't Ex. 10. The violation was subsequently abated by the application of three tankers of rock dust, over the course of two shifts, by three to five miners. Tr. 157-59, 239. The Secretary later proposed a penalty of $50,700 for the violation. 32 FMSHRC at 1439.

Grosely also issued Citation No. 6686313, alleging that the accumulations must have been present during the most recent preshift examination that included the belt entry, which was

conducted between 2:00 and 3:00 that morning, but there was nothing noted about accumulations in the preshift examiner's book for that time period. 32 FMSHRC at 1446, 1448; Gov't Ex. 11. The latter citation was also designated S&S, but not unwarrantable.[11]

2. The Judge's Decision

Twentymile did not contest MSHA's allegation that the accumulations constituted a violation of section 75.400. 32 FMSHRC at 1441. The Judge found that the accumulations of float coal dust constituted a hazard to miners, particularly because the operator had failed to apply sufficient rock dust to render the coal dust safe, and because the mine liberates extensive quantities of methane. *Id*. at 1443-44, 1450. In light of the evidence that the coal dust had been deposited over a number of shifts and that the violation was obvious, the Judge concluded that a reasonably prudent miner would have noted the hazardous accumulation in the preshift examination book and recommended rock dusting in the area. *Id*. at 1442, 1450. Because that did not occur as part of the preshift examination that most recently preceded the MSHA inspection, the Judge upheld the citation alleging that the preshift exam was inadequate under section 75.360(a)(1). *Id*. at 1450.

As to the issue of whether the section 75.400 accumulations violation was S&S, the Judge rejected the Secretary's position that the uncontested accumulations violation was S&S because the rate of frequency of failure of rollers on the belt, as well as the areas of the belt where the inspector observed the belt rubbing against belt hangers, had the potential to result in the generation of heat that would ignite the coal dust. *Id*. at 1443. Taking into account the "confluence of factors" present, the Judge was not persuaded that in this instance the belt, or its constituent parts, such as rollers or electrical components, would be a source that would ignite the coal dust in the area. *Id*. The Judge also found that there was no methane detected in the area of the belt, and that it was unlikely that methane would be found in that area of the mine. *Id*. at 1442-43.

Nevertheless, the Judge concluded that the accumulations violation was S&S. The Judge focused on the possibility that the float coal dust would be put in suspension in the mine atmosphere as a result of a methane explosion at the face and the blast force traveling to the area of accumulations. *Id*. at 1443-44. The Judge was also concerned that such force could so severely disrupt the mine's ventilation system as to cause air to stop flowing through entries, which would result in the dust remaining in suspension, increasing its volatility. In that event, the dust could provide fuel for a methane explosion occurring at the face to continue down the entries for a considerable distance beyond the presence of the methane. *Id*. at 1444. Additionally, the Judge noted that if the float coal dust is placed in suspension, the ignition sources in the area of the suspended dust could ignite it independent of a methane explosion

[11] The citation was originally an order for which the Secretary proposed a penalty of $50,700, but at the hearing he modified it to a citation under 30 U.S.C. § 814(a), alleging high negligence. 32 FMSHRC at 1448-49.

further inby. *Id*. at 1444, 1445. Because the Judge found that it is reasonably likely that there will be at least one serious methane ignition or explosion over the life of a gassy coal mine such as the Foidel Creek Mine, he concluded that the presence of the accumulated float coal dust significantly increased the hazard to miners and thus that the violation of section 75.400 was S&S. *Id*.

With regard to whether the preshift examination violation was also S&S, the Judge found that the examiner contributed to a serious safety hazard when he failed to perform an adequate examination. *Id*. at 1450. The Judge concluded that this failure prevented a foreman from knowing of the need to rock dust the No. 3 belt entry, and the hazard contributed to by the violation would result in an accident in which there would be serious injury. *Id.*

The Judge also concluded that the accumulations violation was attributable to Twentymile's unwarrantable failure, in that the accumulations resulted from aggravated conduct and a serious lack of reasonable care on the part of the operator. *Id*. at 1445-48. The Judge did so on the basis of his findings that the accumulations of float coal dust were obvious, extensive, and hazardous. *Id* at 1447. He also found that the accumulations had occurred over the course of several preceding shifts, yet during those shifts many of the preshift examiners did not consider the accumulations of float coal dust to be hazardous and did not even note the condition in the examination book. *Id*. Finally, the Judge recognized that Twentymile had been cited about 45 times in the preceding 15 months by MSHA for accumulation violations, and, in October 2006, had been specifically advised by MSHA that it needed to make greater efforts to combat float coal dust accumulations in another of its belt entries. *Id*.

For the accumulations violation, the Judge found the negligence to be high and assessed a penalty of $50,000. *Id*. at 1448. For the preshift violation, the Judge concluded that the negligence had not been shown to have been high, and assessed a penalty of $5,000. *Id*. at 1451. On appeal, Twentymile challenges the Judge's two S&S findings, his unwarrantable failure finding with regard to the accumulations violation, and the penalties accordingly assessed, but does not challenge his finding that the preshift examination conducted was inadequate.

B. Disposition

1. Whether the Violations were Significant and Substantial

As discussed with respect to the earlier accumulations violation, the conclusion of the reasonable likelihood of a methane ignition at the face during continued normal mining operations is supported by the record in this case and by Commission precedent. However, unlike the other accumulations violation, the accumulations at issue here were not near the face, but a substantial distance away, along the belt as it approached a portal to the mine. The Judge nevertheless concluded that the force of methane ignition at the face could be sufficient to put the accumulations in question into suspension, increasing the volatility of the dust and possibly serving to propagate the initial methane explosion further. He further found that this could

increase the likelihood that the dust would be ignited by local ignition sources because the dust would cover a much greater area of the mine when in suspension. 32 FMSHRC at 1444.

While we agree with the Judge that float coal dust is highly dangerous when put into suspension, we are constrained by the record in this case regarding how the cited accumulations could have been put into suspension. The Judge's conclusion is based on his finding that forces unleashed by a methane explosion at the face can travel "long distance[s]" down mine entries, "for a considerable distance beyond the presence of the methane." *Id*. Nowhere in the Judge's decision, however, does he address how far the cited accumulations were from the face. Testimony at the hearing was that the mine's longwall panels alone were between 10,000 and 20,000 feet in length. Tr. 346. The mine had a belt system that Grosely estimated totaled at least 12 miles in length, while the operator's witness stated it was 8-1/2 miles. Tr. 187, 224. At oral argument before us, the Secretary's counsel estimated the distance between the longwall and the accumulations as seven miles. Oral Arg. Tr. 45-46.

There is no record evidence that explosive forces would travel so far in the mine in question. Both Inspector Grosely, with respect to the instant violation, and Inspector Gore, with regard to the earlier violation, testified repeatedly regarding the danger posed by coal dust once it is put into suspension. Tr. 201-02, 204, 299, 307-08, 309. No testimony or other evidence was presented, however, on whether accumulations along the belt, miles away from the face, could be put into suspension by a methane explosion or ignition at the face. Because S&S determinations are based on the particular facts surrounding a violation, we cannot find that substantial evidence supports the Judge's conclusion that the accumulations along the belt were an S&S violation of section 75.400 due to the risk of a methane explosion at the face.

However, the possibility remains that the violation could be characterized as S&S. Grosely testified that local forces including air velocity could put the float coal dust into suspension. Tr. 201. Based on the operator's preshift reports, he cited that velocity as approximately 350 feet per minute from the portal into the mine along the belt, and concluded that this velocity was sufficient to liberate the float coal dust as coal moved along the belt. Tr. 127-28, 200-01. He further identified another source of liberated float coal dust as that fine material which returns into the mine on the bottom side of the belt when scrapers designed to clean the belt outside the mine fail to entirely do so. Tr. 128. He testified that, given the speed at which the belt at issue moves – 800 to 900 feet per minute – such material would tend to dry and fall off the belt, thus further contributing to the accumulations. Tr. 128-29.

It has long been recognized that a large expanse of float coal dust accumulations, such as in the instant case, can lead to the dust being put into suspension from normal mining operations. In *Freeman Coal Mining Co. v. Interior Bd. of Mine Ops. Appeals*, 504 F.2d 741, 746-47 (7th Cir. 1974), the court upheld a decision of the Commission's predecessor, the Interior Board of Mine Operations Appeals ("Board"), that float coal dust accumulations of approximately 7,200 feet along a belt in a gassy mine constituted an imminent danger that necessitated the issuance of

a withdrawal order.[12] In doing so, the court found substantial evidence to support the Board's decision that the accumulations constituted an imminent danger, given that the dust is so lightweight that it can be easily disturbed and suspended into the air during the course of normal mining operations. *See Freeman Coal Mining Corp.*, 80 Int. Dec. 610, 615, 2 IBMA 197, 211 (1973). The court was persuaded that because coal was being moved by the belt, there was an increased likelihood that coal dust would be kicked up into the air where it could be ignited by local ignition sources. 504 F.2d at 746-47 & n.13.

In light of the decisions in *Freeman*, we are remanding this case to the Judge to review Grosely's testimony as well as the remainder of the record and determine whether there is sufficient evidence to establish that local forces could have put the dust accumulation in the belt entry and crosscuts into suspension in sufficient amounts to risk a local ignition or explosion. If so, the Judge will then need to address whether there was sufficient evidence of local sources that could have ignited the suspended dust.[13]

The Secretary would have us avoid remand and reverse the Judge's conclusion that there was insufficient evidence that the belt or its components could ignite the dust where it had accumulated.[14] The Judge, however, was not persuaded that the ignition sources Inspector Grosely discussed were either sufficiently intense or located close enough to sufficient quantities of the dust to result in a fire that would be hazardous to miners. 32 FMSHRC at 1443 ("[t]here is no evidence that piles of loose coal and coal fines had accumulated under the belt, or under or near the rollers such that a localized ignition . . . could start a fire that would spread"). We find that substantial evidence supports the Judge's conclusion.

The Secretary further points to Grosely's testimony regarding the existence of coal dust clinging to the belt rollers, the fact that 65 such rollers fail and thus need replacing during an average day at the mine, and that there could be a hot spot on the belt from it rubbing against

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[12] Similar to the present case, at the time of the inspection of the Freeman Coal mine, there was no concentration of methane. *Id*. at 746 & n.12.

[13] In his initial decision, the Judge appeared to determine that there was such evidence. *See* 32 FMSHRC at 1444 ("[i]n addition, other ignition sources in the immediate area of the coal dust can ignite the suspended float coal dust."), 1445 ("[i]n addition, there were ignition sources in the area that could independently ignite float coal dust if it were suspended in the mine atmosphere . . ."). Twentymile contends that this conflicts with the Judge's finding, discussed below, that there was insufficient evidence to establish that the belt and its parts could serve as ignition sources. Remand will permit the Judge to further explain his reasoning regarding the potential local ignition sources for the coal dust upon it being put into suspension.

[14] The Secretary is well within his right to do so, because the prevailing party below may urge in support of the decision under review even those arguments the Judge considered and rejected. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

metal components. Tr. 130-31, 133, 139, 142-44, 146. The Judge addressed this evidence, but found that the operator's program of frequent replacement of rollers, coupled with the fact that the rollers or a hot spot on the belt would come in contact with only a small amount of dust, substantially reduced the likelihood of a fire. 32 FMSHRC at 1443. It was within the province of the Judge to require evidence of a heat source close enough to sufficient quantities of dust as a prerequisite to concluding that there was a likelihood of a fire from the accumulations. Here, the Judge appeared to be presented with evidence that the ignition sources would only come into contact with a minimal amount of dust, and thus would not pose a risk of igniting the cited accumulations.

In summary, we vacate and remand for further proceedings the Judge's findings that the violations contained in Order No. 6686312 and Citation No. 6686313 were S&S. Should he find the violations to not be S&S on remand, the Judge will need to reassess the penalties for the order and citation.

2. Whether the Accumulations Violation Resulted from an Unwarrantable Failure to Comply

We reject Twentymile's contention that it was improper for the Judge to consider the role played by the operator's preshift examiners in the accumulation of coal dust over such an undisputedly large area of the belt entry and crosscuts. Twentymile's argument appears to be predicated on the belief that there was nothing more than an honest disagreement between those examiners and MSHA over whether the accumulated coal dust constituted a violation. In asserting a good faith belief as a defense to an unwarrantable failure charge, however, the operator must show that the belief was reasonable under the circumstances. *IO Coal*, 31 FMSHRC at 1357-58. Here, the overwhelming weight of the evidence credited by the Judge was that the dust had not been diluted by rock dust and had accumulated over an extensive area, and thus constituted a violation of the specific prohibition in section 75.400 against the accumulation of float coal dust. 32 FMSHRC at 1445. Indeed, there is evidence that, because of the way the mine's ventilation interacted with the operator's rock dusting methods,[15] the coal dust that had accumulated in the crosscuts was at its greatest depth, and had been there for weeks. 32 FMSHRC at 1442; Tr. 123, 127, 141. Consequently, the record supports the Judge's treatment of the preshift examiners' actions and opinions in this instance and demonstrates that the good-faith-belief argument has no merit.[16]

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[15] Inspector Grosely testified that when rock dust is blown down a main course, like the belt entry in this instance, the air velocity can be so high that the rock dust bypasses the crosscuts. Tr. 129.

[16] Twentymile also argues that it was possible that the dust had accumulated during the brief time the mine had resumed production since the last preshift examination. Inspector Grosely rejected the position that such a large amount of dust could accumulate in such a short

(continued...)

We uphold the judge's finding that Twentymile had been put on notice that greater efforts on its part to comply with section 75.400 were necessary. We have already rejected some of the operator's arguments in our review of the earlier accumulations violation. In the instance of this cited accumulation, there was even a greater basis for the Judge to find that the operator should have been making greater efforts to combat accumulations – because the float coal dust accumulations order previously discussed had been issued just less than two months earlier.

Moreover, the Judge was persuaded by evidence specific to this accumulations order. First, Inspector Grosely had issued an unwarrantable failure citation to Twentymile in October 2006 for float coal dust accumulations in the mine's No. 7 belt entry. 32 FMSHRC at 1447. Second, that same month MSHA had notified Twentymile and the other mines in that district that the agency would be focusing its enforcement efforts on belt lines. *Id*. While Twentymile argues that such evidence is too remote in time and nonspecific to put it on notice (T. Br. at 23, 26), we disagree, given that the order at issue here cited Twentymile for float dust accumulations in a belt entry. *See Enlow Fork*, 19 FMSHRC at 12 (remanding for Judge to address all relevant evidence of Secretary and operator on issue of notice). Consequently, substantial evidence supports the Judge's finding that Twentymile's conduct was unwarrantable in this instance based in part on the notice the operator had received regarding the need to address accumulations problems at the mine.

Accordingly, we affirm the Judge's determination that the violation of the standard was attributable to the operator's unwarrantable failure.[17]

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[16](...continued)
period of time (Tr. 141), and the Judge credited his testimony. 32 FMSHRC at 1442. Such an inference is inherently reasonable, and thus provides further support for the Judge's determination that the accumulations occurred over a number of shifts. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

[17] Because we are remanding the Judge's S&S determination with respect to the belt accumulations violation, Commissioner Young would also remand the unwarrantable failure determination, because that determination relied in part on the Judge's S&S determination. The Chairman and the other Commissioners do not agree that this is necessary, however, given that so many other unwarrantable failure factors are either conceded by Twentymile, such as the obviousness and extent of the violative condition, or have been upheld upon review.

III.

Conclusion

For the reasons set forth above, we: (1) affirm the unwarrantable failure determinations for Order Nos. 7622426 and 6686312 and the S&S determination for Order No. 7622426; and (2) vacate and remand for further proceedings consistent with this decision the S&S determinations for Order No. 6686312 and Citation No. 6686313.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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June 13, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-1238
v.	:	A.C. No. 04-00081-260016
CONNOLLY-PACIFIC COMPANY	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued three citations and a section 107(a) withdrawal order to Connolly-Pacific Company ("Connolly"), alleging that it did not properly maintain two sections of highwall at its mine.

The Administrative Law Judge upheld all three citations and the order. 33 FMSHRC 2270 (Sept. 2011) (ALJ). The Commission granted the operator's petition for discretionary review. For the following reasons, we affirm the Judge's decision.

I.

Factual and Procedural Background

Connolly has owned and operated the Pebbly Beach stone quarry on Catalina Island, California, since the 1950s. 33 FMSHRC at 2271. The 480 North and South sections of the quarry consist of a 300-foot highwall. Connolly's method of mining involves bringing down rock by blasting and gathering rock brought down by secondary causes, such as rainfall and gravity. *Id.*; Tr. I at 33-36, 49. Connolly maintains that the highwall cannot be scaled. *Id.* at 2271-72; Tr. I at 33, 34, 49, 72, 84-85.[1] It is undisputed that Connolly has never used benches or scaling in the 480 North and South sections of the quarry. *Id.* at 2274-75; Tr. I at 33, 34, 49, 72, 84. Instead, Connolly uses

[1] Scaling involves removing loose rock threatening to break or fall from the mine roof or walls.

a system of spotters and supervisor observations to determine if any changes have occurred on the highwall and if it is safe to work under it. *Id.* at 2273-74; Tr. I at 127, 128, 131, 147.

Over the years, Connolly has utilized photographs and management inspections to observe long-term changes in the highwall and predict the fall of material. *Id.* at 2275. Photographs of the highwall show cracks and protruding rock above the working area. *Id.* at 2272; Tr. I at 170.

The talus pile, an accumulation of rock and material that has slid down the highwall, is the primary work location for the loader operator, who mucks the talus pile back to the toe of the highwall. *Id.* at 2274. The loader operator relies on the spotter to warn him in case of a rock fall. *Id.* at 2273-74; Tr. I at 145. The South section had a 70-foot tall talus pile at a 45 degree angle of repose. *Id.* at 2278; Tr. I at 21-22, 30-31, 65, 221; Tr. II at 18. The North section had no talus pile but had evidence of tire tracks leading up to the toe of the highwall. *Id.*; Tr. I at 23.

On May 24, 2011, MSHA Inspector Chad Hilde issued three section 104(a) citations and a section 107(a) imminent danger order based on his observation of conditions involving the highwall sections. 30 U.S.C. §§ 814(a); 817(a); 33 FMSHRC at 2272. Citation No. 8607224 alleged that the 480 South highwall was not properly maintained under 30 C.F.R. § 56.3130[2] because the loader operator was working under a 300-foot highwall at a 72-90 degree slope with loose and unconsolidated materials, and a 70-foot tall talus pile at a 45 degree angle of repose. 33 FMSHRC at 2278-79. The citation also alleged that the 480 North section had recent activity under overhanging material with no action taken by the operator to determine or maintain the stability of the highwall. 33 FMSHRC at 2278-79.

[2] Section 56.3130 provides that:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

30 C.F.R. § 56.3130.

Citation No. 8607225 alleged a violation of 30 C.F.R. § 56.3131[3] in that the highwall above the talus pile in the South section, which was approximately 230 feet tall, had loose and unconsolidated material that had not been sloped to the angle of repose. 33 FMSHRC at 2284-85. In both the North and South sections, the operator was also cited for failing to correct fall-of-material hazards. *Id.* at 2285.

Citation No. 8607226 alleged that, in violation of 30 C.F.R. § 56.3200,[4] the operator failed to correct hazardous ground conditions by not posting warning signs or barricading the area to restrict access. 33 FMSHRC at 2287-88. Although the North section was not currently being mined, it had no talus pile, and material was cleaned up to the base of the highwall, where there was evidence of vehicle traffic in the area. *Id.* at 2287. Connolly did not dispute that it had no warning signs or barriers, and its safety director testified that the mine had intended to barricade the North section to keep employees out, but had not had enough time to do so before the inspector's arrival. *Id.* at 2288.

Withdrawal Order No. 8607223 alleged that an imminent danger existed pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a),[5] and directed Connolly to cease all mining operations in the

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[3] Section 56.3131 provides that:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

30 C.F.R. § 56.3131.

[4] Section 56.3200 provides that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200.

[5] Section 107(a) provides that:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the

(continued...)

480 South and North sections of the highwall. 33 FMSHRC at 2290-91. Connolly did not abate the violations but instead moved its operations to another area of the mine. 33 FMSHRC at 2293.

The Judge upheld the three citations and the withdrawal order and found that fatal injury was reasonably likely, that the violations were significant and substantial ("S&S"),[6] and that the violations resulted from moderate to high negligence. 33 FMSHRC at 2281-84, 2286-87, 2288-90, 2292-93. The Judge raised the penalty amounts from the proposed $555 penalty for two of the three citations, to $1,000 each for Citation Nos. 8607224 and 8607226, and imposed the $555 penalty proposed by the Secretary for Citation No. 8607225. *Id.* at 2293-94.

The Judge determined that although there is no requirement to use benches to protect miners from falling material, in the absence of benches "the mine must employ some alternative methods to maintain stability of the wall." *Id.* at 2279. The Judge concluded that a rock fall hazard existed and had not been corrected in both sections of the highwall. She also concluded that although "the mine understood that there was a hazardous condition," the presence of tire tracks at the toe of the North highwall indicated recent operations in the area. *Id.* at 2286, 2288. She further found that the inspector did not abuse his discretion in issuing the imminent danger order because it was reasonable to believe that a fall of rock or debris was imminent, and neither benching nor scaling could be conducted due to the extreme height of the highwall. *Id.* at 2291-92.

II.

Disposition

On review, Connolly argues that the Judge's findings regarding the instability of the highwall are not supported by substantial evidence. Connolly contends that the rocks only appeared loose and

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[5](...continued)

> Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

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

cracked, and that it is not feasible for it to scale the highwall or construct benches. Connolly claims that the use of spotters allowed for adequate time to warn the loader operator to move away. Connolly further argues that the Judge erred in how she applied the standards in question. Finally, Connolly raises procedural errors purportedly committed by the Judge during the hearing and in writing her decision.

A. The Judge Correctly Interpreted and Applied the Standards in Question.

The language of the relevant standards is clear. Sections 56.3130, 56.3131, and 56.3200 state respectively that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks;" that "conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected;" and that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." 30 C.F.R. §§ 56.3130, 56.3131, 56.3200.

Taken together, these standards require that an operator must maintain highwall stability and correct hazardous conditions before work or travel takes place. As the Judge found in her decision, "a reasonably prudent person familiar with the mining industry would recognize the requirements of the standard." 33 FMSHRC at 2276-77.[7] *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 711 (Aug. 2008); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (question of whether violation occurred is measured against the standard of whether a "reasonably prudent person" familiar with the factual circumstances would recognize that a hazard existed within the purview of the applicable standard).

Connolly's method of mining does not comply with the plain language of the standards. It necessarily involves rock sliding down the highwall to be removed by the loader operator. This method does not maintain wall stability; Connolly instead utilizes a spotter to warn the loader operator when the wall is unstable. Similarly, Connolly's reliance on a spotter to timely warn the loader operator and the operator's supposed ability to move away in time before getting hit by rock fall does not constitute a correction of the fall-of-material hazards.

MSHA's prior lack of enforcement of these standards at the mine does not demonstrate an absence of violations or hazardous conditions. Connolly argues that in more than 50 years of using this method of mining, it never had an accident caused by rock falls, and it had never been cited by

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[7] Connolly further argues in its brief that this enforcement action deprived it of fair notice and due process. Br. at 31-33. Pursuant to section 113(d)(2)(A)(iii) of the Mine Act and Commission Procedural Rule 70(g), we do not reach the issue of fair notice and due process because it was not raised by Connolly in its Petition for Discretionary Review. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(g). Connolly mentioned the "reasonably prudent person" standard with regard to the correct interpretation of the regulations, but specifically distinguished it from, and did not raise, the issue of fair notice. PDR at 9.

MSHA. However, this historical account cannot be used to prevent MSHA or this Commission from enforcing clearly written standards. *See Austin Powder Co.*, 29 FMSHRC 909, 920 (Nov. 2007) (a past inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding to apply the correct interpretation of a standard).

B. Substantial Evidence Supports the Judge's Findings Regarding Highwall Stability.

We further conclude that substantial evidence supports the Judge's determination that the mining methods used by Connolly do not maintain highwall stability in conformity with the standards.[8] Relying on photographs taken at the mine, and the expert testimony of the MSHA inspector and engineer, the Judge found that cracked pieces of rock and loose material overhung the loader operator's working area. 33 FMSHRC at 2272, 2279.

Although the Judge "relied upon the expert testimony of both parties" *(id.* at 2279), she found the "Secretary's witnesses to be more convincing, reliable and objective." *Id.* at 2281. MSHA engineer Steven Vamossy accompanied inspector Hilde on May 24, 2011. *Id.* at 2272. Vamossy testified that there was a potential for sliding or toppling of smaller slabs of rocks, and that the highwall is a hazard in its present condition. *Id.* at 2280-81. Connolly's expert, engineer Jeffrey Johnson, testified that a hazard only comes into play when a secondary force, such as an earthquake or rain, is added into the equation. *Id.* at 2280-81; Tr. II at 111-12.[9] The Judge found "Vamossy's conclusions regarding the condition of the highwall to be consistent with the photographs and the general tenor of the testimony of all witnesses. . . . While Johnson and his team also viewed the area, Vamossy did it with an eye to mine safety, unlike the engineers for the operator who have no experience in the mining industry." *Id.* at 2281.

The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329 (Aug. 2013) (citations omitted). We find no evidence in the record that compels us to take the extraordinary step of overturning the Judge's credibility determinations. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). Therefore, we affirm the Judge's conclusion that Connolly's mining methods do not maintain the stability of the highwall.

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] Johnson recognized that rainfall can cause rock falls which occur days or even weeks after the actual rainfall. Tr. II at 116; 33 FMSHRC at 2284.

C. The Judge Properly Concluded that the Inspector Did Not Abuse His Discretion in Issuing the Imminent Danger Order.

Section 107(a) of the Act provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. Section 3(j) defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated*" (emphasis added.) 30 U.S.C. § 802(j). The Commission has held that "there must be some degree of imminence to support a section 107(a) order." *Utah Power and Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991). It further explained that "imminent" means, among other things, "impending . . . : hanging over one's head: menacingly near." *Id.* (citation omitted). However, "[t]he concept of imminent danger is not limited to hazards that pose an immediate danger." *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd sub nom*. *Cumberland Coal Res., LP v. FMSHRC*, 515 F.3d 247 (3rd Cir. 2008).

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993); *Utah Power*, 13 FMSHRC at 1627. A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47.

Connolly's main argument has been that the condition of the highwall cannot feasibly be abated, and that is the reason for Connolly's mining method and precautionary measures. Although it may seem unusual that a condition which has been in place for many years can one day be cited as an imminent danger, the circumstances here involve extremely hazardous conditions which cannot be abated within the meaning of section 3(j).

Inspector Hilde testified that the operator did not maintain the stability of the highwall and that the top of the wall had loose and unconsolidated materials and boulders. 33 FMSHRC at 2278, 2282; Tr. I at 24-25, 48-51. Hilde further testified that the spotter system "does not stop or mitigate the likelihood of material coming off the wall. It just lets the guy watch it happen." Tr. I at 82. Hilde explained that he issued the section 107(a) order because of the overhanging material and -- regarding the 480 North section -- "because it was imminent that someone could go back there to work." Tr. I at 29. The Judge found it was reasonable for the inspector to "believe that a fall of rock or debris was imminent, thereby threatening the safety of the miners working below." 33 FMSHRC at 2292. We conclude that substantial evidence supports the Judge's conclusion that the inspector did not abuse his discretion. Given Connolly's mining method and the extraordinary height of the highwall, abatement of the hazardous condition was not possible.

D. The Operator's Procedural Error Arguments Lack Merit.

We reject Connolly's contention that the Judge committed procedural errors in not allowing its expert witness to answer certain questions, and by enforcing time limits on some cross-

examinations. Upon review of the record, we find that the Judge's rulings during the hearing were within her discretion and did not constitute prejudicial procedural error. *See Medusa Cement Co.*, 20 FMSHRC 144, 150 (Feb. 1998) (citing *Desjardins v. Van Buren Community Hospital*, 969 F.2d 1280, 1282 (1st Cir. 1992) (judge's request that counsel not be repetitive and follow proper procedures in asking questions was not an abuse of discretion)).

We further conclude that the Judge's reliance on an extra-record publication in her decision was, at most, harmless error due to the general applicability of the principles mentioned by the Judge and the discussion of these principles during the hearing. The Judge "[took] notice of a number of MSHA and NIOSH publications that describe highwall stability and generally refer to a wall that is up to 100 feet high as the outer limit of acceptable height." 33 FMSHRC at 2282. The Judge then quoted and cited a publication discussing general good practices of highwall stability and the dangers inherent to highwalls of great height. *Id.* at 2282, 2284.[10] In any event, the Judge introduced the cited publication at the hearing and questioned a witness about the publication's conclusions without objection from Connolly. Tr. II at 143-44.

Connolly's argument that it was deprived of the opportunity to address principles regarding the outer limit of acceptable highwall height is likewise without merit. *Id.* at 2276; Br. at 30-31. We note that the record includes discussion of this topic during the hearing. *See* Tr. I-175 (discussing the Oregon Rockfall Study addressing highwalls up to 80 feet high and concluding that higher slopes produce more variable rockfalling distances); Tr. I-77 (asking the inspector if "there was no outright prohibition of having a 300 foot highwall"); Tr. II-157 (emphasizing that the Oregon Study's lack of research beyond 80-foot highwalls does not indicate the maximum safe height of a highwall). This discussion indicates that both parties were aware that the highwall in this case was uncommonly high, that this highwall's height was at issue, and that generally most highwalls did not exceed 100 feet. Therefore, the issue was directly raised, and Connolly had the opportunity to respond.

[10] *Citing* Christopher Mark Ph.D. & Anthony T. Iannacchione Ph.D., *Ground Control Issues for Safety Professionals*, in Mine Health and Safety Management 365 (Michael Karmis ed., 2001).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision. We conclude that the operator did not comply with the standards in question and did not correct hazardous conditions before permitting its employees to work under the highwall. We also find that the record supports the Judge's conclusion that the hazardous conditions presented an imminent danger.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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June 20, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-515-M
v.	:	A.C. No. 41-00070-317641-02
COLD SPRING GRANITE COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 29, 2013, the Commission received from Cold Spring Granite Company ("Cold Spring") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment, containing 17 penalties, was delivered on April 9, 2013. Cold Spring timely contested four of the penalties and paid the remaining 13 penalties. Two of the contested citations were issued for alleged violations at Cold Spring's shot saw shop. Cold Spring avers that it originally contested those citations because it believed that MSHA lacks jurisdiction over the shop. It now seeks to reopen seven of the 13 uncontested penalties, stating that these citations also relate to the shot saw shop.

The Secretary opposes the motion to reopen, stating that Cold Spring made knowledgeable decisions regarding which citations to contest. The Secretary contends that Cold Spring's subsequent "change of mind" does not constitute a "mistake, inadvertence, surprise or excusable neglect" that justifies the reopening of uncontested citations. Sec'y's Opposition at 4 (citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950)). In response, Cold Spring asserts that it timely contested two citations issued for alleged violations at the shop and inadvertently failed to contest seven others because it did not initially recognize that those citations involved occurrences at the same shop.

Certainly, "[a] change of mind is not adequate grounds to reopen a final judgement pursuant to Rule 60(b)." *Brzeczek v. Centerior Energy*, 2000 WL 875744, No. 99-3900, slip op. at 1-2 (6th Cir. June 20, 2000). *See, e.g., Ackermann v. United States, supra*. In this case, however, Cold Spring has demonstrated that it originally intended to challenge all the citations originating from the inspection of the shot saw shop. Its failure to contest the seven citations at issue was the result of a mistake. After discovering its mistake, Cold Spring promptly sought reopening of the citations.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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June 20, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. KENT 2011-1354
ADMINISTRATION (MSHA)	:	KENT 2011-1385
	:	KENT 2011-1386
v.	:	
	:	
	:	
CLINTWOOD ELKHORN MINING	:	
COMPANY, INC.	:	

ORDER

A petition for discretionary review was filed by Clintwood Elkhorn Mining Company, Inc. on June 16, 2014. This petition was filed pursuant to section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). Section 113(d)(2)(A)(1) of the Mine Act states that a petition for discretionary review by the Commission may be filed within 30 days after the issuance of the judge's decision. 30 U.S.C. § 823(d)(2)(A)(1).

The judge's decision was issued on May 14, 2014. Any petition for discretionary review was due 30 days thereafter, on June 13, 2014. Although the judge filed an amended decision on May 15, 2014, correcting a clerical error, Commission Procedural Rule 69(c) states that the issuance of an amended decision correcting a clerical error shall not toll the time for filing a petition for discretionary review of the judge's decision on the merits. 29 C.F.R. § 2700.69(c). Thus the 30-day time limit for filing the petition started to run from May 14 (the date of the initial decision) rather than from May 15 (the date of the amended decision).

The petition for discretionary review is therefore denied. Consequently, the decision of Administrative Law Judge Priscilla M. Rae dated May 14, 2014, is final as of 40 days after its issuance. 30 U.S.C. § 823(d)(1).[1]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

[1] Separately, we note that no two Commissioners would have voted to grant the petition on the merits.

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June 20, 2014

SECRETARY OF LABOR,	:	Docket No. SE 2012-226-M
MINE SAFETY AND HEALTH	:	A.C. No. 01-02947-277361
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-560-M
	:	A.C. No. 01-02947-291433
	:	
	:	Docket No. SE 2013-525-M
	:	A.C. No. 01-02947-308350
	:	
	:	Docket No. SE 2013-526-M
v.	:	A.C. No. 01-02947-318268
	:	
	:	Docket No. SE 2013-527-M
ALABAMA MARBLE COMPANY, INC.	:	A.C. No. 01-02947-321067

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

ORDER

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

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 26, 2013, the Commission received from Alabama Marble Company ("AMC") a motion seeking to reopen a penalty assessment proceeding and relieve the operator from the Default Order entered against it, reopen a Decision Approving Settlement, and reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that in Docket No. SE 2012-226-M, Chief Administrative Law Judge Robert J. Lesnick issued on October 24, 2012, an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. The Commission did not

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2012-226-M, SE 2012-560-M, SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M, all captioned *Alabama Marble Company, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

receive AMC's answer within 30 days, so the default order became effective on November 26, 2012. The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). MSHA mailed a delinquency notice on March 20, 2013.

In Docket No. SE 2012-560-M, Administrative Law Judge Thomas P. McCarthy issued a Decision Approving Settlement on March 20, 2013. Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judges' Order and Decision here have become final orders of the Commission.

In Docket No. SE 2013-525-M, the proposed assessment was delivered on December 10, 2012, and became a final order of the Commission on January 9, 2013. MSHA mailed a delinquency notice on February 25, 2013. In Docket No. SE 2013-526-M, the proposed assessment was delivered on April 17, 2013, and became a final order of the Commission on May 17, 2013. MSHA mailed a delinquency notice on July 2, 2013. In Docket No. SE 2013-527-M, the proposed assessment was delivered on May 15, 2013, and became a final order of the Commission on June 14, 2013.

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

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

AMC asserts that it delegated the contest responsibility to a third party and recently discovered that "nothing was ever done to contest and defend the charges." Mot. at 1. The Secretary of Labor opposes the requests to reopen and asserts that the operator identified no exceptional circumstances warranting reopening. The Secretary notes that this operator has been in business for many years and is familiar with MSHA procedures. The Secretary further states that the inadequate monitoring of MSHA assessments and lack of communication between the operator and its representative indicates an inadequate and unreliable processing system. In light

of the operator's claim of financial difficulties, the significant amount of proposed assessments, totaling almost $80,000, should have made the operator more diligent in pursuing a possible appeal.

In response to the Secretary's opposition, AMC explains that it hired a representative and regularly paid him for the work it believed he was doing in these cases. AMC asserts that it is having financial difficulties and could not afford to hire an attorney. Therefore, it relied on the work of the representative and agreed to temporarily make payments in order to avoid further penalties and collection charges.

Having reviewed AMC's request and the Secretary's response, we conclude that AMC had an opportunity to be heard in Docket No. SE 2012-560-M, we therefore deny its motion to vacate the Decision Approving Settlement. In the interest of justice, we hereby vacate the Default Order in Docket No. SE 2012-226-M, and reopen the proposed penalty assessments in Docket Nos. SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M. Accordingly, Docket Nos. SE 2012-226-M, SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Commissioner Cohen concurring in part and dissenting in part:

On July 26, 2013, Alabama Marble filed a motion requesting that the Commission (1) vacate a Decision Approving Settlement, (2) reopen three cases involving citations that had become final orders because Alabama Marble neglected to contest their respective penalty assessments, and (3) vacate an Order of Default entered after it failed to file an Answer to a penalty petition. Alabama Marble contends that the motions should be granted because the consultant and attorney it hired to represent it in proceedings under the Mine Act failed to take adequate steps to "contest and defend the charges." Mot. at 1-2.

For the reasons that follow, I dissent from my colleague's conclusions in part. I would deny Alabama Marble's motion to reopen the cases docketed as SE 2013-525-M and SE 2012-226-M and remand these proceedings to the Chief Administrative Law Judge for further fact-finding.

1) The motion to vacate the Decision Approving Settlement of the case docketed as SE 2012-560-M.

On February 12, 2013, the Secretary filed a motion to approve a settlement agreement for the case docketed as SE 2012-560-M and represented that "[Alabama Marble] has reviewed this motion, [and] has agreed to its terms." Mot. at 1. Alabama Marble did not indicate any disagreement with this statement. On March 20, 2013, a Judge issued a Decision Approving Settlement.

Because Alabama Marble consented to the underlying settlement agreement, I agree with the majority's decision to deny the motion to vacate the Decision Approving Settlement.

2) The motion to reopen the cases docketed as SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M.

The cases docketed as SE 2013-525-M, SE 2013-526-M, and SE 2013-527 became final after Alabama Marble failed to timely contest the Secretary's proposed penalty assessments for the subject citations. Alabama Marble filed its motion to reopen these cases on July 26, 2013. The motion was filed shortly after the Secretary issued a notice of delinquency for the case docket as SE 2013-526-M (July 2, 2013), and shortly after the case docketed as SE 2013-527-M became final (June 14, 2013). Because the record demonstrates that the operator reacted promptly after it learned that the proposed assessments were mistakenly ignored, I conclude that there is adequate cause to reopen these two proceedings.

However, Alabama Marble did not show the same expeditiousness in its request to reopen the case docketed as SE 2013-525-M. In this case, a delinquency notice was mailed on February 24, 2013, a full five months prior to the filing of the motion to reopen.

Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, the Commission considers the amount of time that passes between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009); *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

I conclude that Alabama Marble's motion lacks sufficient details to establish the extenuating circumstances necessary to justify the reopening of the case docketed as SE 2013-525-M.

3) The motion to vacate the Order of Default issued for the case docketed as SE 2012-226-M.

Alabama Marble timely contested the proposed assessment issued for the citation at issue in the case docketed as SE 2012-226-M. However, it subsequently failed to file an Answer to the Secretary's Penalty Petition as required by Commission Procedural Rule 29, 29 C.F.R. § 2700.29. On October 24, 2012, the Chief Administrative Law Judge issued an Order to Show Cause stating that Alabama Marble would be in default if it failed to file an Answer within 30 days. Alabama Marble again failed to file an Answer. On March 20, 2013, the Secretary mailed a notice to delinquency to Alabama Marble.

Alabama Marble waited an additional four months after receiving the notice of delinquency to file the motion to vacate the Order of Default. The operator's motion fails to provide details that justify its significant delay. Accordingly, I conclude that Alabama Marble has failed to demonstrate good cause to vacate the default order.

Conclusion

In summation, I concur with the majority's denial of the motion to vacate the Decision Approving Settlement issued for the case docketed as SE 2012-560-M and its grant of the motion to reopen the proceedings docketed as SE 2013-526-M and SE 2013-527-M.

However, I conclude that Alabama Marble has failed to establish that its delay in filing a motion to reopen the cases docketed as SE 2013-525-M and SE 2013-226-M was reasonable. While Alabama Marble faults a consultant and an attorney it hired for the defaults, it does not account for its failure to act for five and four months respectively, after receipt of multiple documents from the Secretary which stated that further action was necessary on its part.

Therefore, I would remand the cases docketed as SE 2013-525-M and SE 2012-226-M to the Chief Administrative Law Judge for further fact-finding regarding the cause of the delay in filing the motions to reopen.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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June 3, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-908-M A.C. No. 04-02964-323504
v.	:	
TAFT PRODUCTION COMPANY, Respondent	: :	Taft Production Company & Mines

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Esq., Department of Labor, Denver, Colorado, for Petitioner;
Larry R. Evans, Corporate Health & Safety Manager, Oil-Dri Corporation of America, Ochlocknee, Georgia, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Taft Production Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Los Angeles, California and filed post-hearing briefs. A total of four section 104(a) citations were adjudicated at the hearing.[1] Taft Production mines and produces clay for use in kitty litter and other products.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8697954

On April 23, 2013, MSHA Inspector Eric Wiedeman issued Citation No. 8697954 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety standards. (Ex. G-3). The citation states that there was a pile of material at the entrance to the 101 conveyor tunnel. The material was approximately 2 feet by 2 feet and ranged from 6 inches deep to 1 1/2 feet deep. The material consisted of small granules and dust. The citation alleges that miners are in the area to inspect and clean. Inspector Wiedeman determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost

[1] This proceeding was originally designated for simplified proceedings under 29 C.F.R. § 2700.102(a). By order dated November 26, 2013, I removed the case from simplified proceedings and it was tried under the Commission's conventional rules.

workdays or restricted duty. He determined that the operator's negligence was moderate, and that one person would be affected. Section 56.20003(a) of the Secretary's safety standards requires "workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]" 30 C.F.R. § 56.20003(a). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I modify Citation No. 8697954 to be the result of Respondent's low negligence.

Discussion and Analysis

I find that Respondent violated section 56.20003(a) because it failed to keep a passageway clean. Both Inspector Wiedeman and Nick Kingston, a miner representative for Respondent, agreed that a pile of material existed at the 101 conveyor tunnel. (Tr. 13, 73; Ex. R-1). Respondent argues that the cited area was not a workplace or passageway because no miners would work there before the area was cleaned.[2] I find, however, that the area was intended for use by miners for walking. Miners accessed the cited area to grease conveyor lines on a weekly basis. (Tr. 20, 79). Inspector Wiedeman testified that the cited area was the only route to access the grease lines. (Tr. 14). I reject Respondent's argument that weekly use of the area is not frequent enough to constitute a passageway; the cited area was not accessed while the condition existed but the area was a passageway. Based upon the consistent testimony from both the inspector and Kingston, I find that the area was a passageway or work area; miners accessed the area to grease lines or passed through the area in order to access the lines. The area was not clean. (Ex. R-1). A trip or fall leading to a sprain was unlikely, but possible. Respondent violated section 56.20003(a).[3]

I find that the violation was the result of Respondent's low negligence. The inspector testified that the condition existed for two days. (Tr. 15). Miners accessed the area to grease lines, but not while the conveyor operated and only on a weekly basis. (Tr. 79-80). The condition posed little danger and it is likely that no miners knew about the condition. (Tr. 20). Citation No. 8697954 was the result of Respondent's low negligence. I **MODIFY** Citation No. 8697954 to reduce the negligence. A penalty of $400.00 is appropriate for this violation.

B. Citation No. 8697955

On April 23, 2013, Inspector Wiedeman issued Citation No. 8697955 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety

[2] Respondent cites *Alan Lee Good* to show that an area accessed only for maintenance is not a passageway. 23 FMSHRC 995, 1000 (Sept. 2001). Respondent, however, misconstrues the holding in that case. The Commission found that the cited area was not accessed or used to walk upon during maintenance, not that miners walking in the area for maintenance did not make an area a passageway.

[3] My interpretation of workplaces and passageways under section 56.20003(a) is consistent with the decision of Judge James Gilbert on this same issue. *Taft Production Co.*, 23 FMSHRC 522, 526 (Feb. 2014).

standards. (Ex. G-5). The citation states that there was a pile of material upon the section 4 pad that covered a 5 foot by 5 foot area. The depth of the pile varied between 4 inches and 3 feet and there were footprints in the pile. The citation states that miners entered the area to grease the bearings of the chain conveyor. Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial ("S&S"), the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $176.00 for this citation.

For the reasons set forth below, I modify Citation No. 8697955 to be non-S&S.

Discussion and Analysis

I find that the condition cited in Citation No. 8697955 is a violation of section 56.20003(a) for the same reasons I found that Citation No. 8697954, above, violated the safety standard. Respondent does not contest that it violated section 56.20003(a) with respect to this citation, but argues that the cited conditions were not S&S.

I find that the Secretary did not fulfill his burden to prove that Citation No. 8697955 was reasonably likely to contribute to an injury and Citation No. 8697955 is therefore not S&S.[4] The Secretary argues that a serious injury was reasonably likely to occur because miners were exposed to the conditions, evidenced by footprints in the accumulations. (Tr. 39; Ex. G-6). Miners walked through the cited area on a daily basis to grease conveyor bearings. (Tr. 40, 91). I find, however, that the cited condition was unlikely to cause an injury. Kingston testified that the accumulated material was dust and the photographs corroborate his testimony. (Tr. 91; Ex. G-6). Walking through a small amount of dust is unlikely to trip a miner. The area where the largest and deepest accumulations occurred was directly under the conveyor, which was too low to the ground to walk under. (Ex. R-4). The Secretary presented no evidence asserting that the dust was slippery. As a consequence, the dust would be unlikely to obstruct the path of and trip a pedestrian miner. Although the Secretary showed that the condition existed and miners accessed the area, he did not show that the cited condition was likely to cause injury. Access to a condition does not establish that the condition is likely to injure a miner. The Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. The citation is therefore not S&S.

[4] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation…will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

I find that the violation was the result of Respondent's moderate negligence. I credit Kingston's testimony that Respondent noticed the condition a few hours before the inspection and planned to remove it; a miner should not have walked through the cited area before it was cleaned. Citation No. 8697954 was the result of Respondent's moderate negligence. I hereby **MODIFY** Citation No. 8697955 to be non-S&S; a penalty of $500.00 is appropriate for this violation.

C. Citation No. 8697956

On April 23, 2013, MSHA Inspector Eric Wiedeman issued Citation No. 8697956 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. (Ex. G-7). The citation states that the shafts of the squaring plate shuttle on the 104 pelletizer were not guarded. The guard was removed and was near the cited shafts. (Tr. 51-52; Ex. G-8). The shafts move approximately 3 inches and were located 2-3 inches above the deck. The citation states that miners enter the area to inspect and clean. Inspector Wiedeman determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.14107(a) of the Secretary's safety standards requires "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8697956.

Discussion and Analysis

I find that the conditions cited in Citation No. 8697956 violated section 56.14107(a). The Commission has held that a violation of the guarding standard requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered. *Id*. The parties agree that the cited squaring plate shaft was unguarded. Although the equipment was not under repair and operated the previous night, Respondent's policy requires miners to lock out the cited equipment before entering the area. (Tr. 95). Policy, however, cannot account for "the vagaries of human conduct" that may lead a miner to enter the area without locking out the equipment. It would be reasonably possible for a miner to contact the cylinders in the unguarded area, doing so with a foot since the area was 2-3 inches above the deck. (Tr. 52). The focus of the analysis in this guarding standard is the reasonable possibility of contact, not whether the machine was operating and the parts were

physically moving at the time of the inspection.[5] The cited condition presented a reasonable possibility of injuring a miner and Respondent therefore violated section 56.14107(a).

Although the violation was not S&S the gravity was serious. Respondent knew or should have known of the condition cited in Citation No. 8697956. The condition was obvious and the result of Respondent's moderate negligence. I **AFFIRM** Citation No. 8697956 and find that penalty of $600.00 is appropriate for this violation.

D. Citation No. 8697960

On May 1, 2013, Inspector Wiedeman issued Citation No. 8697960 under section 104(a) of the Mine Act, alleging a violation of section 56.14130(g) of the Secretary's safety standards. (Ex. G-9). A miner noticed upon inspection that the seat belt of Respondent's #3 Mack water truck was broken but he operated the vehicle without using the seat belt. *Id*. Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was low, and that one person would be affected. Section 56.14130(g) requires that "[s]eat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt." 30 C.F.R. § 56.14130(g). The Secretary proposed a penalty of $263.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8697960.

Discussion and Analysis

I find that Respondent did not violate section 56.14130(g) because section 56.14130(g) does not apply to the cited piece of equipment. The Secretary does not require all self-propelled vehicles to be equipped with Rollover Protection Systems (ROPS) and seatbelts. Only the vehicles listed in section 56.14130(a) must have ROPS and seatbelts. All vehicles that require seatbelts also require ROPS. The only exception is haulage trucks, which are required to have

[5] I reject Respondent's argument that Citation No. 8697956 should be vacated because the unguarded moving parts were not actively moving at the time of inspection. Respondent mischaracterized a decision to support its argument, citing *Brubaker Mann* to argue that if the inspector did not see the equipment in use, it did not violate section 56.14107(a). 8 FMSHRC 1487, 1493 (Sept. 1986) (ALJ). *Brubaker Mann*, however, does not reference whether a piece of equipment was actively moving, but whether that equipment was in service. The Commission has addressed guarding standards. *See Thompson Brothers Coal*, 6 FMSHRC at 2097. I find that under Section 56.14107(a), moving parts are machine parts that move as part of their functions; the standard is not limited to parts that actively move during an inspection.

Respondent, furthermore, references MSHA's program policy manual ("PPM") to argue that the standard only applies when no guard exists at conveyor pulleys. (R. Br. at 8-9). Respondent misconstrues the PPM and its argument ignores the plain language of section 56.14107(a) that requires any moving parts, including shafts, to be guarded. I also reject Respondent's arguments that rely upon other standards as they do not apply to the current case.

seatbelts but not ROPS under a different safety standard at section 56.14131(a). When the Secretary promulgated section 56.14131 he chose to only require seatbelts upon haulage trucks rather than on all vehicles used at surface mines that are not protected by ROPS. "Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines," 53 Fed. Reg. 32496. 32512 (August 25, 1988).

Subsection (g) of section 56.14130 is only applicable if subsection (a)[6] requires the installation of seatbelts upon the cited equipment. *Ford Construction Co.*, 14 FMSHRC 1975, 1977 (Dec. 1992). The Commission did not require that a piece of equipment be explicitly listed in subsection (a).[7] Instead, the Commission found that the pertinent consideration of whether section 56.14130 applies is the characteristics of the equipment, including "the size of the cited equipment, its function and its ability to articulate[.]" *Id* at 1978.

Based upon Kingston's description of the equipment and the photograph of the equipment submitted by the Secretary, I find that section 56.14130(a) does not apply to the cited piece of equipment. A water truck is not a "wheel tractor," as that term is used in section 56.14130(a)(3), because it does not fit within the definition of a tractor. A "tractor" is a "self-propelled vehicle . . . intended for moving itself *and* other vehicles." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 582 (2d ed. 1997) (emphasis added). The Secretary did not present any evidence that the cab of the water truck was in a tractor that pulled a wheeled water tank. Likewise, the Secretary also did not establish that the water truck was the "tractor portion of semi-mounted . . . water wagon[,]" as that term is used in section 56.14130(a)(4). A water wagon is generally larger than a water truck and cannot operate upon public highways. (Tr. 99). There is also no evidence that any portion of the water truck was "semi-mounted," that the truck had the ability to articulate, or that it included a tractor.

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[6] Section 56.14130(a) states:

> Roll-over protective structures (ROPS) and seat belts shall be installed on—
>
> (1) Crawler tractors and crawler loaders;
> (2) Graders;
> (3) Wheel loaders and wheel tractors;
> (4) The tractor portion of semi-mounted scrapers, dumpers, water wagons, bottom-dump wagons, rear-dump wagons, and towed fifth wheel attachments;
> (5) Skid-steer loaders; and
> (6) Agricultural tractors.

30 C.F.R. § 56.14130(a).

[7] Respondent argues that section 56.14130(g) does not apply to water trucks because water trucks are not specifically listed in section 56.14130(a). The Commission expressly rejected this argument. *Ford Construction Co.*, 14 FMSHRC at 1977.

It is clear that section 56.14130(a) primarily addresses large, industrial, tractors that articulate and not trucks like the water truck cited here. I reject the Secretary's argument that the water truck fits within section 56.14130(a) because it had a "semi-tractor *style* cab consistent with the types of equipment listed" in that subsection. (Sec'y Br. at 18 n. 8) (emphasis added). Subsection (a) was not broadly written to include all vehicles with large truck cabs. It is significant that the Secretary did not present evidence that the water truck was equipped with ROPS or that it was cited by the inspector for not being equipped with ROPS. If a seatbelt was required in the water truck, then ROPS was required as well. I find that the cited water truck does not fit any of the equipment listed in section 56.14130(a), which is a prerequisite for the application of section 56.14130(g).

The Secretary also argues that section 56.14100(b) applies to the cited condition. That safety standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary did not allege a violation of that safety standard and Respondent was not given the opportunity to defend against such an allegation. Consequently, I have not considered this argument. Failure to wear a seatbelt creates a hazard. The Secretary's safety standard and its regulatory history, however, compel me to **VACATE** Citation No. 8697960 because section 56.14130(g) does not apply to the cited equipment.[8]

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-13). Respondent was issued 12 citations in the 15 months prior to April 23, 2013. Most were designed as non-S&S when issued. Respondent was a medium-sized mine operator which employed about 73 people in 2013. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Taft Production Company to continue in business. The gravity and negligence findings are set forth above. I find that the penalties proposed by the Secretary were too low taking into consideration the size of the operator, the gravity of the violations, and Respondent's negligence. I increased the penalties based primarily on the size of Respondent.

[8] The Secretary should consider amending its safety standards for metal and nonmetal mines to require the use of seatbelts in all vehicles used upon the surface at such mines.

III. ORDER

For the reasons set forth above, I **MODIFY** Citation Nos. 8697954 and 8697955, I **AFFIRM** Citation No. 8697956, and I **VACATE** Citation No. 8697960. Taft Production Company is **ORDERED TO PAY** the Secretary of Labor the sum of $1,500.00 within 30 days of the date of this decision.[9]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 5, 2014

REVELATION ENERGY, LLC,	:	CONTEST PROCEEDINGS
	:	
Contestant,	:	Docket No. KENT 2011-357-R
	:	Order No. 8257014; 12/21/2010
v.	:	
	:	Mine: S-4 Netley Branch
SECRETARY OF LABOR	:	Mine ID: 15-17799
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-211-R
	:	Order No. 8257006; 10/22/2010
Respondent,	:	
	:	Mine: S-1 Hunt's Branch
	:	Mine ID: 15-18280
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-1106
	:	A.C. No. 15-18280-254952
Petitioner,	:	
	:	Mine: S-1 Hunt's Branch
v.	:	
	:	Docket No. KENT 2011-1054
REVELATION ENERGY, LLC,	:	A.C. No. 15-17799-251789
	:	
Respondent	:	Mine: S-4 Netley Branch

DECISION

Appearances: Willow Eden Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for Petitioner;

David J. Hardy, Esq. & Christopher D. Pence, Esq., Hardy Pence, LLC, Charleston, WV, for Respondent.

Before: Judge Andrews

This proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Mine Act" or "Act"). Hearings were held in Prestonsburg, Kentucky on September 25th and 26th, 2012, at which the parties presented testimony and documentary evidence. This matter concerns Citation No. 8257006, Citation No. 8257014 and Citation No. 8257015 issued on December 21, 2010, December 22, 2010 and December 29, 2010, respectively. Citation No. 8257006 and Citation No. 8257015 were issued under Section 104(d)(1), and Citation No. 8257014 was issued under Section 103(k) of the Act. After the hearing, Post Hearing Briefs and Reply Briefs were submitted.

Common Facts and Law

The parties agreed to the following stipulations:

1. During all times relevant to this matter, Revelation was the owner of the S-1 Hunts Branch Mine, Mine ID No. 15-18280.
2. The S-1 Hunts Branch Mine, Mine ID No. 15-18280, is a "mine" as that term is defined in Section 3(h) of the Federal Mine Safety and Health Act ("Mine Act"), 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of the subject mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. This Proceeding is subject to the jurisdiction of the Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. MSHA Inspector Todd Belcher, whose signature appears in Block Number 22 of Citation Numbers 8257006, 8257014 and 8257015, was citing in the official capacity and as an authorized representative of the Secretary of Labor when Citation Numbers 8257006, 8257014 and 8257015 were issued.
6. True copies of Citation Numbers 8257006, 8257014 and 8257015 were served on Revelation as required by the Mine Act.
7. The total proposed penalties assessed for Citation Numbers 8257006, 8257014 and 8257015 will not affect Revelation's ability to stay in business.
8. The alleged violation was abated in good faith.

JX-1.[1]

[1] Hereinafter, the joint exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's exhibits will be referred to as "SX" and Respondent's exhibits will be referred to as "RX."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

KENT 2011-1054 & KENT 2011-357-R

Todd Belcher[2] issued Citation No. 8257015 on December 29. 2010 after he investigated a report that a blast at the S-4 Netley Branch Mine on December 21, 2010 caused a flyrock event.[3] Tr. I, 41, 139, 141-142; SX-13.

The S-4 Netley Branch Mine was a multiple seam mining operation, which was approximately 300-500 acres in size. Tr. I, 39. The mine had two spreads of equipment that removed spoil from the coal pits. Tr. I, 40. Belcher explained the process by which an operator extracts coal from this sort of surface mine: first they develop a work area by removing trees

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[2] At the time of hearing, Todd Belcher had been working for five years as a surface and ground control specialist for MSHA at the District 6 office in Pikeville. Tr. I, 26-27. Prior to working for MSHA, Belcher worked in the engineering department at Central Appalachian Mining (CAM) tracking the permitting and application process for one year from 2006-2007. Tr. I, 32-33. Prior to that, Belcher worked for 21 years as an inspector and then supervisor for the Commonwealth of Kentucky at the Department for Surface Mine Reclamation Enforcement. Tr. I, 33. He has an Associate's degree in Mining Technology from Pikeville College. Tr. I, 38.

As a ground control specialist with MSHA, Belcher's primary responsibilities are to ensure that adequate plans for ground control plans are submitted and acknowledged throughout the District, and to perform accident and regular investigations as needed. Tr. I, 27. Belcher had attended a two-week training on accident investigation at Beckley, and had performed approximately 10-12 accident investigations since coming to MSHA. Tr. I, 27-28. Most of the accident investigations took place at surface mines. Tr. I, 28. Approximately half of these investigations were flyrock accidents, and the remainder were primarily equipment accidents. Tr. I, 28.

[3] Austin Powder was also served with citations and violations for the fly-rock incident. Tr. I, 273.

and creating a drill bench to allow the drilling process to proceed. Tr. I, 29-30. Then the holes are drilled and loaded, and the material is blasted or shot so it can be fragmented and removed with loading equipment.[4] Tr. I, 30. Once the overburden or spoil is removed, then the coal can be picked up.[5] Tr. I, 30.

Revelation began operating the S-4 Mine in April 2010. Tr. I, 193. Prior to that, Appalachian Fuel operated the mine. Tr. I, 193. The blasting at the S-4 Mine was contracted out to Austin Powder in December 2010. Tr. I, 192-193.

December 21, 2010 was a cold and snowy day, with visible snow cover on the ground. Tr. I, 197. Day shift foreman Robert Stanley followed his general routine of arriving at the mine at approximately 4:45 a.m., and proceeded to do a pre-shift examination.[6] Tr. I, 197. According to this routine, he would check the road conditions and the highwall, with the whole process usually taking him an hour. Tr. I, 197. Stanley performed a full examination before letting any of the day shift men enter the work area at 6:00 am. Tr. I, 198-199.

Stanley testified that nothing stood out on the December 21 inspection. He testified that "the walls and stuff were intact, everything was safe, the roads were graded from the night before, the area was safe to go into and proceed on." Tr. I, 199. Stanley then took an hourly employee and Wendell Schwartz, a loader man, into the area. Tr. I, 199-200. Schwartz was working with three rock truck drivers that rotated through the pit area. Tr. I, 200. These workers would have removed the overburden or the shot from the day before that was still in place. Tr. I, 201.

Stanley looked at all the holes and saw that they were not loaded. Tr. I, 204-205. The holes were usually loaded at daylight, around 7:30 or 8:00 am. Tr. I, 207. Stanley left the area

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[4] A "shot" is synonymous with the term "blast." The detonation that occurs after a hole is drilled and loaded with explosives is a "shot." Tr. I, 40. Each blast or shot is assigned a number. Tr. I, 61. Shots are numbered sequentially, and are reset at the beginning of each calendar year. Tr. I, 229.

[5] The overburden or spoil is the rock that overlies the coal. It can consist of sandstone, shale, and similar rock. Tr. I, 30.

[6] Robert Stanley was the day shift foreman at the S-4 Mine on 12/21/2010. Tr. I, 191. This shift lasted roughly from 5 am-5 pm. Tr. I, 191. Stanley began his mining career in 1994, and has worked in surface mining since. Tr. I, 191-192. He was a Kentucky and West Virginia certified coal miner and foreman, as well as a Kentucky certified EMT and an MSHA limited instructor. Tr. I, 192. Stanley had worked at the S-4 Mine since April 2010. Tr. I, 193. He reported to Roland Davis, the general manager of the mine. At that time, Davis was also managing the Hunts Branch S-1 mine. Tr. I, 194.

around 6:20 or 6:30 a.m.[7] Tr. I, 208. Wallen called Stanley prior to the shot and stated that he was ready to detonate and that Stanley's men needed to be removed from the area. Tr. I, 212. Stanley was at the "prell bin" where the powder was located when the shot was detonated. Tr. I, 212. At this position he was about a quarter of a mile away and did not have a clear view of the shot because it was blocked from the spoil bank. Tr. I, 213.

Wallen was in charge of Shot 255, and had two additional men working with him on it.[8] Tr. I, 228, 235-236. Prior to detonating the shot, Stanley told Wallen what area they were going to shoot. Tr. I, 236. Wallen and his men went to the magazines, got the product, placed everything in place, and had a pre-shift meeting. Tr. I, 236. They then proceeded to go out to the area and look around to make sure there was nobody working. Tr. I, 236. They then placed a blasting sign to make anyone around aware of the upcoming blasting. Tr. I, 237. Wallen used his GPS to determine how far they were from houses. Tr. I, 237. He then checked the area on the face and the burden of the holes to determine if anything else needed to be done before the blast. Tr. I, 237.

The shot was detonated at 9:01 am. Tr. I, 250. Wallen did not see anything that caused him concern, and he did not see any flyrock depart from the shot. Tr. I, 251. Wallen was aware of the location of the homes, and he testified that he designed the shot away from the homes. Tr. I, 243-244. Wallen testified that the shot appeared to detonate the way he designed it to detonate. Tr. I, 251.

Danny Mullins pulled the trigger on the shot, while Wallen videotaped. Tr. I, 274. At the time of the shot, Wallen was trying to videotape it, but he fell because it was slick where he was standing. Tr. I, 251. As a result, the camera fell from his hand and turned off.[9] Tr. I, 251, 258-259. Wallen testified that when he fell, the shot was 95-100% completed. Tr. I, 262. Reviewing the video, Wallen was not able to see the flyrock. Tr. I, 252-256. Wallen testified

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[7] He communicated with the certified blaster, Shawn Wallen, at Austin Powder from time to time. Tr. I, 194-195. Stanley would usually tell Wallen in the early mornings what areas needed to be blasted. Tr. I, 195. Revelation relied on Austin Powder, and did not have someone responsible for laying out Wallen's shot or supervising Wallen. Tr. I, 195.

[8] On December 21, 2010, Wallen was employed by Austin Powder Company as a certified blaster at the Revelation S-4 Mine. Tr. I, 226. Wallen had been working at that mine since April 2010, and his shift was from 10 pm until approximately 6 am. Tr. I, 227-229. His supervisor was Dana Hamilton, and his contact at the mine was Superintendent Robbie Stanley. Tr. I, 227. Part of Wallen's job required him to communicate first thing in the morning with Stanley about the drill bench, road conditions, the areas where shooting was going to occur, as well as the plan for the day. Tr. I, 227.

[9] The video submitted into evidence appears to be shut off before any motion that would indicate that the person operating the camera was falling. SX-18.

that the vehicle visible in the video was a D-9 bulldozer, and that it was empty. Tr. I, 259-260. It would have been dangerous for an individual to be inside the vehicle during a blast, but Wallen stated that it was left there because he "felt it was safe for it to sit there."[10] Tr. I, 260.

After the shot was detonated, Stanley went to do another on-shift examination. Tr. I, 213. Stanley radioed Wallen to ask if everything was clear and it was alright to go into the area, and Wallen said things were all clear. Tr. I, 214.

Between 9:45 and 10:00 am, Stanley received a phone call from the engineering department asking if there had been a flyrock. Tr. I, 214-215. Stanley responded that he did not know of any flyrocks, and the engineering department told him that residents below called to complain of flyrocks in their yards. Tr. I, 215. Stanley called Wallen immediately and they contacted Dana Hamilton, who was a certified blaster with Austin Powder.[11] Tr. I, 215. While Wallen and Hamilton made arrangements to go down to the area where the flyrocks landed, Stanley contacted MSHA and officials at the Commonwealth of Kentucky to report the flyrock. Tr. I, 215.

After Belcher received the report at around 9 a.m., he went to the location of the alleged flyrock event in order to see if any homes had been damaged or any injury had occurred. Tr. I, 41-42. First, Belcher issued the 103(k) Order, which ceased all blasting on the mine property. Tr. I, 42. The next day, MSHA conducted interviews at the mine office, which led to the conclusion that flyrock events had occurred that should have been included in the ground control plan. Tr. I, 42-43.

Belcher testified that the 15 year history of the mine showed that the area was subject to flyrock events. Tr. I, 43. Flyrock is not in itself a violation, however failing to follow a ground control plan is a violation of 30 C.F.R. 77.1000. Tr. I, 59-60. Section 77.1000 requires each operator to establish and follow a ground control plan in order to provide safe working conditions at the mine site. Tr. I, 60. The ground control plan for the S-4 Netley Branch Mine that was in effect at the time of the citation was dated April 26, 2010. Tr. I, 60; SX-16.

A ground control plan must address the type of mining being conducted, whether single seam mining, multiple seam mining, or area mining. Tr. I, 28. The ground control plan must also address how the configuration of the highwall will be left such that it provides safe working conditions for the miners. Tr. I, 28. If the mine is engaging in multiple-seam mining,

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[10] In the video it appears that the vehicle has its headlights on and is moving, indicating that someone was operating it. SX-18. It would have been illegal to have someone sitting in the vehicle during the blast. Tr. I, 259-260.

[11] Dana Hamilton had worked as a certified blaster with Austin Powder S-1 Mine since October 13, 2009. Tr. II, 135-136, 139. Hamilton began blasting work in 1982 and became a certified blaster in 1984. Tr. II, 136. As part of the certification process, Hamilton worked two years on a powder crew and took two Kentucky examinations. Tr. II, 136-137.

then safety benches must be strategically placed to ensure safe highwall conditions.[12] Tr. I, 28. Additionally, the plan must include safety precautions for various activities, such as blasting. Tr. I, 28-29. If there had been a history of flyrock events, the plan must include greater blasting details. Tr. I, 29.

In this case, due to the dangers associated with blasting, rocks were projected between 1,100-1,200 feet through the air and landed near people's homes. Tr. I, 46. One of the rocks fragmented and struck the window of a nearby home. Tr. I, 46. When there is a flyrock event, there is an automatic suspension of blasting until an analysis and investigation can be performed. Tr. I, 47.

A drill log is used to inform blasters about any abnormalities, such as cracked holes, so that the blaster is informed prior to loading the holes. Tr. I, 55. Belcher noticed in the drill log that there were four holes marked with the letter "V," indicating that these holes were voided.[13] Tr. I, 56. During the course of the investigation, Belcher found that at least three of these four holes were not loaded because the material was loaded out. Tr. I, 56, 144. According to the report, these holes were loaded with backfill material, however Belcher believed that these holes were removed prior to the blast. Tr. I, 148. Belcher did not notice any holes marked with the letter "C," which stands for crack. Tr. I, 56-57.

One home that was affected by the flyrock event at issue in this case was previously affected by a flyrock event five years earlier. Tr. I, 43. Due to this history, and the proximity of the homes, Belcher believed that there should have been a "heightened awareness of the sensitivity of the area." Tr. I, 43. The Netley Branch Mine had a blast remediation plan prior to the flyrock event cited here. Such plans are put in place once a flyrock event occurs. Tr. I, 62-64. In the plan, it identifies what went wrong, what led to the occurrence of the flyrock event, and what measures will be put in place to prevent a similar occurrence. Tr. I, 62.

Belcher had been to the S-4 Netley Branch Mine 20-30 times over 15 years, though he was not at the mine on the morning prior to the shot. Tr. I, 47. As part of his investigation, Belcher conducted interviews on December 22, 2010 with homeowners who lived near the mine site. Tr. I, 47-48, 57-58. Belcher also took contemporaneous notes on the violations. Tr. I, 57-58. Belcher examined the distances between where the rocks landed and the homes nearby. Tr. I, 48. He found that there were four to five different rocks ranging in sizes from four-by-four inches to 12 by 12 inches. Tr. I, 48. These rocks were scattered on nearby property and Belcher

[12] The "highwall" is a vertical rock wall that remains after the vertical holes are drilled and blasted. Tr. I, 31. To "pre-line" or "pre-split" a highwall means to drill a separate line of holes separate from the production holes in as straight a line as possible to crack the wall in a straight line. Tr. I, 32.

[13] Stanley testified that the holes with a "V" on them were unloaded holes. Tr. I, 210. Wallen testified that the four holes marked with a "V" were voided, meaning that there were no explosives loaded. Tr. I, 239.

saw the marks on the sides of homes from the rocks. Tr. I, 48-49. Furthermore, there was snow on the ground, so one could see the paths of the rocks. Tr. I, 49. Belcher stated, there were five people in one home and three people in another and said, "fortunately no one was injured or killed, but there was people home at the time." Tr. I, 49.

Belcher also interviewed individuals who were present at the mine during the flyrock event, including several state officials and several officials with the Office of Surface Mining. Tr. I, 49-50.

Shawn Wallen was the certified blaster in charge of Blast 255 and filled out the report.[14] Tr. I, 139, 141-142. Belcher interviewed Wallen on December 22, 2010. Tr. I, 140-141. Belcher interviewed Austin Powder foreman Robert Stanley on December 21 and 22, 2010. Tr. I, 149. Belcher's investigation did not reveal that any agent of the company was present at the blast site or in the pit beside the blast site between 6:00 am and 9:00 am on the morning of the flyrock event. Tr. I, 150.

Belcher also reviewed the ground control plan, the drill log, and the blast report.[15] Tr. I, 50-51. The blast report contains a formula that includes the weight of the explosives and distance to the nearest dwelling in order to determine a delay. Tr. I, 51. Belcher received the blasting report in this case from either Revelation or Austin Powder, and the delay used was eight milliseconds. Tr. I, 51, 53.

Photographs were admitted into evidence that showed a rock that broke through part of a window of the house closest to the blast site. Tr. I, 108-109; SX-15. This house was approximately 1,000 feet from the blast. Tr. I, 109. The photos also showed splattering on the ground where rocks had landed. Tr. I, 111. The owner of the house told Belcher that the window had been broken by the flyrock in the photo. Tr. I, 110-111. Belcher interviewed this homeowner, and the homeowner stated that the rock came from the mine on the morning of the blast. Tr. I, 113. Belcher and the homeowner walked around the entire yard, and the owner pointed out the rocks that landed in his yard. Tr. I, 111-112.

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[14] Belcher was not sure if Wallen completed the shot report before or after the flyrock event. Tr. I, 155-156. Shawn David Wallen had been a certified blaster for four years at the time of hearing, which means that he had classroom training, worked two years on a surface mine with a powder crew and blaster, and passed two examinations. Tr. I, 224-225. Wallen had worked as a certified blaster since receiving his certification. Tr. I, 226.

[15] Belcher testified that he has reviewed thousands of blast reports during his years mining. Tr. I, 51. A blast report has several components, including the company name, the amount of holes that are drilled, the depth of the holes, the amount of explosives loaded, the amount of stemming, a date and time, and a house number and direction. Tr. I, 50-51. Blast reports are used to document the amount of explosives used to move certain amounts of rock. Tr. I, 51-52.

According to the photographs, flyrocks landed on a county road, and on other property further from the blast site. Tr. I, 112-113; SX-15. The rock was large enough to kill a person if it struck him or her in the head. Tr. I, 113-114. Other photos similarly showed rocks that had splattered on the side of homes, on trees, and on rooftops. Tr. I, 113-116.

On December 21, 2010, the public highway and access roads at the mine were accessible, and people were using them. Tr. I, 116. Furthermore, people were living in the two homes affected by the flyrock event. Tr. I, 116-117.

After conducting an investigation as a result of the December 21, 2010 flyrock incident, Belcher discovered that three elements of the plan were violated, which he grouped into one citation. Tr. I, 64-65. The first violation that Belcher discovered was that "sufficient burden was not maintained on the side of the shot toward the dwelling." Tr. I, 66; SX-13. The burden was the amount of spoil that was either left in place from the previous shot or solid material that had not yet been shot. Tr. I, 66-67. There was a calculation based on the diameter of the hole to determine how much burden is necessary to help prevent flyrock from traveling as far. Tr. I, 67-68. Here, the burden and spacing in the ground control plan ranged from 14-17 feet, with a 14-foot minimum. Tr. I, 68. The plan states that "any variance from this minimum requires identification." Tr. I, 68-69; SX-16. No variance was ever requested. Tr. I, 69.

Too much or too little burden can cause problems with flyrocks. Tr. I, 69-70. Belcher testified that he believed that the shot was being loaded too quickly, leading to the flyrock event. Tr. I, 71. There was not sufficient burden maintained on the side toward the homes, which was a violation of the ground control plan. Tr. I, 71-72. Specifically, in the section labeled, "Shot Design Parameters," it states, "[b]urden of spacing ranges will be a minimum of 14 feet on face burden will be maintained." Tr. I, 72. It also states, "[a]ll blasts will be directed away from homes." Tr. I, 72-73. SX-16. Based on his investigation, Belcher believed that there was less than 14 feet of burden maintained on the side facing houses. Tr. I, 73. Failing to leave sufficient burden is enough, and often highly likely, to create a flyrock incident. Tr. I, 96, 98. Belcher testified that this was the most serious violation listed in the citation. Tr. I, 97.

The second violation was in regard to the incomplete video of the shot. The ground control plan requires a shot to be captured and recorded on video.[16] Tr. I, 73; SX-16. The purpose of the video requirement is to provide the blaster, blasting coordinator, and company management the opportunity to review blasts. Tr. I, 76. In this instance, the video did not comply with the requirements because the video was interrupted during the shot when the camera fell. Tr. I, 73-74; SX-16. As a result, the video only captured approximately 30-40% of the shot. Tr. I, 77. After reviewing the video, Belcher testified that he noticed rocks projecting from the holes in the direction of the nearby houses. Tr. I, 77-78. Belcher testified that in his

[16] The plan states, "A video camera will be used to monitor each shot and record the area prior to, during and after the blast." SX-16, 8.

experience, the failure to review a problematic blast that created a flyrock incident would lead to subsequent flyrock incidents. Tr. I, 99-101. Belcher described how the shots occur quickly in real time—often within milliseconds of each other—and the ability to review the video at slower speeds can help evaluate and analyze shot performance. Tr. I, 101. Some sites use tripods to record video of shots, and Belcher testified that such use would be safer. Tr. I, 123-125.

The third violation involved the amount of explosives used. Tr. I, 81-82. The danger of using too much explosives is that one can over-break the rock and have less control of flyrock. Tr. I, 102. The ground control plan contained a scale distance formula that required an eight-millisecond delay. Tr. I, 83. However, Belcher found that the delays overlapped each other, with at least two holes designed not to fire within eight milliseconds.[17] Tr. I, 83-84, 88; SX-17. There was nothing in the ground control plan that would allow Revelation to exceed the normal amount of explosives based on their use of a seismograph.[18] Tr. I, 90.

The blast report listed 354.8 as "Max weight of explosives per eight millisecond interval," and 254.9 as the maximum per interval. Tr. I, 91-92; SX-17. Belcher testified that if the number on the blast report was 419.5, rather than 254.9 as the amended report stated, this confirmed for him that more explosive was used than allowed. Tr. I, 171-173. Wallen testified that the maximum weight of explosives per 8 millisecond interval figure of 254.9 figure on the shot report was the result of a computer malfunction. Tr. I, 231; SX-17. The mistake was discovered the day after the flyrock by Marty Bashir at the Kentucky Office of Mine Safety and License Explosive and Blasting. Tr. I, 231-232. Wallen testified that the amended report, which stated that the maximum weight of explosives per 8 millisecond interval figure of 419.5 was correct.[19] Tr. I, 234; RX-A.

The blaster in charge makes the determination for this number based on one of three different formulas, based on the distance of the house from the shot. Tr. I, 92. In this case, the house was 1,036 feet away, so the correct formula would be D over 55 squared. Tr. I, 92. The scale distance factor was 64.89. Tr. I, 93-94. Belcher arrived at the conclusion that these two holes did not meet the eight millisecond delay by reviewing the blast record provided by the company. Tr. I, 135-136.

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[17] The two holes that Belcher found that discharged without an 8 millisecond delay were number 1752 and 1760. Tr. I, 134. Wallen disagreed with the Inspector's assessment concerning whether two holes had the required 8 millisecond delay. Tr. I, 245-246.

[18] The State of Kentucky has such a provision, but MSHA does not. Tr. I, 90.

[19] In his testimony, Wallen first stated that the correct figure was 254.9. Then, he stated that the correct figure was 419. The amended shot report lists 419.5. Tr. I, 232-234; RX-A.

Belcher testified that in his experience, excess explosives alone have not resulted in flyrock. Tr. I, 103. Rather, it usually occurs from a combination of factors such as inadequate stemming,[20] loading cracked holes, insufficient burden, and neglecting to profile the highwall. Tr. I, 103. However, Belcher testified that if one exceeds the amount of explosives in the window of time allotted, it could lead to an opportunity to produce a flyrock. Tr. I, 104.

Belcher testified that the insufficient burden was the leading cause of the flyrock event. Tr. I, 178-179. The filming was a problem because if the operator is not getting an adequate picture of what is happening with the shots, then adjustments and corrections cannot be made. Tr. I, 179. Also, two holes going off at one time due to the lack of an eight millisecond delay or exceeding the maximum charge weight could lead to flyrock. Tr. I, 179.

The combination of the three violations listed in the citation created a situation where the gravity was highly likely and the injury or illness that could be expected was fatal. Tr. I, 104-105. Belcher testified that the combination of these three violations made the occurrence of a flyrock event more likely than if only one of these violations were present. Tr. I, 105. Even flyrock that does not leave the mine property presents a hazard to miners on the property. Tr. I, 106. Belcher testified that the injury to be expected from such an event would be fatal. Tr. I, 107-108.

Belcher testified that Revelation's negligence stemmed from their directing workers to remove the spoil in and around the blast. Tr. I, 117. Through interviews at the mine, Belcher discovered that Austin Powder could not keep ahead of Revelation, so their shots were being encroached upon.[21] Tr. I, 117-119. There was a 50-foot buffer distance that was required. Tr. I, 117-120. Four of the holes that were drilled were not loaded properly. Tr. I, 118. They were voided, which means that the holes had been loaded out. Tr. I, 118, 121. It was Revelation that was in charge of loading these holes. Tr. I, 122. Belcher testified that he did not view the relationship between Austin Powder and Revelation as a mitigating factor because ultimately Revelation had a responsibility to ensure that Austin Powder did the work correctly. Tr. I, 122.

KENT 2011-1106 & KENT 2011-211-R

Belcher issued Citation No. 8257006 on October 22, 2010 at the S-1 Hunts Branch Mine. Tr. II, 18; SX-1. The citation was issued in relation to a flyrock incident that occurred on October 7, 2010. Tr. II, 18-19. The S-1 Hunts Branch Mine is a large surface coal mine. Tr. II, 14-15.

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[20] Stemming is process of placing material at the top of the hole, so as to prevent rock from shooting out of a cylindrical hole, like a bullet from a gun. Tr. I, 102-103. Stemming forces the energy of the blast to break the rock, rather than eject it from the hole. Tr. I, 103.

[21] Stanley denied that there were any problems with Revelation encroaching on the burden area. Tr. I, 209.

Dewey Reed was the blaster at the S-1 Mine on October 7, 2010, and Hamilton was on the property helping Reed.[22] Tr. II, 137. Reed was the lead blaster on the shot, Blast No. 651, but Hamilton was his boss. Tr. II, 138.

Roland Davis was the General Manager at the Hunts Branch S-1 Mines on October 7, 2010[23]. Tr. II, 87. On October 7, 2010, Davis arrived at the mine between 5:00-6:00 am and left between 5:00-5:30 pm. Tr. II, 92-93. Prior to leaving on that day, Davis went to the shot area periodically. Tr. II, 93.

Hamilton testified that the shot was shot at 6:51 pm, and a resident called approximately 10 minutes later to say that a rock came off of the out-slope and was at their residence. Tr. II, 146. Hamilton did not see the rock go down the hill from where he was standing, which was approximately 2,000 feet away. Tr. II, 146. Another Austin Powder employee, Charles Sexton, thought he saw the rock, so Hamilton immediately went to make a visual observation of the area. Tr. II, 147. He did not see any evidence that the rock had made any contact with either catch bench. Tr. II, 147-148. Hamilton sent a driller named Dwayne Endicott over the outslope, and he reported that he did not see anything. Tr. II, 148.

Hamilton received another call from a mine clerk saying that her mother had another rock by her residence. Tr. II, 149. Hamilton went to the residence and observed a rock that was approximately three to four feet in diameter. Tr. II, 149. He made sure that no one was hurt, and at 7:00 pm called the State Mining Office and Roland Davis. Tr. II, 94, 149.

Hamilton told Davis that a rock had gone over the hill. Tr. II, 94. He further stated that no one was hurt, there was no damage to property, and that he had made the proper phone calls reporting the incident. Tr. II, 95. Davis went back to the mine, arriving at approximately 8:00-8:30 pm. Tr. II, 95. Davis drove up the hollow where the rock had come to rest, spoke with Hamilton, and then went home. Tr. II, 95.

Belcher received notification of the flyrock incident when he came into work on the morning of October 8, 2010. Tr. II, 19. He proceeded to conduct interviews with individuals who worked at the mine site and with residents of nearby homes, visited the mine site at least

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[22] Dewey Reed is also called "Bruce Reed." Tr. II, 138.

[23] Davis is a certified surface mine foreman in Kentucky, West Virginia, and Virginia. Tr. II, 89. He is a certified MSHA limited trainer. Tr. II, 89. Davis began his surface mining career in 1978. Tr. II, 89. He is not a certified blaster. Tr. II, 89-90. In his position as General Manager, Davis's duties were to manage the mine costs and mine production, as well as setting the mine plans. Tr. II, 87-88. At the time of the cited event, Revelation had been in control of the mine for approximately one year. Tr. II, 88. Prior to Revelation, CAM Mining was the operator of the mine. Tr. II, 88. Revelation prepares the areas for the blasting company to blast, however Davis had no involvement with drilling, loading, or detonating. Tr. II, 90.

twice, and travelled to the area where the flyrock landed. Tr. II, 20-21. Belcher reviewed a copy of the ground control plan, the drill log, the video, and the mine's history. Tr. II, 21-22. Belcher took photographs and notes, dating from October 8-29, 2010, in order to document his findings. Tr. II, 22.

After performing his investigation, Belcher found that the mine site was above steep terrain, there were heavily populated areas below the mine site, and there were at least three or four different flyrock events in the past. Tr. II, 23-24. This was a "highly sensitive" area that required a detailed blast remediation plan.[24] Tr. II, 24. Such plans are jointly reviewed and agreed upon by the Commonwealth of Kentucky, the operator's blasters, and MSHA. Tr. II, 24. The plan in place at this mine required a catch bench of a specific size. Tr. II, 24.

A catch bench is utilized to catch spoil, rocks, and debris that may be removed from the top as material is extracted to get to the coal bed. Tr. II, 15-16. Catch benches must be constructed prior to blasting, and are commonly placed along perimeters, especially in areas where there is a possibility that the rocks could travel into public roads or residences. Tr. II, 16. The catch bench requirements must be included in the mine's ground control plan. Tr. II, 17-18. The size of the catch bench necessary is generally determined by an assessment of any past history, rock sizes, and other catch materials. Tr. II, 16-17. A common size for catch benches is 15 feet wide and 10 feet high. Tr. II, 17.

Belcher found that there were two catch benches that had been constructed in the area between where the shot was detonated and down to the Alma Seam they were mining down to. Tr. II, 24, 25. These were less than 10 feet high, with some portions approximately 5 feet high. Tr. II, 25. The rock that Belcher saw was approximately four and a half by four and a half by six feet, and weighed approximately eight to nine tons. Tr. II, 25, 48.

The ground control plan was drafted by the company and approved by MSHA on October 16, 2009. Tr. II, 26, 33; SX-1, 1. It was in place at the mine on October 7, 2010. Tr. II, 26; SX-1, 1. The ground control plan contains a blast remediation plan because of prior flyrock events. Tr. II, 27-28. Item four of the ground control plan required a 15-foot wide catch bench, measured from the top of the berm to the highwall, with a 10-foot high berm, at all major seams, which included Williamson, Thacker, Cedar Grove, and Alma.[25] Tr. II, 29; SX-3, 11.

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[24] The blast remediation plan is also sometimes called the "blasting plan." Tr. II, 24.

[25] Item four of the Blast Remediation Plan states:

> 4) A 15 foot wide catch bench (measured from the top of the berm to the high wall) with a 10 foot high berm, will be installed on all major seams (e.g. Williamson, Thacker, Cedar Grove, & Alma) to be mined at all times when practical, prior to blasting in the area. The catch bench will be cleaned prior to the next shot. In the event that a catch bench can't be constructed, then items 18-23 [sic] of the Blast Remediation Plan for Areas where a Catch Bench is not constructed will apply.

(continued...)

Belcher testified that this item was violated. Tr. II, 29; SX-3, 11. Belcher testified that this requirement was a minimum size requirement, which the operator could exceed. Tr. II, 30.

Item four of the plan states that if a catch bench cannot be constructed as required, then items 18-23 of the blast remediation plan apply.[26] Tr. II, 31-32, 38; SX-3, 11. None of these

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[25](...continued)

SX-3, 11. After the flyrock event, Revelation removed the phrase "when practical" from item four. Tr. II, 118.

[26] The plan mistakenly references items 18-23, but it is clear from the document that the correct items are 19-24, under the heading, "Blast Remediation Plan for Areas where a Catch Bench is not Constructed." Tr. II, 32; SX-3, 12. Items 19-24 state:

> 19) In protection zone areas (see page 17), for the first breakdown shot which has a maximum depth of 25', the first row of holes will be pre-split or break line drilled and located a minimum of 20' from the crop. If company elects to, the pre-split can be drilled to the coal.
>
> 20) For the first breakdown shot of the protection zone, a complete free face (excess burden removed) will be maintained. The face and the direction of the blast are to be oriented away from the control structure and towards the open pit.
>
> 21) The outside 2 rows of holes in the protection zone will be decked as shown on the attached diagrams. It should be noted that the diagrams are typical and that the actual shot will be based on field conditions. A minimum of 10' true burden will be maintained from the pre-split to the first row of production holes.
>
> 22) The protection zone is not considered a "No Spoil Area." A "No Spoil Area" is any location of a shot where material, rocks, and spoil cannot be cast, pushed, or ejected onto the down slope beyond the designated safety bench.
>
> 23) All shots within the protection zone will be designed to minimize the back pressure toward the no spoil side.
>
> 24) The out slope in the protection zone will be videotaped prior to and directly after the shot to monitor the change in cracks or hill seams. After 2-3 shots, if the out slope visibly does not show that it is being stressed by the shots and also if decking is causing secondary blasting due to improper breakage (e.g. unmanageable rock sizes) or causing unsafe ragged walls, then the shot deck will be evaluated and changed with the approval of DMRE.

SX-3, 12.

items allow Revelation to build two catch benches of smaller height and width in lieu of the one required in item four. Tr. II, 32. Revelation did not comply with the alternate provisions set forth in items 19-24. Tr. II, 38.

Hamilton discussed the catch benches with general manager, Roland Davis, and foreman, Joey Branham, at Revelation. Tr. II, 140. Hamilton testified that Revelation had exceeded the requirements of the ground control plan because the two safety benches combined were greater than 15 by 10 feet. Tr. II, 142. Hamilton believed that two smaller benches were better than one larger bench. Tr. II, 143.

Davis testified that he and Hamilton read the ground control plan and interpreted item four as requiring a 15 by 10 foot catch bench if possible. Tr. II, 113. He testified that they then interpreted the following sentence requiring alternative procedures to only be applicable if no catch bench could be constructed.[27] Tr. II, 114. He therefore concluded that since they could build two 10 by 5 foot catch benches, these would be allowable.[28] Tr. II, 114. He further testified that after "intense discussions" on the matter, they determined that the two smaller catch benches would be safer than one larger catch bench. Tr. II, 114. Davis did not believe that a 15 by 10 foot catch bench would have made contact with the rock. Tr. II, 119. They built the first catch bench just below the Upper Alma seam and the other one approximately 25-30 feet below it. Tr. II, 115. Davis testified that he did not need to contact MSHA about the catch bench issue. Tr. II, 127.

Hamilton testified that he did not believe that a 15 by 10 foot bench would have made a difference. Tr. II, 156. He also testified that he understood item four of the plan to mean that they were permitted to construct two smaller catch benches "as long as we were within the 15-by-10 measurements." Tr. II, 161.

On October 7, 2010, the upper Alma coal seam was being mined, which is a major seam that required a 15 by 10 foot catch bench. Tr. II, 33; SX-3, 11. Belcher testified that the flyrock event that occurred at the mine showed why two small catch benches were not as effective as one larger catch bench. Tr. II, 38. The boulder travelled approximately 400-500 feet in elevation on a steep terrain, exhibiting a "tremendous amount of force," and the catch benches in place were not large enough to catch the rock. Tr. II, 39. Belcher testified that a 15-foot wide catch bench with a 10-foot high berm would have been capable of catching the boulder. Tr. II, 39. Similarly, he believed that if Revelation had complied with the alternate provisions outlined in items 19-24, the boulder would have been stopped. Tr. II, 39-40. Specifically, the alternate provisions required that Revelation stay 20 feet from the outcrop, take a cut down to the coal seam, and maintain the outer portions. Tr. II, 39; SX-3, 12. This would have served as a

[27] The alternate procedures listed in items 19-24 could have been done at the mine. Tr. II, 167.

[28] In other areas where it was not possible to construct a 15 by 10 foot catch bench, Revelation followed the blast remediation plan. Tr. II, 116.

highwall that would prevent rocks and other spoil materials from traveling over the hill. Tr. II, 40.

The danger of not constructing an adequately-sized catch bench is that a large rock rolling down the hill would not be captured, and would roll into an area where there are homes and public roads, posing a risk of injury or death to individuals. Tr. II, 47. Belcher testified that with two smaller catch benches instead of one larger catch bench, it was highly likely that an injury would occur. Tr. II, 47. He reached this conclusion because the boulder would not be caught by the smaller catch benches, and there were multiple families residing in the area where the boulder ended up. Tr. II, 47-48. If an individual were impacted by the boulder at issue here, they would suffer a fatal injury. Tr. II, 49.

The elevation that the rock travelled was approximately 475 feet, and the overall distance that the rock travelled was between 800-1,000 feet. Tr. II, 58-59. The rock took a path down the hill, at times reaching within 50 feet of several homes, before hitting the asphalt road and coming to rest. Tr. II, 57. The impact of the rock hitting the county road created a significant divot.[29] Tr. II, 57-58; SX-4, 25-26.

Taking into account the prior history and the risks involved with mining in steep terrain above populated areas, Belcher determined that Revelation exhibited high negligence. Tr. II, 60-61. Further, the ground control plan provided specific provisions to prevent such an event from occurring, which Revelation chose not to follow. Tr. II, 61.

All three prior events at the mine took place prior to Revelation taking over control of the mine in October 2009. Tr. II, 79-80. The purchaser of a mine inherits the ground control plan because the history of the site's prior occurrences is highly relevant to the plan. Tr. II, 61-62. The blast control plan contains the history of previous events at the mine, so that a new operator would be aware of these events. Tr. II, 63-64. The blast control plan at issue in this case mentioned the previous incident on January 31, 2009. Tr. II, 64; SX-3, 11.

Belcher testified that the operator could have made an appointment to speak with him about amending their ground control plan. Tr. II, 65-66. Prior to October 7, 2010, no one at Revelation contacted Belcher about how to interpret item 4 of the plan or anything regarding

[29] Davis also participated in an investigation, which consisted of assisting or accompanying the Kentucky state inspectors. Tr. II, 96. Davis disagreed with Belcher's conclusion as to the path of the rock, stating that it went 130-140 feet to the right, and did not make contact with the benches. Tr. II, 98-111.

After the evidence had been reviewed, Davis was interviewed by MSHA and the Kentucky investigators. Tr. II, 111. MSHA raised the 15 by 10 foot catch bench issue, and Davis responded that Revelation tried to build such a catch bench in October 2009. The out-slope was too steep, and there was no dirt material, so building the 15 by 10 foot catch bench was not possible. Tr. II, 112.

catch benches. Tr. II, 66-67. However someone at Revelation had contacted MSHA in order to discuss amending a provision of the plan that dealt with drill bit diameters. Tr. II, 67.

Belcher marked the citation as an unwarrantable failure to comply with the ground control plan because the operator was aware of the conditions and there was a deliberate decision to build two smaller benches rather than the one larger one as required by the plan. Tr. II, 67-68.

ANALYSIS

1. Citation No. 8257015 was Properly Issued for a Violation of 30 C.F.R. §77.1000

Citation No. 8257015 was a 104(d)(1) citation issued on December 29, 2010. It was marked Highly Likely, Fatal to 1 person, High Negligence, and Unwarrantable Failure. The Citation states:

> The Operator has failed to follow their acknowledged ground control plan to prevent a flyrock event that occurred on December 21, 2010 during blasting operations. The blast was identified as shot #255 and was detonated at 9:01 am according to the shot report. A blast remediation plan outlining specific blasting safety pre-caution measures had been previously incorporated into the ground control plan and acknowledged on April 26, 2010. A previous flyrock event had occurred at this same mine on November 19, 2008. The purpose of the acknowledged ground control and blasting safety pre-cautions is to prevent a similar occurrence of flyrock. The blasting plan contained in the acknowledged ground control plan for this shot was not followed as follows:1) Sufficient burden was not maintained on the side of the shot toward the dwellings to insure the blast was directed away from the occupied dwellings that were impacted by the flyrocks.2) The shot detonated on 12-21-10 was not completely video recorded during and after the shot as outlined in the plan.3) The maximum amount of explosives allowed to be detonated within an 8 millisecond delay was exceeded. The blast was detonated in rock strata between the Thacker and Cedar Grove coal seams identified as Pit #19, causing 4 separate rocks measuring between 4 x 4 and 13 x 13 to be cast from the blast and land in the yards of two residences located on Big Blue Springs of Blackberry Creek. One of the smaller rocks, measuring approximately 4 by 4 struck the window of a residence occupied by Gary Hatfield. This type of practice presents a high degree of risk of serious injury or death to residents living below the mine. The mine Operator has engaged in aggravated conduct constituting more than ordinary negligence by not following their acknowledged ground control plan. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-13.

The Citation references 30 C.F.R. §77.1000, which states:

The Citation references 30 C.F.R. §77.1000, which states:

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

The Secretary argues that Revelation violated the ground control plan by failing to keep at least 14 feet of burden in front of the shot; by failing to fully record the blast after the video stopped during the shot; and by exceeding the amount of explosives which could be detonated within eight milliseconds.

The Respondent asserts that a flyrock incident alone is not enough to sustain a citation, and that the Secretary must prove the specific grounds of the citation. The Respondent argues that it maintained the proper amount of burden, and the inspector's belief that insufficient burden was used was based on hearsay statements from an unnamed informant, making it unreliable. The Respondent further argues that the Secretary did not submit sufficient evidence that the amount of explosives used exceeded the amounts permitted in the plan.

Based upon the totality of the evidence presented at hearing, the Secretary has met its burden of proving that Revelation violated §77.1000 by failing to follow its ground control plan in three key respects.

First, Respondent failed to keep at least 14 feet of face burden as required by the ground control plan. This requirement was to ensure that "all blasts will be directed away from homes." Tr. I, 68; SX-16. Belcher conducted a thorough investigation, which involved numerous interviews, visits to the sites, and reviews of plans, and determined that the minimum burden was not being maintained. Tr. I, 50-53, 64-65, 108-112. I credit Belcher's informed testimony that his investigation revealed that the materials were being loaded out too quickly and the shots were being encroached upon. Tr. I, 71, 117-119. As evidence of this encroachment, Belcher pointed to four holes that were drilled but not loaded. Tr. I, 117-118. Failing to leave sufficient burden makes it highly likely that a flyrock event, like the one that occurred in this case, will happen. Tr. I, 96, 98.

Second, the Respondent failed to fully record the blast, as required by the ground control plan. The plan stated, "A video camera will be used to monitor each shot and record the area prior to, during and after the blast." SX-16, 8. Shots occur quickly, often over the course of only a few seconds, so recording the shot provides the operator the opportunity to review the shot. Tr. I, 76. The video evidence submitted at hearing, as well as the testimony, shows that during the recording of the shot, the camera switched off. Tr. I, 73-74; SX-16. Belcher estimated that the video only captured 30-40% of the shot. Tr. I, 77.

The Respondent argued that even though the camera accidentally shut off, it still complied with the requirements in the ground control plan. It argues that the ground control plan requires taping before, during, and after the shot, but does not provide specific time frames for

taping before and after the shot. Shot 255 consisted of 30 blasts, spaced eight milliseconds apart, so that the shot took less than one quarter of a second. Therefore, Respondent argued that even though the video shut off after a few seconds, there was no violation of the plan. *Resp. Post-Hearing Brief*, at 13-15.

Respondent's hypertechnical understanding of the taping provision in the ground control plan is unreasonable. The purpose of the taping requirement is to allow blasters and other mine personnel the opportunity to review the shot. This includes reviewing the conditions before, during, and after the shot. The speed at which a shot occurs further emphasizes the need for a full video of the shot, which includes the period before and after. According to Respondent's interpretation of the plan, a half-second video would comply. However, such a video would provide little informative value in reviewing the shot. The ground control plan requires a reasonable taping of the area before and after the shot, such that the video may be used for the purposes it was intended. In this instance, the video shut off prior to a reasonable taping of the period after the shot. Therefore, I find that the Respondent violated this provision of the plan.

Third, the Respondent violated the ground control plan by exceeding the amount of explosives that could be detonated within each eight millisecond interval. The ground control plan contained a scale distance formula that required an eight-millisecond delay. Tr. I, 83. After reviewing the blast record provided by the company, Belcher determined that two of the holes overlapped each other, thereby not complying with the eight-millisecond delay requirement. Tr. I, 83-84, 88, 135-136; SX-17. At hearing, the issue of the correct maximum weight of explosives per eight millisecond interval was in dispute. Various witnesses and documents represented that the number was 254.9, 419, and 419.5. Tr. I, 91-92, 171-173, 231-234; SX-17. The discrepancies between the original and corrected blast reports appeared to be largely irrelevant, as both blast reports provided that "Max. Allow. Chg. Wt. per 8 ms w/o Seismograph" was 354.8 pounds. SX-17; RX-A. No seismograph was permitted under the plan, making the 354.8 figure the appropriate one. This figure corroborates Belcher's analysis and conclusion.

Any one of these violations of the ground control plan would constitute a violation of §77.1000. The Secretary has more than met its burden in proving that the combination of the three was a violation of the regulation.

The Respondent's repeated admonitions that the hearsay evidence of an anonymous miner is inherently unreliable are misplaced. *See e.g. Resp.'s Post-Hearing Brief*, at 11. The Commission rules explicitly allow for the maintenance of anonymity for miner informants. 29 C.F.R. §2700.61. "The purpose of the privilege is to protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation." *Bright Coal Co., Inc.*, 6 FMSHRC 2520, 2522-2523 (Nov. 1984). Furthermore, the Commission's rules explicitly allow for the admission of hearsay evidence, when such evidence is "material and relevant." *Mid-Continent Resources, Inc*., 6 FMSHRC 1132, 1135 (May 1984); *see also REB Enterprises, Inc*., 20 FMSHRC 203, 206 (March 1998); 29 C.F.R. §2700.63. Moreover, the Commission has stated that:

> [P]roperly admitted hearsay testimony, and reasonable inferences drawn from it, may constitute substantial evidence upholding a judge's decision if the hearsay testimony is

> surrounded by adequate indicia of probativeness and trustworthiness. Hearsay testimony "may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence."

Id. at 1135-1136 (citations omitted). I find that the miner informant's hearsay information told to Belcher was both probative and trustworthy. To exclude it for the reasons provided by Respondent would eviscerate the miner informant rule.

2. The Violation was Significant & Substantial

I further find that the conditions were Significant and Substantial in nature. S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

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

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: "We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

Further, "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." and "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S" *Cumberland Coal Resources, LP*, 33

FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.,* 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996)). The Commission and Courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S 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, 135-36 (7th Cir. 1995).

The first element of *Mathies*—the underlying violation of a mandatory safety standard—has been clearly established. As to the second element of *Mathies*—a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation—has also been clearly established by the record. As discussed *supra*, the cited condition contributed to the danger of a flyrock incident.

I find that the third element of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in an injury—has been satisfied here. The hazard of large rocks flying into a populated area and a public road was likely to lead to an injury. Under *Mathies*, the fourth and final element that the Secretary must establish is that there is a reasonably likelihood that the injury in question will be of a reasonably serious nature. The type of injury caused by a flyrock making contact with an individual is death.

Respondent argues that a violation can only be found to be S&S if it affected the health and safety of miners. In the instant case, Respondent argues that no miners were in danger, and the Secretary presented no evidence that flyrock came anywhere near where a miner or other employee of the mine could have been injured. Respondent argues that the Secretary failed to present evidence showing how the inadequate taping would reasonably result in a serious injury.

Respondent's argument that a violation may only be S&S if it can lead to a serious injury of a miner, is both bizarre and incorrect. While it is true that Congress passed the Mine Act to ensure the health and safety of miners, the Commission has never interpreted S&S in such a narrow fashion so as to limit it to the health and safety of miners. Both §104(d) and the seminal Commission cases that developed the criteria for S&S spoke only of the type of injury, not the status of the individual who suffered such injury. *See Mathies*, 6 FMSHRC 1 (Jan. 1984), *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011); *Musser Engineering, Inc. and PBS Coals, Inc.,* 32 FMSHRC 1257 (Oct. 2010). One need not come up with an example that illustrates the absurdity of this position, because this case does so in spades. To say that a violation that placed persons who resided in the path of flyrocks at grave risk was not significant and substantial because they may not meet the statutory definition of miners is absurd. The Mine Act makes no such distinction when persons lives are at risk.

3. The Violation was the Result of High Negligence and Unwarrantable Failure

In the citation at issue, Belcher found that the violations were the result of high negligence and an unwarrantable failure to comply with the standard. High negligence is described as when "[t]he operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." 30 C.F.R. §100.3(d), Table X. Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." *Id.* Low negligence is served for situations where there are "considerable" mitigating circumstances. *Id.*

In the instant case, Revelation was on notice that there had been previous flyrock events at the mine. The S-4 Netley Branch Mine had a Blast Remediation Plan as part of the Ground Control Plan, which indicated that there had been a previous flyrock accident. SX-16; Tr. I, 126-127. Furthermore, Revelation was on notice that strict compliance with the blast remediation plan was necessary in order to prevent future flyrock accidents. Tr. I, 127, 180.

The plan was explicit in its requirements that sufficient burden be left in front of the shot, that the shot be videotaped, and that specific amounts of explosive be used. Tr. I, 66, 73, 81-82; SX-13. Despite being on notice of these requirements, Revelation violated the plan in each respect. The Respondent presented some evidence that Wallen fell while trying to videotape the shot because it was slick where he was standing. Tr. I, 251. However, the Respondent took no precautions to avoid this possibility, such as using a tripod, despite the adverse weather conditions that made a fall likely. Even laypersons know that attempting to hold a video camera by hand can produce images flawed by motion. Wallen's lack of concern for producing a stable, clearly focused video of sufficient length to be usable for post-shot analysis directly resulted in a violation. Furthermore, Revelation presented no mitigating circumstances regarding the other two violations that make up this citation. Revelation's choice to hire a blasting contractor does not mitigate its negligence, as the mine operator bears ultimate responsibility to ensure that the ground control plan is followed at all times. *See Speed Mining*, 528 F.3d 310 (4th Cir. 2008); *Buffalo Mining Co*., 1 FMSHRC 1740 (Oct. 1979) (ALJ).

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id*. at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995).

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

Manalapan Mining Co., 2013 WL 754106, *4 (Feb. 2013), citing *IO Coal*, 31 FMSHRC 1346 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all factors must be considered. *Id.*

The cited condition involved three violations of the plan, each of which was in place to prevent a flyrock incident. Though they occurred quickly, these three violations in a single shot was somewhat extensive. The factor of the length of time of the violation is inapplicable here, as shots occur quickly, and any violations would occur just as quickly.

The violation at issue here posed a high degree of danger. The inspector testified that each of these three violations increased the likelihood of a flyrock accident, which occurred in this instance. Tr. I, 103-104, 178-179. The flyrocks from this site were large in size and travelled to areas where people live and travel. Tr. I, 46. Additionally, the operator had been placed on notice that greater efforts were necessary for compliance. As noted *supra*, there were previous flyrock events at this site, and the mine was on a Blast Remediation Plan to prevent future flyrock accidents. Furthermore, this mine site was previously cited for flyrock events, and past citations are relevant to the issue of whether Respondent had notice. *IO Coal*, 31 FMSHRC at 1353-1355. Respondent argued that these citations were issued prior to its taking over the mine, however such arguments do not negate the notice that these citations provided. Flyrocks can cause fatal injuries, yet Respondent failed to strictly follow their Ground Control Plan as required. The operator took no efforts in abating the violative condition prior to the flyrock incident and citation. I find the unwarrantable failure determination to be correct.

4. <u>The §103(k) Order No. 8257014 was Properly Issued</u>

Issuance of the 103(k) Order was necessary and proper in this instance. Section 103(k) of the Act provides, in relevant part, that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. §813(k).

In a companion case to the instant case, the Commission confirmed that a large rock leaving a mine and landing in a residential area, with no injuries, constituted an "accident" for purposes of issuing a 103(k) Order. *Revelation Energy*, 2013 WL 6792685 (Nov., 2013). The Commission rejected the operator's arguments that the definition of "accident" in §103(k) was

limited to the more narrow definition of "accident" in the definitions provided in 30 C.F.R. §50.2(h), stating that the latter definition only applied for reporting purposes. *Id.* at *4.

> Section 50.2 plainly limits its application to terms "used in this part," that is, Part 50 of MSHA's regulations (the reporting regulations). 30 C.F.R. § 50.2. In contrast, the definition of ""accident" in section 3(k) applies to the entire Mine Act, as section 3 of the Mine Act specifically states that the definition of the term "accident" set forth in paragraph (k) applies "[f]or the purpose of this Chapter …." 30 U.S.C. § 802. Thus, section 3(k) is the applicable provision for purposes of determining what constitutes an "accident" under section 103(k).

Id. The Commission "easily" concluded that such a flyrock event was an "accident" for purposes of §103(k). The Commission's decision is directly on point and controlling for this case.

5. Citation No. 8257006 was Properly Issued for a Violation of 30 C.F.R. §77.1000

Citation No. 8257006 was a 104(d)(1) citation issued on October 22, 2010. It was marked Highly Likely, Fatal to 1 person, High Negligence, and Unwarrantable Failure. The Citation states:

> The Operator failed to follow their acknowledged ground control plan to prevent a flyrock event that occurred on October 7, 2010, during blasting operations. A blast remediation plan outlining specific blasting safety pre-caution measures was incorporated into the ground control plan and acknowledged on March 17, 2009 in response to a flyrock event that occurred on January 31, 2009. The purpose of that acknowledged plan was to prevent a similar occurrence of flyrock. Two smaller than designed safety catch benches (5 high x 10 wide) were constructed, instead of the designed size of 10 high x 15 wide safety catch bench, prior to the October 7th blast. The ground control plan states that when the catch bench cannot be constructed, then a solid 20 foot wide berm will be left at the outcrop edge of the pit. Rolland Davis, General Mine Manager stated that he was familiar with the acknowledged ground control plan and knew what size the safety catch bench should have been before blasting operations occurred. The blast was detonated in an area above the Upper Alma coal seam, causing a large rock measuring 4.5 x 4.5 x 6, to leave the blast site, and roll down the hillside, jump the safety catch benches, leave the mine property and continue rolling down the hillside until crossing a county road (Old Shoe Branch of Barrenshee Creek) and landing in the creek. The large rock narrowly missed striking two residences by approximately 40 to 50 feet. This type of practice presents a high degree of risk of serious injury or death to residents living below the mine. The mine Operator has engaged in aggravated conduct constituting more than ordinary negligence by not following their acknowledged ground control plan. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-1.

The Citation references 30 C.F.R. §77.1000, which as discussed *supra*, requires an operator to follow the ground control plan.

The Secretary contends that item four of ground the control plan required Revelation to build a 15-foot by 10-foot catch bench, when practical. And in the instant case, it was practical. As such, Revelation's construction of two 10-foot by 5-foot catch benches in lieu of one 15-foot by 10-foot catch bench was a violation of the plan. If the larger bench was not practical, then the Secretary contends that the plan required Revelation to follow the alternate provisions laid out.

The Secretary argues that the Respondent's failure to comply with the ground control plan was highly likely to result in fatal injury to at least one person. This is due to the fact that the terrain below the S-1 Hunt's Branch Mine is quite steep and slopes sharply towards the homes below, where many residents live. Further, the Secretary argues that the violation was S&S because an eight-ton flyrock is highly likely to result in fatal injury to persons in proximity to it.

The Secretary argues that Revelation was highly negligent in failing to comply with their blast remediation plan because Revelation knew the mine had a propensity to produce large flyrock, knew that the mine sat above homes and a public road, and still did not comply with the catch bench requirements of the plan. The Secretary argues for the same reasons that the violation was an unwarrantable failure, adding that Revelation had not been in compliance for almost a year.

With regard to Citation No. 8257006, the Respondent argues that the ground control plan only required it to build a 10 by 15 foot catch bench if practical. Relying on the indefinite article in the sentence, Respondent further argues that the alternative procedures were only necessary if no catch bench could be constructed. The Respondent also argues that even if a 10 by 15 foot catch bench had been constructed, there is no guarantee that such a catch bench would have been able to stop the flyrock at issue.

Respondent argues that the violation was not S&S because the 10 by 15 foot catch bench would not have caught the flyrock, meaning that the two smaller catch benches did not make it likely that a serious injury would occur. Respondent argues that the violation was not high negligence or unwarrantable failure because it was either due to a reasonable interpretation of the plan, or an honest mistake. For these reasons, Respondent argues that if the violations are upheld the penalties should be reduced and modified to 104(a) citations, with low negligence and no S&S designation.

Based upon the totality of the evidence presented at hearing, the Secretary has met its burden of proving that Revelation violated §77.1000 by failing to follow its ground control plan in constructing its catch bench.

Paragraph four of the Blast Remediation Plan, which is quoted in full *supra*, states in relevant part that a "15 foot catch bench...with a 10 foot high berm, will be installed on all major seams...to be mined at all times when practical, prior to blasting in the area." SX-3. The provision further states that "[i]n the event that a catch bench cannot be constructed, then items [19-24] of the Blast Remediation Plan for Areas where a Catch Bench is not constructed will apply." SX-3. The plain language of the plan, combined with the inspector's testimony, makes it clear that the Respondent was required to build a 10 by 15 foot catch bench if it was practical to do so. If the conditions made the construction of such a catch bench impractical, then the Respondent was required to follow the alternate procedures detailed in the plan. Rather than building a 15 by 10 foot catch bench at the Upper Alma seam, which is one of the "major seams" specified in the plan, Respondent constructed two catch benches that measured between five and 10 feet high and five feet wide. Tr. II, 25, 114.

Respondent's interpretation of the plan is unreasonable as it essentially makes much of the plan meaningless. The Respondent argued that it was impractical to construct a 10 by 15 foot catch bench below the Upper Alma Seam. Tr. II, 119, 124-128, 144. Therefore, instead of following the alternate procedures, or consulting MSHA about its alternate interpretation, it chose to build two five by ten foot catch benches. The Respondent argued that because the plan specified that the alternative procedures should be followed "in the event that *a* catch bench can't be constructed," rather than stating "in the event that *the* catch bench can't be constructed," the alternate procedures were only required when no catch bench could be constructed.[30] (emphasis added.) Relying entirely on the use of the indefinite article ("a"), rather than the definite article ("the"), Respondent argued that it took this course of action because it interpreted the alternate procedures in the plan as only being required in no catch bench could be constructed.

Based on this interpretation, Respondent was free to determine the practicality of building the required catch bench, and if it determined that it was impractical, it could build whatever size catch bench it so desired. The Respondent's argument transforms the size requirement in the plan to a mere suggestion that can easily be ignored so long as some sort of catch bench was constructed.[31] The Respondent cites the general principal of contract law that the interpretation "which gives meaning to all words and provisions of a contract is favored." *Eastern Gas and Fuel Associates v. Mid-west Raleigh, Inc*., 374 F.2d 451, 454 (4th Cir. 1967). However, the Respondent's contorted attempts to give meaning to a single indefinite article essentially negates the meaning of the entire provision.[32] I do not credit Respondent's witnesses

[30] Respondent similarly suggested that the provision should have read "*such* catch bench."

[31] Respondent focused much of its evidence and argument at hearing in trying to prove that construction of a 15 by 10 foot catch bench was impractical. However, after the citation, a 15 by 10 foot catch bench was constructed. Tr. II, 82-83.

essentially negates the meaning of the entire provision.[32] I do not credit Respondent's witnesses as to their contemporaneous interpretation of the provision. If anything, this interpretation appeared to be a *post hoc* rationalization for the open flouting of a plan provision.

I find that the provisions of the ground control plan gave Respondent two options. The first option was that it was required to construct a 15 by 10 foot catch bench, if conditions made such a catch bench practical to construct. If it was impractical to construct a 15 by 10 foot catch bench, then Respondent was required to follow the alternate procedures in the plan. It could not simply construct one or several smaller catch benches to suit its convenience.

Respondent's second argument concerning the path of the flyrock is similarly unavailing. At hearing, Respondent presented testimony of how the flyrock followed a different path than that presumed by the inspector and that a 10 by 15 foot catch bench would not have been any more successful at stopping the flyrock that was projected on October 7, 2010. Tr. II, 102, 105. Section 77.1000 does not require that a flyrock occur for the regulation to be actionable. The regulation simply requires that an operator follow the ground control plan, and any failure to do so is a violation of the regulation. I find the inspector's testimony that his investigation concluded that the flyrock followed such a path as would have been stopped by the 10 by 15 foot catch bench to be plausible. However even if this were not the case, and Respondent proved that the flyrock would not have been stopped by the required catch bench, it's failure to construct the catch bench would still have been a violation of the regulation.

6. The Violation was Significant & Substantial

I further find that the conditions were Significant and Substantial in nature. The first element of *Mathies*—the underlying violation of a mandatory safety standard—has been clearly established. As to the second element of *Mathies*—a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation—has also been clearly established by the record. The 15 by 10 foot catch bench required in the plan, as well as the alternate procedures, were intended to prevent flyrock from reaching public areas. Failure to construct such obstacles to flyrock contribute to the hazard of a large flyrock entering public areas and making contact with individuals.

I find that the third element of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in an injury—has been satisfied here. The hazard of a rock several feet in diameter and weighing several tons flying into a populated area and a public road was likely to lead to an injury. Under *Mathies*, the fourth and final element that the Secretary must establish is that there is a reasonably likelihood that the injury in question will be of a reasonably serious nature. The type of injury caused by a flyrock making contact with an individual is death.

[32] Respondent's argument that every letter and word of the plan must be accepted in only its strict literal meaning, without consideration of the purpose of each provision or the possibility of mistake, is further weakened by the fact that the section outlining the alternative procedures had an enumerating error.

7. The Violation was the Result of High Negligence and Unwarrantable Failure

In the citation at issue, Belcher found that the violations were the result of high negligence and an unwarrantable failure to comply with the standard. The preamble to the Blast Remediation Plan stated that a flyrock accident had occurred at the mine in 2009 causing a large boulder and another rock to project off the mine property. SX-3, 9; Tr. II, 27-28, 62-64. The inspector testified that the mine site had at least three or four different flyrock events in the past. Tr. 23-24. Therefore, Revelation was aware that the mine had a propensity to produce large flyrocks. Furthermore, Revelation knew that the mine was located above residences and a county road, and that the terrain between the mine and these areas was very steep. Tr. II, 23-24, 28, 57-59. It was precisely because of these conditions and the mine's history that the Blast Remediation Plan specified that Revelation was required to construct a 15 by 10 foot bench or take alternate procedures. SX-3, 16; Tr. II, 24, 37. In spite of this information, Revelation constructed two smaller catch benches, at the minimum size that their equipment could construct them. Tr. II, 61, 68, 130-132.

Revelation argued that it employed a reasonable interpretation of its ground control plan. However, as I have found that interpretation to be unreasonable, I do not find that it constituted a mitigating circumstance. If Revelation believed at the time that its interpretation of the plan was reasonable, then it should have called MSHA and asked for advice. Tr. II, 66-69. Alternately, if it believed that its method of building two smaller catch benches was safer, then it should have sought to modify that portion of the plan. Tr. II, 67. Revelation availed itself of neither of these options. Therefore, I find that violation was the result of high negligence.

The violation was also an unwarrantable failure to comply with the standard. As discussed *supra*, the operator had knowledge of the violation, it knew the history of previous flyrock events, and the violation at issue posed a high degree of danger. Furthermore, the non-compliant catch benches were approximately half the size of those required and had been in place for a significant period of time prior to the citation. Revelation constructed these catch benches in open defiance of the plan. Prior to issuance of the citation, Revelation took no efforts in abating this condition. For the foregoing reasons, I find that the violation was an unwarrantable failure.

8. Penalty

Having affirmed the Secretary's determinations in all respects no deviation in the civil penalty is necessary. I have considered each of the six statutory criteria set forth in Section 110(i) of the Act, and find that the Secretary's proposed penalties are appropriate. 30 U.S.C. §820(i). As discussed *supra*, the mines had a history of previous violations, Respondent had high negligence in each citation, and these citations were found to be S&S. The parties have stipulated that the proposed penalties will not affect Revelation's ability to remain in business and that Revelation abated the violations in good faith. JX-1; Tr. I, 19-20. Within the calendar year prior to the issuance of Citation 8257006, Revelation produced 304,734 tons of coal, with

the S-1 Hunt's Branch Mine producing 177,984 tons. SX-10. Within the calendar year prior to the issuance of Citation 8257015, Revelation produced 604,734 tons of coal, with the S-4 Netley Branch Mine producing 425,000 tons. SX-10.

ORDER

For the reasons set forth above, the citations are **AFFIRMED** as indicated. Revelation Energy, LLC, is **ORDERED** to pay $23,800.00 for the violation set forth in Citation No. 8257006 and $52,500.00 for the violation set forth in Citation No. 8257015. Revelation shall pay the Secretary of Labor the total sum of $76,300.00 within 30 days of the date of this decision.[33]

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

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/mzm

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 6, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2012-894-M A.C. No. 02-00112-287258 MWX
v.	:	
MARCO CRANE, Respondent	: :	Mine: Freeport McMoRan Miami Inc.

DECISION GRANTING SUMMARY DECISION
DISMISSAL ORDER

Before: Judge Gill

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case concerns a single 104(a) citation, Citation No. 6585510, and was originally set for hearing on October 1 and 2, 2013.

PROCEDURAL HISTORY

On August 9, 2013, the Respondent, Marco Crane, filed a motion for summary decision. The Secretary of Labor opposed this motion and filed a memorandum in response on August 23, 2013. After reviewing the pleadings, I determined that the citation was issued under the wrong standard. The Commission's case law suggested that the most appropriate response would be to order the Secretary to show cause why the citation should not be amended. The hearing was continued, and the Secretary was ordered to show cause as to why the citation should not be modified from a violation of 30 C.F.R. § 56.16007(b) to a violation of 30 C.F.R. § 56.14100(c) by filing a written explanation with the court. In the order to show cause, I indicated that I was inclined to grant the operator's motion for summary decision if the citation was not amended. The Secretary responded to the order, and Marco Crane requested and was granted permission to file a reply to the Secretary's response.

UNDISPUTED FACTS

Marco Crane, a crane company, was providing general hooking and hoisting services to the Freeport McMoRan Miami Inc. mine, when it was cited for a violation of 30 CFR § 56.16007(b) on February 28, 2012. Section 56.16007(b) requires that hitches and slings used to

hoist materials shall be suitable for the particular material handled. The inspector issued a citation after finding two frayed slings among the items stored in the storage compartment of a flatbed truck trailer during his inspection. The inspector did not observe the damaged slings being used during his inspection, and he destroyed them after issuing the citation. The trailer where the slings were stored was not capable of hoisting materials. The slings were not in use during the inspection, and the truck was not being used to hoist anything.

THE PARTIES' ARGUMENTS

In his response, the Secretary declined to seek leave to modify the citation. Instead, the Secretary argues that the cited standard was the appropriate standard. He contends that the phrase "used to hoist materials" was included to clarify that 30 C.F.R. § 56.16007(b) applies to slings that are intended for the purpose of hoisting material, as opposed to slings meant for other purposes, and that the standard does not require a defective sling to be hoisting material during an MSHA inspection for a violation to occur. Finally, the Secretary argues that the inspection reveals that the defective slings were used by the Respondent to hoist material.

In its reply to the Secretary's response, Marco Crane argues that the phrase "used for hoisting" means that the slings in question must be in use, or at least have been used, before a citation can be issued, and the record does not support that the slings were "intended to be used" or "damaged from use." The operator further argues that the Secretary's interpretation of the regulation makes it virtually impossible to comply with the standard, and that the Secretary has provided neither justification for deference to its interpretation nor notice of its intended interpretation.

ANALYSIS

The granting of motions for summary decision by a Commission ALJ is governed by Commission Rule 67, 29 C.F.R. §2700.67. This rule states that a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

As discussed in the order to show cause, I find that there are no contested issues of material fact in relation to the citation at issue. This satisfies the first requirement of the summary decision standard.[1] Because that part of the standard has been satisfied, I must examine whether the moving party is entitled to summary decision as a matter of law. For the reasons discussed below, I find that the undisputed facts in the pleadings, read in the light most favorable to the Secretary, are not sufficient to prove a violation of 30 C.F.R. § 56.16007(b).

The citation at issue, Citation No. 6585510, was issued as a violation of 30 C.F.R. § 56.16007(b). This regulation states that "[h]itches and slings used to hoist materials shall be suitable for the particular material handled." 30 C.F.R. § 56.16007(b). The interpretation of this

[1] The Secretary argues that Marco Crane's denial of a request to admit that the defective slings were not tagged out of service constitutes a disputed issue of material fact, but that is not a material fact under the standard at issue here.

citation is disputed by the parties, with the conflict centered around the phrase "used to hoist materials."

Commission case law states that if the meaning of a regulatory provision is plain, the provision should be interpreted so as to give effect to that plain meaning. *Exportal Ltd. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). When "a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Martin Cnty. Coal*, 28 FMSHRC 247, 255 (May 2006). In determining whether a provision's meaning is plain, courts apply all of the traditional tools of interpretation, including both the language of the particular provision at issue and the language, structure, and purpose of the statutory scheme as a whole. *Tacoma, Wash. v. FERC*, 331 F.3d 106, 114 (D.C. Cir. 2003); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001). If the regulation is ambiguous, the Court will defer to the Secretary's interpretation of the regulation unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

To prove a violation of 30 C.F.R. § 56.16007(b), the Secretary would have to present evidence of 1) use of a hitch or sling 2) to hoist materials. The Secretary would then have to present evidence that 3) the sling is inappropriate for the particular materials handled. This gives effect to the full text of the regulatory provision and is reasonable in the context of the regulatory scheme. There is potential ambiguity in that the regulation does not specify past, present, or future use, but the remainder of the provision indicates that something more than mere availability for use is meant. The word "particular" is key in this analysis, as it is impossible to know whether the slings are "suitable for the particular materials handled" absent evidence that the slings have actually been, or will actually be, used to hoist materials. Thus, an interpretation that reads actual use out of the regulation is erroneous. The reading proposed by the Secretary, stating that actual use is not required and that "slings used to hoist materials" means slings that are generally intended for the purpose of hoisting materials, as opposed to other types of slings, is plainly inconsistent with the regulation.[2]

The Secretary's interpretation of the provision is problematic because would have far-reaching results that are inconsistent with the regulation. The Secretary's concern with potential, inadvertent use of inappropriate slings features heavily in his response to the order to show cause. He explains that the Respondent was cited because worn out slings were found in a storage compartment with other slings. Because these slings were of a type that are generally "used to hoist materials" and were stored with other, undamaged slings, the Secretary fears that an inattentive miner could potentially retrieve and use a damaged sling for hoisting. This is a valid concern, but it is not the type of hazard that this regulation is intended to address.

[2] The Secretary misconstrues the Court's interpretation of the standard, arguing that under the Court's interpretation, an operator could only be cited for a violation of 30 C.F.R. § 56.16007(b) if an MSHA inspector observed damaged or otherwise improper slings in use during an inspection. This is not the case. Witness testimony or circumstantial evidence could be used to establish that a sling is not suitable for the material it is, was, or would soon be used to lift.

The Secretary's proposed interpretation only makes sense in the context of slings that are inappropriate for use because they are damaged. Different types of slings are appropriate for different types of lifts. If several types of slings are available in an operator's on-site supply storage areas, it is also possible that an inattentive miner could select the wrong type of sling to lift a load. Thus, under the Secretary's version of the regulation, an operator could be cited for simply having multiple different types of slings available. This is an absurd result. Requiring that slings be appropriate "for the particular material handled" suggests that Section 56.16007(b) contemplates the on-site availability of multiple different types of slings. This further supports the proposition that the regulation is concerned with the actual use of slings that are inappropriate for the particular material handled, not the mere availability of inappropriate slings.

The overall structure of the statutory scheme also counsels against the Secretary's interpretation. The Secretary's concern with the potential for inadvertent use of damaged slings is addressed under a different standard. Section 56.14100(c) requires that "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected." 30 C.F.R. § 56.14100(c).[3] The fact that this provision addresses the hazard posed by the availability of damaged equipment, which would include damaged slings, further indicates that the cited standard, 30 C.F.R. § 56.16007(b), was not meant to deal with that specific hazard. A citation under this standard would address the risk of inadvertent use that the Secretary has identified, and Citation No. 6585510 should have been modified accordingly.

Having established that this citation requires something more concrete than the mere availability of inappropriate slings, I find that the Secretary cannot prove a violation of the cited standard based on the facts in the record. In addition to discussing the risk of accidental use, the Secretary states that there is evidence that the damaged slings had actually been used in violation of the regulation. In support of this contention, the Secretary states that

> "Respondent is a crane company that uses slings to lift heavy objects. At the time of the inspection the lifting involved the rebuilding of haul trucks and other equipment. The worn slings at issue in this case were found in a box with undamaged slings in the toolbox on a flatbed truck. The slings were damaged from use. They did not become damaged sitting in the toolbox."

Secy. Response Ord. Show Cause 4 n.3

The Secretary expects me to infer, based on the fact that that the damaged slings had been found in a toolbox in one of Marco Crane's flatbed trucks, that the slings had been used to hoist materials. This is not an unreasonable inference, but it is only the first step in a longer chain of inferences that I would have to make in order to conclude that a violation occurred. In addition

[3] I note that because there is a factual dispute over whether the slings had been tagged out or otherwise taken out of service, a citation under this standard would survive a motion for summary judgment based on the pleadings.

to concluding that they had been used to hoist materials, I would have to conclude either that the damage was caused by inappropriate use instead of normal wear and tear, or that the slings had been used in their damaged state. In this case, however, the sling was found in a storage compartment in a truck that both parties admit was incapable of hoisting anything at all on the day of the inspection. The Secretary has presented no additional evidence with regard to what materials the slings had been used to hoist, which makes it unreasonable for me to reach either one of those conclusions. Moreover, there is no evidence whatsoever that the slings would actually be used in the future.

The regulations promulgated under the Mine Act are intended to protect the safety and health of miners, and as a Commission judge I have a duty to do the same. I also have a duty to interpret and apply these regulations fairly and correctly, and to hold the Secretary to his burden of proof. It would be inappropriate to stretch and twist the plain meaning of a regulatory provision so that the Secretary can prove a citation that was issued under the wrong standard, but that is what the Secretary is asking me to do. This request is especially problematic in light of the availability of a much more appropriate provision and the explicit opportunity I provided to amend the citation.

Reading the undisputed facts in the light most favorable to the non-moving party, I find that a reasonable finder of fact could not determine that the Secretary has proved a violation of 30 C.F.R. § 56.16007(b). Wherefore, the operator's motion for summary decision is **GRANTED**.

ORDER

Wherefore, it is **ORDERED** that Citation No. 6585510 is **VACATED** and Docket No. WEST 2012-894-M is **DISMISSED**.

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

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June 10, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. TUSCALOOSA RESOURCES Respondent.	: : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2012-490 A.C. No. 01-03390-288534 Mine: Highway 59 Mine No. 1

DECISION

Appearances: Sophia Haynes, Office of the Solicitor, U.S. Department of Labor
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Josh Bennett, Maynard Cooper & Gale, PC,
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Before: Judge Simonton

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 Tuscaloosa Resources, Inc. at the HWY 49 No. 1 mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This case includes one 104(d)1 citation and one 104(d)1 order issued on November 11, 2011 for a total combined penalty of **$140,000.00**. The parties presented testimony and documentary evidence at the hearing held in Birmingham, Alabama beginning January 15, 2014.

I. CASE SUMMARY

Tuscaloosa Resources, Inc. (Respondent) operated the surface coal HWY 59 No 1. mine ("HWY 59 Mine") from August 2009 through November 2011. Tr. 603. In order to remove the economically valuable layers of coal present in this area, Respondent had to first remove a layer

of sandy topsoil 60 feet deep and then a 40 foot deep layer of shale rock before the first coal seam was exposed. Resp. Br., 5-6; Tr. 70, 606. Per MSHA regulations, Respondent submitted a ground control plan prior to beginning operations which was acknowledged by MSHA. Tr. 258. This plan stated that during the development of highwalls, hazardous conditions, including movement of the highwall, would be eliminated or workers would be removed from that area. Sec'y Ex. 9, 7 section (g) (6); Tr. 681, 685. The plan did not indicate that berms would be used to control or eliminate movement in highwalls. Tr. 263, 692.

In January 2011, a 103(g) complaint was filed with MSHA, claiming that a large section of a highwall had collapsed and had not been cleaned up. Tr. 78, 81. MSHA Inspector James Brodeur investigated this complaint and confirmed that a large slide had occurred in the Northwest area of the mine in a location with water saturated soil but confirmed that no injuries had occurred. Tr. 82. During the investigation of the complaint, Respondent's management informed Brodeur that they were moving away from this area to mine in another direction. Tr. 90. Inspector Brodeur did not issue any citations or orders during the January 2011 event. Tr. 89. On May 10, 2011, MSHA Inspector Jarvis Westerly examined the HWY 59 mine as part of a regular inspection and did not find any highwall violations. Tr. 350-51.

On October 5, 2011 a massive highwall failure occurred at the active face of the HWY 59 Mine. Tr. 381. A 230 foot wide section of the highwall slid out from the toe, overtopping a protective berm and sweeping a haul truck and driver over the adjacent bench lip. Tr. 98-99. The haul truck driver, Mr. Willis Jones, was severely injured, suffering a broken sternum, internal bleeding, concussion, and bruised heart. Tr. 98

Respondent immediately reported the incident and MSHA Inspector Brodeur investigated the accident that day. Tr. 93. Upon arriving at the scene, Inspector Brodeur noted that this slide had occurred in the West end of the pit in the same general proximity as the January slide. Tr. 97. Inspector Brodeur took photos of the accident scene and interviewed witnesses, including the excavator operator who was closest to the highwall at the time of the slide. Tr. 97, Sec'y Ex. 5, 15-16.

After concluding his investigation, Inspector Brodeur issued one 104(d)1 Citation and a separate 104(d)1 Order on November 11, 2011. For Citation No. 8521047, Brodeur alleged that Respondent had violated 30 CFR 77.1004(b) and failed to follow its Ground Control Plan by not implementing adequate controls or properly barricading the area in which the failure occurred. Sec'y Ex. 5. For Order No. 8521048, Brodeur alleged that Respondent had violated 30 CFR 77.1713(a) in failing to identify overhanging material, loose rocks, water seepage, and overfilled catch benches at the highwall during required daily inspections. Sec'y Ex. 6. Inspector Brodeur alleged that both violations were the result of the Respondent's high negligence and constituted an unwarrantable failure to comply with the Mine Act. Sec'y Ex. 5; Sec'y Ex. 6.

The Secretary issued proposed penalty assessments for these alleged violations on May 17, 2012. Sec'y Proposed Assessment Exhibit A. Respondent timely contested both alleged violations and the parties engaged in lengthy discovery efforts. On May 2, 2013, I issued a prehearing order that required the parties to submit a prehearing report that detailed agreed upon stipulations and remaining issues of contention. May 2, 2013 Pre-Hearing Order, 2. The pre-

hearing order also notified the parties that absent exigent circumstances witnesses and exhibits not disclosed within their prehearing report would be excluded from the record. *Id*. Three days prior to hearing, after the parties had exchanged the required pre-hearing reports and participated in a pre-hearing teleconference, the Secretary submitted a Motion to Amend to Cite the Standard in the Alternative for Citation No. 8521047. Sec'y Motion to Amend, January 10, 2014. Respondent opposed the motion to amend, alleging bad faith on the part of the Secretary and stating that such a change would prejudice their ability to defend themselves. Resp. Motion in Opposition, January 14, 2014. I denied the Secretary's motion, finding that the motion was not timely filed, the discovery process had not provided Respondent notice of an alleged failure to adhere to the "prudent engineering standard" governed by the alternative 30 CFR 77.1000 standard, and that the motion was not necessary as the alleged facts of the citation corresponded directly with the originally cited 30 CFR 77.1004(b) standard. Order Denying Motion to Amend, January 14, 2014.

I presided over a three day hearing in this matter on January 15, 16, and 17 in Birmingham, Alabama. The Secretary presented testimony from Respondent employee Michael Howell, MSHA Inspectors James Brodeur and Jarvis Westerly, and Regional MSHA Supervisor Steven Womack. Respondent presented testimony of employees Ricky Williams, Stephen Smith, Judson Jones, Jan Kizziah, Michael Howell and Charlie Bridges. At the conclusion of the hearing, the Secretary renewed her motion to cite Citation No. 8521047 in the alternative, which the Respondent again opposed. Tr. 778. I again denied the Secretary's Motion but informed the parties that I would evaluate whether or not Respondent complied with its written ground control plan as part of my determination of whether it violated 30 CFR 77.1004(b). Tr. 789-791.

The parties submitted post-hearing briefs as requested by the Court. In summary, the Secretary argued the Citation and Order should be upheld as Respondent negligently relied upon a rock berm to contain obviously wet and unstable material that regularly slid out from the toe. Sec'y Br. 11, 23. Respondent argued that the Citation and Order should be vacated, claiming that the October 5, 2011 slide was unforeseeable, that MSHA had observed its mining and ground control methods during previous inspections without objection, and that no standard regulated or notified Respondent of the dangers of saturated ground conditions. Resp. Br., 25, 29, 35. The Secretary, responding to the claim that MSHA did not have regulations pertaining to saturated ground conditions, filed a reply brief supported by MSHA bulletins outlining best management practices for stockpiles not produced or referenced at hearing. Sec'y Reply Br., 2-3. The Respondent filed a motion in opposition, stating that these exhibits violated my pre-hearing order requiring disclosure of exhibits pre-hearing and were irrelevant as they applied to stockpiles and not developing highwalls. Resp. Obj. to Reply Br., 3-4. Respondent also submitted their own Reply brief for consideration. Resp. Reply Br.

In response to the parties arguments, I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Statute Interpretation; 2) Burden of Proof; 3) Significant and Substantial violations; 4) Unwarrantable Failure; and 5) Civil Penalty and Special Assessment. After detailing these guidelines, I have set forth my case findings as follows: A) HWY 59 Mine Ground Conditions and Control Plan; B) January Slide, C) October Slide D) Analysis. Due to the volume of testimony, I have not included a separate summary of testimony, but have considered all testimony and evidence presented and referenced the testimony and

arguments critical to my ultimate rulings. As they were not necessary for my ultimate findings, I did not consider the alternative standard or government exhibits submitted after hearing in reaching this decision.

After considering the testimony and evidence presented, I **AFFIRM** Citation No. 8521047 and Order No. 8521048 as originally written. Upon reviewing the six penalty criteria and evidence presented regarding the specially assessed penalty amounts, I find that $50,000.00 is an appropriate penalty for each of the violations for a total combined penalty amount of **$100,000.00.**

II. STATEMENT OF LAW

A. Statute Interpretation

The Commission has stated that:

> The operator is entitled to the due process protection available in the enforcement of regulations... 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. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory safety standard, rather,

> The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as '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.'

Energy West Mining Co., 17 FMSHRC 1318 (internal citations omitted).

B. 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).

C. 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). However, the Secretary "need not 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).

The Commission has mandated that ALJs perform a full analysis of all four *Mathies* factors based on specific evidence, including the likelihood of an injury producing event occurring. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010). The Commission has also maintained that an S&S determination must be based on more than a showing that a

violation 'could' result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1678 (quoting *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)).

D. Unwarrantable Failure

Section 104(d) (1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,… and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; Rochester *& Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)1 and 104(d) 2 orders: (1) the length of time that the violation has existed and the extent of the violative condition,(2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

E. 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 the six statutory penalty criteria:

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. When specific aggravating factors outside of the normal gravity and negligence determinations are present, the Secretary may instead rely upon 30 CFR 100.5 and propose specially assessed penalties. In either assessment method, the Secretary may only propose penalties up to $70,000.00 per citation for violations considered under Section 110(a) (1) of the Mine Act. The Secretary may only propose penalties above $70,000.00 per citation when there is evidence that the violation was a flagrant violation per the definition of Section 110(b) (2) of the Mine Act.

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).

III. FINDINGS AND ANALYSIS

A. Hwy 59 Mine Ground Conditions

The Hwy 59 Mine was comprised of several distinct levels of material. The top 60 feet of the mine was comprised of unconsolidated layering of red clay, sand, and pea gravel. Tr. 344-45, 465-66, 606. Below this overburden layer was a harder 40 feet level of shale rock. Tr. 70, 606. The shale rock was impermeable to water and groundwater collected on top of the shale rock at the bottom pea gravel layer of the overburden. Tr. 465-66, 614. This groundwater was routinely diverted by a berm system to the pit below where sump pumps pumped the water out of the mine continuously. Tr. 614-15. The bench at the top of the shale rock level was referred to as the Brookwood bench. Below the shale rock were alternating seams of coal and sandstone. Sec'y Ex. 9, 9. The bench at the bottom of the shale rock level and the top of the first coal seam was referred to as the Milldale bench. Respondent tested the overburden to determine if it had commercial value, and the test results indicated that the material was not cohesive enough to act as a binder in concrete or asphalt products. Tr. 655-66. Within the mine, the West side of the overburden layer was generally wetter than the east side. Tr. 692.

Before beginning operations, Respondent submitted a ground control plan to MSHA per MSHA regulations. Tr. 331. MSHA acknowledged the plan without reservations. The ground control plan stated in relevant part,

> When failure to control the developing highwall occurs such as the existence of overhan(g)s, loose material, unconsolidated rocks,

> materials falling into the pit, movement in the wall, or blasting practices fail to result in a clean and stable highwall, and corrective action cannot be taken to eliminate the existence of these conditions, the affected area will be barricaded to prevent persons from being exposed to the conditions and the plan will be revised to safely control the highwall and provide for safe conditions.

Sec'y Ex., 9, 7 (g) 6.

The ground control plan did not list berms as a proposed method of controlling or eliminating movement in the highwall. Tr. 692, 263.

Respondent used an excavator and haul trucks to remove the unconsolidated overburden from the active pit. Each "cut" through the overburden created a bench approximately 150 feet wide. Tr. 614. Respondent built up a working berm at the toe of the 60 foot tall overburden highwall as mining progressed. Tr. 397. This berm was used to divert groundwater, keep the working bench clean, protect equipment, and allow trucks to operate without become stuck in soggy conditions. Tr. 611, 736. The toe/working berm was positioned approximately 10-20 feet from the toe of the overburden and ranged from 8-12 feet high.[1] Tr. 398, 677. An excavator was positioned on the far bench side of the toe berm while it dug material from the highwall side. Tr. 397. The excavator had a reach of approximately 25 feet and both directly tore down material from the overburden highwall or relied upon material sliding to the working berm on its own as it dug at the berm. Tr. 669-70, 677.

B. January 2011 Slide

On January 19, 2011 a large slide occurred at an 80 foot wide section of the highwall at the West side of the mine. Tr. 81. MSHA received a hazard complaint alleging that a large slide had occurred and had not been cleaned up. *Id*. Inspector Brodeur traveled to the mine and investigated the site and interviewed eyewitnesses to the slide. Tr. 82. Inspector Brodeur testified that eyewitnesses informed him that the slide occurred in an area where an excavator was reaching over a berm to excavate soupy saturated material at the toe of the overburden.

[1] Inspector Brodeur alleged within Citation No. 8521047 and testified that he believed the toe berm was 100 feet away from the toe of the overburden highwall. Tr. 283; Sec'y Ex 5, 1. After reviewing the testimony of all witnesses and the exhibits entered, I find that the working toe berm was located within 10-20 feet of the toe of the highwall. Tr. 398, 677, 738 . Given that each cut was approximately 150 feet wide, a 100 foot working berm configuration would not have allowed the excavator and trucks to operate in the manner credibly described by Truck Driver Ricky Williams. Tr. 370, 614. This finding regarding the location of the toe berm does not affect my ultimate finding that the toe of the overburden highwall was significantly saturated prior to the October slide.

Tr. 83. This testimony is corroborated by Bordeur's January 20, 2011 inspection notes which recorded that prior to the slide:

> The highwall above the Brookwood bench consisted of dirt, clay, sand, small rock and gravel and was wet from snow and rain weather. The highwall was sloped back and Gauley stated that as he would dig, the highwall material would slide toward the excavator. An approximate 4.5 foot high berm, constructed of rock, was built at the base of the highwall with the excavator on the bench side reaching over to dig on the highwall.

Sec'y Ex. 4, 10.

Brodeur also testified that the highwall collapsed in the area being excavated and breached the toe berm and flowed across the shale rock bench and then down onto a lower bench where it pushed a backhoe 75 feet. Tr. 83-84. Brodeur's testimony on the specifics of the slide are corroborated by his January 20, 2011 inspection notes which record that eyewitnesses stated:

> The top approx. 40 feet of the approx. 60 foot highwall slid out at the bottom of the 40 foot, traveled approx. 120 feet across the Brookwood bench and over the highwall down to the Milldale bench… The material pushed the backhoe approx. 75 feet along the Milldale bench.… The material got up under the hoe and slid it. The hoe operator stated he unbuckled his seatbelt, got off the hoe and ran when he saw the material coming. All witnesses stated the material slid and flowed like slow moving water… The area of the wall that slid out was 40 feet in height, 80 feet in width and 30 feet in thickness…

Sec'y Ex. 4, 10-12.

Brodeur inspected the on-shift examination book, noted an entry recording that a "wall slid on Milldale pit" and mistakenly concluded that Respondent had identified the conditions of the highwall as a hazard prior to the major slide. Tr. 88. In fact, Respondent had only completed this entry after the January 19 slide had occurred. Tr. 177. Respondent's Superintendent Charlie Bridges informed Brodeur Respondent was not going to mine in that area anymore and that they were going to mine in a different direction. Tr. 90-91. Based on his previous observations of HWY 59 mining conditions and relying upon his understanding that Respondent would cease mining in that area, Inspector Brodeur decided not to issue any violations. Tr. 89-90.

The Respondent has emphasized that they were not actively excavating in the location of the January slide at the time it occurred. Resp. Br., 13; Tr. 400. Upon questioning by the Court, Superintendent Bridges stated that crews were digging from the toe approximately 150 feet away from the main point of the January slide, but also stated that the area had already been excavated

and that a pump had been set at this location prior to the slide.[2] Tr. 761. The Respondent has also argued that the January slide was primarily caused by the presence of an old settling pond at this location and was made up of different material than the normal highwall. Resp. Br. 14, Tr. 630-31. However, Respondent did not produce any witnesses who personally observed the January slide as it occurred. Tr. 377, 403, 423, 739. As noted above, Inspector Brodeur testified that eyewitnesses to the January slide stated to him that the slide was made up of the saturated material of the highwall. Tr. 83. Indeed, Inspector Brodeur's January 20 investigation notes indicate that the excavator operator digging the highwall, Alan Gauley, observed the slide and that the "berm on the Brookwood bench was constructed out of the same material as the highwall that slid down." Sec'y Ex. 4, 10-11.

As such, I find that the January slide occurred in an excavated area with saturated soil conditions, and that the slide consisted of the normal mixture of clay, sand, and gravel present at the highwall in this area. I also find that although the settling pond present at the top of the highwall in this location may have added to the saturation and instability of the wall, it is also apparent that the extensive wetness of the highwall below was a significant contributory factor of this slide. In making this determination, I note that the highwall slid out from a point 40 feet below the top of the highwall and moved like "slow moving water" in a manner similar, if much more voluminous, than the routine sliding considered part of the excavation cycle. Sec'y Ex. 4, 11-12.

C. October 2011 Slide

On October 4, 2011, Respondent employee Michael Howell inspected the active face of the highwall recording that that the highwall was "ok" at his last inspection time of 11:37 PM. Tr. 721-23; Sec'y Ex. 7, 10. This active face was approximately 500 feet to the Northwest of the location of the January slide. Tr. 97, 707-08, Resp. Ex F. Howell later stated at hearing that he did not observe any unusually excessive water saturation or other unsafe ground conditions prior to the fall. Tr. 722-23. However, Howell confirmed that a soupy mixture of sand and water regularly ran from the toe of the highwall at this area. Tr. 62. Howell also confirmed that the toe of the highwall would slide out from the bottom of the highwall as it was excavated. *Id*. A toe berm approximately 10-12 feet high was used to contain the toe of the highwall in this area and divert water to the pit below. Tr. 611-12. The next morning, Steve Smith performed the pre-shift examination for the day shift, noting that everything was "ok" at 3:38 am. Tr. 452-53; Sec'y Ex. 7, 9. The shift began production with Excavator Operator Gary White digging from

[2] Although the record is not entirely clear, it appears that there was already one dewatering pump in place at the top of the shale rock bench prior to the slide and that a separate pump was being installed on the bench below at the time of the January 19 slide. Tr. 84, 761.

behind the toe berm and loading haul trucks with the overburden. Tr. 98, 370; Sec'y Ex. 5, 15-16. Mr. White later informed Inspector Brodeur that the soupy material that ran out from the toe ranged up to 6 feet high on the highwall side of the berm.[3] Tr. 107; Sec'y Ex. 5, 16. Respondent Foremen Howell and Smith disputed this six foot figure at hearing. Tr. 449, 723. Truck Driver Ricky Williams stated he was unable to directly observe the soupy material from his haul truck on the opposite side of the berm. Tr. 387.

At 7:30 am, a 230 foot wide section of the highwall failed directly above the active excavation. Tr. 108-09. During excavation, the face of the highwall slid out rapidly from the bottom, overtopping the toe berm and sliding the excavator backwards. Tr.98; Sec'y Ex. 5, 15. This first wave of material also pushed the haul truck driven by Mr. Willis Jones to the top lip of the Brookwood bench. Tr. 98, 713. After a brief interval of several seconds, a second wave of material slid out from the toe of the highwall, again breaching the berm. Tr. 98, 101-02. This second wave struck the haul truck as Jones attempted to jump clear, sweeping both the truck and Jones over the bench onto the Milldale pit below. Tr. 98-99; Sec'y Ex. 5, 15-16.

Respondent employees spotted Jones' fingertips sticking out from the slide and freed him quickly from the slide. Tr. 99-100. Emergency services arrived at the scene and transported Mr. Jones by helicopter to a nearby hospital, treating him for a bruised heart, concussion, bulging disc and internal bleeding. Tr. 100, 120.

D. Citation No. 8521047

1. Motion to Amend to Cite in the Alternative

The Secretary renewed her Motion to Amend Citation No. 8521047 to cite 30 CFR 77.1000 at the beginning of the hearing, at the end of the hearing, and again within her post hearing brief. Tr. 9, 778; Sec'y Br., 33. However, the Secretary essentially restated the positions originally articulated in his original motion to amend and did not offer significant additional arguments. As such, I again deny the Motion to Amend to cite the standard in the alternative for the reasons stated in my January 15th Order concerning this issue.

To reiterate the position I stated at the conclusion of the hearing, I did analyze the effectiveness of the toe berm in controlling the hazard of sliding saturated material, and considered testimony regarding Section (g)(6) of the Respondent's Ground Control plan as

[3] Mr. White passed away prior to the hearing due to causes apparently unrelated to this matter and was not deposed during the discovery process. However, Inspector Brodeur's investigation notes confirm that Mr. White stated he was digging a soupy mixture of water, sand, and clay up to 6 feet deep from the highwall side of the toe berm prior to the accident. Gov. Ex. 5, 15-16. Additionally, although Respondent's employees have disputed that the soupy material was up to 6 feet deep on the highwall side of the mine there is no substantive dispute that there was a notable amount of soupy sand/water mixture present at the toe of the highwall. Tr. 62. As such, while Inspector Brodeur's testimony recounting Mr. White's statements are not critical to my ultimate findings, I found that they were a credible and corroborated account of the October 5 slide.

evidence that the described conditions were indeed a hazard. Tr. 790-91. However, I did not consider testimony or arguments regarding the operator's general mining plan or alternate mining methods referenced at hearing. Tr. 494,768; Sec'y Br. 14-15.

2. The Violation

Inspector Brodeur alleged in part within Citation No. 8521047 that:

> The Mine Operator failed to follow the Ground Control Plan for this mine by implementing adequate controls to prevent a highwall failure or poorly barricading the highwall to prevent persons from being exposed to ground failure hazards.

Sec'y Ex. 5.

Brodeur determined that an injury had occurred, the injury was permanently disabling, affected one person, the violation was S&S and the result of the operator's unwarrantable failure to comply with the Mine Act. Sec'y Ex. 5. The Secretary proposed a specially assessed penalty of $70,000.00 for violating 30 CFR § 77.1004(b). Sec'y Proposed Assessment, Exhibit A.

30 CFR § 77.1004(b) mandates:

> Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

Thus, the Mine Act requires mine operators to correct or barricade all "unsafe ground conditions" that a reasonably prudent miner would identify. *Energy West Mining Co.*, 17 FMSHRC 1318.

The Secretary contends that the wet material that regularly slid out from the toe was an unsafe ground condition the Respondent should have eliminated and or barricaded. Tr. 91-92; Sec'y Br. 13. The Secretary also argues that the toe berm was not a sufficient control method as it only kept material that had already slid out from the toe from spreading further out onto the bench. Tr. 676-77; Sec'y Br. 13. The Respondent rejects this contention on three points, arguing that 1) the water seepage present at the HWY 59 highwall was normal and did not present a hazard; 2) MSHA regulations do not regulate soil saturation, and; 3) the 10 foot berm was properly constructed and functioned adequately under foreseeable circumstances. Resp. Br. 5, 25, 27.

After reviewing the testimony, entered exhibits, and relevant Commission case law, I find that a reasonably prudent miner would have identified the wet sliding material as a hazard requiring elimination or evacuation. I also find the Respondent's rebuttal arguments on this matter unavailing and lacking credibility.

a. Significant Water Seepage was Present at the Highwall Prior to the October Slide

Respondent's Vice President of Operations Jan Kizziah's testified that the October slide consisted primarily of "wet and sloppy" material. Tr. 713. Indeed, the accident investigation photos show a layer of dark grey sludge fanning out across several hundred feet of the lower pit floor. Sec'y Ex. 5, 33. The material is obviously very saturated and wet as equipment used after the slide in abatement efforts left deep tire tracks. *Id*. However, Respondent's foremen Smith and Howell testified that prior to the slide that water seepage at the highwall was "normal" and that this substantial volume of wet material was not detectable. Tr. 453, 719-22. After reviewing the testimony and description of ground conditions at this area, I find that the Secretary has established that the toe of the slope was obviously saturated prior to the slide and the Respondent's argument that this condition was undetectable lacks credibility and are contradicted by their own statements.

Respondent Foreman Michael Howell conceded that prior to the October Slide, it was normal for a sand and water mixture to run from underneath the highwall. Tr. 62. Howell also stated that that the toe berm was used to contain the "soupy material" as the excavator scooped out this mixture. *Id*. Howell did not consider the regular sliding of the toe material a hazard since the berm normally contained those slides. Tr. 64. However, Foreman Smith stated that in addition to the January and October slides, there were times when the excavator splashed enough water onto the haul side of the bench that clean-up efforts were necessary. Tr. 436-37. Given the 10 foot height of the toe berm, this account supports Inspector Brodeur's testimony that after the accident, excavator operator Gary White stated that he had been digging up to six feet of soupy material from the highwall side of the toe berm prior to the accident. Tr. 222, Sec'y Ex. 5, 15-16.

Additionally, although Superintendent Bridges described water seepage at this area as normal and safe, he also stated that the toe berm was necessary to divert water away from the haul path as "You had to keep it clean to be able to work. The trucks would not go on wet or soggy material." Tr. 736.

Similarly, Vice President Kizziah indicated that the bottom layer of the overburden was inherently wet as water was "gonna wind up at the interference of the shale and sand and gravel because it can't go any further." Tr. 614.

The photos of highwall areas immediately adjacent to the October slide show obvious areas where groundwater was seeping from the toe of the overburden highwall. Tr. 109; Sec'y Ex. 5, 33. Kizziah and Bridges both testified that it was normal for overburden in this region of Alabama to be moist. Tr. 608, 730. However, Kizziah conceded that the West part of the HWY 59 mine where the January and October slides occurred was wetter than the East part. Tr. 692. Additionally, the presence of large water stains on the adjacent highwalls indicates that groundwater was flowing under pressure in this area and that the soil in this area contained more water than it could hold. Sec'y Ex. 5, 33.

Thus, based on the testimony and exhibits presented, I find that prior to the October slide, there were obvious visual signs of extensive water accumulations at the active highwall, particularly at the toe of the slope.

b. Wet Saturated Material is an Unsafe Ground Condition at a Highwall

The Respondent is correct that 30 CFR § 77.1004(b) does not literally specify wetness or saturation as an unsafe ground condition. Tr. 208. However, water saturation and erosion due to water seepage are well-known ground control parameters. MSHA's Regional Supervisor stated that the water saturated condition of the unconsolidated material he observed at the HWY 59 mine increased the likelihood of highwall failure. TR. 477, 489-90. The Respondent has objected to Mr. Womack's testimony regarding mining methods and ground conditions as Womack did not inspect the mine prior to the accident or personally observe Respondent's mining methods. Still, Womack inspected the HWY 59 mine on October 11, observing the muddy conditions of the slide itself and the soil composition and water seepage present at the adjacent highwall. As such, I find that given his first hand observations of the HWY 59 mine and his experience and training as an inspector, his testimony regarding the probable effect of water upon unconsolidated material is relevant and admissible in these proceedings.

Similarly, Inspector Brodeur testified that some minor movement of highwalls was acceptable but that the sliding of saturated material at the toe of the slope was inherently dangerous and required evacuation. Tr. 135, 211-12. Brodeur also testified that at other mines where water came out from the highwalls, operators installed pumps to remove the water. Tr. 131-32. I find this testimony consistent and supported by his statements made during deposition that while minor sloughage of a highwall could occur in dry sandy conditions, when the material at the toe of the slope was wet and saturated, the weight of the highwall material above could cause the toe to slide out from the bottom due to pressure. Resp. Ex. 4, 178.

More importantly, the January slide provided Respondent specific notice that saturated soil presented a significant hazard as the slide overtopped the toe berm and nearly overturned a backhoe on the bench below. Tr. 83-84. Respondent argues that the January slide differed from the October slide as they claimed the January slide involved sliding material from a settling pond near the top of the highwall. Resp. Br. 14: Tr. 630-31. I have already found that the January slide involved a slide from near the midpoint of a rain soaked highwall and that the settling pond was only a partial factor of the January slide. However, regardless of the point at which that slide began or the source of water saturation, the fact that the January slide overtopped the toe berm put Respondent on notice that wet saturated material was prone to failure and that toe berms were inadequate in containing significant slides.

Furthermore, the dangers of wet saturated material at a highwall are not a novel concept to the Commission. In a remarkably similar case, an excavator operator was fatally injured when an overburden highwall collapsed due to the destabilizing effects of wet and muddy ground conditions. *Featherlite Building*, 12 FMSHRC 2580, 2583 (ALJ Cetti) (December 1990). The ALJ, after considering expert testimony on the effect of saturated ground conditions, found the

wet condition of the highwall was an obvious hazard that the operator had failed to correct prior to the collapse.[4] *Id.* at 2591.

Although the Respondent repeatedly tried to downplay the danger of saturated material sliding off the highwall by describing it as minor and controllable sloughage, TRI Superintendent Charlie Bridges acknowledged in regards to sliding material that,

> "Oh, it's always a hazard, if it's coming off the wall, it's a hazard, I mean, you know, that's the reason we had the berm."

Tr. 758.

Additionally, Vice-President Kizziah stated explicitly that without the toe berm, the wet sandy material present at the toe was a hazard and, "could slough out and it's gonna run out all your bench… (and) ... damage equipment." Tr. 622. Kizziah also stated that at a previous mine in the area he had previously witnessed wet material "(take) out pickup trucks." Tr. 622. Kizziah also stated that a prior excavation method using dozers to push overburden down from above had failed because:

> "Now we have that sand down in the pit with us and all the water we've got down there. We were having a problem stabilizing low walls."

Tr. 608.

In summary, Inspector Brodeur and Supervisor Womack credibly stated that water saturation decreased the stability of the highwall; a previous slide of wet saturated material had occurred in that area of the HWY 59 mine; Commission precedent has recognized saturated ground conditions as a highwall hazard; and Respondent's management repeatedly acknowledged sliding or saturated wet material created highwall hazards. As such, I find that a reasonably prudent miner would have recognized the wet sliding material at the toe of the

[4] *Featherlite* involved a surface metal/nonmetal mine and an alleged violation of 30 CFR § 56.3200 which states that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." As such, this standard issues a substantially identical ground control mandate to surface metal non/metal operators as 30 CFR 77.1004(b) does to surface coal operators applicable in the before case.

highwall as an unsafe ground condition that required further control and or evacuation. 30 CFR § 77.1004(b); *Energy West Mining Co.*, 17 FMSHRC at 1318.

c. The Toe Berm was an Inadequate Control for the Extensive Saturation Hazard

The Secretary argues that the berms were not listed in the ground control pan and were an inadequate control since they only contained sliding material and did not prevent the sliding from occurring in the first place. Tr. 692; Sec'y Br. 13. The Secretary also argues from MSHA Supervisor Womack's testimony that it was inherently unsafe for Respondent to rely upon the toe berm to stop sliding material and dig from the toe of the slope rather than scaling at an angle from the top. Tr. 472, 477; Sec'y Br. 13.

Respondent's witnesses testified that the berms were stoutly constructed, contained the highwall for over 99% of the highwall development, and that the January and October highwall failures were unforeseeable events beyond its reasonable control. Tr. 372, 673, 739, 749. The Respondent also contends that MSHA Supervisor Womack's testimony regarding excavation techniques at the toe of the highwall is inadmissible because he never observed Respondent's mine in operation. Resp. Br. 25, n. 7. Nevertheless, the Respondent contends that digging from the toe and allowing material to slough towards the excavator was a safe method given the use of the toe berm. Resp. Br. 27.

After considering the testimony, exhibits and arguments of the parties, I find that the Secretary did demonstrate the toe berm was an inherently inadequate control method for the saturated sliding material at the toe of the slope. Respondent stated in its ground control plan that among other concerns, movement in the developing highwall will be eliminated and/or barricaded. It is obvious that the toe berm did not eliminate sliding of the highwall. Sec'y Ex. 9, 7- (6). Instead, it kept the sliding toe from spreading out over the bench while the excavator reached over the berm and scooped out fill material. Tr. 732-33. Additionally, the positioning of the outer edge of the toe berm approximately 15 feet away from the toe of slope decreased the effective reach of the excavator. Resp. Br. 27; Tr. 398, 669-70, 677-78. As such, the toe berm decreased the ability of the excavator to scale the upper parts of the highwall and relieve pressure from the saturated material.

Respondent's Operations Vice President of Kizziah claimed that the ground control provision did not apply to active faces of the highwall but was rather limited to highwall areas that had already been completely excavated. Tr. 683-85. This claim is directly contradicted by the section's explicit coverage of "developing" highwalls and specific requirement for the "result" of a "clean and stable highwall." [5] Respondent alternately claims that sloughage is a

[5] Respondent's Operations Vice President Kizziah testified emphatically that this provision only applied to established highwalls and did not apply to active faces. Tr. 688. The Respondent has quoted the language of this provision in supporting this argument. Resp. Br., 3-4. However, after reviewing the Ground Control Plan as a whole, I find that the referenced "developing highwall" section applies to significant uncontrolled movement of active as well as established sections of the highwall.

necessary element of excavation, and the regular sliding of material at the toe was not the sort of hazardous movement referenced by the ground control plan. Resp. Reply Br., 3-4.

However, the very need to construct a compacted 10 foot high rock berm indicates that the sliding toe placed substantial pressure against the berm as Respondent's Superintendent Bridges testified in regards to the working/toe berm that:

> "You couldn't just push it up and leave it loose, because if you did, I mean, it would, you know, have a tendency to maybe lose one…If we felt like it was a little weak… We'd have to send them and load rocks and bring back rock and bring it back in there and shore up the berm again to make sure that it was safe and everything."

Tr. 737-739.

The fact that the toe berm was consistently used at the HWY 59 mine and significant highwall failures only occurred along 1% of the total highwall is hardly an impressive safety record or proof of the toe berm's adequacy. Tr. 371, 673. After the January slide, it was evident that that the existing 4 foot toe berm was incapable of controlling significant slides. Tr. 90. Additionally, given the approximate 60 foot height of the overburden highwall and the fact that the January slide produced so much material that it traveled to the level below and pushed a backhoe over 75 feet, it was obvious that increasing the height of the toe berm to 10 feet would do little in terms of preventing and or controlling a significant highwall failure. Tr. 706.

Furthermore, the Respondent's argument that the toe berm was adequate for foreseeable sloughage, but that the October slide overtopping the toe berm was unforeseeable is contradicted by the evidence presented. As I have just noted, the January slide made large slides of saturated material in this area a foreseeable possibility. Furthermore, during routine excavation following the January incident, the highwall apparently did exhibit instability and slid up to the highpoint of the berm on several occasions, prompting Respondent's employees to temporarily withdraw from the area until the highwall stabilized. Tr. 375-76; 617. As such, it is clear that Respondent's employees did not consider the 10 foot berm a fail-safe control of highwall conditions at this area. Additionally, both Inspector Brodeur and Inspector Westerly testified that during their investigation of the October 5 slide, Respondent's employees stated that at least one other significant slide had occurred in addition to the January and October slides at the HWY 59 mine. Tr. 187; Sec'y Ex. 5, 17-18. Tr. 365.

After considering all the above evidence, I find that the toe berm was an inadequate control for the saturated conditions at the toe of the highwall. The toe berm failed to eliminate the saturated condition of the material, relieve pressure from the overburden above, or stop sliding from the toe of the wall from occurring. Additionally, given the dimensions of the 60 foot highwall and the excavator's limited reach, it was impossible to construct a workable berm high enough berm to contain a top to bottom failure of the highwall. Tr. 612, 677.

In summary, I have found that ground conditions were significantly saturated at the toe of the highwall, this saturation was a hazard a prudent miner would have recognized, and that the toe berm relied upon to control this condition was inherently inadequate. As such, I affirm the underlying violation in Citation No. 8521047 and find that the Respondent violated 30 CFR § 77.1004(b) in failing to eliminate or barricade an unsafe ground condition.

3. Significant and Substantial

I have already found that Respondent violated a mandatory safety standard in failing to adequately control saturated ground conditions at the toe of the highwall. This violation contributed to the discrete safety hazard of the highwall sliding out from the toe and overtopping the toe berm. As an excavator and several haul trucks continuously operated on the bench side of the toe berm, a failure of the 60 foot highwall was reasonably likely to engulf, overturn, and sweep over equipment and personnel present on the bench. Tr. 370. Workers caught in such a mass of unconsolidated material were reasonably likely to suffer broken bones, blunt trauma, and asphyxiation ranging in severity from lost time to possibly fatal injuries. Tr. 120. As such, the evidence presented by the Secretary satisfies the four factor of the Mathies S&S test.

The Respondent contends in regards to the second Mathies element that even if there was a technical violation of 77.1004(b), the routine sloughage did not present a safety hazard because the berm contained routine sloughage. Resp. Br. 32. The Respondent also argues that the October and January slides contained different material than normal and thus, the characteristics of those slides should not be considered in the question of whether not the sliding material present at the toe wall presented a discrete safety hazard. Resp. Br. 32 n. 9, 10. Respondent's witnesses did claim that the berm adequately contained routine sloughage. Tr. 376, 444-45, 744-45. However, Respondent's witnesses also testified that the sliding saturated material had the potential of spreading out and damaging equipment, exerted so much pressure on the toe berm that the berm had to be recompacted, slid excessively to the point that workers evacuated the bench as a pre-caution, and had severely damaged equipment at other mines in the nearby region. Tr. 375-76, 622, 737-39. As such, I find that the evidence on the record, including the testimony of Respondent's employees, support the Secretary's contention the saturated ground conditions at this area constituted a discrete safety hazard.

The Respondent similarly contends in regards to the third Mathies element that the ground conditions were not reasonably likely to lead to an injury because there was no evidence of a significant amount of water or wet material breaching the berm under regular conditions. Resp. Br. 33-34. The Respondent does acknowledge that there were prior instances in which irregular sliding caused miners to evacuate the bench, but appears to contend that under normal conditions workers had time to withdraw from the bench before a hazardous slide occurred. Resp. Br. 33. However, in the two major slides that did occur, despite their best efforts to outmaneuver the slides, at least three people were unable to avoid exposure to the rapid spread of unconsolidated material, and one person was seriously injured. Tr. 83, 98, 120. I note the specifics of the significant documented slides that did occur not as self-proving events, but as supporting evidence that ground falls are reasonably likely to occur in overpowering fashion. Additionally, as stated above, the 60 foot height of the highwall and saturated ground conditions made it reasonably likely for a highwall failure in this specific set of circumstances to involve a

large amount of free flowing material. Thus, I find that the Respondent's rebuttal argument on this element unconvincing.

For the reasons stated above, I find that the Secretary has produced evidence establishing the four required elements of the Mathies S&S test and that the Respondent's rebuttal arguments are insufficient. Therefore, I affirm Citation No. 8521047 as reasonably likely and S&S. I also find that the violation did in fact cause Mr. Jones' injuries to occur and that those injuries are permanently disabling. Tr. 120.

4. 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.

The Secretary argues that the Respondent acted with high negligence as it was aware the toe was sliding on a regular basis and failed to take any additional corrective action other than relying upon the toe berm. Sec'y Br. 18-19. The Respondent states that there were no indications that ground conditions at the highwall were hazardous prior to the October slide. Resp. Br., 34. The Respondent points out that MSHA had inspected the mining methods in place on numerous occasions prior to the October slide and had never issued any citations for ground control violations. Resp. Br., 35. The Respondent specifically points to Inspector Westerly's acknowledgement that he observed Respondent mining in damp conditions in January and May 2011 and did not issue any citations as evidence Respondent had no reason to believe it was negligently excavating the overburden. *Id.*; Tr. 350, 354.

After considering the testimony and arguments of the parties, I initially find that the Respondent was actually aware of the saturated and regularly sliding material at the toe of the highwall. While Respondent believed the berm was an appropriate control method, this belief was not objectively reasonable, and I do not consider the use of the berm as a mitigating negligence factor. Additionally, previous inspections by MSHA without highwall citations do not stand as a mitigating factor in this situation. After noting that the May inspection occurred at the drier Northeast area of the mine and at a different level of the mine, I credit Inspector Westerly's testimony that the ground conditions he observed in May were not nearly as saturated as those present immediately prior to the October 5 slide. Tr. 332-33,354, 359. Additionally, the January slide and other near overtopping events provided independent notice to Respondent regarding the hazards of saturated material and insufficiency of the berms. Tr. 83, 375, 617.

Thus, as Respondent was aware of the violative conditions and there were not any legitimate mitigating factors, I find that Citation No. 8521047 was the result of the Respondent's high negligence.

5. Unwarrantable Failure

For Citation No. 8521047, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

I find that saturated ground conditions were extensive in the area of the October 5 slide and a number of significant slides had occurred at the HWY 59 mine in the previous two years. Foreman Howell testified that it was normal for a soupy sand and water mixture to run from the toe of the highwall in the shifts prior to the October 5 slide. Tr. 62. Howell also testified that that it had been necessary to add rock to the toe berm in order to "sheer" the berm up the evening shift prior to the slide. Tr. 723; Sec'y Ex. 8, 4. Vice President Kizziah indicated that the saturated condition at the toe of the highwall was an inherent characteristic of this area as the shale rock level was impervious to the groundwater that migrated through the overburden. Tr. 614. Additionally, two major documented slides occurred in the space of nine months in this specific Northwestern region of the mine, excessive sliding had previously prompted Respondent employees to temporarily evacuate the bench on several occasions, and statements gathered during the investigation of the October slide indicate that additional major slides separate from the October and January 2011 slides had occurred in the previous two years. Tr. 83, 98, 187, 365, 375-76, 617.

b. Notice to the Operator

Inspector Brodeur testified in regards to his communications to Respondent following the January slide that,

> …it was obvious to me as well as TRI that (berming) was not a control method. I mean it didn't work. The highwall slid out… TRI realized that that didn't work as well and told me that they were not going to mine that West end of a pit. They were gonna cease mining in the West end of the pit and drive in a different direction, which would have been in the Northeast direction."

Tr. 90.

However, Inspector Brodeur did not issue any violation in regards to the events that led up to the January slide, did not issue a withdrawal order for this area of the mine, and did not issue any safeguard directives regarding the hazards of the sliding saturated toe. Tr. 89. Inspector Brodeur appears to have not issued official orders on this matter because of his belief that the saturated condition of the highwall was isolated to that specific area and his reliance upon Superintendent Bridges' representation that Respondent would not mine in that area anymore. Tr. 89-90. Inspector Brodeur also maintained that while he did not issue any clear directives or warnings, that he believed the sum of his conversations with Superintendent Bridges established the need to avoid or eliminate saturated ground conditions. Tr. 315-16. I note that while MSHA did not issue any formal directives on this issue, Superintendent Bridges made efforts to inform Inspector Brodeur that they were moving to a different, drier area of the

mine during the course of the January 2011 hazard complaint investigation. Tr. 741-42. As such, it appears Respondent's management was aware of Inspector Brodeur's concerns regarding the saturated ground conditions at the Northwest area of the Hwy 59 mine.

c. Prior Abatement Efforts

The Respondent claims that the toe berm, and particularly the enlarged 10-12 foot toe berm should be considered as a substantial abatement effort. Resp. Br. 45. However, as I have noted above, given the 60 foot height of the highwall and the demonstrated mass of material involved in the previous January slide, and the fact that other slides had come to the top of the berm, I find that the toe berm was not a legitimate abatement effort. Tr. 83, 617. The toe berm failed to eliminate the waterlogged nature of the material at the toe of the highwall, did not keep the toe of the highwall from sliding out, and was incapable of containing the type of significant slide Respondent was aware could occur after the January slide. Tr. 612, 676-77. As such, I find that the Respondent has failed to show it conducted noteworthy abatement efforts prior to the October 5 slide.

d. Obviousness of the Hazard and Degree of Danger

The wet sliding nature of the material at the toe of the highwall was acknowledged by Respondent employees Howell, Kizziah, and Bridges. Tr. 62, 617, 749-51. While they did not subjectively consider this routine sliding a hazard, that belief was unreasonable, given the occurrence of the January slide and the readily apparent pressures exerted upon the toe berm. Tr. 617, 737-39. Additionally, the regular sliding motion of the toe of a 60 foot highwall presented a high degree of danger to the workers on that bench, as it was obvious that a significant slide could produce enough material to sweep personnel and equipment over the adjacent bench. Tr. 83.

e. Operator's Knowledge of the Violation

Respondent was aware of, and in fact relied upon the wet and sliding condition of the toe of the highwall to continue production at this area. Tr. 62, 678, 749-51. Again, given that the Respondent's ground control plan required movement in highwalls to be eliminated or barricaded, and that saturated material had contributed to the previous January slide, it was unreasonable for Respondent to disregard the hazards presented by the saturated sliding toe as routine sloughage.

As such, I have found that the Secretary has presented sufficient evidence for all of the Consolidation Coal unwarrantable failure factors. Furthermore, when considering the evidence on this matter as a whole, I find that Respondent acted with a serious lack of reasonable care in responding to the obvious destabilizing condition of the water saturated highwall toe. Thus, I hold that Citation No. 8521047 was the result of the Respondent's unwarrantable failure to comply with the Mine Act.

E. Order No. 8521048

1. The Violation

Inspector Brodeur alleged in part within Order No. 8521048 that:

> Proper daily inspections are not being conducted at this mine site. …A section of the highwall approximately 230 feet across, 80 feet outward and 60 feet in height collapsed sending a wave of saturated sand and gravel material into an excavator and 100 ton haul truck.... An inspection of the highwall at the mine site after the accident indicates hazards existed that would be evident to even a casual observer, including loose material overhanging the pit, loose broken rocks at numerous locations on the highwall, water seepage from the highwall at several locations (including the first 60 feet of material which consist of unconsolidated sand and gravel), and the only bench on the 190 foot highwall is full, allowing material to fall into the pit. A review of the inspection records … indicates no highwall hazards were present even though hazards are clearly evident and have existed for a considerable time period.

Sec'y Ex. 6, 1-2.

Brodeur determined that this failure to note hazards violated 30 CFR § 77.1713(a), an injury had occurred, the injury was permanently disabling, affected 1 person, the violation was S&S and the result of the operator's unwarrantable failure to comply with the Mine Act. Sec'y Ex. 6. The Secretary proposed a specially assessed penalty of $70,000.00. Sec'y Proposed Assessment, Exhibit A.

30 CFR § 77.1713(a) mandates:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

As such, the Secretary must show that the conditions listed in Order No. 8521048 existed prior to the October slide, that a reasonably prudent miner would have identified these conditions as hazards requiring corrective action, and that Respondent failed to record these conditions in their examination records.

As noted above, Respondent Foreman Michael Howell stated that prior to the October 5 slide he observed a soupy mixture of material running out from the toe of the slope. Tr. 62. Inspector Brodeur also testified credibly that during his investigation immediately after the slide, he observed water seepage, overhanging rocks, and full catch benches in areas adjacent to the slide. TR. 109-114, 116-18; Sec'y Ex. 6, 7-10. When presented with the Inspector Brodeur's investigation photos, Respondent Foreman, Steve Smith, confirmed that while the slide itself had not yet covered the floor of the pit, the October 5 investigation photos depicted the conditions that were present at the overburden and shale rock highwall prior to the slide. Tr. 409-10.

These photos show several large areas where a significant amount of water seepage flowed from the bottom of the unconsolidated overburden layer over and across the face of the shale rock highwall. Tr. 109-110. Sec'y Ex. 6, 7-9. The last photo of the series shows a profile view of the highwall at the edge of the overburden face and the vertical shale rock highwall below. Tr. 117; Sec'y Ex. 6, 10. From the photo it appears that the overburden has pushed out to the very edge of the shale rock face and that there is not a horizontal catch bench. *Id*. In two separate investigation photos, a section of the overburden highwall has washed down across the shale rock face at the right hand side of the photos, as the dark gray shale rock is covered with red and tan clay and sand. Tr. 119; Sec'y Ex. 6, 8-9. It also appears that several large boulders and/or clay consolidations project from the upper face of the overburden. Sec'y Ex. 6, 8-9

However, Foremen Smith and Howell both maintained at hearing that none of these conditions, including the sliding of the toe, were hazardous or required notation in their daily pre-shift examinations. Tr. 405-06, 412-13, 722. The Respondent also argued that Order No. 8521048 cannot pertain to hazards present at the area of the slide because it does not specifically reference the sliding material of the toe. Resp. Br. 51-52. The Respondent additionally states that the water seepage present on the walls was normal for this area. Resp. Br. 57; Tr. 448-49, Tr. 719-20. The Respondent finally contends that the there was a permanent catch berm in place at the toe of the overburden highwall adjacent to the slide area and any of the irregularities along the face of this highwall cannot be considered overhanging, as the photos indicate that the overburden is sloped back from vertical. Resp. Br. 58-59.

After considering the evidence presented and the parties' arguments, I find that the Secretary has established there were obvious hazards present at the area of the slide and the adjacent highwall which Respondent failed to either note or correct. I also find that the Respondent's arguments on these points are insufficient and contrary to the hazards identified in their own ground control plan.

As an initial matter, I find that Order No. 8521048 does include the area of the slide as it describes the collapse of the highwall and notes that this slide was comprised of "saturated sand and gravel." Sec'y Ex. 6, 1. Thus, the Order specifically lists the saturation hazard of the overburden in the area that collapsed. Furthermore, as both Foreman Smith and Howell confirmed that the bottom of the overburden was wet and sliding out from the toe of the highwall, it is clear that the saturated nature of the toe in this area was obvious prior to the slide. Tr. 62, 405-06. Nevertheless, Smith and Howell failed to record the saturated material or regular sliding of the toe, recording that the highwall was "ok", despite a notation on Oct. 4th that it had been necessary to shore up the berm where the excavator was digging from the "sand"

overburden. Tr. 63-64, 405; Sec'y Ex 8, 4. For these reasons, I find that at the area of the slide, hazardous saturated ground conditions were evident prior to the slide and that Respondent failed to record these hazards.

For the areas adjacent to the area of the slide, both Respondent employees and Inspector Brodeur stated that some water seepage was common at highwalls in mines in this area of Alabama. However, the fact that a condition is common in a particular area does not render that condition harmless. Inspector Brodeur credibly testified that water seeping from the highwall could wash out smaller binding material and make the highwall unstable. Tr. 111. Indeed, Respondent's own ground control plan specifically noted that:

> Water seepage from rainfall or the natural watershed from eroding at the highwall will be controlled by using a settling pond…

Sec'y Ex. 9, 6-15.

While it appears that Respondent did make efforts to divert groundwater in some active areas of excavation and did set pumps at the lower pit area, it is also clear that Respondent did not record the areas in which seepage was occurring, give any indication of how much seepage was occurring, or list the manner in which that seepage was controlled, if at all. By failing to record the seepage Respondent failed to maintain an inspection system that allowed its employees to gauge and track the severity of ongoing seepage and erosion.

It is also clear from the inspection photos and testimony that the bench above the shale rock on the North wall was full with loose unconsolidated overburden and that there was no horizontal catch bench between the overburden slope and vertical face of the shale highwall. Tr. 117; Sec'y Ex. 6, 10. I find the Respondent's claim that there was a functioning permanent catch berm at this area unconvincing. In the investigation photos, the relatively steep face of the overburden highwall has a constant unbroken slope that continues down to the vertical face of the shale highwall. Sec'y Ex. 6, 10. As such, once a stray rock or section of highwall began to roll or slide, there was neither a catch bench nor functional catch berm present that would contain even a small slide of unconsolidated material. Sec'y Ex. 6, 10. Indeed, as previously noted, the investigation photos show that in one area a large amount of sandy overburden has spilled down across the shale highwall. Sec'y Ex. 6, 7.

Although the majority of photos are taken from a distance and the one close up view of the overburden only shows a narrow vertical band of the overburden slope, the investigation photos do give some support to Inspector Brodeur's testimony that there were segments of broken up sandstone overhanging the highwall. Tr. 244-45. Respondent witnesses testified that there were no overhanging rocks in this area and the Respondent has argued that the overburden was not steep enough for rocks to overhang. Tr. 448, 719; Resp. Br. 60-61. While it is clear from the photos that the overburden highwall is less than vertical, I found Inspector Brodeur's testimony on this matter credible when viewed in conjunction with the investigation photos, and I rely on his first hand observations and expertise in determining that there were rocks present on the unconsolidated overburden highwall which could topple over and slide or fall down to the pit below.

Within their daily examination records, Respondent's foremen uniformly described the highwall as "ok" and failed to note the presence of sliding saturated material in areas of active excavation or water seepage, full catch benches, or overhanging rocks at the North area of the overburden highwall. Two notations from the evening shifts on October 3rd and October 4th do state that the crew had "hauled rock to 150 to shear sand up" and "sheared rock up for Trackhoe digging sand." Tr. 720, 723; Sec'y Ex. 8, 4-5. However, as explained in detail above, these entries only demonstrate that Respondent failed to recognize or record the saturated ground material as a significant hazard that required corrective action beyond reinforcing the toe berm.

Therefore, I affirm the underlying violation in Order No. 8521048, as the Secretary has established the Respondent failed to record or correct obvious hazardous conditions a reasonably prudent miner would have recognized.

2. Significant and Substantial

I have already found that Respondent violated a mandatory safety standard in failing to record obvious hazardous ground conditions per the requirements of 30 CFR § 77.1713(a). By failing to adequately inspect the highwalls, this violation contributed to the discrete safety hazards of uncorrected unstable and sliding ground conditions at the overburden highwall. Given the 60 foot height of the overburden highwall, the saturated condition of the toe, the non-cohesive nature of the overburden, and the presence of many workers on both the Brookwood and Milldale levels, it was reasonably likely for a significant slide to occur, strike personnel and cause injuries. Tr. 62, 370-71, 665-666. Additionally, given that the shale rock highwall was approximately 40 feet high, it was reasonably likely that even a small slide of unconsolidated material on the North wall could fall to the pit below and strike workers on the drill crew below. Tr. 70, 413. Based on the height of the highwall and its unconsolidated nature, it was reasonably likely for a worker struck by either a mass of unconsolidated material or a stray boulder to suffer broken bones, blunt trauma, and asphyxiation ranging in severity from lost time to possibly fatal injuries. Tr. 120. As such, the evidence presented by the Secretary satisfies the four factors of the Mathies S&S test.

The Respondent primarily relied upon the same S&S arguments for Order No. 8521048 as it did for Citation No. 8521047. Resp. Br., 62. I again incorporate my S&S analysis from Citation No. 8521947 in rejecting these arguments for Order No. 8521048. The Respondent also argues that the conditions on the North wall adjacent to the slide cannot be considered S&S as Inspector Brodeur did not issue individual ground control violations based on these conditions. Resp. Br., 64. The Respondent also states that Inspector Brodeur allowed abatement efforts to occur on the floor of the pit without correcting conditions on the highwall above. *Id*. I reject these arguments on three separate grounds. First, I have already found that the Respondent failed to adequately inspect or record the hazardous nature of the saturated sliding toe at the West area of the highwall and that this hazard was S&S within the context of both Citation No. 8521047 and Order No. 8521048. As such, the failure to adequately inspect the West area of the highwall where the October slide occurred provides an independently sufficient basis to sustain the Secretary's S&S determination for Order No. 8521048. Secondly, I have found above that failure to adequately inspect the North highwall was also S&S in that falling material would fall

over 40 feet and was reasonably likely to strike workers present on the drill bench below. Tr. 413. Although MSHA did not issue separate ground control violations for the specific conditions of the North overburden highwall, that does not diminish the demonstrated hazards presented by the failure to adequately inspect this area. Finally, although not critical to my S&S determination, Inspector Brodeur testified credibly that abatement efforts were not conducted at the foot of the shale rock highwall where sliding material would be reasonably likely to cause an injury. Tr. 240.

For the reasons stated above, I find that the Secretary has established the four required elements of the Mathies S&S test and that the Respondent's rebuttal arguments are insufficient to overcome the weight of evidence presented. As such, I affirm Citation No. 8521048 as reasonably likely and S&S. I also find that the violation did in fact contribute to Mr. Jones' injuries and that those injuries are permanently disabling. Tr. 120.

3. Negligence

After reviewing the evidence and testimony presented, I find that the saturated condition of the overburden toe on the West wall and the water seepage, full bench and loose overhanging rocks on the North wall were readily apparent hazardous conditions that should have been identified during pre-shift examinations. Respondent's witnesses testified consistently that all of these conditions were visible prior to the October slide but stated that they did not consider them hazardous. Tr. 62, 410-11, 608. For the reasons detailed above regarding the likelihood of highwall failure and ground fall events, I find that this subjective belief was unreasonable. I found Inspector Brodeur and Inspector's Westerly statements that they had not observed these sorts of hazardous conditions on previous inspections of the mine consistent, straight forward and credible. Tr. 71, 270, 286, 332-33, 359. Had they done so I have no reason to doubt that they would have issued citations for those conditions to the Respondent. Although Respondent recorded daily pre-shift examinations after receiving a 30 CFR 77.1713 (c) citation in December of 2009, they did not alter or bolster their inspection methods after failing to anticipate the January 2011 slide. Tr. 406-07, 680, 690, 758-759. After the occurrence of the January slide and other instances of excessive sliding, Respondent was particularly remiss in continuing to consider water seepage and saturated ground material as routine non-hazardous conditions that did not merit recording or control beyond the continued use of the working berm or last-second evacuations. Tr. 83, 375-76, 617.

As such, Respondent has not established any mitigating circumstances in regards to the failure to identify, record, or correct the apparent hazardous conditions. For these reasons, I find that Order No. 8521048 was the result of the Respondent's high negligence.

4. Unwarrantable Failure

For Citation No. 8521048, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The saturated condition of the soupy sand/water mixture on the West wall, and the water seepage, full bench, and overhanging material on the North wall were spread out over a distance of several hundred feet. Foreman Howell also testified that it was normal for the soupy sand/water mixture to run from the toe of the slope and a Respondent witness Howell testified it was necessary to shore up the working berm on the shift prior to the slide. Tr. 62, 723; Sec'y Ex. 8, 4. As such, I find that the excessive saturated condition at the toe of the slope on the West wall was present for at least several shifts prior to the October slide. It also clear from Inspector Brodeur's testimony and notes that similar conditions were present prior to the January slide. Tr. 168-69; Sec'y Ex. 4, 10. Additionally, given the developed appearance of the North shale rock highwall, the presence of extensive water stains and one notable sand slide area on the North highwall, it appears that these conditions had been present on the North wall for many shifts. Tr. 113-114; Sec'y Ex. 6, 7-10.

b. Notice to the Operator

Inspector Brodeur issued the Respondent a violation of 30 CFR 77.1713(c) for a failure to record pre-shift examinations in December 2009. Tr. 267; Sec'y Ex. 11. Although MSHA issued this violation under the recordkeeping section of the inspection standard, this previous citation provided the Respondent with specific notice that inspecting and recording hazardous ground conditions was a critical safety requirement.

c. Prior Abatement Efforts

As noted above, although the Respondent failed to anticipate the January slide, they did not offer any evidence of increased monitoring or testing of water saturation or slope stability. Tr. 680, 690, 758-759. While Truck Driver Williams' testimony regarding temporary evacuations after excessive sliding demonstrates employees were aware of hazards, it also shows that Respondent took a reactive rather than proactive approach in responding to this hazard. Tr. 375-76. As Respondent failed to show it had attempted to improve inspection efforts after the January slide, I find that Respondent has not established that it carried out notable abatement efforts.

d. Obviousness of the Hazard and Degree of Danger

As I have found repeatedly above, the January slide and other near overtopping events made the continued disregard of saturated conditions at the highwall toe an obvious hazard. Additionally, the possibility of material sliding down the unprotected North overburden highwall was also made obvious by the presence of sand slides on the North highwall. Tr. 114, Sec'y Ex 6, 9. Given the 60 foot height of the unconsolidated overburden highwall, and the 40 foot near vertical drop to the Milldale bench below, any ground slide in this area, whether large or small, presented a significant degree of danger to workers on both levels of the pit. Tr. 413.

e. Operator's Knowledge of the Violation

The Respondent was aware of the saturated toe, water seepage, full bench, and overhanging rocks present at the active area of the HWY 59 mine. Tr. 62, 410-11, 608. However, the Respondent's witnesses did not subjectively consider these conditions a hazard. Tr. 448, 647-48, 719-23. As such, the Respondent did not fail to record those conditions through willful intent or a plan to conceal hazards which would constitute reckless disregard. However, the obviousness of the hazards and previous slide events made it unreasonable for Respondent to continue disregarding saturated ground conditions in particular.

Based on these findings, I hold the Secretary has presented sufficient evidence for all of the *Consolidation Coal* unwarrantable failure factors. Furthermore, when considering the evidence on this matter as a whole, I find that Respondent acted with a serious lack of reasonable care in conducting thorough inspections of the developing highwall. Thus, I hold that Order No. 8521048 was the result of the Respondent's unwarrantable failure to comply with the Mine Act.

IV. PENALTY

In determining the appropriate penalty for a violation, 30 CFR §100.3 generally directs me to consider:

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

For these citations, the Secretary submitted a special assessment narrative form per 30 CFR § 100.5, stating that the violation was related to a non-fatal sliding material accident. Sec'y Narrative Findings, 1. The special assessment narrative form restated Inspector Brodeur's gravity and negligence determinations and proposed the maximum penalty of $70,000.00 per violation allowed under Section 110 (a)(1) of the Act. *Id*. at 2.

MSHA had issued Respondent seven violations in the 15 months previous to this incident, none of which were ground control violations. Sec'y Prop. Assessment, Exhibit A. This violation history would normally correspond to a minimal amount of penalty points under 30 CFR § 100.3: Table VI. The Hwy 59 mine is a midsize mine while Walter Energy, the Controlling entity, is a large operator. Sec'y Prop. Assessment, Exhibit A. Respondent was highly negligent in failing to identify, correct and or eliminate the saturated ground conditions in places of active excavation, but as MSHA did not issue any formal directives regarding this condition, it did not act in willful violation of a site specific MSHA order. The Respondent has not asserted that the proposed penalty of $70,000.00 per violation would affect its ability to continue operations. The violations were significant and substantial violations of the Mine Act as

they were reasonably likely to, and did in fact, result in a serious injury. The Respondent acted with good faith in promptly removing personnel from the area and ceasing all mining activities at the HWY 59 mine. Sec'y Br., 28.

The Special Assessment Narrative form restated the gravity and negligence determinations of Inspector Brodeur and listed several facts that supported these negligence determinations. Sec'y Narrative Findings, 1. However, neither the special assessment narrative form, nor the Secretary's presentation of evidence at trial nor his post hearing brief articulated a specific reasoning for increasing the monetary penalties beyond the amounts that would have been generated by the standard 30 CFR § 100.3 penalty tables. As such, I find that the Special Assessment Narrative Form and the specially assessed penalty amounts provide no substantive guidance to my de novo determination of the appropriate penalty amount.

As a starting point, it appears that Respondent would have received a normally assessed penalty under 30 CFR § 100.3 of $7,774 for Citation No. 8521047 after accounting for all gravity and negligence determinations, including the actual occurrence of an injury to a single individual.[6] As Order No. 8521048 involved a single repeat violation of 30 CFR § 77.1313, it would have likely received a slightly higher regularly assessed penalty of $8,421. However, I note that the gravity of both violations is greater than that considered by the normal penalty calculation, as the violations exposed all workers involved in the excavation of the overburden to potentially fatal injuries. Additionally, Respondent resumed mining the area where it had informed Inspector Brodeur it would no longer mine without notifying MSHA, decreasing MSHA's ability to promptly respond to changing conditions at the HWY 59 mine. Tr. 180.

For these specific reasons, I find that a penalty of $50,000.00 per violation serves as an appropriate penalty and deterrent to Respondent and other operators, warning them of the economic repercussions of ignoring obviously hazardous ground conditions.

[6] Upon reviewing the 30 CFR 100.3 penalty tables, Citation No. 8521047 would have received a total of 113 penalty points while Citation No. 8521048 would have received 114 penalty points.

V. ORDER

Tuscaloosa Resources, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$100,000.00** within 30 days of this order.[7]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 11, 2014

POCAHONTAS COAL COMPANY, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2014-642-R
	:	Safeguard No. 7169714; 01/30/2014
	:	
	:	Docket No. WEVA 2014-646-R
	:	Safeguard No. 9002753; 02/04/2014
	:	
v.	:	Docket No. WEVA 2014-647-R
	:	Safeguard No. 9002751; 02/04/2014
	:	
	:	Docket No. WEVA 2014-648-R
	:	Safeguard No. 9002752; 020/4/2014
	:	
	:	Docket No. WEVA 2014-649-R
SECRETARY OF LABOR	:	Safeguard No. 9002750; 02/04/2014
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Affinity Mine
Respondent.	:	Mine ID: 46-08878

ORDER OF DISMISSAL

These cases are before me on Notices of Contest filed by Pocahontas Coal Company pursuant to Section 105(d) of the Federal Mine Safety and Health. These contests are directed not at a particular citation or order but, rather, at five written notices to provide safeguard issued by MSHA pursuant to Section 314(b) of the Act. On March 24, 2014 the Secretary filed a motion to dismiss for lack of jurisdiction. Sec'y Mot. 1. Pocahontas raises a number of arguments in its notice of contest and its response to the motion to dismiss, however, for reasons that follow, I find that the Commission is without jurisdiction to consider these arguments in the context of these proceedings and, accordingly, I **DISMISS** these cases.

On January 30th and February 4th, 2014 MSHA issued the five safeguards that are disputed in these dockets. In each case, MSHA notified Pocahontas that a mine specific requirement for safety, which related to the transportation of men and materials at the Affinity Mine, needed to be put in place. The "Condition or Practice" sections of the respective safeguards state that the documents are notices to provide safeguard and set forth the requirements MSHA seeks to impose. On February 27, 2014, Pocahontas filed these notices of contest pursuant to Section 105(d) of the Act to contest the issuance of each of the five safeguards.

The Secretary argues in its motion to dismiss that the jurisdiction of the Commission does not extend to an independent review of a notice to provide safeguard. The Secretary relies on the language in Section 105(d) of the Mine Act and asserts that 105(d) does not confer specific

jurisdiction to hear a contest arising from a notice to provide safeguard and, instead, jurisdiction attaches only once a citation or order has been issued for a violation of the underlying safeguard. In its response the mine operator argues that, pursuant to 105(d) of the Act, the Commission does have jurisdiction to hear arguments on the initial notice to provide safeguard, and that to deny jurisdiction is a violation of the mine's right to due process.

While the Commission has acknowledged a mine operator's right to contest the validity of a safeguard in the context of contest to a citation issued pursuant to a violation of the underlying safeguard, *see* e.g., *Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992), it has not addressed the question of whether it has jurisdiction to hear a contest of a notice to provide safeguard in the context of a separate proceeding prior to the issuance of a citation or order for a violation of the safeguard. Nevertheless, Commission judges have declined to review the validity of an underlying safeguard prior to the issuance of a citation for a violation of the underlying safeguard. *Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987) (ALJ); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988) (ALJ); *Jim Walters Resources, Inc.*, 18 FMSHRC 380 (Mar. 1996) (ALJ); *Jim Walters Resources, Inc.*, Unpublished Order of Dismissal dated April 22, 1996, Docket No. SE 96-118-R (ALJ). I am aware that there is an ALJ decision that reaches an opposite conclusion, but I am not bound by that case, nor do I agree with the reasoning set forth in that matter. *Affinity Coal Co., LLC*, Unpublished Order Denying Motion to Dismiss dated August 29, 2013, Docket No. WEVA 2013-700-R et al. (ALJ).

Similarly, the Commission has not addressed whether it has jurisdiction to hear a dedicated contest of a written notice of pattern of violations, and its judges, when addressing arguments similar to those raised in these matters, have reached conflicting results on that question. *See Bledsoe Coal*, Unpublished Order dated Nov. 11, 2011 (ALJ) (Judge William Moran found that the Commission did have jurisdiction to hear a contest of a written notice of pattern of violations); *Brody Mining LLC*, 36 FMSHRC ___, slip op. at 4, Docket No. WEVA 2014-81-R (Jan. 30, 2014) (Chief Administrative Law Judge Robert Lesnick found that the Commission was without jurisdiction to adjudicate the mine operator's contest of the written notice of pattern of violations by itself).

The Mine Act does not grant the Commission unfettered jurisdiction. In *Rushton Mining Co*., 11 FMSHRC 759, 764 (May 1989) the Commission stated that it "is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." Given that the Commission is "an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012) (citing *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988)). A review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice to provide safeguard in the context of a dedicated proceeding. Pocahontas has brought this action pursuant to section 105(d) of the Act. Section 105(d) provides mine operators with the right to contest, among a limited number other things, the issuance or modification of citations and orders. 30 U.S.C. § 815(d). Notably, the section does not afford a right to contest notices to provide safeguard. Further, the legislative history, the Secretary's regulations, Commission case law, and the Commission's Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a notice to provide safeguard.

Safeguards are a unique enforcement tool available to the Secretary. Section 314(b) of the Mine Act grants the Secretary authority to issue "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials." 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after "determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard." *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard "must be narrowly construed" and is "bounded by a rule of interpretation more restrained than that accorded promulgated standards." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). Further, a notice to provide safeguard "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." *Id.*; *See also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Given their unique nature, Safeguards cannot be construed to be either citations or orders. The Commission has stated that "in considering the meaning of the Mine Act, we must 'give effect to the unambiguously expressed intent of Congress.'" *Revelation Energy*, 35 FMSHRC 3333, 3337 (Nov. 2013) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, the distinction between a notice to provide safeguard and a citation or order issued subsequent to that notice is clear. The language of the Act makes clear that the notice to provide safeguard is a separate document which must be issued prior to any citation or order issued pursuant to section 314(b). Even if one could read some ambiguity into the language of the Act, Congress clearly intended to distinguish written notices issued pursuant to section 314(b), which are meant to act similar to a mandatory standard and put the mine on notice that in the future, the act or omission may result in a citation or order, from those citations or orders. If Congress had intended the Commission to hear contests to notices to provide safeguard, it would have said so or at least equated the notice to provide safeguard with citations or orders, which are subject to contest proceedings. Instead, Congress differentiated the notice to provide safeguard from citations and orders.

Contestant is not without remedy on the issue and may properly challenge the notice to provide safeguard in the context of a contest to a citation or order issued for violation of the safeguard. Section 105(d), as mentioned above, provides mine operators with the right to contest the issuance or modification of citations and orders. 30 U.S.C. § 815(d). The section then charges the Commission with affording an opportunity for a hearing and then issuing "an order . . . affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." *Id*. Section 105(d)'s "unambiguous[] . . . broad grant of . . . authority to direct 'other appropriate relief'" allows the Commission to address a notice of pattern of violations in the context of a contest to a citation or order issued for violation of that safeguard. *See North American Drillers, LLC*, 34 FMSHRC 352, 356 (Feb. 2012). If and when a citation or order is issued that alleges a violation of the one of the safeguards herein, Pocahontas may file a notice of contest or contest any penalty that is assessed as a result of the citation, and at that time, also raise the validity of the safeguard as a defense to the violation. If

Pocahontas wishes to pursue the arguments set forth in its notice of contest, it may properly do so in the context of those proceedings.

The fact that the mine can contest any citation or order issued as a result of the notice to provide safeguard also negates the mine's due process argument. Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) "the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used" and the value of additional or substitute procedural safeguards; and 3) the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.*(citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

Here, Pocahontas argues that its property interest will be unjustly deprived should it not be able to immediately contest the notice to provide safeguard. It suggests that when a safeguard is issued it faces the "immediate choice" of spending "oftentimes large sums of money to comply with the safeguard" or accepting an order "effectively taking the equipment out of service or shutting down the mine." Pocahontas Resp. to Mot. to Dismiss. 17. Moreover, it argues that there are no current procedures in place which can protect Pocahontas from erroneous deprivation. Finally, Pocahontas argues that any government interest in having MSHA respond "flexibly and quickly to unsafe conditions" must be subjected to "some type of check and balance that affords protection to mine operators." *Id*. at 18.

I have already found that Mine Act does not provide the Commission with a formal mechanism to exert jurisdiction over this matter. I agree with the Secretary's argument that, because the Act does not provide the court with subject matter jurisdiction, it would amount to "bootstrapping" if the court could use an inquiry into whether constitutional due process has been violated to establish jurisdiction. Sec'y Reply. 5-6. Certainly I cannot create jurisdiction where none exists. Even so, I find that due process has not been violated. While a formal mechanism to immediately challenge the notice to provide safeguard may not exist, less formal mechanisms, such as a request for a technical citation, as is often used in the context of plan disputes, could seemingly be used to immediately contest the issue on an expedited basis. *See Mach Mining*, 34 FMSHRC 1784, 1787 n. 8 (Aug. 2012). Further, the Secretary concedes that, if the operator wishes to bring a facial challenge, it may properly do so in Federal District Court. Finally, I find that the government interest in flexibly and quickly addressing hazards related to the transportation of men and materials is an extremely compelling one. While Pocahontas asserts that no check and balance exists, I disagree, and find that the current system already does provide an opportunity for a check on the validity of the safeguard through the ability to contest the notice to provide safeguard following the issuance of citation or order for violation of such.

This docket contains no citations or orders, only the notice to provide safeguard that was issued to the mine, prior to the issuances of any 104(a) citation or order. Therefore, the above captioned contest proceedings are **DISMISSED**.

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

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June 12, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2013-605-M
Petitioner,	:	A.C. No. 23-00457-325635-01
	:	
v.	:	
	:	
THE DOE RUN COMPANY,	:	
Respondent.	:	Mine: Buick Mine/Mill

DECISION

Appearances: Carol Liang, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

R. Henry Moore, Jackson Kelly, PLLC, Pittsburg, PA, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against The Doe Run Company ("Doe Run") at its Buick Mine/Mill, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves one citation with a penalty assessed pursuant to section 110(i) of the Mine Act. The parties presented testimony and evidence at a hearing held on April 17, 2014 in St. Louis, Missouri.

The parties agree that Doe Run is an operator as defined by the Act, and is subject to the jurisdiction and provisions of the Mine Safety and Health Act. The parties further agree that the citation was abated within the allowed time and the penalty of $2,106.00 will not inhibit the mine's ability to continue in business. Jt. Stip. 11. Buick Mine/Mill consists of an underground mine that mines lead, copper and zinc, and a surface mill. The mine is located near Rolla, Missouri.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 15, 2013, Inspector Dale Coleman with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 8688248 under section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 57.15005, which requires that "safety belts and lines shall be worn when persons work where there is danger of falling." The citation alleges that a miner was working while standing on top of an electrical cabinet that was seven feet tall, without wearing fall protection. Inspector Coleman designated the alleged violation as reasonably likely to result in a permanently disabling injury, significant and substantial, one

person affected, and the result of high negligence on the part of the operator. The Secretary proposed a penalty of $2,106.00 for this citation.

On May 15, 2013, two electricians, Marion Mills and Kevin Brady, were assigned to change out an electrical switch in the motor control room ("MCC") at the mine. Mills and Brady were both experienced miners. Andrew Wlaschin, an electrical engineer, was responsible for supervising and directing the work of Mills and Brady while they completed the job. Wlaschin had been at the mine for less than a year and, while he had worked on various projects, had never performed the job which had been assigned to Mills and Brady.

The assigned task required the two electricians to disconnect a cable in an electrical cabinet and pull the cable out from inside its location. The top of the cabinet, which is roughly 34 inches by 36 inches in area, is approximately 7 feet, 7 inches above the cement floor below. Two pipes extend vertically from the top of the cabinet to the ceiling above.

Prior to beginning the work, the electricians locked out power to the cabinet at a substation location. Locking out the power to the cabinet and work area also disabled the lights in the work area. As a result, the electricians worked with cap lamps and flashlights. After locking out the power, Mills removed the door on the high voltage center, and then moved to an adjacent cabinet to remove another door. Brady helped Mills with the removal and, as Mills began disconnecting the cable within the box, Wlaschin reminded Brady that he was required to wear a respirator. Brady left the area for a short time to locate the respirator and when he returned saw that Mills was inside the cabinet disconnecting the cable and Wlaschin was at his side. Brady then got a ladder, which he positioned next to the cabinet and climbed to the top of the cabinet to help pull the cable.

Wlaschin saw Brady return with his respirator, get the ladder, and climb to the top of the cabinet, but he asserts that he was distracted by watching Mills and looking at prints, and did not see Brady step off of the ladder and climb on top of the cabinet. According to Wlaschin, he only noticed that Brady was on top of the cabinet after being told by the inspector that Brady was required to come down or have fall protection. Wlaschin acknowledged that he did not see any harness or other safety device on Brady as he climbed the ladder.

Inspector Coleman testified that when he entered the room it was dark, although there was some ambient light. However, he immediately noticed movement and saw someone wearing a cap lamp while standing near the edge of the top of the cabinet. When Coleman shined his flashlight toward the top of the cabinet he saw Brady standing near the pipes, preparing to guide the cable. The top of the cabinet was flat and dry and it would have taken Brady a few minutes to pull the cable from that position. Coleman asked Wlaschin if Brady should be on the top of the cabinet without fall protection. Wlaschin testified that he responded to the question and agreed that Brady should have been wearing fall protection. Coleman remembers that Wlaschin did not agree and argued that fall protection was not necessary. Either Wlaschin or Coleman asked Brady to come down and he complied. As Brady made his way down, Wlaschin secured the ladder and Brady grabbed onto the cable tray above his head. Sec'y Ex. 2. However, Brady acknowledged that the cable tray was not strong enough to use as a place to tie off and that he saw nothing he could use as an anchor. Coleman testified that it was clear

to him that Wlaschin had to see Brady on the top of the cabinet and failed to take any action as his supervisor.

Wlaschin, the supervisor, did not indicate to the inspector that he was unaware of Brady's position. Rather, Brady and Wlaschin told the inspector that there was no hazard and fall protection was not necessary. Brady explained that, because he was working in the middle of the area on top of the cabinet, and given the presence of a wall roughly 32 inches from the edge of the cabinet, there was no risk of falling. Brady acknowledged that he had been trained in the use of fall protection, and fall protection was available nearby for his use. Further, he testified that it was the company policy to use fall protection and he realized he may face disciplinary action for failing to do so.

The mandatory standard requires that any person working in an area where there is a danger of falling must use fall protection. Brady was not wearing a safety belt and line, and was working in a small area atop a 7 foot 7 inch tall electrical cabinet, with a concrete floor below. Brady asserts that he was not in danger of falling due to working in the middle of the area on top of the cabinet and the presence of a wall approximately 32 inches from the edge of the top of the electrical box, which he could have used to catch himself had he lost his balance. I find these arguments to be entirely without merit. The area had no handrails or other protective devices which could have been used by Brady had he lost his balance. Further, working near the middle of a roughly nine square foot area, some of which was taken up by the pipes which extended up from the cabinet, still placed him perilously close to the edge of the cabinet. Furthermore, his belief that the wall 32 inches away from the edge of the electrical box would have prevented a fall is unreasonable. A miner should not, and must not, be expected to arrest themselves from falling by catching themselves against a wall 32 inches away from the surface they are standing on. Moreover, these miners were operating in an unlit room with only cap lamps and flashlights. I credit Coleman's testimony that pulling cable can cause a miner to lose their balance. While Brady had not yet begun to pull the wire, he testified that he would have done so had he not been ordered down. Pulling wire would have exposed him to the hazard to a greater degree. I find that any misstep or loss of balance would have resulted in Brady falling over seven feet to the concrete floor below. Clearly a danger of falling existed. Given the location of the cabinet, its height, and that Brady was focused on removing cable, I find that there was a danger of falling, and hence, Brady should have been wearing fall protection. Accordingly, I find that a violation of the cited standard existed.

I also find that the violation was significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary

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

I have already found a violation of the cited standard. Moreover, I find that a discrete safety hazard existed; the danger of falling from a height of more than seven feet and landing on the concrete floor below.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Commission and courts have also observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC, 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc.*, 52 F.3d 133, 135 (7th Cir. 1995).

I find that there was a reasonable likelihood that the hazard would have resulted in an injury. Although Brady insists that he was only on top of the cabinet for a short time and he might be able to catch himself on the wall 32 inches away, I agree with Coleman that it is likely that he would fall from the top of the cabinet. In evaluating the level of exposure, I have considered the length of time the violation existed both before and after the inspector arrived. Brady acknowledged that he was on top of the cabinet preparing to pull wire prior to the inspector entering the room, and attests that he would have followed through had he not been ordered down. I find that, while the time of his exposure may have amounted to only minutes, there was more than enough time for Brady to fall. First, the area on the top of the cabinet was small for one person to stand on and some of that area was obstructed by the pipes which extended upward from the center of the cabinet. Given the size of the area, the obstructions present, and Brady's position of working with his back to the edge of the cabinet, it is difficult to imagine how he could safely maneuver while maintaining his balance. Second, the area was dark. While the inspector testified that there was some ambient light present, Brady asserted that there was none. Accordingly, if Brady's testimony is to be taken at face value, then the only light he had to work with was that which was provided by the cap lamp. The lack of light and

the inability to fully see his surroundings certainly contributes to the likelihood of a fall. Third, Brady's balance would have been compromised because he would have needed both hands to pull and direct the cable that was being removed from the cabinet. I credit Coleman's testimony that pulling cable can cause a miner to lose his balance. Had Brady lost his balance, it is likely he would have attempted to arrest his fall by grabbing the cable tray, which he relied upon and grabbed to steady himself when descending the ladder. Notably, Brady conceded the cable tray could not support his weight. Given the circumstance, I find it likely that he would have fallen had the inspector not addressed the situation.

The normal actions of miners must be considered in determining whether a violation is S&S. In discussing the injuries related to guarding in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission took into account "inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" and explained that "in related contexts, we have emphasized that the constructions of mandatory safety standards involving miners behavior cannot ignore the vagaries of human conduct." *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (Nov. 1981). Here, a simple misstep, inadvertent stumble, or moment of inattention would have resulted in Brady falling more than seven feet to the concrete floor below.

The inspector testified that he is aware of a number of falls from such heights, including a fall in which a miner was attempting to pull cable prior to losing his balance and falling. Coleman explained that there have been fatalities in the mining industry as a result of falls from this height. I credit Coleman's testimony and agree that falling from a height of more than seven and a half feet, as measured by the inspector, would result in a serious injury. It is reasonably likely that the miner would strike his head, break a bone, or receive other serious injuries due to the impact on the floor. The injuries would be permanently disabling or even fatal. Consistent with my above analysis, I find that the violation is significant and substantial.

I also find that the violation was a result of the mine operator's high negligence. The Secretary's regulations explain that "high negligence" exists when "the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d), Table X (defining "high negligence"). The Secretary argues that Doe Run "should have known of the violation, and presented no mitigating factors." Sec'y Br. 11. I agree, and find that the operator either knew or should have known of the violation and that there were no mitigating circumstances.

Inspector Coleman testified that, based on Wlaschin's reaction to the inspector's initial identification of the hazard, it was his belief that the supervisor, Wlaschin, knew or at the very least should have known, that Brady had climbed the ladder and was standing on top of the cabinet without fall protection. Specifically, Coleman noted Wlaschin's lack of surprise that Brady did not have fall protection on, Wlaschin's denial that fall protection was needed, and the absence of any argument presented by Wlaschin at the time of the incident that he did not know Brady was on top of the cabinet. While Wlaschin acknowledged that he was aware that Brady had begun to ascend the ladder, he claims that he did not know Brady was on top of the cabinet. Moreover, Wlaschin claims that, contrary to Coleman's testimony, he did tell the inspector that he did not know that Brady had climbed on top of the cabinet.

I credit the inspector's testimony and find that Wlaschin had knowledge that Brady was on top of the cabinet without fall protection. While the area was dark, it is undisputed that Wlaschin saw Brady move the ladder into place and climb up without fall protection. I find it curious, at best, that, immediately upon seeing Brady begin to ascend the ladder, Wlaschin became distracted by Mills' work and the blueprints he was holding on to.[1] Moreover, I find it unlikely that he couldn't hear Brady moving on top of the large metal cabinet or see the light of Brady's cap lamp as he moved above. Tr. 62. I find that Wlaschin's testimony amounts to revisionist history of the events and, accordingly, credit the inspector's testimony and find that Wlaschin had knowledge of the violative condition. Moreover, I credit Coleman's testimony and agree that no mitigating circumstances existed. Accordingly, I find that Wlaschin, exhibited high negligence.

Doe Run, in arguing that the high negligence finding is not supported, states that Brady's conduct "was an isolated incident involving one miner who disregarded the company's policy, his training, and the availability of fall protection equipment" and that his negligence cannot be imputed to the operator. Resp. Br. 11. However, this argument, along with other arguments in its post hearing brief, ignores my above findings regarding Wlaschin's high negligence. Undoubtedly, Brady acted with extreme negligence and has admitted as much. However, Brady was a rank-and file miner, whose negligence generally cannot be imputed to the operator. *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982)("SOCCO"); *Reading Anthracite Co*., 32 FMSHRC 399, 411 (Apr. 2010) (ALJ). Wlaschin, on the other hand, was a supervisor, whose negligence can be imputed. *See generally Capitol Cement Corp.*, 21 FMSHRC 883, 894 (Aug. 1999). Wlaschin offered testimony that he was relatively new to the mine, had far less experience than the two electricians he was observing, and hinted that he wasn't really a supervisor because he was learning from the electricians and had never completed this specific task in the past. However, he was the one who noticed that Brady was not wearing his required respirator before starting the job, and signed the reprimand for Brady as his supervisor. Therefore, I find that Wlaschin was the supervisor in charge of the job. This finding is further supported by Brady's testimony that Wlaschin was his supervisor. While Wlaschin is young and was only at the mine for about a year prior to the incident, he is well educated and agreed that he had training on the mine's fall protection policy. I find that the totality of the evidence requires a finding that the violation was due to a combination of Brady's and Wlaschin's high negligence, and that Wlaschin's negligence may properly be imputed to the operator.

[1] Wlaschin testified that he "saw Brady up on a ladder. Then he went back in the cabinet when Brady wasn't standing there anymore." Tr. 59. I find this testimony puzzling. If Wlaschin saw Brady standing on the ladder, and then saw that Brady was no longer on the ladder, and could not be seen on the ground, it stands to reason that Brady had climbed up, gotten off of the ladder, and was on top of the cabinet. Yet somehow, if Wlaschin's testimony is to be believed, he failed to make this connection. At the very least, based on his own testimony, I find that Wlaschin *should have known* where Brady was and, given that he knew Brady did not have fall protection on, *should have known* of the violative condition.

I also find that the violation was a result of the operator's unwarrantable failure to comply with the mandatory standard. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek Coal*, *Inc.*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, concurring in part and dissenting in part).

The condition did not exist for an extended period of time, nor was it particularly extensive, and the operator was prompt in abating the condition. It is undisputed that Brady was only on top of the cabinet for a few minutes. However, while only a few minutes would have been needed to complete the task at hand, only a moment of inattention was needed for a misstep, or loss of balance, to result in a fall. Coleman assumed, and Brady confirmed, that Brady would have worked without fall protection if Coleman had not entered onto the scene. Nonetheless, when told to come down, Brady did so immediately and did not complete the job until toggle bolts were installed so that he could safely tie off. The violative condition was confined to a small area, on one job, and one electrician who decided he could quickly pull the cable without having to locate and put on fall protection. While these three factors arguably weigh in the favor of the operator, the same cannot be said for the other factors.

The condition was obvious. Coleman testified that almost immediately upon entering the room he noticed movement on top of the cabinet. While the room was dark, Brady's cap lamp was plainly visible and clearly revealed his location on top of the cabinet. There is no dispute that Brady was not wearing fall protection and that he was working at a height of over seven feet above the concrete floor. Given my above findings regarding Wlaschin's knowledge of Brady's location and lack of fall protection, and his proximity to violative condition, I find that the condition was obvious and easily seen by Wlaschin despite his testimony to the contrary.

The degree of danger and level of exposure presented by the condition are discussed in detail above in the context of my S&S analysis. Similarly, the operator's knowledge of existence

of the violation is discussed in detail above in my negligence analysis. Nevertheless, it is worth reiterating that, given the surrounding circumstances, Brady's blatant disregard of law and Wlaschin's failure to uphold the "high standard of care" required of mine operators made it reasonably likely that Brady would fall and suffer a serious injury. *See* 30 C.F.R. § 100.3(d). The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott*, 17 FMSHRC at 1116; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *SOCCO,* 4 FMSHRC at 1464. The Commission has further determined that "where a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464 (emphasis in original). Finally, while this standard is normally applied in determining the operator's negligence for penalty purposes, the Commission has confirmed that it also applies in determining whether an operator can be held responsible for a miner's aggravated conduct and, thus, be found to have unwarrantably failed to comply with a regulation. *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997). In this case, I am particularly concerned that Brady, who agreed he had been trained, blatantly ignored the requirement to tie off. Brady is not a supervisor, but his training and any discipline at the mine obviously were not sufficient to cause him to follow the rules.

The mine had been placed on notice that greater efforts were necessary for compliance. The inspector testified that he addressed the issue twice with the operator during inspections over the previous two years. In one instance, Coleman issued a citation where a miner was not tied off correctly while working at height. During a second inspection he had a conversation with the operator regarding its failure to have tie off points in an elevated area that was accessed by miners. In the course of those conversations he discussed with the mine the need to "improve [tie off] . . . points and focus on fall protection better." Tr. 32. While I agree with the operator that, on its face, the limited history of violations does not provide an especially strong case that notice was provided, I credit Coleman's testimony that he did have conversations with the mine regarding the need to focus on fall protection after he identified a place in the mine where miners worked in an elevated area without tie off points. Similarly, here, tie off points were also not available in the area where a miner was working. While Doe Run argues that these two events were not part of Coleman's calculus of the unwarrantable failure designation, I find that the facts bear out that the mine was on notice. Accordingly, I find that Coleman did place the mine on notice that greater efforts were necessary for compliance.

I have already found that both Brady and Wlaschin exhibited high negligence. They both knew that Brady should not be working at a height of over seven feet without fall protection, yet, Brady chose to do so and Wlaschin chose to keep his attention elsewhere. In doing so, Brady engaged in intentional misconduct and his supervisor exhibited a serious lack of reasonable care, both of which are indicative of "more than ordinary negligence." Wlaschin's conduct cannot be excused because he is relatively new or has less experience than the electricians he worked with at the time of the violation. He is well-educated and as a supervisor should know the rules about working safely. While the condition may have been short-lived, it was a serious hazard that was ignored, and could have quickly led to a fall, which would have resulted in a serious and potentially fatal injury. Therefore, I agree that the violation was an unwarrantable failure.

II. PENALTY

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

In the instant case, the operator is large, has no unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was high and, given the facts as discussed above, I agree. I have discussed the gravity and S&S nature above and find that a penalty of $2,106.00 as proposed by the Secretary is appropriate.

III. ORDER

The citation is affirmed as issued and Doe Run is hereby **ORDERED** to pay the Secretary of Labor the sum of $2,106.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 18, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEITH OVERFIELD, Complainant	: : : : :	DISCRIMINATION PROCEEDING Docket No. KENT 2014-483-D MSHA Case No.: MADI-CD-2014-13
v.	:	
HIGHLAND MINING COMPANY, LLC Respondent	: :	Mine: Highland #9 Mine ID: 15-02709

DECISION AND ORDER REINSTATING KEITH OVERFIELD

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, Representing the Secretary of Labor

Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY
Representing Respondent

Before: Judge Lewis

On May 13, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.,* and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Keith Overfield ("Overfield" or "Complainant") to his former position with Highland Mining Company, LLC, ("Highland" or "Respondent") at the Highland #9 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Overfield on April 3, 2014, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Overfield to his former position and rate of pay.

On May 21, 2014 Respondent requested a hearing regarding this application via certified letter. A hearing was held in Evansville, Indiana on June 10, 2014. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

At the close of the hearing Respondent conceded that the miner's complaint had not been frivolously brought. However, Respondent maintained that the miners' discrimination claim should be barred because of untimely filing. In the alternative, Respondent further argued that any reinstatement order should be modified based upon the mine's shut down, tolling Respondent's Reinstatement obligation.

For the reasons set forth below, I grant the Secretary's application for temporary reinstatement of Overfield, find that Overfield's discrimination claim is not barred upon late filing, and find that there should be no tolling of Respondent's reinstatement obligation pending full hearing.

Discussion of Relevant Law

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

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[1] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

[1] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and Overfield need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary 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).

Stipulations

The parties stipulated to the following legal and factual propositions:

1. At all times relevant to this action, Highland Mining, LLC has extracted and produced coal in interstate commerce

2. Highland Mining, LLC owns and operates the No. 9 mine located in Union County, Kentucky

3. Highland Mining, LLC is an operator subject to the jurisdiction of the Federal Mine Safety and Health Administration and its Administrative Law Judges.[2]

4. Keith Raymond Overfield was employed by Highland Mining, LLC as a mine examiner at Highland No. 9 mine during the period from 12/5/2012 through September 30, 2013. He began at Highland on September 20, 2010.

5. Keith Raymond Overfield left employment at the Highland Mining, LLC No. 9 mine on September 30, 2013.

6. Keith Raymond Overfield filed a complaint with the Federal Mine Safety and Health Administration on April 3, 2014 alleging that he was wrongfully terminated from his employment at Highland Mining, LLC No. 9 Mine.

(Joint Exhibit 1).[3]

Contentions of the Parties

On April 3, 2014, McKinsey executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint on the same date. In this statement he alleged the following[4]:

> I feel I was discharged because I am a mine examiner and was finding numerous violations that I wrote in the exam book. They didn't want me to put all of them in the box but allow them to just take care of them. I couldn't do that so when I had to take leave for a medical condition, they used that to discharge me. I am asking for my job back with all back pay and benefits restored.

GX-1*: Application for Temporary Reinstatement* at Exhibit B, p. 2.

The Secretary also submitted the May 12, 2014 Declaration of Curtis Hardison, a Special Investigator employed by the Mine Safety and Health Administration, with the Application. Inspector Hardison wrote that he investigated Overfield's discrimination claim against

[2] Clearly the parties intended to refer to the Federal Mine Safety and Health Review Commission's Administrative Law Judges. The undersigned takes no offense.

[3] Hereinafter Joint exhibits will be referred to as "JX" followed by the number. Government exhibits will be referred to as "GX" and Respondent's exhibits as "RX."

[4] The left-hand margin of the photocopied Discrimination Report filed by the Secretary was cut off. As a result, several words are either missing in whole or in part. These words have been recreated to the extent possible. Words and letters that are based on attempts to complete the document are included in brackets.

Respondent. Based on his investigation, Hardison concluded the following relevant facts were true:

> 4. Based on the foregoing facts and other facts gathered during my investigation, I have concluded that Keith Overfield was terminated on September 28, 2013 by Highland because he made safety complaints and engaged in protected activity during the summer of 2013. Highland also engaged in activity that interfered with the miners' rights of examiners at the No. 9 mine, including Keith Overfield. This constructive discharge violated Section 105(c) of the Mine Act. Accordingly, the complaint filed by Mr. Overfield was not frivolous.

Id. at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. (GX-1). In addition, both Hardison and Secretary's counsel at hearing asserted that Overfield's late filing in this matter was excusable as arising from justifiable ignorance, mistake, inadvertence, or excusable neglect. (Transcript at 111-112)(GX-1: *Application for Temporary Reinstatement* at Exhibit A, p. 2).[5] Further the Secretary asserts that there is a non-frivolous issue as to whether a subsequent layoff properly included Overfield. (Tr. 118-120).

Respondent disputes the Secretary's claim that Overfield was terminated for making safety complaints, but concedes that the discrimination was not frivolously brought. (Tr. 110). However, Respondent argues that the discrimination complaint should not be considered because Overfield was impermissibly late in filing. (Tr. 111-116). Further, Respondent argues that even if reinstatement were appropriate, that Overfield would currently be laid off as a result of an unrelated accident that occurred at Respondent's Prep Plant. (Tr. 118-120).

Summary of Testimony

At the time of the hearing, Keith Overfield had last worked September 17, 2013 at the Highland #9 Mine as a certified mine examiner.[6] (Tr. 16). Overfield had started at the mine around September 20, 2010 as a roof bolter. (Tr. 16).

In November 2011, while a roof bolter, Overfield filled in for Respondent's mine examiner, Mark Burns. (Tr. 17). He did so because Burns was sick and, according to management, would not return to work. (Tr. 17). In that capacity Overfield examined the air courses and pre-shifted outby areas. (Tr. 17-18). To examine an air course, Overfield would

[5] Hereinafter references to the transcript will be cited "Tr." with the page number.

[6] Overfield was present at the hearing and testified. (Tr. 15). Overfield had ten years of experience in underground mining and had held a Kentucky mine foreman certification since 2006. (Tr. 16-17, 60). At the time of the hearing Overfield was unemployed. (Tr. 15-16).

travel an intake or return in its entirety and mark down any hazards or violations.[7] (Tr. 18). During examinations, Overfield would take air readings to ensure the air was flowing with the necessary amount pressure and in the proper direction. (Tr. 18). Hazards, violations, and the course traveled were marked in a book at the surface, as was required by state and federal law. (Tr. 18-19). Most of the violations he found were pins (or roof bolts) out, pins sucking above the plates, or pins spread. (Tr. 20). Sometimes he found a substantial amount of these conditions. (Tr. 20). In a separate book, he would note the air readings. (Tr. 18-19).

Overfield examined about two miles a day in the air courses. (Tr. 21). In the returns, Overfield would use a permissible ride and in the intakes he would use a golf cart. (Tr. 21). Sometimes he was unable to get a ride because another miner, Darrell Bradshaw, would cut off the locks and take it. (Tr. 21, 65). These late starts would greatly affect his ability to conduct examinations. (Tr. 22). As a result, he would have to rush to complete the examinations in time and would not have the opportunity to do them properly. (Tr. 22). He rushed because this examination had to be completed before 12:00 a.m. Tuesday each week, or a violation would be issued. (Tr. 22-23). Overfield reported Bradshaw's thefts to "everybody" in management including the mine manager, the assistant mine manager, the safety department, the mine foreman. (Tr. 21-23). He even called the assistant mine foreman because he was stressed out trying to complete his job without the necessary tools. (Tr. 23). Overfield filed a harassment charge against Bradshaw. (Tr. 65). Both Overfield and Bradshaw were union employees, not management. (Tr. 66). Overfield was aware that he had the right go to the union representative and spoke to another miner, Larry Baker, about the situation. (Tr. 66).

In May 2012, Overfield went to the No. 2 unit's intake air course and found that his golf cart was missing again. (Tr. 24). Overfield attempted to reach the mine foreman, but he believed the foreman knew the reason for his called and chose to ignore it. (Tr. 24). The ride was eventually returned at 10:30, but the battery needed to be charged. (Tr. 24). Overfield then went to the foreman, Sleigh Kuykendall, and told him that the golf cart was dead and that he would not be able to complete the examination by midnight. (Tr. 24-25). Kuykendall said that he was tired of Overfield acting like he was a boss and that when Overfield returned to the pin crew he would show him who was boss. (Tr. 25). Overfield believed his job was permanent. (Tr. 25). He told Kuykendall that it was against the law to allow the air course to remain unexamined past 12:00 a.m. and that he was out of line. (Tr. 25).

The next day the Overfield's supervisor, assistant mine manager Aaron Farmer, told him that he would return to his duties as a roof bolter. (Tr. 20, 25-26). George Tudor was present as Overfield's union assistance. (Tr. 25). Farmer said he was not happy that Overfield had approached Kuykendall but Overfield believed he was just abiding by the law. (Tr. 26).

In November, Farmer told Overfield that examiners could not or would not finish the air course examination in seven days and Respondent was receiving citations for inadequate

[7] Until the new law was passed in 2012, Overfield did not use the term "violation" to refer to conditions found in the mine. (Tr. 19). However, the way he conducted the examination did not change with the new law, he just changed the way he referred to conditions in the book. (Tr. 19).

examination. (Tr. 26-27, 74-75). Farmer asked Overfield to apply for a soon-to-be posted examiner job.[8] (Tr. 26-27). Respondent wanted him to fix the problem by actually marking conditions in the book. (Tr. 75). Overfield bid for the permanent examiner job and was certified in December 2012, though he already had the proper paperwork before that point. (Tr. 27, 65).

When Overfield returned to the examiner position, he was still working on air courses but two months later switched to the rotating crew examining belts.[9] (Tr. 27-28). This was the position he held until he left Highland. (Tr. 28). In that position he rotated between the day and second shift conducting the on-shift examination. (Tr. 28-29). When on day shift he examined the main north, main east, to No. 2 and 4 unit outby area of the mine for conditions in the belt entry. (Tr. 28, 30). He would cover around six miles in a day examining three main belts and two unit belts. (Tr. 29). He would check the belts and rollers, but also loose ribs, loose top, and pins out. (Tr. 29). He traveled mostly along the belt in a golf cart. (Tr. 29). During his pre-shift, Overfield would examine the outby travel supply roads. (Tr. 30). As a result, his name would be in both the pre-shift and on-shift book. (Tr. 30-31). Any condition he found were recorded and signed in on-shift book at the surface. (Tr. 29-30). If a condition required attention because it posed an immediate hazard or could not be corrected, Overfield would call out for repairs. (Tr. 30).

In December 2012, Overfield, along with three other examiners and some salaried personnel, received written reprimands for failure to complete his examination books properly. (Tr. 71-72, 74). Farmer informed him that he had failed to follow MSHA regulation and Respondent's policy because the examiners had failed to take air readings while moving a power de-energized power unit. (Tr. 71-72). MSHA Inspector Felix issued an Order for failure to include an air reading on three straight shifts on which the foreman signed off. (Tr. 72-73). Overfield did not believe that there was a hazard. (Tr. 72-73). He did not fail to include information; he misunderstood what was required under the law. (Tr. 72-73, 78). Overfield conceded that he should have known better but he also asserted that he followed the example of more senior examiners who had moved in this manner for as long as they could recall. (Tr. 72-74). Respondent had known about this practice long before the reprimand and had only disciplined the examiners after the violation was issued. (Tr. 77). Because of this, Farmer stated he did not want to discipline the examiners but that he was under pressure from MSHA to discipline them and the salaried personnel. (Tr. 74). Overfield believed Respondent should have corrected the problem rather than blaming the examiners. (Tr. 73).

Sometime after Overfield returned to examination, Farmer quit and was replaced by Les Hawkins. (Tr. 31). Hawkins and Overfield had numerous discussions regarding information recorded in the books. (Tr. 31, 34). Hawkins would ask Overfield to quit writing down pin violations and to write fewer conditions and then correct them the next day. (Tr. 31). Overfield believed that if something was recorded and it was not corrected or worked on within a certain number of shifts, MSHA would issue an order. (Tr. 33). Management said that in recording numerous pins in the supply and belt roads, that Overfield was doing MSHA's job for them. (Tr.

[8] As this was a union mine, were required to be posted for bidding. (Tr. 27).

[9] The problem with the locks continued. (Tr. 65).

34). MSHA would see the recorded conditions, go to the recorded location, and then cite Respondent if the condition was not fixed. (Tr. 34-35). Overfield tried to comply with Hawkin's request, but it did not work out. (Tr. 31-32). A few times he did not record conditions, but later he or the foreman would write it up or tell another examiner about it. (Tr. 32). Most of the condition he did not record were damaged or spread pins. (Tr. 32). He would not report conditions if he felt he was already overwhelming management with what he had found. (Tr. 32). For example, if he saw four conditions he might only record three. (Tr. 32-33).

In August 2013 Hawkins spoke with Overfield about 25 missing bolts that Overfield had recorded in the book following an examination. (Tr. 35). Hawkins asked Overfield "what the deal was" with writing down 25 pins. (Tr. 35). Overfield told him that he was doing his job. (Tr. 35). Hawkins said he was ruffling feathers, that he and Mike Jones, the overseer of mines, were unhappy about it, and that he should "watch it." (Tr. 35-36, 43). Overfield believed that MSHA wrote citations for this condition. (Tr. 35).

In addition to Hawkins, assistant mine foreman Randy Lehman, Luke Hunley, and Rodney Sims would heckle Overfield about writing up conditions. (Tr. 69-70). They would ask each day how many pins he wrote up. (Tr. 69-70). Terry Johnson would ask him "how much dumb shit did you write up today." (Tr. 70). That was all they said. (Tr. 70). Overfield felt that Johnson was joking and did not feel pressured as a result. (Tr. 70-71). No one else in management complained about what Overfield wrote or did not write in the books. (Tr. 71).

Overfield spoke with the union regarding management. (Tr. 66). In particular, he spoke with Baker (and perhaps others) in June 2013 about the fact that management "stayed on his butt" for writing up pins. (Tr. 67). However, Overfield did not file a grievance because he was still noting hazards he saw and he or someone else was correcting them. (Tr. 68). Baker told him to continue to write things up. (Tr. 68). Overfield was not aware of Baker speaking to anyone in management about the situation and did not ask him to. (Tr. 68). Nothing changed after he spoke with Baker, Hawkins continued to talk him about the conditions he noted. (Tr. 68-69).

Overfield felt pressure from management. (Tr. 36). He had been receiving treatment from neurologist Michael Mayron for depression and attention deficit disorder since 2008 (before working for Respondent). (Tr. 37, 58). Respondent was probably not aware that he was seeing Dr. Mayron, but they were aware of his condition. (Tr. 37). Overfield had separate conversations with Hawkins, Farmer, and Ezra French regarding his depression. (Tr. 38). Usually, he would discuss the condition when he was doing better. (Tr. 38). He was pretty sure that they knew he was on medication. (Tr. 38).

On September 17 Overfield returned from work and saw that his house had been robbed for the fourth time since June. (Tr. 36). He had filed two previous police reports but to no avail. (Tr. 36-37). When he saw his home he suffered a nervous breakdown. (Tr. 37). He then purchased a crossbow (because all of his guns were stolen), parked his car in the woods, and sat in the dark with the lights out for four days hoping to learn who had broken into his house. (Tr. 38). While there, Overfield was scheduled to work but did not attend. (Tr. 38-39). Instead, he called each day and left messages stating he was unable to go to work. (Tr. 39-40). He believed he could use his sick days and that he was not violating the attendance policy. (Tr. 40, 75). One

day he told the mine foreman, Mickey Morris, that he would not be able to go to work and that he needed psychiatric help. (Tr. 39). He recognized that he was having a breakdown and that he was not fit to work. (Tr. 39-40, 76). Eventually, he called Dr. Mayron to set up an appointment on the 25th, which was the earliest available date. (Tr. 40-41). He tried to call his family doctor but the doctor was out of town. (Tr. 40).

On Monday, Hawkins left a voicemail with Overfield asking him to do an air course examination. (Tr. 41). Overfield called back and said he had had a breakdown, that he had an appointment with a doctor the next day, and that he could not come in. (Tr. 41). Hawkins asked him to come in and said they would work something out. (Tr. 41). Overfield did not believe he had any business being there, but Hawkins knew Overfield would do anything if the mine was in trouble. (Tr. 41). As a result, Overfield went to the mine around 2:30 to talk to Hawkins. (Tr. 41-42). He did not clock in or wear the mining clothes he stored at the mine. (Tr. 42).

At the meeting Overfield informed Hawkins that he had a doctor's appointment the next day and did not believe he needed to be present, but that he would do an examination if necessary.[10] (Tr. 42-43). Hawkins told him to wait and then brought in Mike Jones and Tanya McCullough.[11] (Tr. 43, 100). When he arrived, Overfield did not anticipate that he would have a meeting with HR and management. (Tr. 44). The situation made Overfield's mental condition worse. (Tr. 44). Mike Jones asked Overfield what happened and Overfield said that he had had a nervous breakdown and was going to see a doctor. (Tr. 44). Mike Jones told him that he was going to be suspended with intent to discharge because he was absent for five days without a doctor's excuse and then gave him documents to that effect. (Tr. 44-45). Overfield asked for FMLA time and it was denied. (Tr. 44). When he said he had a doctor's appointment the next day, Jones said to bring a doctor's note in and they would see what they could do. (Tr. 46).

On the 25th, Overfield saw Dr. Mayron. (Tr. 46). He did not feel ready to go back to work and Dr. Mayron excused him from the 17th through the 26th. (Tr. 46, 76). The excuse verified that he was not able to work and he brought the note to HR. (Tr. 46-47). He did not know of any policy against a backdated doctor's excuses. (Tr. 75). Overfield felt on the 26th that he could return to work. (Tr. 77). He then called the mine and was told by McCullough that he was still suspended with intent to discharge. (Tr. 47).

On September 29, 2013 Overfield attended a meeting with Respondent. (Tr. 47-48). He first met with union officials, including Steve Jones, the District 12 Union Representative; Terry Miller, the Local 1793 President; George Tudor, the Local Union Treasurer; and Baker, Local

[10] While at the mine, Overfield checked the air course books to see if he was actually needed and saw that the area Hawkins had told him he would be examining already been checked. (Tr. 44-45). While he was there, no one talked about the examination. (Tr. 45).

[11] Tanya McCullough appeared at hearing and testified for Respondent. (Tr. 81). At the time of the hearing and in September 2013, McCullough was the manager of human resources for Respondent. (Tr. 81). In that capacity she was responsible for contract administration, attendance control, employee discipline, hiring benefits, and other duties. (Tr. 81).

Union Secretary and safety committee member. (Tr. 47-48). He then met with Mike Jones, Hawkins, and another human resources official (not McCullough). (Tr. 49, 100). At the meeting, they told Overfield that he was fired. (Tr. 49). The union did not say anything on his behalf but they told him to plead for his job or a last chance agreement.[12] (Tr. 49). The request was denied by Mike Jones and Hawkins. (Tr. 49). However, after speaking with the union, Respondent allowed Overfield to resign instead of being fired. (Tr. 51). Human resources drafted the resignation letter, Overfield signed and dated it on September 30, 2013, and it was witnessed by Steve Jones. (GX-2, Tr. 50-51). Overfield did not feel like he had any options because if he signed he got unemployment and a positive recommendation, but if he did not sign he would be terminated and his unemployment would be denied. (Tr. 51-52).

When Overfield signed the resignation letter, he believed he had been discriminated against and went to a lawyer about the issue. (Tr. 61-63). He contacted his attorney, Gary Gibbs, seeking legal advice but Gibbs did not represent miners in discrimination and wrongful termination proceedings. (Tr. 52-53). Gibbs referred Overfield to Amy Zachary but he was never able to meet with her. (Tr. 53, 62). She cancelled their first meeting at the end of October and later informed him that she no longer worked discrimination cases. (Tr. 53). He then spoke with attorneys in Evansville in December or January but they required a $2,500.00 retainer so he did not hire them. (Tr. 62-63). He considered other attorneys in Louisville. (Tr. 63). None of the attorneys Overfield spoke to suggested that he contact MSHA. (Tr. 55). Overfield did not approach MSHA because he did not know that he could. (Tr. 53, 55). In April, Overfield heard about a case involving David Woods and decided to call MSHA. (Tr. 53-54, 56). It was probably only one day between hearing about Woods' case and the filing of Overfield's complaint. (Tr. 56).

After his resignation, Overfield filed for unemployment benefits in Kentucky. (Tr. 63). Under the reason for the application he stated he was forced to resign because of a mental health crisis. (Tr. 63-64). He did not tell the unemployment office that he was discriminated against because he did not think it was relevant and because the mental health reason was on the one given by Respondent. (Tr. 64). Further, the form was very basic. (Tr. 64-65).

Overfield conceded that he attended annual refresher training in March. (Tr. 54). This occurred twice a year. (Tr. 54, 61, 105). During those trainings workers were instructed about miners' rights. (Tr. 54, 61, 105). Overfield testified that he did not recall learning about his right to go to MSHA with a discrimination complaint. (Tr. 54, 61). Randy Glen Duncan testified that the right to go to MSHA with a discrimination complaint was included in Respondent's miners' rights training.[13] (Tr. 106). However, Duncan was not sure if he had spoken with Overfield about miners' rights or even if Overfield was present for the training. (Tr. 107). He never told Overfield personally that if he was discriminated against, he should contact MSHA; that was the instructors' job. (Tr. 107). Duncan could not say how much time was

[12] According to Overfield, a last chance agreement is a six month to one year period where a miner keeps his job but can be terminated for any run-ins with management. (Tr. 49).

[13] Randy Duncan appeared at hearing and testified for Respondent. (Tr. 103). At all relevant times he was safety manager with Patriot Coal, at Highland 9 mine. (Tr. 103-104).

devoted to miners' rights in the training, but he knew it was usually covered before lunch as part of the safety meeting. (Tr. 108). In addition to the training, Duncan testified that MSHA regularly handed out miners' rights information and that the information, along with a phone number, was posted on a board at the mine. (Tr. 105-106). The discrimination protections were well known throughout the mining industry. (Tr. 106).

Back at the mine, on May 6 between 11:00 and 12:00, one of the floors of the Camp 9 prep plant collapsed. (Tr. 104). The Camp 9 prep plant is where the coal mined at Highland #9 is sent from underground to be cleaned and shipped to the terminal. (Tr. 104). The plant was idled from after MSHA inspector Coburn issued a (j) order (RX-F). (Tr. 104-105). With the prep plant down, coal production was impossible. (Tr. 83-84). Respondent continued to mine coal until May 9 and then, on the 10th the mine idled. (Tr. 84-85, 105). By May 12, no one was working. (Tr. 84).

On May 9, mine management personnel met with Steve Jones, the UMWA International District Representative, and Steve Earle, the International District Vice President and discuss how to get the employees through the layoff during the idle period. (Tr. 82-84, 100). (RX-A). (Tr. 82-83). Respondent and the UMWA made an agreement that they would retain the most senior employees in their respective job title during the period (RX-A). (Tr. 84, 86). Respondent determined the number of employees it still needed in each job title and then kept the most senior employees in each classification. (Tr. 84). Those employees would continue to work while the rest were idled. (Tr. 84). The job classification was the one that existed at the time of the layoff but the seniority calculation was from the time of hiring, not the time that the miner received that job classification. (Tr. 85-86). As operations ramped back up and more employees were needed, the same seniority rules would be used for call-back priority. (Tr. 85). Seniority and job classification would be the only issues considered during recall. (Tr. 85). At the time of this meeting, McCullough was aware that Overfield had filed the complaint, having learned of it in April. (Tr. 100). However, she asserted that the outstanding case with Overfield was not considered in making the agreement. (Tr. 100).

On May 12, Respondent had a meeting at Henderson Community college with the union and all of the employees. (Tr. 85, 105). Respondent explained that everyone would be off of work and then how everyone would be brought back. (Tr. 105).

According to McCullough, if Overfield still worked for Respondent, he would still be laid off. (Tr. 92-93). McCullough reviewed a list of workers classified as mine examiners and their seniority date. (Tr. 87). Even though Overfield was not employed in May 2014, he was included in the list at the No. 16 spot.[14] (Tr. 87-88). Because he was a mine examiner when he resigned, that was his classification used for determining the recall. (Tr. 87). The seniority ranking was placed automatically onto personnel information sheets based on information in the

[14] Tavon Polk and Overfield were both hired on the same day, September 20, 2010 (RX-C). (Tr. 86). As a result, a drawing was conducted to see who had the higher seniority. (Tr. 86). Polk drew the No.1 spot and Overfield the No. 2 spot for callback. (Tr. 86-87).

human resources data bank (RX-D).[15] (Tr. 88-90). At the time of the hearing, the ten most senior examiners had returned to work while the remaining examiners had not. (RX-E, Tr. 90-91). At No. 16 in seniority, five more examiners would be reinstated before Overfield. (Tr. 91-92). For example, Carl Rich was hired on December 16, 2009, before Overfield. (Tr. 90). Rich was ranked No. 13 on the seniority list of examiners and would be entitled to reinstatement before Overfield. (Tr. 90).

The personnel information used to determine seniority did not include previous job titles. (Tr. 96-97). One miner, David Reynolds, only became a belt examiner on September 25, 2013, around the same time Overfield left. (Tr. 97). However, McCullough could not say if Reynolds would not have been classified as a belt examiner if Overfield had not left, because Respondent added 60 new jobs between September 18 and 25 during a change in schedule. (Tr. 97-98). McCullough could not say which examiner was replacing Overfield, because of the change in staffing at Respondent's mine, however someone was replacing him. (Tr. 98-99). It is possible that someone would not be on the list if Overfield had not been laid off. (Tr. 99).

McCullough was familiar with the 2013 Coal Wage Agreement between Respondent and the UMWA and was aware that it was binding. (Tr. 93). The contract section regarding reduction and realignment allows senior miners to move into another job. (Tr. 93-94). However, McCullough believed that this was not a reduction because it was temporary. (Tr. 94). She believed the agreement with the UMWA ensured they followed the contract. (Tr. 100). No units were shut down due to economic reasons. (Tr. 94). Respondent simply had to idle the mine based upon the prep plant. (Tr. 94). If they had taken gone through a reduction, the 390 employees would have lost their jobs and health insurance in May and been forced to use the recall process to bid back into jobs when the mine started back up. (Tr. 94-95). Respondent and the UMWA were attempting to retain job titles and allow for extended benefits to minimize adverse effects. (Tr. 94-95).

McCullough also reviewed a list of roof bolters arranged by seniority date (GX-3). (Tr. 95-96). The list was highlighted for those roof bolters who had returned to work, including one with a seniority date of February 7, 2011). (Tr. 96). However, McCullough did not believe that this meant Overfield would be senior to the last recalled roof bolter because the agreement regarding recall superseded the contract. (Tr. 96). Under the terms of that agreement, it was not permissible for Overfield to return to another position, even if he was qualified. (Tr. 92, 101). Other employees with seniority over recalled workers have requested to change titled, but the call backs were based on seniority and job title, not just seniority. (Tr. 92-93). In fact, employees senior to Overfield were laid off despite being qualified to perform other jobs. (Tr. 101).

At hearing, Overfield's mental condition was still not good and he had been depressed since he lost his job. (Tr. 54, 58, 60). He had been depressed since he lost his job. (Tr. 54). He was unable to see Dr. Mayron or buy his depression medication (Pristiq) because he had lost his insurance and could not afford it. (Tr. 54, 58, 60). However, he was taking 30 milligrams of

[15] The sheet listed the employees' address, marital status, birth date, hire date, and title. (Tr. 88).

morphine twice daily, 10 milligrams of Oxycodone four times daily, and Adderall for attention deficit. (Tr. 56, 58-59). He was prescribed to take Adderall twice a day, but he could not afford to without insurance. (Tr. 56, 59-60). Instead, he would still take it if he required the ability to focus and pay attention. (Tr. 59-60). He had been on the pain medication since 2008 when he had the first of three back surgeries. (Tr. 56). The pain medications were generic and less expensive. (Tr. 60). This was the same medication he took while working. (Tr. 57). However, at hearing he felt that if he could take his medication, he could return to work. (Tr. 77).

Overfield believed that he was fired because he wrote too many conditions, including pin condition, in the book. (Tr. 55). He knew from being pulled aside by Hawkins that Respondent was unhappy that he recorded conditions. (Tr. 55). He believed they wanted an examiner who was not keen on finding hazards and violations. (Tr. 55).

Findings and conclusions

A. Timeliness

Both parties agree to the facts in this matter as it pertains to timeliness. Furthermore, the parties agree about the Commission's framework for determining timeliness. As a result, the only issue is the application of that framework to the instant matter.

Under §105(c)(2) of the Mine Act, a miner alleging discrimination has 60 days from the date of the discriminatory action to file a complaint with the Secretary of Labor. 30 U.S.C. §815(c)(2). As the parties agree, under settled Commission case law, the 60-day period is not jurisdictional. *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984); and *IMCO Services*, 4 FMSHRC 2135 (Dec. 1982). Instead, a judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" in order to determine whether a miner's late filing should be excused. *Arch of Illinois*, 21 FMSHRC 1381, 1386-1387 (Dec. 1999) *citing Hollis*, *supra*. To that end, a miner's late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including genuine ignorance, mistake, inadvertence, and excusable neglect. *Phillips Dodge Morenci*, 18 FMSHRC 1918, 1921-1922 (Nov. 1996) *citing Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). A consideration in determining whether a delay was justifiable is whether the operator suffered "material legal prejudice." *See Arch of Illinois*, *supra*; *see also Nantz v. Nally & Hamilton, Enters.*, 16 FMSHRC 2208, 2214-2215 (Nov. 1994) *overruled on other grounds Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996); *Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992); and *Lizza Indus.*, 6 FMSHRC at 13. Even a lengthy delay beyond the 60-day period can be permissible when it is justified by the circumstances and without prejudice to the operator. *See e.g. Secretary of Labor on behalf of Hale v. 4-A Coal Co.,* 8 FMSHRC 905, 905-06 (June 1986) (two year delay); *Nantz,* 16 FMSHRC at 2214-2215 (Nov. 1994) (four month delay).

In the instant matter, the parties agree that Overfield ceased his employment with Respondent on September 30, 2013. (GX-2, Tr. 50-51). Therefore, in order for his complaint to

be considered timely, Overfield was required to file with the Secretary no later than November 29, 2013. However, Overfield did not file his discrimination complaint until April 3, 2014, 185 days after the adverse employment activity (and therefore, 125 days late for the 60-day deadline). (GX-1, Tr. 53-54, 56).

I find that Overfield's failure to file his discrimination complaint until April 4, 2014 was the result of genuine ignorance, mistake, inadvertence, or excusable neglect. I credit Overfield's testimony that he did not file with the Secretary because he did not know that he had that option. (Tr. 53, 55). While he conceded that he attended safety training that included miners' rights instruction, he stated that could not recall hearing that he had the right to bring discrimination complaints to MSHA. (Tr. 54, 61). While evidence suggested that some information on miners' rights was posted, nothing shows that Overfield had actual knowledge of his rights but failed to act. In fact, Respondent's witness, Duncan, could not state whether Overfield had actually received this information. (Tr. 107).

Overfield's genuine ignorance about the Mine Act's protective provisions is shown by his subsequent action. Specifically, he filed for his unemployment benefits and immediately sought out several attorneys in the field of wrongful termination and workplace discrimination. (Tr. 52-53, 61-63). Unfortunately for Overfield, none of these attorneys were aware of the Mine Act's provisions. (Tr. 52-53, 61-63). The Commission has considered the pursuit of related complaints when determining whether a delay is justifiable. *See Arch of Illinois*, 21 FMSHRC at 1387). The ignorance of these attorneys should not form a basis for punishing Overfield. The evidence shows that Overfield did not "sleep on his rights" but instead actively sought legal redress for the alleged wrong. He was simply genuinely unsure of how to do so. As a result, I find that Overfield's delay was justifiable.

I further find that no evidence was presented that indicated that Respondent suffered any prejudice from the delay. On the contrary, Respondent was able to vigorously defend its position through witnesses and documentary evidence without any perceivable hindrance.

In light of these circumstances, I find that a dismissal of Overfield's claim would be inappropriate, regardless of the delay.

B. Discrimination Claim

As noted, *supra*, at the close of hearing Respondent essentially conceded the miner's complaint was not frivolously brought. (Tr. 110). Therefore, only a brief discussion of this issue is deemed warranted. To support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action.

In the instant matter, Overfield testified that in his capacity as mine examiner, he often reported hazards and violations in the record books on the surface. (Tr. 18-20, 29-31). Specifically, he testified that he reported broken, missing, or overly spaced roof bolts and other, similar conditions. (Tr. 20, 29). Therefore, there is evidence of protected activity.

Further, Overfield testified that he was pressured to resign on September 30, 2013. (Tr. 51-52). According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985). Constructive discharge is an adverse employment action for the purposes of the Act. *See e.g., Simpson v. FMSHRC,* 842 F.2d 453, 461 (D.C. Cir. 1988); and *Nantz*, 16 FMSHRC at 2210. Therefore, there is evidence of an adverse action.

In light of the evidence of protected activity and the evidence of adverse action, the question turns to whether there is a nexus between those two factors. The Commission recognizes that direct proof of actual knowledge is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See*, *e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

With respect to hostility or animus, Overfield testified that members of management asked him to cease making safety complaints and to refrain from reporting conditions in the record books. (Tr. 31, 34-36, 43). Further, he testified that members of management would give him a hard time about his zeal for safety. (Tr. 35-36, 43, 69-71). With respect to knowledge, Overfield testified that he reported safety conditions in the record books reviewed by management and that management referenced his complaints in ordering him to "back off." (Tr. 31, 34-36, 43, 69-71). With respect to the coincidence in time, Overfield testified he made these complaints at all times during which he was a mine examiner from November 2011 to May 2012, and again from November 2012 until his discharge on September 30, 2013. (Tr. 18-20, 29-31). Finally, the Secretary presented no evidence of disparate treatment. Considering all of the factors together, there appears to be some evidence of nexus between the protected activity and the adverse employment action.

Respondent argued that it gave Overfield the choice between signing a letter of resignation because he had failed to follow the proper procedures for sick leave and missed five unexcused days. (Tr. 44-45, 51-52). However, given the low evidentiary bar at this level of the proceeding, Respondent conceded that Overfield's discrimination claim was not frivolously brought. In light of this fact, and the evidence summarized above, I find that Overfield's discrimination complaint was not frivolously brought. As a result, I find that temporary reinstatement is appropriate.

C. Tolling

While conceding that Overfield's discrimination complaint had some merit, Respondent argues that the temporary reinstatement should be tolled in light of intervening circumstances. Within the scope of a temporary reinstatement proceeding, the Commission has permitted a

limited inquiry to determine whether the obligation to reinstate a miner may be tolled. *Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, *3 (Feb. 2013). The Commission recognized that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012)(citations omitted). When an operator seeks to toll a temporary reinstatement order based on a subsequent layoff, it bears the burden to demonstrate by a preponderance of the evidence that "the layoff properly included" the miner who filed the complaint of discrimination. *Ratliff*, 35 FMSHRC at *3-4 (*citing Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1055 (Oct. 2009)). However, if the objectivity of the layoff as applied by the miner is called into question during the temporary reinstatement proceeding, the judge must apply the "not frivolously brought" standard from §105(c)(2) of the Act to the miner's claim. *Id*. The Commission further clarified that under the "not frivolously brought" standard, the Secretary's burden of proof was "limited to establishing facts which *could* support the claim that any inclusion of the complaining miner in the layoff might have been based in part on the miner's protected activity." *Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, *4 (May 2013)(emphasis in original). The Commission explained that the lower burden was appropriate because "the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action." *Id*. Therefore, if the claim that the layoff arose at least in part from protected activity is not frivolous, then the reinstatement should not be tolled. *Ratliff*, 35 FMSHRC at *3-4. If the Secretary then fails to establish any possibility that the miner's inclusion in the layoff was motivated by the miner's protected activity, then the burden reverts to the operator to show, by a preponderance of evidence, that tolling was justified. *Id*.

Therefore the Commission requires that when an operator raises the issue of tolling in a temporary reinstatement proceeding the judge must first determine whether the Secretary has "called into question" the objectivity of the layoff. If the Secretary has not called that objectivity into question, then the operator must prove by a preponderance of the evidence that the miner was properly included in the layoff. If the Secretary has called the objectivity of the layoff into question, then the judge must determine if facts exist which *could* support a claim that the layoff was based in part on the miner's protected activity. If the Secretary is able to present a non-frivolous argument regarding the discriminatory motivation of the layoff, then the tolling is inappropriate. However, if the Secretary is only able to provide frivolous arguments as to the discriminatory motivation of the layoff, then the Respondent must only prove by a preponderance of the evidence that the miner was properly included in the layoff.

In the instant proceeding, Respondent argued that the temporary reinstatement should be tolled because Overfield would have been included in a layoff that occurred on May 10, 2014. Specifically, it noted that on May 6, 2014, a floor in the mine's preparation plant collapsed, necessitating a complete shutdown of the mine on May 10, 2014. (Tr. 84-85, 104-105). Respondent and the UMWA developed a call-back procedure from that layoff based on seniority and job title. (Tr. 82-84, 100). Miners were brought back to the mine based on their job titles at the time of layoff and their overall seniority at the mine. (Tr. 84-86). Respondent argues that under the terms of that agreement with the union, Overfield would still be laid off as there are five examiners with more seniority who had not yet been returned to work. (Tr. 92-93). Therefore, the tolling issue was raised.

Respondent argued that the Secretary failed to call into question the objectivity of the layoff. (Tr. 119). The Commission has not specifically defined what actions are necessary to "call into question" the objectivity of a layoff. In the instant matter, however, I find that the Secretary's actions were sufficient to call into question the objectivity of the layoff. There are several reasons for this determination. Perhaps most importantly, Secretary's counsel affirmatively stated that the Secretary wished to challenge the layoff's objectivity. (Tr. 119-120). In addition, the Secretary's counsel cross-examined Respondent's witnesses regarding the layoff and also introduced documentary evidence during that cross-examination. Given the fact that the layoff occurred three days before the Discrimination Complaint was filed (and the call-back procedure was announced the day before it was filed) and the Complaint was filed without knowledge of the layoff, there was no reasonable time for the Secretary to "call into question" the objectivity of the layoff before hearing. (Tr. GX-1, 50-51, 84-85, 105). In fact, Secretary's counsel only received copies of Respondent's documentation regarding the layoff at the hearing. (Tr. 79-81). Furthermore, even if the Secretary had knowledge of the layoff, the duty to "call into question" the objectivity of the layoff only arises when Respondent asserts that the reinstatement should be tolled. Therefore, the total record established that the Secretary reasonably called into question the objectivity of the layoff.

Having found that the Secretary "called into question" the objectivity of the layoff, the next issue is whether the Secretary presented facts which could support a claim that the miner's inclusion in the layoff was based in part on the miner's protected activity. In the instant matter, it appears that all the miners at the mine were laid off for several days after the collapse of the prep plant. (Tr. 83-85, 105). The issue here is whether facts exist that could support a claim that Respondent's failure to call Overfield back to work since such time was the result of his alleged protected activity. I find that such facts exist. Specifically, Respondent's witnesses testified that the layoff and callback procedure used at the mine differed in some ways from the collective bargaining agreement as it relates to reduction and re-alignment. (Tr. 92-94, 96, 101). If the collective bargaining agreement sections regarding reduction and re-alignment were followed, Overfield could have bid for the roof bolter position. (Tr. 93-94). At the time of the hearing a roof bolter position was filled by a miner with less seniority than Overfield. (Tr. 96). Further, McCullough testified that when Respondent and the union were negotiating this modified call-back procedure, that Respondent was aware of Overfield's discrimination complaint.[16] (Tr. 100). As discussed *supra*, Respondent was aware of Overfield's protected activity. (Tr. 31, 34-36, 43, 69-71). Therefore, I find that the Secretary has raised a non-frivolous issue as to whether the call-back procedure was designed in part to prevent Overfield from being called back because of his protected activity.

Respondent's witnesses argued at hearing that Overfield was not considered in creating the call-back procedure. (Tr. 100). McCullough argued that the reduction and re-alignment sections of the collective bargaining agreement did not apply in this matter. (Tr. 94). Further, she stated that the motivation in creating the call-back procedure used was to protect the miners' benefits during the layoff. (Tr. 94-95). All of these assertions could very well be true.

[16] McCullough's inability to answer what specific miner had filled Overfield's position raised further questions as to the objectivity of the miner's continued inclusion in the layoff. (*See also Secretary's cross-examination* at Tr. 98-100).

However, at this preliminary stage, it would be inappropriate to consider the conflicting evidence regarding the call back procedure. It is sufficient that the facts could support a claim that Respondent designed the call back procedure to prevent Overfield from returning to the mine. A full determination of the circumstances surrounding the layoff and call back will be made at the hearing on the merits.

Therefore, after careful review of the total record and above-cited case law, I find that the Secretary's claim was not frivolous that Overfield *may* not have been called back to work from layoff due to, in part, his past safety complaints. The Secretary mustered sufficient facts that *could* support the claim that any continuing inclusion of Overfield in the layoff following the shutdown *may* have been based in part on his protected activity. Therefore, given the burden would not in such case revert to the operator to show, by a preponderance of the evidence, that tolling was justified, I need not resolve whether Respondent proved that Overfield was properly laid off. Instead, I find that tolling is inappropriate in this matter. Therefore, immediate temporary reinstatement is warranted.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Overfield, as a mine examiner, at the same rate of pay, for the same number of hours worked, and with the same benefits, as at the time of his discharge.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 19, 2014

BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2012-453-R
v.	:	Order No. 8431667; 03/06/2012
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2012-454-R
MINE SAFETY AND HEALTH	:	Citation No. 8431668; 03/06/2012
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. LAKE 2012-455-R
	:	Citation No. 8431669; 03/06/2012
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2012-174
Petitioner	:	A.C. No. 11-03054-270696-02
	:	
v.	:	Docket No. LAKE 2012-175
	:	A.C. No. 11-03054-270696-03
BIG RIDGE, INC.,	:	
Respondent	:	Docket No. LAKE 2012-262
	:	A.C. No. 11-03054-273420-02
	:	
	:	Docket No. LAKE 2012-263
	:	A.C. No. 11-03054-273420-02
	:	
	:	Docket No. LAKE 2011-349
	:	A.C. No. 11-03054-242336-02
	:	
	:	Mine: Willow Lake Portal

Appearances: Letha A. Miller, Esq., and Breyana Penn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Arthur M. Wolfson, Esq., and Jason P. Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Respondent

Before: Judge McCarthy

DECISION AND ORDER

I. Statement of the Case

This case is before me upon three Notices of Contest filed by Contestant Big Ridge, Inc. against the Secretary of Labor and five Petitions for Assessment of Civil Penalties filed by the Secretary against Big Ridge, Inc. (Respondent) pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act"), as amended.[1] Twelve violations of mandatory safety standards remain at issue from four dockets. They involve nine 104(a)(1) citations and three 104(d)(2) orders issued by various MSHA inspectors between August 2010 and October 2011. P. Exs. 1, 4, 6, 9, 10, 12, 21, 32, 34, 38, 40, 43. The Secretary has proposed specially assessed penalties for six of the twelve unresolved citations/orders. Respondent contests the alleged unwarrantable failure, significant and substantial (S&S), gravity and/or negligence designations, and the validity of the proposed civil penalties.

A hearing was held in Carbondale, Illinois. The parties agreed to conduct several "mini trials" on each unresolved citation/order, elected to waive opening statements, and introduced testimony and documentary evidence, with witnesses sequestered. Tr. 13-24.

Based on the entire record, including the parties' lengthy post-hearing briefs and my observation of the demeanor of the witnesses,[2] I first evaluate citations/orders for roof control, accumulations of combustible material, and maintenance of the incombustibility content of rock dust. I then evaluate the ventilation control, belt maintenance, and accumulation citations written during an impact inspection in which Respondent allegedly was denied its walkaround rights under section 103(f) of the Mine Act. Finally, I affirm my bench decision vacating on credibility grounds an alleged unwarrantable order for failure to perform a pre-shift examination and certify that the examination had been made.

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[1] At the outset of the hearing, Respondent withdrew its Notices of Contests of Order No. 8431667 and Citation Nos. 8431668 and 8431669. Tr. 7. In addition, the parties settled the majority of the citations and orders at issue in the above-referenced dockets prior to hearing, including all of Docket No. LAKE 2011-349. The settlement terms were submitted to the undersigned as Joint Exhibit 2. Tr. 12. I have reviewed the parties' joint settlement motion made on the record and I approve the parties' settlement agreement set forth in Joint Exhibit 2 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

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

II. Basic Legal Principles

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial nature. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co. v Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that often is the most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there is a confluence of factors that make an injury-producing fire and/or explosion reasonably likely. *Utah Power & Light Co., Mining Div.,* 12 FMSHRC 965, 970-971 (May 1990) ("*UP&L*"). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03.

B. Negligence and Unwarrantable Failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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

30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp*., 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136. Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g., Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

C. Penalty Assessment Principles

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

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

> C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

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

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed." *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg,* 5 FMSHRC at 293.

As Senior Judge Zielinski recently explained in *American Coal Co.*, 35 FMSHRC ___, slip op at 54-55, No. LAKE 2008-666 (May 19, 2014), the purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). Similarly situated operators, determined to be liable for violations with similar gravity, negligence and other penalty criteria, ideally should be assessed similar penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $100 to $70,000. The Secretary's regulations for determination of a penalty amount by a regular or special assessment, 30 C.F.R. §§ 100.3, 100.5, take into consideration the statutory factors that the Commission is obligated to consider under section 110(i) of the Act.[3] The product of these assessment formulae provide a useful reference

[3] Under the regulations, penalty points are assigned based on the size of the operator and (continued...)

point, which promotes consistency in the imposition of penalties by Commission judges. *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. § 100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving extreme gravity and/or gross negligence, or other unique aggravating circumstances may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment.

Where the Secretary urges a penalty higher than that derived by reference to the assessment process set forth in 30 C.F.R. § 100.3, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria. The undersigned recognizes that the Secretary has developed, pursuant to his authority under 30 C.F.R. § 100.5, a process for the special assessment of proposed penalties. MSHA, OFFICE OF ASSESSMENTS, ACCOUNTABILITY, SPECIAL ENFORCEMENT & INVESTIGATIONS, SPECIAL ASSESSMENT GENERAL PROCEDURES (Sep. 7, 2011), http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf. These procedures, however, have not been codified as binding regulations, and thus, have not been subject to notice and comment rule making, unlike the normal assessment procedures in section 100.3. Where the Secretary has provided adequate documentation of how he determined the specially assessed penalty and is able to demonstrate the appropriateness of proposing a specially assessed penalty, the guidance in the General Procedures may also provide a helpful guide for assessing an appropriate penalty.

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[3](...continued)
the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A proposed penalty is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies proposed penalties ranging from $112 for 60 or fewer points, up to the statutory/regulatory maximum of $70,000 for 144 or more points for non-flagrant citations and orders. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. § 100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. § 100.3(h).

The Secretary has proposed a total penalty of $274,153 for the twelve citations/orders remaining at issue. For the reasons explained herein, I assess a total penalty of $116,622.

III. Stipulated Facts

The parties stipulated to the following facts at hearing.

1. At all times relevant to these proceedings, Respondent was engaged in underground bituminous coal mining operations at Willow Lake Portal (Mine ID 11-03054) in Equality, Illinois.

2. Respondent's mining operations affect interstate commerce.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ et seq. (the "Mine Act").

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803 (d), at Willow Lake Portal where the Citations being contested in the proceedings were issued.

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

6. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

7. The individuals whose signatures appear in Block 22 of the Citations at issue in these proceedings are all authorized representatives of the United States Secretary of Labor, assigned to MSHA's Benton, Illinois and St. Clairsville, Ohio Field Offices at the time of the inspections at issue. All six inspectors were acting in official capacity when the Citations at issue were issued.

8. The Citations at issue in these proceedings were properly served upon Big Ridge, Inc. as required by the Mine Act.

9. The Citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

10. The proposed penalties will not affect Respondent's ability to remain in business.

11. The certified copies of the MSHA Assessed Violations History reflect the history of the citation issuance at the mine for fifteen months prior to the date of the Citations and may be admitted into evidence without objection by Respondent.

12. The operator demonstrated good faith in abating the violations.

13. Big Ridge, Inc. is a large operator and Willow Lake Portal is a large mine.

14. The parties have settled Docket LAKE 2011-349; and citations from Docket LAKE 2012-174, LAKE 2012-175, LAKE 2012-262 and LAKE 2012-263. The specific terms are outlined in Joint Exhibit 2.

Jt. Ex. 1; *see also* Tr. 11-12.

IV. Factual Background

Respondent operates the Willow Lake Portal Mine ("WLPM"), an underground, bituminous coal mine, located in Equality, Illinois. Jt. Ex. 1, para 1; Tr. 30-33. The coal is mined via perimeter or room and pillar mining. Jt. Ex. 1; Tr. 434. The mine is large and made up of miles of belt and air courses. Several MSHA inspectors work on a regular basis for about three months to complete each quarterly inspection. Jt. Ex. 1; Tr. 31-32.

WLPM is a "gassy" mine and liberates in excess of 1,000,000 cubic feet of methane every 24 hours. Inspectors regularly travel the mine to perform five-day spot ventilation inspections. Tr. 31, 510.

At material times herein, the WLPM operated on three shifts. The day shift ran from 7:00 a.m. until 3:00 p.m. The afternoon shift started at 3:00 p.m. and ended at 11:00 p.m. The midnight or graveyard shift started at 11:00 p.m. and continued until 7:00 a.m. Tr. 150-51.

WLPM has a significant history of roof falls and the inspectors in this case had knowledge that a number of unintentional roof falls had occurred before their inspections. Tr. 188-89, 207, 326-27, 330-31; P. Exs. 28-30, 61. Three of the citations at issue concern alleged roof control violations of §§ 75.202(a), 75.202(b) and 75.220(a)(1). They were designated as S&S violations, with high or moderate negligence. Two of these three citations were issued in August 2010 by inspector James Preece and one was issued in June 2011 by inspector James Rusher. The timing is significant because of WLPM's recent history of roof control problems and because MSHA repeatedly notified Respondent that it needed to make greater efforts to comply with roof control standards after it implemented its Rules To Live By ("RTLB") program in March 2010. Tr. 193-94; P. Ex. 26. The RTLB fatality prevention program specifically included sections 75.202 and 75.220(a)(1), the first two standards on the list. Tr. 193-94; P. Ex. 26.

MSHA inspectors specifically discussed the RTLB program and Respondent's need to comply with the roof control standards with Respondent's management at closeout meetings immediately prior to the roof control citations at issue. P. Exs. 28-29; Tr. 62-63, 192-93. The

first closeout meeting occurred on March 29, 2010. The closeout document that was circulated gave Respondent the following notice:

> Better focus on the "Rules To Live By" standards especially since MSHA is holding the mine operator more accountable for violation of the identified standards with stronger enforcement.

P. Ex. 28, at 3; Tr. 192-93. The document indicates that section 75.202(a) was cited twenty-one times and section 75.220(a)(1) was cited ten times that quarter. P. Ex. 28, at 17. Thereafter, the June 2010 closeout document indicated that roof control violations had decreased that quarter, but gave the same notice regarding enhanced enforcement under the RTLB program. P. Ex. 29, at 2-3.

Inspector Preece found several roof violations in August 2010. Preece issued Citations Nos. 8030991 and 8030992 alleging violations of § 75.220(a) and § 75.202(b), respectively. *See* P. Exs. 4, 6. The day before he issued said citations, Preece issued two other roof control citations, one for violation of §75.220(a) and one for violation of § 75.203(e)(2). R. Ex. 85, at 14; Tr. 237-45.

Thereafter, on September 24, 2011, another closeout meeting occurred. P. Ex. 30. The closeout document indicated that twenty-five citations were issued for section 75.202(a) violations during the quarter. It further stated:

> Roof and Ribs - roof control violations are high here. Problems need to be addressed before we have to take care of them.

P. Ex. 30, at 9.

For the inspection quarter from July through September 2010, there were twenty-five section 75.202(a) violations, the second most violated standard at the mine that quarter. P. Ex. 30, at 5. Furthermore, Respondent was aware that its mine had a significant history of roof falls and falling rock in draw rock areas. Between February and August 2010, Respondent reported six roof falls that resulted in injuries and several others that were reported as accidents without injury. P. Ex. 61.

On June 24, 2011, inspector James Rusher issued one of the roof control citations at issue, Citation 8427546, alleging a violation of § 75.202(a). P. Ex. 21. The record establishes that 140 section 75.202(a) citations were served on Respondent in the two years prior to June 24, 2011. *Id.*; Tr. at 328, 346. Furthermore, in the six months prior to the citation issued by Rusher in June 2011, nine reportable roof falls resulted in two injuries. P. Ex. 61.

The record also establishes that Respondent had significant problems with accumulations, as evidenced by recurring citations, orders, and discussions with MSHA personnel. In the two years prior to Preece's August 2010 inspections, Respondent was cited for

299 violations of § 75.400. P. Ex. 1; Tr. 66. Although the March 2010 closeout conference noted a reduction in § 75.400 citations, the June 2010 closeout conference notes emphasized that § 75.400 violations had increased again and needed improvement. *See* P. Exs. 28-30. Even after Preece issued 104(d)(2) Order No. 8030700 on August 2, 2010. Section 75.400 was the most cited violation for the third quarter that year. P. Ex. 30.

V. Findings of Fact and Conclusions of Law

A. Roof Control Citations Nos. 8030991, 8030992, and 8427546

1. Citation No. 8030991

Respondent does not challenge the violation of section 75.220(a)(1) alleged in Citation No. 8030991 for failure to follow the MSHA-approved roof control plan. R. Br. 26. Rather, Respondent challenges the gravity, S&S, and high negligence findings and the appropriateness of the specially assessed $47,700 penalty. I affirm the violation, as written, but reduce the negligence to moderate and reduce the specially assessed penalty from $47,000 to $14,700.

a. The Alleged Violation

During an E01 inspection on August 4, 2010, inspector Preece,[4] accompanied by Respondent's safety and compliance manager, Bob Clarida, issued Citation No. 8030991 for a violation of 30 C.F.R. § 75.220(a)(1). Tr. 173-74; P. Ex. 4.[5] Preece determined that Respondent was not following the MSHA-approved roof control plan because the fender (block of coal) between the #8 and #9 perimeter cuts on unit 5 measured five-feet three-inches wide, instead of the six-foot width required in the plan. P. Ex. 4, P. Ex. 5, at 24; Tr. 192, 266. Accordingly, Preece wrote Citation No. 8030991 alleging the following unlawful condition or practice

> The approved roof control plan page 24 was not being complied with on the 005/005 section. The fender left between the No. 8 and No. 9 perimeter (3+25) cuts measured 5'3". Visible footprints were

[4] Inspector Preece has worked for MSHA since 2000 as an Authorized Representative ("AR") of the Secretary. Tr. 25-26. Preece works in the St. Clairsville, Ohio MSHA Field Office. In August 2010, he inspected the WLPM while on detail. Tr. 30. Before working for MSHA, Preece worked in the coal mining industry in various job classifications. Tr. 27-28. He has a Mining Engineering degree from West Virginia Institute of Technology, an Occupational Development degree from Marshall University, and mine foreman certifications from Ohio and West Virginia. Tr. 29.

[5] Section 75.220 states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

> observed where a miner had traveled behind the barricade as referenced in citation 8030991 . . . .[6]

P. Ex. 4.

Preece determined that the violation contributed to the hazard of a roof fall, which was reasonably likely to cause an injury because miners were traveling in areas that had been mined, but not supported properly. P. Ex. 4; Tr. 178, 186, 200. Preece determined that the most likely injury would be a fatal, crushing injury from a roof fall. P. Ex. 4; Tr. 187. Preece also determined that one person would be affected because ten to twelve people were actively working on the section, and there were fresh, visible footprints in the area. P. Ex. 4; Tr. 184, 200.

b. Positions of the Parties

Respondent argues that the Secretary adduced no evidence to demonstrate a reasonable likelihood of a serious injury based on the nine-inch deviation from the plan requirement that the front of the fender be six feet wide. R. Br. 28 (citing P. Ex. 5, at 24; P. Ex. 8). Respondent also argues that there is no evidence that the cited condition adversely affected the immediate roof in the area. Rather, Respondent relies on Clarida's testimony that the narrow fender did not compromise roof control, and the roof condition in the area looked "pretty good, normal." Respondent also relies on Preece's acknowledgment that there were no problems with the roof bolts, and on compliance manager Todd Grounds' testimony that roof bolts with cables attached were installed before the continuous miner made perimeter cuts. R. Br. 28; Tr. 222, 264-65, 276.

In addition, Respondent claims that there was no exposure to the condition. R. Br. 29. Respondent notes that the perimeter cuts that created the fender were complete. *Id.* (citing Tr. 276). According to Respondent, the supplemental roof support would have been removed from the "fresh air side" of the fender. Therefore, the continuous miner operator would not have been exposed to the fender while removing supplemental support. *Id.* (citing Tr. 265). Respondent further notes that after the cut, the area around the fender was barricaded, and there was no reason for anyone to pass by that area. *Id.* (citing Tr. 276, 291). Although Preece testified that "[if] you don't follow the roof control plan, over time it's going to deteriorate and come out as well." Tr. 212. Respondent argues that "over time," there would be no exposure because the immediate area around the fender was barricaded and the entire set of rooms was barricaded at the mouth, when completed. R. Br. 29 (citing Tr. 259-60).

Preece designated the violation as S&S because he believed that there was travel through the area after the fender was created based on visible footprints behind the barricade. Tr. 184; P. Ex. 4. In response to a leading question suggesting that the footprints were fresh, Preece testified that the footprints were fresh because the day before there had been rock dusting citations issued, and the footprints were visible in the fresh rock dust. Tr. 199. Respondent

[6] Counsel for the Secretary represented at hearing that the citation referenced should be 8030992, discussed below, not 8030991. Tr. 185-86.

argues that Preece was mistaken because the Certified Violation History Report shows that no citation was issued on August 3, 2010 for a violation of section 75.400 or 75.403, each of which would require rock dusting for abatement purposes. R. Br. 30, n.17 (citing P. Ex. 63). In addition, because the footprints went straight through and not around the barricade, Respondent disputes any travel through the area after the perimeter cuts were made. R. Br. 30 (citing Tr. 279-80).

Respondent further argues that even if travel past the fender occurred, the Secretary has failed to establish that the nine-inch deviation in fender width resulted in a roof condition that posed a reasonable likelihood of serious injury. Respondent relies, in part, on ALJ decisions applying section 75.202(a), which delete S&S determinations based on the unlikelihood that two specific events will occur simultaneously, i.e., a rock will fall from the roof while a miner is directly underneath it. R. Br. 29, n. 16 (citing *Ohio County Coal Co.*, 31 FMSHRC 1486, 1489 (Dec. 2009) (ALJ); *Freedom Energy Mining Co.*, 32 FMSHRC 1809, 1829 (Dec. 2010) (ALJ)). Respondent argues that Preece's own actions undercut his determination that the width of the fender posed any serious hazard because Preece placed himself at the fender to measure it and travel past it. *Id.* (citing Tr. 176-77). Finally, Respondent argues that Preece's attempt to link the purported travel past the fender to exposure to unsupported top should be discounted because Preece followed the footprints "till they ended" and he never traveled under unsupported roof. R. Br. 30-31 (citing Tr. 197, 198, 223-24). Therefore, Respondent concludes that the route of travel past the narrow fender did not place anyone under unsupported top. R. Br. 31.

The Secretary relies, in part, on a fatalgram from MSHA's website that involved the death of a miner caused by a roof fall in a mine with a similar roof. P. Ex. 31, at 2; Tr. 211. The fatalgram states that the roof at issue was "gray shale and sandstone with intermittent siltstone and carbonaceous shale deposits." P. Ex. 31, at 2; Tr. at 211. Preece testified that the roof at WLPM is similar since black shale and limestone are present. Tr. at 211. The fatalgram investigation established that the mine was not following its roof control plan and a rock – measuring 89 inches long by 45 to 54 inches wide by one to four inches thick – broke in two pieces when it struck the victim. P. Ex. 31, at 1; Tr. 211. As noted, Preece testified that when a mine does not follow its roof control plan, the roof will deteriorate over time and material will come loose from the roof. Tr. 211.

Respondent counters that the roof control plan violation in the fatalgram involved a West Virginia mine where thirty-five bolts exceeded the four-foot spacing requirement in the rock-fall area. It did not involve the width of a fender during perimeter mining. Respondent argues that the instant violation involves different requirements for different mining practices, and is not the least bit similar. R. Br. 32-33. Further, Respondent argues that none of the roof falls that occurred at WLPM between October 2009 and October 2011 (*see* P. Ex. 61) resulted from a fender that was less than six feet in width. Therefore, Respondent argues that the fatalgram is immaterial. *Id*.

c. Legal Analysis

I find the violation to be S&S. I credit the testimony of Preece, an experienced underground coal inspector, over contrary testimony from Clarida, that the violation of the mandatory standard created a measure of danger to safety because the non-compliant fender contributed to the hazard of a roof fall that was reasonably likely to result in a serious injury. Tr. 212. Specifically, Preece testified that in his experience a roof fall is "very likely . . . if you don't support the roof, the roof will fall . . . it has no support . . . over time it's going to deteriorate and come out . . ." Tr. 212. Although Respondent relies on Clarida's testimony that no one was exposed to the noncompliant fender because the barricades were up and no one was supposed to be in that area after the cut (Tr. 276), I find that a miner was in the area based on the visible footprints that Preece observed, and that other miners were likely to be in the area and exposed to the noncompliant fender during required examinations.[7]

I also emphasize that the instant record establishes an ongoing likelihood of roof falls at WLPM. Tr. 178, 190, 206-07. Using Petitioner's Exhibit 61, Preece highlighted the multitude of roof falls at WLPM in the six months prior to his inspection. P. Ex. 61; Tr. 202. The MSHA District Office considers such history when a roof control plan is approved, and there are no exceptions to the fender-length requirement. Tr. 174. The standard requires development of a roof control plan that "is suitable to the prevailing geological conditions and the mining system to be used at the mine." MSHA determined that the geological conditions and the room and pillar mining system used at WLPM required the fender to be six or more feet wide at the front. It was nine inches too narrow.

Grounds, Respondent's compliance manager, conceded that the roof control measurements that Respondent agreed upon and MSHA approved are important and should be as precise as possible. Tr. 267-68. Respondent's other witnesses also conceded that Respondent must comply with the specific requirements of its MSHA-approved roof control plan. Tr. 286, 292. In these circumstances, particularly in light of Respondent's recent history of roof falls, I conclude that during continuous mining operations, it was reasonably likely that the noncompliant fender would contribute to a hazard of another roof fall that would result in serious injury.

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[7] I am not persuaded by Respondent's argument that even if a section foreman or shift leader subsequently learned about the creation of the narrow fender, there would be nothing that such manager could do about it after it was created as the coal could not be put back in the fender. I find that additional support could have been installed. I further find that there was miner exposure, even in the absence of the visible footprint evidence, because the foreman or an examiner should check the cuts after they are made. Further, a weekly examination is required behind the barricade after perimeter cuts are taken. Tr. 234, 260-61. Finally, although Clarida testified that during his career he was not aware of any incident when a continuous miner operator would be operating the remote on the side of the machine opposite the fender, mining history is replete with instances of serious injury or fatality when the operator is pinned on the wrong side of the machine or struck by falling rock when in the red zone.

I further find that Respondent's negligence should be reduced from "high" to "moderate." Per regulation, high negligence occurs when an operator knew or should have known of the violation, and there are no mitigating circumstances. 30 C.F.R. § 100.3, Table X. Respondent presented evidence that the continuous miner operator, an hourly employee, was responsible for taking the cuts that created the narrow fender, and that the section foreman or shift leader was only responsible for marking where the cuts were to be taken. Tr. 265, 289. In addition, Respondent presented evidence that the section foreman or shift leader would have limited opportunity to observe the narrow fender because a barricade was installed right after the cut was made and no one would travel past that point. Tr. 276, 283.[8] In these circumstances, I find that Respondent has raised sufficient mitigating circumstances to reduce negligence from high to moderate. *See Excel Mining LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013) (if no mitigating factors exist, the violation is attributable to high negligence; otherwise, the inspector must find moderate, low, or no negligence).

The Secretary justified a special assessment in this matter, particularly given Respondent's history concerning roof control violations and the Rules to Live By notice. Tr. 242-44, 246. Guided by the criteria set forth in § 100.3(a) and the Special Assessment General Procedures, I assess a penalty of $14,700.

2. Citation No. 8030992

The Secretary argues that Respondent violated § 75.202(b) when a miner traveled under unsupported roof in a previously mined area, and that such violation was significant and substantial, reasonably likely to be fatal, and resulted from moderate negligence. P. Br. 24. Respondent argues that it did not violate the standard because no miner worked or traveled under unsupported top. R. Br. 42. Respondent also challenges the S&S and moderate negligence designations and the appropriateness of the specially assessed $13,600 penalty. I affirm the violation, reduce negligence from "moderate" to "no negligence," reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and delete the significant and substantial designation. Based on said modifications, I decline to be guided by the Secretary's special assessment of the proposed penalty, and assess a penalty of $162.

a. The Alleged Violation

Near the cited fender, Preece observed fresh footprints in rock dust that he traced back to a previously mined-out perimeter area until they turned and ended at the corner mouth of an old set of unbolted rooms (return) where a miner had gone to the bathroom under unsupported roof on fresh rock dust. Tr. 196-200; P. Ex. 8. Preece cited Respondent for a violation of §

[8] Although Preece testified and his notes indicate that the narrow fender appears to be a practice with perimeter mining and that previous rooms and mining indicate the same violation of the plan (R. Ex. 85, at 14; Tr. 238-39), the Secretary provided no corroborating documentation or citation for such assertions, and Citation No. 8030697 was written because the entry was cut too wide, not too narrow. Tr. 243. Accordingly, I give little weight to such evidence.

75.202(b), which states that "[n]o person shall work or travel under unsupported roof unless in accordance with this subpart."[9] The alleged unlawful condition or practice states:

> Visible footprints were observed where a miner had traveled behind the barricade located on the 005 section, No.1 room entry, 04+00 and between the Nos. 7 and 8 perimeter cut which was not supported. The miner traveled through the bleeder in the previously cut set of rooms to relieve them self . . . .

P. Ex. 6.

Preece designated the alleged violation as S&S after determining a reasonable likelihood that standing or squatting under unsupported roof to relieve oneself would result in a crushing or fatal injury from the hazard of a roof fall. Tr. 200-01; P. Ex. 6. Preece designated negligence as moderate, but did not know whether a rank-and-file miner or a member of management was responsible for the excrement. Tr. 216-17. When asked whether management should have been aware of the alleged violation, Preece responded, "I would hope so, because management controls the workforce on the section where people work and travel." *Id.*

On cross examination, Respondent established that the entries in the old set of rooms were bolted. Tr. 225, 234. Respondent also established that when Preece was a foreman, members of his crew would take certain action unbeknownst to him. Tr. 228.

On redirect, however, Preece reaffirmed that there was no support on the corner of the old perimeter mining area where the miner went to the bathroom. "There is no support at all there." Tr. 250-51.

Respondent's compliance manager Grooms and safety representative Clarida testified that all entries and crosscuts in the rooms were bolted. Tr. 259, 282. In addition, Clarida contradicted Preece and testified that "the evidence of the person relieving themselves was under supported roof." Tr. 283. When asked by the undersigned why this was so, Clarida testified, "well, you can look up and see there's roof bolts in the roof. It's supported." Tr. 285.

Both Preece and Clarida confirm that they never traveled under unsupported roof. Tr. 197, 223, 282. Clarida, however, testified that when he observed the excrement, he stood only a foot away from it. Tr. 285.

[9] The subparts are not applicable as they include roof bolting and installation of roof support using mining machines. *See, e.g.*, 30 C.F.R. § 75.204 (roof bolting), 30 C.F.R. § 75.205 (installation of roof support using mining machines with integral roof bolters).

On rebuttal, Preece was shown his notes for the instant citation. Tr. 298-99; P. Ex. 7. Page 8 of his notes state:

> 1) 1820
> 2) Visible footprints were observed in the number 1 entry and through the barricade into the previous cut set of rooms to relieve themself. The Miner traveled by the No. 7 & 8 perimeter cut that was unsupported.
> 3) 005/005 Section, No. 1 entry 4+00 bleeder
> 4) Foreman was not aware that a miner traveled through the area
> 5) from the previous shift
> 6) 1 miner traveling through the area to relieve themself
> 7) Crushing injuries
> 8) unsupported (illegible) 7-8
> 9) Visible footprints

b. Legal Analysis

In resolving the credibility conflict between Preece and Clarida as to whether the excrement was under supported or unsupported roof, I credit Preece's testimony in direct response to questioning from the undersigned and find that someone went to the bathroom under unsupported roof in fresh rock dust. Tr. 200, 250-51; P. Ex. 8; *see also* P. Ex. 5, at 24 (showing that about ten feet in the corner of the entry of the perimeter mining area was unsupported).

I reverse Preece's S&S determination. Preece's testimony suggests that it was not a regular practice for miners to relieve themselves under unsupported top. Rather, it was common practice was to do so under supported top. Tr. 300-01. I find that the instant violation was a brief aberration, and the hazard contributed to by the violation was not reasonably likely to result in an injury given the limited exposure and the unlikelihood that a rock would fall during such brief exposure. *Cf., Ohio County Coal*, 31 FMSHRC at 1489; *Freedom Energy*, 32 FMSHRC at 1829 (deleting S&S designation for a violation of section 75.202(a) "in light of the uncertainty of a potentially injury-causing event and limited presence of miners in the subject area"). Accordingly, I find that the third prong of the *Mathies* test was not established.

The Secretary argues that I should uphold Preece's moderate negligence determination. Although Preece could not determine if a miner or management was traveling under unsupported roof, the Secretary argues that management either knew or should have known that workers were traveling in unsupported areas. P. Br. 28. I disagree. Preece specifically testified that management should have known of the violation because management controls the workforce on the section where miners work and travel. Tr. 217. But Preece's inspection notes indicate that the "[f]oreman was not aware that a miner traveled through the area." P. Ex. 7, at 3. As noted, Preece could not determine whether the miner who relieved himself in the old set of rooms was an agent of the operator. Tr. 216. Since the negligence of an hourly employee cannot be

imputed to the operator for purposes of a negligence designation,[10] and the foreman was not aware of the violation, which represented a brief aberration from regular practice, I find that the Secretary has failed to establish any level of operator negligence.

The Secretary failed to justify a special assessment in this matter, and particularly failed to establish that multiple citations were issued for the same violation, as Preece testified. Tr. 242. Guided by the regular assessment criteria set forth in § 100.3 and my findings above, I assess a penalty of $162.

3. Citation 8427546

The Secretary argues that there was a S&S violation of section 75.202(a) resulting from high negligence because five pattern roof bolts and plates had separated from the roof causing de-lamination and increasing the pressure on surrounding bolts to support more weight than intended. P. Br. 29. Respondent does not challenge the violation, but challenges the gravity, S&S, and high negligence findings and the appropriateness of the specially assessed $50,700 penalty. I affirm the violation, as written, and the specially assessed penalty of $50,700.

a. The Alleged Violation

On June 24, 2011, inspector James Rusher[11] was traveling the No. 2 room haulageway, where steel-canopied haulers transport coal from face to feeder. P. Ex. 21; Tr. 314. Respondent's section supervisor and safety representative, Crit Stephenson, accompanied Rusher. Tr. 370-71.

Rusher noticed five pattern roof bolts that had been dislodged by mobile equipment, three in one place (tag No.0+65) and two more just a few feet away (tag No.1+95), which was causing separation and de-lamination in the immediate roof. P. Ex. 21; P. Ex. 22, at 9; Tr. 314. Rusher cited Respondent for a violation of § 75.202(a), which states, "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." P. Ex. 21; Tr. 315.

All five plates were loose, which caused causing sagging or de-lamination of the roof in those areas. Tr. 316-17, 320-22. Rusher explained that when the bolts and plates became loose, layers of the roof began to separate, and support for the immediate roof was compromised by strain on the surrounding bolts. Tr. 314-17, 318, 322. Although Stephenson testified that he did

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[10] *See, e.g.*, *Fort Scott Fertilizer-Cullor, Inc.,* 17 FMSHRC 1112, 1115-16 (July 1995), (citing *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982)).

[11] Rusher, now retired, inspected coal mines as an authorized representative for thirty-three years. He was assigned to MSHA's Benton, Illinois field office. Tr. 308-09. Rusher had twelve years of coal industry experience before joining MSHA. Tr. 309-10. Rusher had inspected the WLPM since it opened. Tr. 312.

not notice any de-lamination and that Rusher did not point it out (Tr. 378-79), I credit Rusher's specific description of the de-lamination, which was obvious after rock dusting, and made the roof unsafe because it put greater load on the surrounding bolts and would likely result in a roof fall. Tr. 316-22; 344. Rusher's testimony concerning the de-lamination is corroborated by Rusher's inspection notes. P. Ex. 22, at 9. Rusher further credibly testified that the face boss had to travel through that particular intersection to check on the face for methane every twenty minutes, and should have detected the condition. Tr. 334, 365.

I also agree with Rusher's S&S determination because the violation contributed to a specific roof-fall hazard that was reasonably likely to result in a serious or permanently disabling injury to two miners, i.e., a coal haul operator and a supervisor making rounds or checking faces, in the heavily traveled haulageway. P. Ex. 21; Tr. 322-330. Although Rusher noted that the roof conditions were solid (P. Ex. 22, at 6) and Stephenson testified that the roof looked fine (Tr. 372, 381), I find that the number of dislodged roof bolts in the pattern and the de-lamination of the roof in the immediate area contributed to a discrete roof fall hazard because during the course of continued mining operations, the other surrounding bolts would not support the weight of the roof. A roof fall across the compromised area would likely crush even those traveling in a covered canopy. Furthermore, Respondent has a remarkable history of roof falls even with fully grouted bolts. P. Ex. 61; Tr. 380-81. Accordingly, I affirm the gravity and S&S findings.

I also affirm Rusher's high negligence determination because Respondent knew or should have known about the violation, and there are no mitigating circumstances. As outlined above, there were many roof falls and roof-control issues at WLPM. P. Exs. 28-30, 61. Respondent was aware of MSHA's warnings regarding increased enforcement, particularly in light of the closeout conferences and enhanced emphasis on §§ 75.202(a) and (b) in the RTLB program. There was constant traffic in the haulageway. Tr. 325, 334. I have found that rock dusting made the separated bolts and plates and the concomitant de-lamination obvious. The face boss traveled through the intersection every twenty minutes and should have detected and corrected the condition. In these circumstances, and in the absence of any mitigating circumstances, I find that the violative condition resulted from Respondent's high negligence.

The Secretary justified a special assessment in this matter, particularly given Respondent's history concerning roof control violations, the Rules to Live By notice, and Rusher's testimony that this was an active haulageway, with five roof bolts dislodged and extensive de-lamination. Tr. 242-44, 246, 360. Guided by the criteria set forth in § 100.3 and the Special Assessment General Procedures as set applied in the Special Assessment Narrative Form (R. Ex. 58), I assess a penalty of $50,700.

B. Accumulations of Combustible Material Order No. 8030700 and Citation Nos. 8428798, 8428776, and 8436403

1. Order No. 8030700

The Secretary argues that Respondent violated section 75.400 because accumulations of combustible material were amassed in two different crosscuts, and although the non-S&S violation was unlikely to lead to a lost workdays or restricted duty injury, it was an unwarrantable failure resulting from high negligence. Respondent specifically challenges the unwarrantable failure and high negligence findings and the specially assessed $8,400 proposed penalty. As explained below, I find the non-S&S violation, reduce Respondent's negligence to moderate, reverse the unwarrantable failure finding, and assess a penalty of $500.

a. The Alleged Violation

On August 1, 2010, when inspector Preece and miner/union representative Rodney Shires were exiting the mine in a diesel vehicle driven by Respondent's mine manager, Roby Podoriscki, Preece asked, "[w]hat is that in the crosscut?" Tr. 68. Preece testified that he received a response that it was roadway gob or something to that effect, but he did not identify who gave that response. Tr. 68-69. Rodney Shires did not testify.[12] Given the noise of the diesel engine and Podoriscki's denial that he had such a conversation or heard any such conversation between Preece and Shires, the Secretary failed to establish that Podoriscki knew about the conditions on August 1, 2010. *See* Tr. 88-89, 100-104.

On August 2, 2010, inspector Preece, accompanied by Respondent's safety representative Shane Kendall and miner/union representative Rodney Shires, rode to crosscut 107 in the 5D travel road where Preece had noticed accumulations the prior day while exiting the mine. Tr. 33-37, 60, 116-17, 119. Preece issued 104(d)(2) Order No. 8030700 for accumulations of combustible material. The alleged accumulations consisted of a mix of combustible and non-combustible materials, consisting of wood, coal mixed with mud or stone, roadway material such as fire clay, gob of rock and mud, crushed up oil cans that still had oil in them, roof bolts, glue and plates, and other refuse, such as rock dust bags. The materials were piled up in two locations about 300 feet apart in the 107 and 109 crosscuts on the 5D travel road. The alleged accumulations in the 107 and 109 crosscuts where piled four feet high and covered an area of 10x20 feet and 8x15 feet, respectively. Tr. 35-37, 47, 78, 122-125; P. Ex. 1-3; R. Exs. 81(c)-(f).

The Order states:

> Accumulation of combustible materials were allowed to accumulate in the No. 6 to No. 5 entry crosscut, 5 "D" Travel road. Coal dust,

[12] I note that Roger "Blaine" Shires, section foreman, did testify at the hearing as to the facts pertaining to Citation No. 8428378, discussed below. The two Shires should not be confused as Rodney Shires was a rank-and-file miner.

> including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials (wood and paper) were not being cleaned up and permitted to accumulate. The following conditions existed:
>
> 1.) 107 crosscut, 80+70, Combustible material mixed with roadway material, gob and coal from sloughage of the rib existed next to the stopping measuring 10 feet in length, 20 feet in width and 4 feet in height.
>
> 2.) 109 crosscut, Combustible material mixed with roadway material, gob and coal from sloughage of the rib existed next to the stopping measuring 8 feet in length, 15 feet in width and 4 feet in height.
>
> Upon interviews with Mine Management, management stated that the condition was obvious and extensive, has existed for over 24 hours and has a history of accumulation violations (299 in the previous 24 months) and Mine management was in the area of the accumulations on all shifts.

P. Ex. 1. Preece testified that his concern was that the accumulations had not been rock dusted properly, although there was some rock dust underneath the piles. Tr. 46-47.

Preece designated the alleged violation as non-S&S after determining that the hazard of fire or propagation of an explosion was unlikely because of the location of the material in the crosscuts and the fact that no vehicles were running over the coal present in the piles, the coal was not raised in suspension, and other areas of the mine were adequately rock dusted. P. Ex. 1; Tr. 42, 45-46, 89. If a fire or explosion were to occur, however, Preece determined that the likely injury would be lost workdays or restricted duty to one person due to smoke inhalation. P. Ex. 1; Tr. 46.

Preece determined that Respondent's negligence was high because the condition had existed for at least three shifts, and prior to Preece's inspection the previous day, Rodney Shires had confirmed this. Tr. 43-45, 60-61, 67; P. Ex. 2, at 3. Preece also testified that management must have known of the conditions because "someone gave orders for someone to clean up these roadways and put this material in certain locations." Tr. 43.

Preece further determined that the alleged violation was an unwarrantable failure because management should have known that the condition existed, it was present for more than three shifts, it was obvious and extensive, and it was not rock dusted to ensure inertness. Tr. 66-67.

Respondent argues that the condition was not extensive or obvious, existed for an indeterminate period of time, and did not pose a high degree of danger to miner safety.

Respondent further argues that the operator had no specific knowledge of the alleged violation and had not been placed on notice that greater efforts for compliance with the standard were necessary.

To abate the conditions, Preece required the material to be rock dusted, but not removed from the mine. Tr. 71, 76-77. After rock dusting, Respondent's third-shift safety manager, Andy Murphy, took a zip-lock bag sample of each pile of material by scraping off the rock dust and reaching six to eight inches into each pile to obtain the samples. Tr. 143-45. Preece did not observe the sampling. Tr. 72.

Murphy testified that in each sample, he obtained gob or real soft material, which likely originated from the travel road. Tr. 146, 150. Each sample was labeled and given to Respondent's compliance manager, Todd Grounds, who delivered them that same day to Standard Lab for analysis. Tr. 150, 157.

The sample taken from crosscut 107 was determined to be 66.12% incombustible. The sample taken from crosscut 109 was determined to be 72.71% incombustible. Tr. 157-58; R. Ex. 82. During this time, both samples met section 75.403's incombustibility requirement for a travel road, which was 65%, but has since been increased to 80%. Tr. 158-59.

The Secretary argues that combustibility tests are only performed in section 75.403 violations and are irrelevant to section 75.400 violations. P. Br. 37. Also, even if relevant, the Secretary argues that Respondent's tests would not have passed under today's standards. P. Br. 37-38; (citing Tr. 157). Finally, the Secretary notes that the samples were not band samples, and they were not taken or handled by anyone with training in sampling for incombustibility determinations. P. Br. 38 (citing Tr. 163).

Mine manager Roby Podoriscki testified that the roadway bottoms primarily consist of fireclay, a soft noncombustible substance. Tr. 108. He further testified that the practice of scooping up gob from the travel roads and pushing it into the crosscuts was common practice at WLPM and at four or five other Illinois mines where he had worked. Further, Podoriscki had never received, nor was he aware of, any citations for this practice. Tr. 107-08. Similarly, prior to the issuance of the Order, MSHA had never warned or cited WLPM for this practice. Tr. 107.

b. Legal Analysis

To the extent that Respondent's brief can be read as challenging the violation, I affirm inspector Preece's finding of a non-S&S violation. Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The record establishes that loose coal, crushed oil cans, wood and other combustible material, mixed with non-combustible material were

allowed to accumulate in two large piles about 4 feet high, 20 feet wide, 10-15 feet long, and about 300 feet apart in the 107 and 109 crosscuts on the 5D travel road for over three shifts.

The Commission has held that a "construction of the standard that . . . allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985); *but see Lion Mining Co.,* 19 FMSHRC 651, 656 (Mar. 1977) (ALJ) (vacating 104(d) order alleging that gob material was an accumulation and concluding that section 75.403 is the appropriate standard to address the potential hazards associated with combustible material in gob). In this case, the Secretary has interpreted the standard consistent with *Black Diamond, supra,* and I give deference to the Secretary's reasonable interpretation consistent with Commission precedent. Accordingly, I affirm the non-S&S violation.

I reduce Respondent's negligence to moderate. The Respondent should have known of the violation, but there are mitigating circumstances for Respondent's failure to clean up the accumulations. Irrespective of mine manager Podoriscki's denial that he knew about the conditions until after issuance of the Order (Tr. 104) and Preece's speculation that management must have directed the workforce to push the materials in the crosscuts (Tr. 72), I credit and rely on Preece's testimony that examinations on the roadway are done by agents of the Respondent three times daily. Tr. 70. Thus, Respondent's examiner agents should have known about the accumulations.

Respondent, however, presented credible evidence of mitigating circumstances. The accumulations were significantly composed of gob laced with debris and were pushed deep into crosscuts to clear the travel roads. Respondent presented evidence that this was a common practice at Willow Lake and in the Illinois Basin and Respondent had not been cited by MSHA before for this practice. Further, both of Respondent's samples exceeded incombustibility requirements for when rock dusting was required. Moreover, MSHA required rock dusting to abate the violation. Accordingly, I reduce Respondent's negligence to moderate.

I reverse the unwarrantable failure designation. I find, contrary to Respondent's arguments, that the accumulations were obvious, existed for over three shifts, and should have been detected for clean up by Respondent's examiners even though the conditions were about 70 feet within the crosscuts. *See* R. Br. 13. In fact, Preece noticed the accumulations in passing from the 5D travel road the day before the Order was issued and specifically inquired about them. Tr. 68, 76. The fact that the accumulations of combustible and non-combustible material were unlikely to ignite does not exempt an examiner from documenting them as potential hazards in examination reports.

While Respondent concedes that the piles were significant in size, it argues that the amount of combustible material was not extensive since about two-thirds of each pile was composed of non-combustible material. R. Br 15 (citing Tr. 157-58; see also R. Ex. 82). I find some merit in this argument since the standard requires cleanup of combustible material.

Moreover, abatement was accomplished quickly by adding additional rock-dust. Preece did not require the accumulations to be removed from the mine. Tr. 76-77. On the other hand, there were two large piles of material with some combustible content within 300 feet of each other. In these circumstances, I find the extensiveness factor to be neutral in the unwarrantable failure analysis.

The condition did not pose a high degree of danger to miner safety. The Order was designated non-S&S and involved piles of material that were largely incombustible. As noted, abatement was accomplished by adding additional rock-dust, but the accumulations were not removed.

Although Respondent was clearly placed on notice of a past history of section 75.400 violations, it was not placed on notice that greater efforts were necessary to comply with its apparent practice of pushing large gob piles into a crosscut to clear travel roads. Tr. 83. The Secretary provided no evidence to rebut the testimony of Respondent's witnesses Podoriscki and Kendall that the practice was employed at Willow Lake and other mines in the Illinois Basin where they had worked, and that MSHA did not notify Respondent that the practice was prohibited. In fact, MSHA's sanctioned abatement method of additional rock-dusting rather than removal adds confusion as to what should be done with such accumulations. I also note as a practical matter, that when clearing travel roads of debris, it may be difficult to immediately remove non-S&S accumulations such as those at issue from the mine. Under these circumstances, I find that Respondent was not placed on notice that greater efforts were necessary to comply with the standard as applied in this case. Rather, in the absence of any evidence that the past citations or discussions with MSHA involved conditions that bore any resemblance to the conditions cited in Order No. 8030700, I decline to find that Big Ridge was on notice that greater efforts toward compliance were necessary. *See, e.g., Cumberland Coal Res. LP*, 31 FMSHRC 137,157 (Jan. 2009) (ALJ) (finding in the section 75.400 context that "to establish that [the operator] had been put on notice that additional compliance efforts were needed, the Secretary was required to show more than a history of prior citations for violations of the broad standard").

In sum, I find that the accumulations were obvious, extant for at least three shifts, and Respondent should have known that they existed. On the other hand, the accumulations of combustible material were not particularly extensive since they comprised only about one-third of the piles and were quickly abated through rock dusting, they did not present a high degree of danger, and Respondent was not placed on notice that greater efforts were necessary to comply with its practice of pushing large piles of gob mixed with lesser combustible material into crosscuts to clear travel roads. Thus, while the issue is close, on balance I find no aggravated conduct or unwarrantable failure here.

Since I have reduced Respondent's negligence to moderate and reversed the unwarrantable failure finding, which was the primary basis for Preece's special assessment recommendation (Tr. 72-73), I decline to be guided by the Secretary's special assessment

guidelines. Consistent with my findings above and section 110(i) criteria, I find that a penalty of $500 is appropriate for the violation.

2. Citation No. 8428798

The Secretary argues that Respondent violated section 75.400 because the transformer "5D" belt line had accumulations of float coal dust on previously rock dusted areas. The Secretary claims that the violation was S&S because it was reasonably likely to lead to a lost workdays or restricted duty injury to one person. The Secretary also claims that the violation was the result of high negligence because the cited condition was recorded in the on-shift examination records and Respondent provided no mitigating information to the inspector about why the condition was allowed to continue unabated.

Respondent argues that the citation should be vacated because no violation of the cited standard occurred; that if a violation is found, the S&S and high negligence designations are inappropriate; and that the regularly assessed proposed penalty of $13,268 is excessive.

a. The Alleged Violation

During the day shift on October 13, 2011 at 9:20 a.m., MSHA inspector Anthony Fazzolare issued 104(a) Citation No. 8428798.[13] It alleges a violation of 30 C.F.R. § 75.400, as follows:

> The transformer for the "5D" Belt Line had float coal dust deposited on previously rock dusted areas. The float coal dust was paper-thin to approximately 1/8 inch thick, black in color and from rib to rib and on the top of the transformer.
>
> This condition was listed in the on-shift examiners report from the previous shift's examination.
>
> This is the 267th violation of this standard at this mine since 10/20/2009.

P. Ex. 40. The Citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty to one person, and was the result of high negligence. *Id.* Fazzolare's photographs

[13] Fazzolare has inspected underground coal mines for more than thirteen years and began inspecting WLPM in 2008. Tr. 721-22. Before that he worked for Kerr-McGee Coal Corp., in Galatia, Illinois as a laborer, construction worker, roof bolter, and/or continuous miner operator from 1984-1998. He is also an Illinois certified examiner and mine manager, and has shop fire papers. Tr. 722.

depicted accumulations of coal on the transformer, on a permissible[14] electrical light, and on the floor as indicated by visible footprints. Tr. 812-16, 832, 898; P. Ex. 41.

The accumulations were in an active working area where miners were required to work and travel. Tr. 818-19, 890. In fact, the on-shift examiner's report from the previous shift listed the condition. P. Ex. 40.

Fazzolare's testimony about the condition was consistent with the citation, as written. Fazzolare described the float coal dust as paper thin to approximately one-eighth of an inch thick, black in color, from rib to rib approximately 20 feet in width, and present on the top of the transformer. Tr. 806, 808; P. Ex. 40.[15] Fazzolare described the condition as dangerous because float coal dust is highly combustible, can ignite at 300 degrees Fahrenheit, and was permitted to accumulate from rib to rib, and on top of the permissible transformer (power center). Tr. 806-08, 817, 869. No methane was detected in the area. Tr. 835.

Bishop testified that he did not see Fazzolare check inside the transformer, although Bishop looked inside and did not see any material. Tr. 857-58. Bishop also testified that the west side of the transformer was damp. Tr. 865.

The transformer was in the same crosscut off the 5D travelway where the accumulations were found on the floor from rib to rib. Tr. 811, 828, 852. The transformer receives power and distributes it to run the 5C belt. Tr. 806, 812. Fazzolare testified that as the transformer receives power, it generates heat, and the float coal dust on top of the transformer would act as a thermal

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[14] At hearing, inspector Fazzolare referred to several pieces of electronic equipment as "non-permissible." The inspector, however, uses the term in a confusing fashion. When Fazzolare called equipment "non-permissible," he was referring to the permissibility standards for electrical equipment used *at the face*, not to the permissibility standards applicable to the rest of the mine. Tr. 807-808. The permissibility requirements at the face are more stringent as they are intended to prevent or contain the ignition of an explosive air-methane mixture. *See Knox Creek Coal Corp.*, 35 FMSHRC ___, slip op at 4, No. VA 2010-81-R (May 28, 2014). The electrical equipment addressed in this case was not located at the face and therefore was not required to include enhanced design requirements. *See* Tr. 807-808. There is no question that the electrical equipment in question met MSHA design requirements to reduce the likelihood of fire and was permissible for the location in which it was used. *Id.; see also* 30 C.F.R. § 75.2.

[15] Safety compliance supervisor, Daniel Bishop, testified that all he saw was gray material on the floor. He did not see any float coal dust on top of the transformer. I credit Fazzalore that the float coal dust was paper-thin, black in color, ran from rib to rib, and was present on the top of the transformer. Fazzolare took photographs to document the condition. P. Ex. 41.

blanket trapping heat inside. Tr. 809.[16] Fazzolare testified that the cat heads going into the power center were another potential heat or ignition source. Tr. 818.

Fazzolare was concerned about a fire because float coal dust is highly volatile and does not require much temperature to ignite. Tr. 816. Fazzolare further testified that since the float coal dust was paper thin and sat on top of the rock dust, the rock dust would do nothing to extinguish a fire. Rather, the float coal dust would burn off and add fuel to a fire. Tr. 808. Fazzolare determined that the three elements necessary for a fire were present: fuel (float coal dust); oxygen (in the air throughout the mine), and an ignition source (permissible power center). Tr. 817. Fazzolare was concerned that the power center could have a problem at any time under continued mining operations. Tr. 844. Fazzolare determined that in the event of a fire, one person in the area, an examiner or maintenance person, was reasonably likely to suffer a lost workday or restricted duty injury from smoke inhalation. Tr. 818-19.

Respondent's assistant shift mine manager, Charles Lane Hendricks, testified that during the pre-shift examination on the midnight shift, the examiner reported that the transformer for the 5D drive needed dusting because it was black. Tr. 878; R. Ex. 92. The written report was reviewed and noted by Hendricks about 6:15 a.m., prior to the start of the 7 a.m. day shift. Tr. 877-879. Hendricks discussed the condition with other shift managers and assigned day-shift belt shoveler, Harley Partridge, to address the condition. Tr. 878-79. Hendricks credibly testified that he instructed Partridge to adjust his work duties and make the condition his first stop of the day, thus giving the matter priority. Tr. 879.

Hendricks testified that Partridge typically would catch the first available ride into the mine after shift change, and get off about thirty minutes later at his golf cart located on one of the main north belts, which he used to travel to different belt drive locations. Tr. 879. Hendricks recalled that on the day in question (October 13), Partridge and others did not get a ride into the mine until about 8 a.m., which meant that Partridge would not have reached his golf cart until about 8:30 a..m., and would not have reached the location of the 5D transformer until about 8:55 a.m., i.e., about twenty-five minutes before Fazzolare wrote the citation. Tr. 880-81. Hendricks further testified that about 9 a.m., he received a call from another mine manager, Ronnie Hughes, informing him that Partridge's golf cart had malfunctioned, and that the inspector had found a problem at the transformer. Hughes asked Hendricks, who was in another area of the mine, to get down there. Tr. 882-83.[17]

Fazzolare testified that Respondent provided no mitigating information as to why the condition was allowed to continue. Tr. 823-24. By contrast, Hendricks testified that when he arrived at the transformer, Fazzolare explained why he was writing the citation. In response to a leading question, "[d]id you tell him what you told us, that you had somebody on the way," Hendricks testified, "Yes, I did." Hendricks did not recall any response from Fazzolare. Tr.

[16] Respondent's mid-west safety director, Chad Barras, testified that the heat generated on the surface of the transformer was somewhere between 100 to 180 degrees. Tr. 896.

[17] Neither Hughes nor Partridge were called to corroborate this hearsay.

883. Safety compliance supervisor, Daniel Bishop, testified that Hendricks told Fazzolare that he had sent an employee to address the problem, but his ride went dead and he had not made it there yet. Tr. 865. On cross examination, Fazzolare admitted that he vaguely recalled the mine manager telling him that somebody was on the way, but his ride had broken down. Tr. 841. Accordingly, I find that Hendricks did offer evidence of mitigation, i.e., that Partridge had been dispatched to correct the accumulation problem, but his ride had broken down and Partridge had not arrived yet.

Hendricks opined that the condition would have been addressed about twenty minutes after Fazzolare's arrival at the transformer. Tr. 883-84. The Citation was abated in about ten minutes when rock dust was spread around the transformer on the floor. Tr. 859, 890. Bishop testified that Fazzolare did not require any cleaning of the top of the transformer or the nearby light to abate the Citation. Tr. 858-59, 871.

b. Legal Analysis

I find a violation of section 75.400. The credited evidence establishes that Respondent permitted accumulations of float coal dust from rib to rib in an active working area and on the transformer or power center, a piece of electric equipment. In fact, Respondent's examiner reported that the transformer for the 5D drive needed dusting because it was black. Tr. 878; R. Ex. 92.

I further find that the violation is not S&S. Fazzolare credibly testified that although coal dust has a relatively lower heat threshold required for combustion, the coal dust in the Illinois coal basin must be heated to 300 degree before it will ignite. Tr. 807; *see also* Tr. 900. Fazzolare was primarily concerned that the electrical transformer might provide an ignition source for the coal dust.[18] Fazzolare, however, did not remember if the transformer was hot during the inspection and did not offer any testimony as to the potential heat the transformer could generate. Tr. 831. Respondent, on the other hand, adduced uncontradicted testimony from Barras that the transformer was between 100-180 degrees, but was not hot enough to burn a miner if touched. Tr. 896. Furthermore, Bishop credibly testified that the transformers where never too hot to handle comfortably during the hundreds of times that he had accessed them. Tr. 856-57.

[18] It is unclear from Fazzolare's testimony how the overhead light or cat heads could act as ignition sources. No coal dust was observed on the cat heads and the overhead light would not be susceptible to the "thermal blanket effect" described by Fazzolare. Further, it is unlikely that the fluorescent bulb in the overhead light would be able to reach a temperature capable of igniting the coal dust. Tr. 898; *see generally* Clete R. Stephan, MSHA, *Coal Dust Explosion Hazards*, http://www.msha.gov/S&HINFO/TECHRPT/P&T/COALDUST.pdf (top of a 1500-watt incandescent bulb can exceed 300 degrees Celsius).

I am not convinced by Fazzolare's assertion that the paper thin layer of coal dust would have provided sufficient insulation to cause the transformer's temperature to rise over the 100 degrees necessary to cause the coal dust to ignite.[19] There is no question that there can be a danger of electrical equipment overheating and rising to a temperature capable of igniting coal if there is a significant amount of densely packed coal enveloping electric equipment. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 8-11 (Jan. 1997) (remanding S&S analysis where inspector noted up to 2 ½ feet of coal dust, hydraulic oil, and loose coal packed in and around a gear case). Commission ALJs, however, have not been inclined to find that an ignition source exists when only a relatively small layer of combustible material covers electrical equipment. *Pittsburg & Midway Coal Mining Co.*, 16 FMSHRC 574, 578-79 (Mar. 1994) (ALJ); *Cam Mining*, *LLC*, 34 FMSHRC 2965, 2972-75 (Nov. 2012) (ALJ) (finding that an ignition based upon the heat generated by a transformer box and the electrical connections therein was not reasonably likely).

In the case at hand, the dust on the outside of the transformer enclosure was only paper thin and there is insufficient evidence on this record to establish that enough coal dust would accumulate under continued mining operations to create the "thermal blanket effect" described by Fazzolare. No dust was observed in the enclosure where it could be ignited by sparks or arcing that might occur assuming malfunction during continued mining operations. Tr. 831; *see also Knox Creek Coal Corp.*, 35 FMSHRC ___, slip op at 7, No VA 2010-81-R (May 28, 2014) (judges should assume common malfunctions of electric equipment in determining whether electronic equipment is an ignition source).

Based on the foregoing, I find that under continued normal mining operations, it was unlikely that a fire at the transformer would result in a lost workday or restricted duty injury from smoke inhalation to a miner traveling in the active working area. Tr. 818-19. The Secretary has failed to show a confluence of factors such as methane or ignition sources as required under Commission precedent in *Texasgulf*, 10 FMSHRC at 500-3. Accordingly, the S&S designation is removed.

I reduce Respondent's negligence from high to moderate. It is undisputed that the Respondent knew about the accumulation problem. Although Fazzolare testified that Respondent provided no mitigating information as to why the condition was allowed to continue, I have found that Hendricks did offer evidence of mitigation, i.e., that Partridge had been dispatched to correct the accumulation problem, but his ride broke down and he had not arrived yet. Hendrick's testimony was corroborated by Bishop's testimony and Fazzolare's vague recollection. Although the Secretary argues this was not a mitigating circumstance because the citation was issued at least two and a half hours after the on-shift examiner recorded the hazardous condition, I credit Hendrick's testimony that he gave the matter priority that morning, but Partridge's golf cart broke down. The Secretary offered no evidence to the contrary, and did

[19] Even Fazzolare conceded on cross that the coal dust would have to build up before it would act like a thermal blanket trapping heat in the transformer enclosure. Tr. 831.

not subpoena Partridge to testify. In these circumstances, I find sufficient evidence of mitigation to reduce Respondent's negligence from high to moderate.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $807.

3. Citation No. 8428776

The Secretary argues that Respondent violated section 75.400 because there were accumulations of float coal dust under the cable reel of the Fletcher Roof Bolter Co. No. 425, located in the #1 Unit on the right side. The Secretary claims that the violation was S&S because it was reasonably likely to lead to a lost workdays or restricted duty injury to two persons, and was the result of high negligence because Respondent should have known about the condition and offered no mitigating circumstances.

Respondent argues that the S&S and high negligence designations are inappropriate and that the regularly assessed proposed penalty of $14,373 is excessive.

a. The Alleged Violation

On September 3, 2011, MSHA inspector Fazzolare, accompanied by Respondent's representative Mike Cummins, inspected the Fletcher Roof Bolter No. 425. Tr. 966. There were no defects observed with the cable, or any other component of the permissible roof bolter (pinner), which might act as a potential ignition source. Tr. 939, 943, 950, 966-67.

Fazzalore issued 104(a) Citation No. 8428776, which alleged a violation of 30 C.F.R. § 75.400, as follows:

> There were accumulations of coal, oil and float coal dust under the cable reel of the Fletcher Roof Bolter Co. No. 425, located in the #1 Unit on the right side.
>
> These accumulations were black in color and ranged in depth from 1 inch to 1½ inches deep and the cable reel had been rolling in accumulations.

P. Ex. 32; Tr. 956. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury to two persons, and the result of high negligence. P. Ex. 32.

Consistent with the citation, Fazzolare testified that he observed accumulations of coal, oil and float coal dust under the cable reel of the Fletcher roof bolter. Tr. 924. Cummins testified that there was no float coal dust present. Rather, there was moist material comprised of fire clay, coal fines, and rock dust from the mine floor. Tr. 965.

The cable reel is insulated to isolate the possibility of the flow of electrical current and it carries about 350 feet of 480-volt energized cable, which powers the roof bolting machine. Tr. 924-25, 960-62, 973. The cable reel retracts or releases cable as the bolter moves. Tr. 925. The reel is guarded in front and covered on top, making observation or photographing of the inside of the reel compartment difficult. Tr. 964-65; R. Ex. 87(a). To reach into the compartment, a miner would have to reach between two guides that aid the retraction and extension of the cable. Tr. 977.

At one point, Fazzolare testified that the cable reel served as an ignition source. Tr. 927, 929; P. Ex. 32. Although the bolter is permissible equipment, this fact did not factor into Fazzolare's assessment because of the location of the accumulations underneath the cable reel. Tr. 929. Fazzolare testified that once the cable reel was full, the cable would be rolling in the accumulations. Tr. 926.

Upon subsequent questioning from the undersigned, Fazzolare testified, without further explanation, that he saw evidence that the cable *reel* had been rolling in accumulations. Tr. 932. I discredit this testimony because, as further explained below, Fazzolare walked and examined the full length of the cable when it was extended off the reel (Tr. 950), and the power was not energized on the machine to observe the retraction because the unit was idle. Tr. 934, 952, 954. Rather, I find that Fazzolare was speculating as to what would occur during the retraction process.

Fazzolare then testified that the roof bolter, the electrical motors on the roof bolter, and the cable, all generate heat. Tr. 932. Fazzolare testified that he had no knowledge of the cable being shielded. Tr. 939, 967. Fazzolare examined the full length of the cable and found no defects. Tr. 942.

Fazzolare testified that the cable reel would be full of energized cable and there could be a pinhole in that electrical cable that would be hard to see or detect and create an ignition source. Fazzolare also testified that he got shocked because of a pinhole when he was a roof bolter on a different type of machine, but the cable on that machine was not shielded. Tr. 930-31, 947, 950-51.

The specific hazard that Fazzolare was concerned with was smoke inhalation by the two roof bolters in the event of a fire. Tr. 930-31. He testified that if the cable reel was full during roof bolting, and there was a bad spot in the cable, a pinhole would ignite the float coal dust or coal, and the miners would be exposed to smoke inhalation from the fire, resulting in lost work days or restricted duty. Tr. 932-33. Fazzolare further testified that splices in cable are common because the cable or insulation gets torn, exposing the inner leads, and the cable gets run over, requiring spicing. Tr. 949.

The record establishes that underneath the cable reel and between its side walls there are clean-out holes that permit water and other material to exit the compartment when it is washed

out, or enter the compartment when the rear of the articulated bolter pivots up and down to follow the contours of the mine floor during tramming. Tr. 961-63, 965-66; R. Ex. 88(a). Cummins, a former 11-year roof bolter, testified that a clean reel compartment can become dirty in minutes from mine floor material entering the compartment through the drain holes if the bolter is operated with the rear of the machine articulated on the ground. Tr. 959, 965, 984.

Cummins further testified that the retracting cable would not rub in the accumulations because a tape ball prevents overloading beyond the sides of the cable reel. Tr. 972. He further testified that the reel moves at such a slow rate of speed during the tramming process – about 35 feet of cable could be retracted in a minute – that frictional heat would not be generated. Tr. 972-73.

Fazzolare testified that the accumulations under the cable reel were in active workings because "[t]his is a producing unit." Tr. 928. Fazzolare further explained that at some unspecified time after he issued the Citation, he revisited the unit and it was running coal. Tr. 952-53. Fazzolare confirmed that the accumulations were black in color, indicating that they had not been mixed with rock dust to lower combustibility. Tr. 928. The accumulations extended about one to 1.5 inches under the cable reel and about two feet wide. Tr. 925-26. Fazzolare testified that once the cable reel was full of cable, the cable would be rolling in the accumulations creating a frictional heat source that could ignite the accumulations. Tr. 926-27. In addition, Fazzolare testified that he was concerned about the high temperature oil which was present and also combustible. Tr. 928.

Fazzolare testified that the production unit was idle at the time of his inspection and had been idle for a week. Tr. 934; 952. Fazzolare conceded that under normal circumstances, there would be no power on the roof bolter when the unit was not operating. Tr. 954. Cummins confirmed this. Tr. 981. The Secretary failed to establish that there was power on the cable.

Even when the unit was idle, the cable reel and cable were subject to a thorough permissibility examination on a weekly basis, including cleaning and washing out of accumulations, if necessary. Tr. 954, 968-69, 979. Such cleaning also occurred, as needed. Tr. 980-81. The last weekly examination was performed on August 28, 2011, six days prior to the citation and within the weekly period. Tr. 968; R. Ex. 90.

b. Legal Analysis

I find a violation of section 75.400. I credit Fazzolare's testimony about the nature of the accumulations in lieu of Cummins' testimony and find that accumulations of coal, oil and float coal dust were present under the cable reel of the Fletcher roof bolter. Tr. 924. Although Cummins testified that there was no float coal dust present and the material was moist, I discredit this testimony, particularly since the pinner had not been washed, at least since the last examination almost a week earlier.

I further find that the accumulation violation under the cable reel of the roof bolter was in an active working, even though the production unit was idle for about a week, because miners continued to work or travel in the unit for maintenance and inspection purposes. *Cf. Consolidation Coal Co.*, 20 FMSHRC at 348-49.

On the other hand, I find that the violation was not S&S under the third prong of the *Mathies* test because the violation did not contribute to a hazard that was reasonably likely to result in a mine fire. When evaluating an S&S designation related to the reasonable likelihood of a fire, ignition, or explosion, the Commission examines the "confluence of factors" present based on the particular facts surrounding the violation. *Amax Coal*, 19 FMSHRC at 848 (citing *Texasgulf*, 10 FMSHRC at 501). These factors include the extent of accumulations and the presence of possible ignition sources, the presence of methane, and the type of equipment in the area. *Maple Creek*, 22 FMSHRC at 755 (citing *Enlow Fork*, 19 FMSHRC at 9).

The unit was idle at the time of the inspection and no power was energizing the roof bolter. Tr. 952. Therefore, an ignition would not have occurred. Even when production and power was restored during continued mining operations, no ignition source was established that was reasonably likely to result in a mine fire. The bolter was maintained in permissible condition.[20] Although Fazzolare testified that he "could have missed" a pinhole defect in the cable, he found no defects with the insulated cable. In fact, Fazzolare performed a full inspection of the pinner and its cable and issued no citations. Moreover, the electric shock that Fazzolare experienced through a pinhole when he was a bolter occurred on a different type of bolting machine that lacked a shielded cable. Finally, Fazzolare provided an insufficient evidentiary foundation for his summary conclusion that if the cable reel was full during bolting, a pinhole would ignite the float coal dust or coal and the miners would be exposed to smoke inhalation from the fire, resulting in lost work days or restricted duty.

Similarly, I reject the argument that the cable reel would likely serve as a frictional heat source. I have discredited Fazzolare's testimony that he observed the cable rolling in the accumulations and found that this was mere speculation as to what he thought would occur when the cable was recoiled during the retraction process. By contrast, I am more persuaded by Cummins' testimony that the retracting the cable would not rub in the accumulations because a tape ball was designed to prevent overloading beyond the sides of the cable reel. Furthermore, the Secretary relies on little more than Fazzolare's conclusory belief that the bolter could produce heat sufficient to produce an ignition. That belief is unsupported by fact on this record. Rather, I credit Cummins' testimony that the slow movement of the cable back onto the reel at about 35 feet per minute would generate insufficient frictional heat to start a fire.

[20] Although Fazzolare testified that he was concerned about a fire and not an explosion, I agree with the Respondent that the non-defective permissible equipment was unlikely to propagate an explosion because no exposed energized ignition sources were present, no sparks were capable of emission, and the jacket of the shielded cable was made of quarter-inch-thick pliable rubber. Tr. 967.

In sum, based on the particular facts surrounding this violation, the Secretary has failed to prove that an injury-causing event was reasonably likely to occur. Accordingly, I find that the violation was not S&S.

I reduce Respondent's negligence from high to moderate. Although Fazzolare testified that there were no mitigating factors provided to him when he wrote the citation, Respondent established some at trial. The design of the roof bolter and the location of the accumulations made detection difficult. Although Fazzolare was led on cross examination to testify that the violation was obvious, I discredit this testimony because the testimony from Cummins and the photographs in evidence establish that the reel compartment was not readily visible and was protected by bolted covers and by a guard. Furthermore, one would have to get down and peer through the guides to observe the accumulations. Tr. 959-960, 964, 974, 977, 981-82; R. Ex. 87(a). Finally, since the unit was idle, it was less likely that an examiner would discover the condition until production resumed and the bolted covers were removed by a rank-and-file bolter operator during his examination and cleaning. That weekly examination was not yet due at the time the citation was written. Accordingly, I find sufficient mitigating circumstances to reduce Respondent's negligence to moderate.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $807.

4. Citation No. 8436403

The Secretary argues that Respondent violated§ 75.400 because there were accumulations of float coal dust in crosscut 100 on the main west travel way. The Secretary claims that the violation was S&S because it was reasonably likely to lead to lost workdays or restricted duty to one person, and was the result of high negligence because Respondent should have known about the condition and offered no mitigating circumstances.

Respondent argues that the S&S and high negligence designations are inappropriate and that the regularly assessed proposed penalty of $13,268 is excessive.

a. The Alleged Violation

On October 19, 2011, inspector Fazzolare, accompanied by Respondent's compliance supervisor, Vernon Dunn, issued 104(a) Citation No. 8436403 alleging a violation of 30 C.F.R. § 75.400, as follows:

> There were paper thin to approximately 1/16 accumulations of float coal dust in XC 100 on the Main West travelway, these accumulations were rib to rib, on the ribs and on the 1200 volt energized power center, on the overhead light, on both cat heads and on the switch box.

> This is the 267th violation of this standard at this mine since 10/20/2009.

P. Ex. 43. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury to one person, and the result of high negligence.

Fazzolare observed combustible and volatile accumulations of float coal dust out by active workings on a 1200-volt energized power center, and on the permissible overhead light, and the cat heads and switch box located at crosscut 100 in the Main West travelway, which paralleled the Main West No. 2 belt. Tr. 988, 990-93, 1010, 1015, 1022, 1024; P. Exs. 43, 44. The floor of the Main West travelway was composed of gray clay-like material, and there was approximately three to four inches of rock dust on the floor of the cited area. Tr. 1023-24. Dunn testified that the float coal dust could have come from the running belt or the roadway. Tr. 1026-27.

The accumulations were paper thin to one-sixteenth of an inch thick and found in an area that had been rock dusted previously. Tr. 989; P. Ex. 45, at 7. Fazzolare was concerned with the accumulations of combustible material on top of the rock dust. Tr. 1013. Fazzolare testified that in the event of a fire, the float coal dust would burn off and fuel the fire. Tr. 989.

There were some accumulations on top of the transformer, but not inside the transformer. Tr. 1008, 1025. No citations were issued with respect to the transformer or overhead lights. Tr. 1026. There was no methane in the area. Tr. 1029.

Based on his experience and the extent of the accumulations, Fazzolare determined that the cited condition existed for more than one shift, and likely did not arise after the last pre-shift examination. Tr. 995-96; 1033. Dunn confirmed this. Tr. 1027, 1033.

Fazzolare designated the violative condition as S&S because there were several ignition sources present around the highly volatile fuel source, which exposed an examiner or maintenance person working on the power center to the hazard of a fire, which was reasonably likely to result in lost workdays or restricted duty due to smoke inhalation. Tr. 994-95; P. Ex. 43.

Fazzolare also determined that the violation resulted from high negligence given the large number of section 75.400 citations that Respondent was issued, and because the cited area was supposed to be pre-shifted every eight hours. Tr. 996. Although Fazzolare testified that he was not shown any pre-shift inspection reports indicating that the area had been examined, he did not write any citation for failure to conduct a pre-shift under section 75.360. Tr. 991-92, 996. Fazzolare testified that the condition was obvious and should have been noted by the pre-shift examiner and by any maintenance personnel or foreman, who entered the area. Tr. 996-97, 1015. Fazzolare did not recall management providing any mitigating circumstances. Tr. 999. His notes, however, indicate that Dunn told him that he did not think there was a hazard present. P. Ex. 45, at 7.

Dunn testified that he told Fazzolare that the citation should not be written because the condition did not present a hazard given the amount of rock dust present and the absence of any ignition source. Tr. 1028, 1037-38. According to Dunn, Fazzolare responded that the transformer constituted the ignition source. Tr. 1038.

Fazzolare testified that the citation was terminated twenty minutes after issuance when Respondent's agent mixed the float coal dust with the existing rock dust in the area to lower combustibility, and also wiped off the switch box and overhead light. Tr. 999, 1014. Dunn testified that the abatement process lasted "probably ten minutes." Tr. 1025. Dunn testified that the rock dust on the floor was so deep that it was just kicked around with his feet and a broom. Tr. 1025. Dunn further testified that when he cleaned off the top of the transformer, he felt nothing but "body temperature-type heat" of about 100 degrees, which he opined was insufficient to cause any sort of ignition. Tr. 1025-26, 1029.

Fazzolare did not testify with any specificity about the overhead light mentioned in the citation. Dunn testified that it was a fluorescent-type light with a plastic cover, and that he did not recall seeing float coal dust on the light bulb, or cleaning or wiping off the light bulb or its cover. Tr. 1032-35.

b. Legal Analysis

I find a violation of section 75.400. Respondent permitted paper thin accumulations of float coal dust from rib to rib in the Main West travel way at cross cut 100, and on the transformer, overhead light, cat heads and switch box located at this location. Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Essentially for the same reasons set forth above with respect to Citation No. 8428798, I find the violation set forth in Citation No. 8436403 to be non-S&S. The float coal dust accumulations on top of the coal transformer did not contribute to a discrete fire hazard that was reasonably likely to result in a serious injury. Under continued normal mining operations, it is unlikely that the paper thin layer of coal would cause the transformer to reach a temperature of 300 degrees, which was enough to ignite the coal dust. Accordingly, the S&S designation is removed.

I affirm the high negligence designation. The Secretary established that Respondent should have known of the condition. I reject Respondent's argument that it is unlikely that the condition came into existence since the last pre-shift examination because it was located near an active belt line and travel way. I note that Dunn, Respondent's own witness, confirmed Fazzolare's testimony that the condition likely existed at the time of the last pre-shift examination. Furthermore, I discount the argument that a mine examiner would not have regarded the condition as hazardous and reportable. Although Dunn told Fazzolare that he did not think there was a hazard present, particularly given the amount of rock dust present and the

absence of any ignition source, these are not mitigating circumstances because the amount of rock dust on the floor did not mitigate the float coal dust on the transformer, cat heads and overhead light, which are potential ignition sources capable but not likely to result in a mine fire. In sum, the high number of past violations of section 75.400, the fact that Respondent had notice that accumulations were at issue at the mine, the fact that the condition should have been recorded, but was allowed to exist for at least one shift, and the absence of persuasive mitigating circumstances support my finding of high negligence.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $2,678.

C. Maintenance of Incombustible Content of Rock Dust Order No. 8428378

1. Order No. 8428378

The Secretary alleges that the Respondent violated section 75.403 because the mine floor in entry no. 6 of MMU 011 did not contain enough rock dust to achieve 80% non-combustible content. The Secretary further alleges that the violation was unlikely to result in injury, but if injury did occur, it would be fatal, with sixteen persons affected. The Secretary further alleges Respondent's high negligence and unwarrantable failure to comply with the standard.

Respondent argues that the Order should be vacated because it was based on samples taken from discrete piles of material that were not representative of the entry floor. Respondent also challenges the gravity, high negligence, and unwarrantable failure designations, and the appropriateness of the specially assessed proposed penalty of $45,000.

a. The Alleged Violation

During an E02 spot inspection on June 20, 2011, inspector Eddie Kane,[21] accompanied by Respondent's representative Mike Cummins and miner's representative Ron Pinkston, issued section 104(d)(2) Order 8428378 for a violation of 30 C.F.R § 75.403. Tr. 564, 567; P. Ex. 34. Section 75.403 states:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the

[21] For three years prior to the hearing, MSHA inspector Kane worked as a coal mine inspector and collateral duty special investigator in the Benton, Illinois field office. Tr. 560-62. Prior to joining MSHA, Kane worked in the industry for about nine years as an outby laborer, examiner, face boss, ram car operator, roof bolter, and scoop operator. Kane possesses state mining examiner and mine manager certifications and ninety-six hours of electrical training. Tr. 560-61. Kane was the lead inspector at WLPM in early 2012 and visited the mine almost every day. Tr. 563.

> combined coal dust, rock dust, and other dust shall not be less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

The Order was designated non-S&S, unlikely to result in a fatal injury to sixteen persons, and the result of high negligence and an unwarrantable failure. P. Ex. 34. As a result of this Order, the area was closed off, and no other activity was allowed to proceed through the area. Tr. 700.

The Order issued at 10:30 a.m., when the unit was in full production running coal. P. Ex. 34; Tr. 592, 656. The shift began at 7:15 a.m. The first coal run was made at 8:05 a.m. Tr. 706; R. Ex. 25. Three cuts had been taken on the left side of the unit, at the 9 left crosscut, entry no. 9 and entry no. 8. Tr. 706-07; R. Ex. 25. Typically, three coal haulers on the left side of the unit used entry no. 6 to go to the feeder. Tr. 669. The ram cars made about 60-80 trips from face to feeder per shift. Tr. 669.

Kane testified that upon arriving at Unit 1 entry no. 6, Kane observed a lot of coal dust and float coal dust all over the entry and obvious to the casual observer. Tr. 565-66, 592.[22] Kane had to stop and wait for a ram car to pass through the area. Kane noticed that the ram car was kicking up a lot of black coal dust and suspending it in the atmosphere. Tr. 566, 577.[23]

Kane then walked further into entry 6, which was off the 2nd right panel from the 5th north main, and he noticed that this condition was extensive between survey station 10 + 75 and 12 + 35. Tr. 566. Kane took two floor samples from the area where the violative condition existed. Tr. 580-81, 583. Kane took photographs, measurements, and two spot samples about 160 feet apart across the entire entryway. Tr. 577-79, 584-85; P. Ex. 35-37. The piles of coal sampled on the return side ribs were 18-24 inches wide, and six to ten inches deep. Tr. 578-79, 584; P.

[22] Entry no. 6 was about twenty feet wide and was used as a haulage road for the left side of the unit to haul coal from face to the feeder. Tr. 656, 658.

[23] I credit this specific testimony from Kane. Although Cummins testified that he did not recall observing any ram cars drive through entry 6 and he did not observe any "rock dust" in suspension, Cummins confirmed that the accumulations were present on the mine floor along the two ribs because ram cars would rub against and grind material off the rib as they turned into the crosscut. Tr. 667-68. I also note that section foreman Blaine Shires observed ram cars running in entry 6 that day, but by the time Shires reached the area, Kane had already shut it down. Tr. 718-19.

Ex. 35; P. Ex. 36, at 3.[24] The piles that were cited extended approximately 18-24 inches in width from the left rib line into the entry. Tr. 578-89, 615-16; P. Ex. 35; R. Exs. 23(i), 23(k), 23(w). Cummins and Shires credibly testified, as corroborated by photographic evidence, that the piles were created when ram cars struck the ribs as they turned into the crosscut toward the feeder. Tr. 658, 668, 678, 708-09; R. Ex. 2, at 15-18; R. Ex. 23(a); R. Ex. 23(x). Cummins also explained that the miner cable was present on the opposite side of the piles, which would cause the operators to "hug farther to the left-hand rib to stay off the cable." Tr. 669-71.

Kane testified that the accumulations occurred over a period of time, which he estimated to be about two shifts, excluding the current one. Tr. 586. Although section foreman Shires testified that entry no. 6 was regularly scooped at least once per shift to clean spillage along the haulageway (Tr. 710), Respondent proffered no specific testimony or documentary evidence that entry no. 6 was scooped and/or rock dusted on the prior two shifts. By contrast, Kane's notes indicate that the condition has existed for at least two shifts since it appears that the accumulations came from overloaded ram cars dropping excess coal on the haul road, and then continually running over the coal until it was ground into a fine powder and pushed to the rib line by the wheels of the ram car. P. Ex. 36, at 3. In these circumstances, I credit Kane's empirical estimate that the accumulations existed for about two shifts. Tr. 586.

Cummins did not witness Kane take a sample across the entire width of the mine floor. Tr. 680. Cummins and Shires confirmed that Kane took two samples, although Cummins and Shires only witnessed Kane take one spot sample from the rib area floor. Tr. 680-82, 691-92, 715-16. Cummins specifically raised an objection with Kane about the manner in which Kane was taking his sample. Tr. 692. Cummins also recorded his observation in documentation that he completed immediately after the inspection. Tr. 683; R. Ex. 19. Cummins noted, "[t]he inspector only collected a sample of the coal that was spilled." R. Ex. 19. Neither Cummins nor any other representative of Respondent took a sample of their own. Tr. 689, 697.

For each sample taken, Kane received lab results indicating that the incombustible content of the rock dust was non-compliant. One sample contained 43.4% incombustible content, the other 48.1%. Tr. 585, P. Ex. 37. Per section 75.403, each sample should have had 80% incombustible content. Tr. 586.

Kane testified that MSHA's policy on rock dust sampling is dependent on the area where the sample is taken and the ability to take a representative sample of the area. Tr. 580-82. Where possible, MSHA procedures typically require the taking of a band sample from the roof, ribs, and floor, but MSHA's inspection procedure manual does not indicate that a band sample is mandatory. Tr. 588-89; P. Ex. 58. The ribs and roof had been rock dusted with a wet duster and were a whitish color. Tr. 582, 618, 667; P. Ex. 35. Kane did not include any of the rock dusted surfaces from the roof or ribs in his samples. Tr. 680.

[24] Cummins, who did not take measurements, recalled that the accumulations were about six inches deep. Tr. 662; P. Ex. 35; P. Ex. 36, at 3. Cummins further testified that the length of the condition was about 150 feet, excluding the length of the crosscut in the measurement. Tr. 666-67.

Kane testified that he took two floor samples from the area where the violative condition existed. Tr. 580-81, 583. He testified that the rib had wet rock dust on it and the floor away from the ribs was very hard and there was not enough material to sample down an inch and "cone and quarter." To obtain a representative sample, Kane used a floor brush and a dust pan to brush 1/8 to 1/4 inch across the surface of the entry floor from rib to rib. Kane then ran the sample through his 20-mesh sieve and tagged the entire sample to be sent to the lab for testing. Tr. 581-82.

As noted, Cummins and Shires testified that they did not observe Kane take a sample from across the entire width of the floor, but they each observed one sample at survey station 10+85. Tr. 679-80, 682, 709, 718. In any event, I credit Kane's testimony, confirmed on cross examination, that he used a floor brush and a dust pan to brush across the surface of the entry floor from rib to rib. Tr. 616-17. Accordingly, I find Cummins' testimony – that the floor in the entry consisted of incombustible fire clay, other than the piles cited – to be an overstatement that does not account for coal dust across the entry. Tr. 667.

Respondent's witness Steve Kattenbraker, a former MSHA field office supervisor and current contractor for parent Peabody Energy, confirmed that while a band sample from floor, rib, and roof may be preferable, an inspector could take a sample representative of the entire floor, and if such sample cannot be taken an inch down, the inspector should brush what he can off the floor. Tr. 635-39, 642-45. Further, safety compliance supervisor Danny Bishop testified regarding Citation 8428798 that Respondent has only taken floor samples, not band samples, when the floor was the area cited. Tr. 867, 869-70. Finally, based on prior sampling experience from ribs after wet-dry dusting, Kane testified that a band sample that included the ribs and roof would have been less representative of the violative condition and put even more combustible material into the sample. Tr. 626-29.

Kane determined that no methane was present in the air course in entry no. 6, and that the methane at the face was not high and measured 0.2%. Tr. 588, 620; P. Ex. 36, at 2. Kane further determined that a coal dust explosion was unlikely and the violation was non-S&S. Tr. 590.[25] Kane also testified, however, that the left-side miner was used in the entry, and cutting torches or welding equipment may be brought into the area, thereby introducing an ignition source necessary to trigger an explosion. Tr. 590-91, 621. Kane determined that in the unlikely event of a coal dust explosion, injury would be fatal, and all sixteen miners working inby would be killed. Tr. 590-94; P. Ex. 36.

Kane testified that Respondent had failed several rock dust surveys in the past and that Respondent's management was repeatedly told during closeout conferences that it needed to comply with the standard and get the mine rock dusted, or there would be increased enforcement. Tr. 571. Kane also testified about fatalities in mines because of inadequate rock dusting and that such fatalgrams are posted on MSHA's website and hand-delivered to mine operators upon issuance. Tr. 572-73; P. Exs. 50-51. Kane further testified that MSHA provides bulletins to

[25] Kattenbraker testified that float coal dust must be extremely dense to ignite, without methane, such that visibility would be less than two feet. Tr. 640-41.

operators to educate them on proper rock dusting and ventilation maintenance to keep methane away from the faces in an effort to prevent explosions and fires, especially during winter months. Tr. at 574; P. Ex. 52.

Kane determined that Respondent's violation resulted from high negligence because Respondent had been warned repeatedly to increase rock dusting, and the condition was open and obvious to face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes. Tr. 591-92. Kane further determined that the violation was an unwarrantable failure to comply with the rock dusting standard because the condition was obvious and extensive and the face bosses should have known that it existed. Tr. 594.

Abatement efforts, which involved scooping the area and rock dusting the floor, took about an hour. Tr. 595.

b. Legal Analysis

I find a violation of section 75.403. Section 75.403 requires that the incombustible content of the rock dust be no less than 80%. 30 C.F.R. § 75.403; Tr. 568-69. The Secretary's unrebutted sample evidence shows that both samples were non-compliant; one sample contained 43.4% and the other 48.1% incombustible content, well below the 80% incombustible content requirement.

Respondent argues that observations alone are insufficient to support a section 75.403 violation, and that the violative samples taken from isolated coal spills are not evidence of inadequate rock dusting. Rather, Respondent argues that the samples must be taken from representative areas of the mine floor rather than from areas where discrete coal accumulations are located. Accordingly, Respondent argues that Order No. 8428378 should be vacated because it is premised upon samples that were taken from discrete piles of material that were not representative of the floor in entry no. 6.

I reject Respondent's arguments. The standard does not require the taking of band samples. *Cf. Eighty-Four Mining Co.*, 22 FMSHRC 690, 698 (2000) (ALJ). In addition, I have credited Kane's testimony that he used a floor brush and a dust pan to brush across the surface of the entry floor from rib to rib in order to take a representative floor sample. Finally, the testimony from Kane and Respondent's witnesses establishes that the sampling methodology employed to obtain representative samples was reasonable given the nature and location of the accumulations along the rib.

I further find that the violation was the result of high negligence. The record establishes that the coal dust accumulations in entry no. 6 were open and obvious to face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes. Tr. 565-66, 591-92. In addition, Respondent had been admonished repeatedly during close out conferences to enhance rock dusting at the mine. Tr. 571. Finally,

Respondent proffered no evidence of mitigating circumstance other than its challenge to sampling methodology, rejected above. Tr. 595-96. In sum, the fact that Respondent had knowledge of rock dusting inadequacies and did not take facile steps to become compliant supports a high negligence finding.

Although the issue is close, I further find that the violation was an unwarrantable failure because there is sufficient evidence of aggravated conduct constituting more than ordinary negligence and a serious lack of reasonable care. As noted, "aggravating factors" include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition before citation, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *IO Coal*, 31 FMSHRC at 1350-51.

Initially, I find that the violative condition was fairly extensive. Both piles of material were twenty-four inches in width from the ribline, about six to ten inches deep, and were about 160 feet apart in the no. 6 entry. More importantly, the first sample was about 46% non-compliant and the second sample was about 40% non-compliant. Furthermore, Kane credibly testified that the coal dust and float coal dust was present all over the entry. In these circumstances, even though the condition was abated in about an hour by scooping and rock dusting, I find that the extensiveness factor tips in favor of an unwarrantable failure finding.

I have credited credit Kane's testimony that the condition existed for about two shifts, despite general testimony from Respondent that entry no. 6 was regularly scooped at least once per shift. Two shifts is definitely a period of time long enough to require that action be taken to eliminate the violative condition. *Cf., Windsor Coal Co.*, 21 FMSHRC 997, 1002 (Sept. 1999); *see also Buck Creek Coal,* 52 F.3d 133, 136 (7th Cir. 1995) (finding unwarrantable failure where cited accumulation must have been present at least since the previous shift). Accordingly, I find that the duration of the violation for about two shifts weighs in favor of finding an unwarrantable failure.

I have also credited Kane's testimony that Respondent repeatedly was placed on specific notice during closeout conferences that greater efforts were necessary for compliance with rock dusting standard section 75.403, or increased enforcement would result. Although Respondent notes that it was assigned only two repeat violation history points for Order No. 8428378 (R. Ex. 28), this fact confirms that Respondent had at least six recent violations of the same standard in the past fifteen months, and bolsters rather than undermines Kane's testimony that greater compliance efforts were necessary. Respondent did, however, make some efforts to comply with the rock dust requirement as demonstrated by the fact that the roof and ribs of entry #6 were adequately rock dusted and Respondent was supposed to regularly scoop the haulage way once per shift. Tr. 583, 630, 710. Accordingly, this factor tips slightly in favor of an unwarrantable failure finding.

With regard to whether the condition posed a high degree of danger, Kane determined that a coal dust explosion was unlikely and the violation was non-S&S. Tr. 590. No ignition sources were present. There was no methane in the air course in entry no. 6 and negligible methane at the face. Tr. 588, 620; P. Ex. 36, at 2. It is undisputed that the roof and ribs of entry no. 6 were adequately rock dusted. The Secretary's own documentation on explosions and rock dusting awareness states that "[f]loat coal dust on the ribs, roof, and other elevated surfaces (overhead dust) can be dispersed much more readily by an explosion than dust on the floor." P. Ex. 53, at 2. In these circumstances, despite Kane's testimony that in the unlikely event of a coal dust explosion, injury would be fatal and all sixteen miners working inby would be killed (Tr. 590-94; P. Ex. 36), I find that the *remote* possibility of a high degree of danger weighs against an unwarrantable failure finding.

The record establishes that the violative condition was open and obvious. Upon arriving at Unit 1 entry no. 6, Kane observed a lot of coal dust and float coal dust all over the entry and open and obvious to the casual observer. Tr. 565-66, 592. The piles of coal sampled on the return side ribs were 18-24 inches wide, and six to ten inches deep, and the dust extended approximately 160 feet across the entry. Tr. 578-79, 584; P. Ex. 35; P. Ex. 36, at 3. The piles that were cited extended approximately 18-24 inches in width from the left rib line into the entry. Tr. 578-89, 615-16; P. Ex. 35; R. Exs. 23(i), 23(k), 23(w). Accordingly, the obviousness factor supports an unwarrantable failure finding.

The operator had knowledge of the condition or at least should have known about it. Both management representatives Cummins and Shires were aware that ram cars traveling through the entry would strike the ribs, resulting in accumulations. Tr. 658-59, 672, 709. As noted, I have credited Kane's empirical estimate that the accumulations existed for about two shifts. Tr. 586. Thus, face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes, should have noted and corrected the condition prior to the inspection. Tr. 591-92, 594. Accordingly, the knowledge factor supports finding an unwarrantable failure.

Finally, an operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining*, 19 FMSHRC at 17). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.*

Concededly, Respondent made some efforts to rock dust to maintain the requisite incombustible content required by the standard. Nevertheless, even though Respondent did attempt to make efforts to eliminate section 75.403 violations generally, this evidence is not dispositive of the specific unwarrantable failure allegation at issue. Where an operator has actual knowledge of a violative condition, the Commission has considered the operator's abatement efforts of the specific violation in question. *See Consolidation Coal,* 22 FMSHRC at 330-33; *Windsor Coal*, 21 FMSHRC at 1005-07. As noted, both management representatives Cummins and Shires were aware that ram cars traveling through the entry would strike the ribs, resulting in

accumulations. Further, the accumulations existed for about two shifts and the face bosses examining the working section and face should have corrected the condition prior to the inspection. Accordingly, I conclude that Respondent failed to make adequate efforts to abate the known violation prior to its issuance. Respondent's inadequate abatement efforts also support an unwarrantable failure finding.

On balance, after considering and weighing the relevant Commission factors, I conclude that all of the factors except the high degree of danger factor support a finding that the violation in Order No. 8428378 was the result of Respondent's unwarrantable failure to comply with section 75.403. Moreover, even that factor had a remote possibility of a high degree on danger. Accordingly, I find an unwarrantable failure violation for Order No. 8428378.

Although the Secretary adduced no specific evidence or rationale to justify the special assessment in this matter, Respondent did so by introducing the Special Assessment Narrative Form received in evidence as R. Ex. 28. Given my high negligence and unwarrantable failure findings, I find that a specially assessed penalty was warranted here. Accordingly, guided by the criteria set forth in § 100.3 and the Special Assessment General Procedures, I assess a penalty of $45,000.

D. The September 12, 2011 Impact Inspection and the Alleged Violation of § 103(f) Walkaround Rights Regarding Citation Nos. 8431250, 8431251, and 8431252

1. Commission Precedent in *SCP Investments*

In *SCP Investments*, the Commission recognized that the qualified walkaround rights set forth in Section 103(f) of the Mine Act are mandatory, but their erroneous denial provides no basis for vacating citations or orders. *SCP Invs., LLC*, 31 FMSHRC 821 (2009). The Commission did not address the complex constitutional issue of whether a violation of the Due Process Clause of the Fourteenth Amendment would defeat the final clause of Section 103(f), which bars vacation of a citation or order for failure to comply with Section103(f) requirements. Respondent has raised that constitutional due process argument here. R. Br. at 76-78.

In *SCP Investments*, Commissioners Young and Cohen directed Commission judges to hold a suppression hearing and apply an exclusionary rule under which evidence obtained in violation of an operator's walkaround rights may be excluded when an operator can demonstrate prejudice in the preparation or presentation of its defense. 31 FMSHRC at 834-37. Chairman Jordan dissented and found that safety violations observed in contravention of walkaround rights do not constitute evidence obtained by virtue of an illegal action such as a violation of the Fourth Amendment's protection from unreasonable searches and seizures. She found it improper for the

judge to consider denial of walkaround rights in deciding whether the Secretary established a violation. *Id*. at 841-45. Commissioners Nakamura and Althen have not yet passed on the issue.[26]

Against this backdrop, the undersigned heard testimony from one company representative (Crit Stephenson) and three MSHA inspectors (Robert Hatcher, Larry Morris, and Phillip Stanley) regarding an impact inspection on September 12, 2011. Respondent argues that three citations – Citation Nos. 8431250, 8431251, and 8431252 – which inspector Hatcher wrote during that impact inspection when he walked a beltline unescorted, violated its walkaround rights under section 103(f) of the Mine Act.

The issues presented are whether Respondent's section 103(f) walkaround rights were denied with respect to the three citations issued by inspector Hatcher. If so, what is the appropriate remedy for such denial under extant Commission precedent? If not, did the violations occur as alleged, and what are the appropriate gravity and negligence findings and the appropriate penalties?

For the reasons set forth below, I find that Respondent's walkaround rights were violated during the instant impact inspection and I apply an exclusionary rule that examines whether Respondent has shown prejudice in its ability to observe the condition, as cited. Applying this analysis, I exclude all evidence in support of Citation 8431251, which resulted from the unescorted inspection, including the Secretary's photographs and Hatcher's testimony, and I find insufficient independent evidence to support that citation and the proposed penalty. Similarly, with regard to Citation No. 8431250, I also find that Respondent has been prejudiced by its inability to observe and challenge Hatcher's chemical test and his testimony based on that test. Accordingly, I exclude such evidence and conclude that there is insufficient evidence to support a violation of the cited standard. Finally, with regard to Citation No. 8431252, I find that Respondent has not been prejudiced by Hatcher's testimony or the photographs he took concerning this violation because Respondent could go back and check the belt alignment and its contact points with the brackets and stands after notice of the violation, and Respondent could observe the violation in essentially the same condition as inspector Hatcher observed it. Accordingly, I affirm that citation as non-S&S because it was unlikely to result in a lost workdays or restricted duty injury, with one person affected. I also affirm Hatcher's high negligence determination. Although Respondent was denied an opportunity to timely proffer mitigating circumstances to the inspector, Respondent was given an opportunity but failed to raise any mitigating circumstances after the fact and at trial. Accordingly, guided by the regular assessment criteria set forth in § 100.3(a) as applied to my findings above, I assess a penalty of $1,203.

[26] Former Chairman Duffy found a suppression hearing unnecessary and would allow the judge during the crucible of a hearing to determine the existence and extent of prejudice when determining a violation and the appropriate penalty in the context of citations written after improper denial of walkaround rights on mine property. *SCP Invs. LLC*, 31 FMSHRC at 838-40.

1. Suppression Hearing Facts

On September 12, 2011, five MSHA inspectors arrived at WLPM to perform an impact inspection during the middle of the afternoon shift about 6:30-7:00 p.m. During that impact inspection, MSHA inspector Hatcher issued Citation Nos. 8431250, 8431251, and 8431252 at issue herein. Tr. 415, 421-22, 436, 468; P. Exs. 9, 10, 12.

Outby foreman Crit Stephenson had just transported a sick miner to the surface when he encountered MSHA field office supervisor Steve Miller and assistant district manager Mary Jo Bishop at the staging area of the bath house. Tr. 413-15. Miller was the lead MSHA supervisor for the WLPM. Tr. 496. Miller told Stephenson that MSHA was conducting an impact inspection and instructed him not to contact anyone or make any phone calls and to transport three inspectors (Hatcher, Morris, and Stanley) underground to different locations. Tr. 415.

Neither Miller nor Bishop testified at the hearing and the Secretary has adduced no evidence to rebut Stephenson's account of Miller's directive. Ordinarily, Stephenson would have obtained company escorts for each inspector, but he did not in this instance because he was he was told not to make any phone calls. Tr. 416.

Stephenson waited until MSHA inspectors Robert Hatcher, Larry Morris, and Phillip Stanley were ready to be transported underground. Tr. 415, 417, 469. Stephenson testified that Respondent usually uses a four-man safety ride to travel from the surface to the underground mine. Tr. 407. That ride left no room for additional escorts. I infer that MSHA knew this since inspectors were at the mine on a daily basis.

Inspector Morris testified that MSHA has impact inspections during the middle of a shift to catch an operator by surprise. Tr. 437. He further testified that when regular inspections are conducted at the start of a shift, Respondent has escorts waiting to accompany the inspectors, but MSHA is not required to wait for the escorts. Tr. 438.

Morris testified that when the inspectors arrived, they were already dressed and ready to go underground. Tr. 438. They went through the diesel shop area and offered three hourly miners the opportunity to accompany them as miners' representatives, but these miners declined. Tr. 441. Morris further testified that had there been more salaried employees (management representatives) present on the surface, they would have been offered walkaround rights as well because that is normal procedure. Tr. 441, 453. But on cross of Morris, Respondent established that although other management representatives besides Stephenson were not present, MSHA was not going to wait around for anyone else. Tr. 456.

Morris' testimony suggests that during an impact inspection, MSHA takes deliberate measures to show up mid-shift with several inspectors already dressed and ready to go when it is likely that most management representatives are already underground or gone for the day. Tr. 432, 452-53, 454-55. Morris further testified that section foremen can often be found underground on a miner or longwall unit and then offered walkaround rights, but seldom do such

representatives take MSHA up on the offer. Tr. 453-54. In this case, however, the impact inspectors targeted belt lines where foremen normally are not present. Tr. 454.

Respondent argues that MSHA did not follow its typical procedures under which MSHA inspectors, several of whom may be present at the large mine on a daily basis, arrive at the mine's safety department office prior to the commencement of the shift, announce their presence, and wait for a company escort and a miners' representative to accompany each inspector before beginning the inspection. R. Br. 63 (citing Tr. 405-06, 416, 438). Stephenson testified, and inspector Hatcher confirmed, that in such circumstances the inspectors would not tell their escorts where they were going until they left the surface. Tr. 406-07, 494. Stephenson testified, therefore, that there was no opportunity to provide advance notice of the inspection to miners working underground. Tr. 409. Stephenson further testified that this arrangement never caused any problems. Tr. 410. The Secretary did not establish any history of providing advance notice at the WLPM.

Hatcher testified that once Stephenson and the three inspectors began traveling inby, they stopped a vehicle coming out, which had some hourly miners on it, and asked if the miners wanted to accompany the inspectors. The miners declined and were instructed not to tell anyone that the inspectors were in the mine. Tr. 484-85. Morris confirmed that miner's representative Ron Pinkston was given and declined the opportunity to turn around and follow the inspection party. Tr. 458-59.

Eventually, inspectors Morris and Hatcher instructed Stephenson to drop them off at the 4th North and 1st West belt intersection. Tr. 417. Morris inspected the 4th North belt and wrote three citations that are not at issue, one for unsupported roof in the corner of an intersection on the belt line; one for a hole in a ventilation stopping; and one because four contract miners did not have multi-gas detectors. Tr. 457, 460-61.

After writing these citations without any management representative present, Morris contacted mine manager, Joel Hughes, because Morris could not leave the contract miners without multi-gas detectors. Tr. 447-451, 462. When Hughes arrived, Morris informed Hughes about the three citations that he had written and Hughes went and obtained multi-gas detectors for the contract miners. Tr. 450-451. Morris then offered Hughes the chance to accompany him as he walked the rest of the belt, but Hughes declined. Tr. 450.

As noted, Hatcher inspected the 1st West belt and wrote the three citations at issue, Citation Nos. 8431250, 8431251, and 8431252, between 9:45 and 10:45 p.m. Tr. 487; P. Exs. 9, 10, 12. In his notes, Hatcher wrote "Declined" in the space used to identify the miners' representative. But in the space used to identify the company representative, Hatcher wrote, "Impact Inspection." P. Ex. 14, at 1.

Citation No. 8431250 alleges a violation of 30 C.F.R. § 75.333(h) and states:

> The Kennedy equipment doors separating the intake (primary escape way) from the 1st West conveyor belt at cross cut #13 are not being maintained to serve the purpose for which they were built. The equipment doors next to the belt conveyor line are damaged. The west door has a hole at the top of the door 1 inch to 3 inches in width x 5 feet in length. The east door has a hole along the bottom of the door and is 12 inches to 3 inches in width x 6 feet in length. Air is leaking through the bottom and top of the doors to the belt line. This was determined by chemical smoke.
>
> Standard 75.333(h) was cited 28 times in two years at mine 1103054 (28 to the operator, 0 to a contractor).

P. Ex. 9. The citation was designated non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id*. The proposed penalty is $873.

Citation No. 8431251 alleges a violation of 30 C.F.R. § 75.400 and states: as follows:

> Accumulation of combustible materials in the form of coal pressing have been allowed to accumulate under the bottom return roller at cross cut #37. The bottom return roller is in contact with the coal pressing and the mine floor. The belt was in service at time of inspection.

P. Ex. 10. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id.* The proposed penalty is $13,268.

Citation No. 8431252 alleges a violation of 30 C.F.R. § 75.1731(b) and states:

> Conveyor belts must be properly aligned to prevent the moving belt from rubbing the structure or components. The bottom return conveyor belt on the 1st west conveyor belt line is not properly aligned and is rubbing the steel bottom roller hanger brackets at the following locations: 2 bottom brackets at cross cut #5 to cross cut #6, 1 bottom roller bracket at cross cut #6 to cross cut #7, and 2 bottom roller brackets at cross cut #7. Also the bottom return belt is in contact with 1 bottom belt stand on the south side of the conveyor belt at cross cut #10 and at cross cut #37 the bottom return conveyor belt has bee[n] in contact with the bottom belt stand and has cut through the steel 2 inch bottom belt stand for a depth of 1¾ inches.

P. Ex. 12. The citation was designated non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id*. The proposed penalty is $1,203.

The Secretary provided no evidence that Respondent's representatives were informed of or learned of the violations written by Hatcher shortly after he observed them.

Meanwhile, after dropping Hatcher and Morris off, Stephenson continued driving inspector Stanley inby and dropped him off at the tail of the 2nd West belt. Tr. 418, 469. At that location, hourly belt shoveler Lonnie Frederickson was present and Stephenson asked Frederickson to act as a miner's escort with Stanley. Tr. 418-19. Stephenson then parked at the head of the 2nd West belt and rejoined Stanley. Tr. 418-420.

After accompanying Stanley for part of his inspection of the 2nd West belt, Stephenson subsequently met Hatcher and then Morris, before driving all three inspectors out of the mine. Tr. 420-21. On the surface, the inspectors met with the midnight-shift mine manager, Nathan Genesio, and the midnight-shift miners' representative, Martin Long, during the closeout conference. Neither Genesio nor Long raised any issue about denial of walkaround rights. Tr. 463.

It is undisputed that no company escort or walkaround representative was with Hatcher when he wrote the three citations at issue during his inspection of the 1st West belt. Tr. 420. Respondent argues that this was because Miller told Stephenson above ground that he would not permit Stephenson to make any phone calls to obtain additional escorts. R. Br. 70-71. The record establishes that Respondent provides its escorts with training on how to take samples, heat gun measurements, photographs and notes, and how to gather other information relating to particular cited conditions. Respondent does this, in part, to facilitate the presentation of mitigating factors to the inspector, which address gravity and negligence findings in a citation/order. Tr. 410-413. Of particular relevance, Stephenson testified that if an inspector, such as Hatcher here, was walking a belt line and found a roller turning in accumulations or a belt rubbing at the stand, the escort would use a heat gun to determine the temperature of the frictional ignition source and assess the likelihood of fire. Tr. 411. Similarly, for a rock dusting or accumulation citation, the escort would take a sample to determine the combustibility content. Tr. 411-12.

By contrast, the Secretary argues that at no time during Hatcher's inspection did any management representative seek Hatcher out in an effort to accompany him. P. Br. 66 (citing Tr. 489). In addition, the Secretary emphasizes that Stephenson did not ask to make any phone calls after he dropped off the inspectors underground, although he had the ability to call anywhere in the mine. In fact, Stephenson never asked any of the three inspectors whether he could call additional company representatives to accompany the inspectors once they were in place. P. Br. 64-65 (citing Tr. 424, 444, 470). Respondent notes, however, that Morris and Hatcher began their inspections as soon as they got off their ride upon arrival at their locations, and based on

Morris's testimony about not waiting on the surface, Respondent argues that the inspectors were not going to wait for management representatives or escorts to arrive underground. R. Br. 62, at n. 45, 71, 72 (citing Tr. 456, 495, 500-01).

Morris testified that Stephenson could have made phone calls once the inspectors were in place because that would not have constituted pre-notification. Tr. 444. Hatcher also testified that Stephenson could have asked for a management representative to accompany Hatcher on his inspection. Tr. 485-86.

Stephenson never indicated to the inspectors that he was upset that more management representatives were not with him to accompany the inspectors. Tr. 424-25, 444, 470, 485. To the contrary, Stanley described Stephenson as very amicable. Tr. 470. The Secretary, however, failed to establish that any inspector advised Hatcher that he could call additional representatives once the inspectors were in place or extended him the opportunity to do so after Miller issued his directive on the surface that Stephenson not call anyone.

2. Legal Analysis

a. No Fourth Amendment Violation is Present

At the outset, I reject Respondent's argument that any denial of section 103(f) walkaround rights, by extension, is also a violation of the Fourth Amendment's protection "against unreasonable searches and seizures" because the opportunity to accompany inspectors is critical to the Mine Act's "inspection program," which justifies warrantless searches. *Cf., New York v. Burger*, 482 U.S. 691, 703 (1987). In *Donovan v. Dewey*, the Supreme Court held that warrantless inspections of mines pursuant to Section 103(a) of the Mine Act are not per se unreasonable and therefore do not violate the Fourth Amendment. 452 U.S. 594, 605 (1981). Respondent argues that warrantless inspections, even in the context of a pervasively regulated industry such as mining, are deemed reasonable only if three criteria are met. *Burger*, 482 U.S. at 702 (1987). First, there must be a substantial government interest that informs the regulatory scheme to which the inspection is made. *Id.; Donovan*, 452 U.S. at 602. Second, the warrantless inspection must be necessary to further the regulatory scheme. *Burger*, 482 U.S. at 702; *Donovan*, 452 U.S. at 600. Third, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutional substitute for a warrant. *Burger*, 482 U.S. at 703; *Donovan*, 452 U.S. at 604-605.

It is noteworthy that an "impact inspection" is not mentioned in the Mine Act or any MSHA-promulgated regulation. It is a special initiative following the explosion at the Upper Big Branch Mine (UBB) to enhance surprise and promote miner safety and health, the paramount concern of the statute. Monthly impact inspections, which began in force in April 2010 following the explosion at UBB, involve mines that merit increased agency attention and enforcement due to poor compliance history or particular compliance concerns. These matters include: high numbers of violations or closure orders; frequent hazard complaints or hotline calls; plan compliance issues; inadequate workplace examinations; a high number of accidents,

injuries or illnesses; fatalities; and adverse conditions, such as increased methane liberation, faulty roof conditions, inadequate ventilation and accumulations of respirable dust. *See, e.g.*, Press Release No. 13-2103-NAT, MSHA, MSHA Announces Results of September Impact Inspections (Oct. 31, 2013), *available at* http://www.msha.gov/MEDIA/PRESS/2013/NR131031.asp.

Typically, an impact inspection involves multiple inspectors who simultaneously arrive unannounced at a pre-selected mine site, capture the phones to preclude advance notice, and spread out to find as many violations as possible. MSHA targets mines with a particular history of compliance problems. Such problems include use of tactics to hide violations from MSHA; employee hazard complaints or anonymous hotline calls; non-compliance with MSHA-approved plans; inadequate workplace exams; a high injury rate; a fatality; a pattern of violations; or hazardous conditions at the mine. *See, e.g.,* Michael T. Heenan, *Dreaded Impact*, Pit & Quarry, Nov. 2012, at 50. As in this case, these surprise impact inspections often occur mid-shift or during night shifts, when fewer representatives are available to accompany the inspectors on behalf of the operator. *Id.*

As practitioner Heenan points out, however, such inspections are not really new because MSHA has been doing "blitz" inspections since the earliest days of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), and they have continued under the Federal Mine Safety and Health Act of 1977 (Mine Act) as consistent with provisions that encourage "frequent inspections." *Id*. After the UBB disaster, however, MSHA's impact inspections are conducted nearly every month under a formalized program in which mines are selected according to the above-referenced criteria and the results are publicly announced. *Id*. Accordingly, I find that the certainly and regularity of impact inspections targeting particular mines that meet specific criteria satisfies constitutional search and seizures concerns irrespective of whether distinct and separate statutory walkaround rights are violated.[27]

Furthermore, in the circumstances of this case, I find that the public interest in promoting safety at the WLPM outweighs the inconvenience of unannounced, warrantless impact inspections that make the exercise of statutory walkaround rights more difficult. Section 103(a) of the Act explicitly gives MSHA inspectors the right to enter any mine without any advance notice of an inspection. 30 U.S.C. § 813(a). In fact, section 103(a) of the Act grants MSHA inspectors the right to conduct warrantless inspections in the inherently dangerous and pervasively regulated mining industry to ensure compliance with mandatory health and safety standards without violating the Fourth Amendement. *Donovan v. Dewey*, 452 U.S. 594, 596, 603, 605 (1986). Accordingly, mine operators must be aware and expect continuous and frequent impact inspections without a warrant or probable cause.

[27] Respondent's Fifth Amendment due process arguments are discussed separately below under the *Matthews v. Eldridge* paradigm. *See* 424 U.S. 319 (1976).

b. The Statutory Provisions in Tension: Section 103(a) Must be Balanced with Section 103(f)

Section 103(a) of the Mine Act states in part, "[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . ."

Section 103(f) of the Mine Act states in pertinent part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . . Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

The Secretary has not issued any regulations under section 103(f). Nor has the Secretary issued any regulations to govern impact inspections, which have become prevalent since the April 2010 UBB coal mine disaster.

I agree with the Secretary that the ability of MSHA inspectors to protect miners from deadly hazards without advance notice of an inspection under section 103(a) of the Mine Act must be balanced with the operator's right to accompany the inspector under section 103(f) of the Mine Act during an inspection. P. Br. 61. This case presents the novel issue of how the Commission should determine such balance during an impact inspection involving multiple inspectors when MSHA specifically informs the operator's walkaround representative not to make any phone calls and to escort multiple inspectors underground. I conclude that MSHA is obligated to provide an opportunity to an operator representative to accompany each inspector for the purpose of aiding each inspection. Otherwise, statutory rights under section 103(f) effectively vanish during impact inspections.

In this case, there was no outright denial of Respondent's walkaround rights as in *SCP Investments*. Respondent's representative Stephenson was given an opportunity to accompany the Secretary's authorized *representatives.* But Stephenson could not be in three places at once to aid the inspectors when they fanned out underground, and he was specifically instructed by Miller, the lead MSHA supervisor for the WPLM, not to make any phone calls.

The statutory language of section 103(f) uses the word "representative" in the singular, i.e., "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection . . . . " In the legislative history, however, the Senate

Committee explained that section 103(f) requires "that *representatives* of the operator and miners be permitted to accompany *inspectors* in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection." *SCP Invs*., 31 FMSHRC at 831 (citing Rep. No. 95-181, at 28 (1977), *reprinted in* S. Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978). Thus, the Commission has held that Section 103(f) affords both *representatives* of operators and *representatives* of miners the right to accompany an MSHA inspector during a "physical inspection of [the] . . . mine" and to "participate in pre- or post-inspection conferences held at the mine." *See Sec'y of behalf of Wayne v. Consolidation Coal Co.*, 11 FMSHRC 483, 488 (April 1989) (citing 30 U.S.C. § 813(f)).

This right to accompany an inspector is not an unqualified right because it is "[s]ubject to regulations issued by the Secretary," requires that a representative "be given an opportunity to accompany" the inspector, and grants the inspector discretion to permit additional representatives where he determines that more than one walkaround representative would aid his inspection. *Id*. (*citing* 30 U.S.C. § 813(f); *Emery Mining Corp*., 10 FMSHRC 276, 279 (Mar. 1988)). Furthermore, the Secretary has given MSHA inspectors the authority to limit the number of representatives participating in an inspection, consistent with the primary obligation to carry out inspections in a thorough, detailed, and orderly manner. Interpretative Bulletin, 43 Fed. Reg. 17546 (1978); *Emery Mining Corp,* 10 FMSHRC at 289, n. 13. More specifically, the Secretary's Interpretative Bulletin, which sets forth guidelines for the inspector's interpretation and application of section 103(f) provides that "[w]here necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection." 43 Fed Reg. at 17546.

In this case, however, the Secretary has failed to show that Miller's directive to Stephenson not to make any phone calls was necessary to assure a proper impact inspection and preclude advance notice. Rather, on this record I conclude that MSHA failed to give Respondent an opportunity to exercise its full section 103(f) walkaround rights when Miller instructed Stephenson to transport three inspectors underground and not to contact anyone or make any phone calls. Tr. 415. Miller explicitly denied Stephenson the "opportunity" to contact other management officials to act as operator representatives to aid in the inspection. I credit Stephenson's testimony that he did not attempt to obtain company escorts for each of the three inspectors (Hatcher, Morris, and Stanley) because he was told by Miller not to make any phone calls. Tr. 416. Miller's directive runs counter to MSHA's statutory obligation to afford an operator representative an opportunity to accompany each authorized representative of the Secretary during the physical inspection of the mine.

I reject the Secretary's argument that MSHA did not deny Respondent an opportunity to escort the inspectors because Stephenson should have called for an escort after dropping off each inspector at the various locations. As noted, Stephenson was given an explicit directive by Miller not to call anyone, and another supervisory official (Bishop) was present when Miller's directive was given. Tr. 415. Stephenson recognized them as supervisory officials for MSHA.

Id. I decline to require Stephenson to buck Miller's direct order and invoke or insist on the opportunity for one-to-one walkaround rights either on the surface or underground as a means of securing the opportunity that the statute requires MSHA to give. *But see NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 257 (1975) (employee's statutory right to union representation during an investigatory interview arises only where the employee requests representation; hence, employee may forego his statutory right and participate in an interview unaccompanied by his union representative). Of course, the Commission is free to fashion a policy decision to the contrary.[28]

Miller's pre-emptive directive to Stephenson suggests that MSHA had little interest in affording Respondent its statutory opportunity to have a representative escort each inspector for the purpose of aiding their impact inspection. Both on the surface and underground, Stephenson complied with the government's directive and did not call any other management officials to act as company escorts. Tr. 416. As a result, Hatcher's inspection of the 1st West belt was unescorted. Although inspectors are not required to wait for management escorts and can "walk" into a mine (Tr. 456-57),[29] section 103(f) places the onus on MSHA to give an opportunity to company representatives to accompany the inspectors for purposes of aiding their inspection. In short, Miller's directive, which Stephenson followed, denied Respondent an opportunity to escort Hatcher's inspection.

The Secretary justifies Miller's directive to Stephenson not to call company escorts on the grounds that Respondent cannot provide advance notice of an inspection. P. Br. 61. On this

[28] There appears to be some confusion as to whether the Commission formulates any policy. Certainly, it does not formulate enforcement policy, left to MSHA. But the Mine Act does gives the Commission jurisdiction over "substantial question[s] of law, policy or discretion," 30 U.S.C. § 823(d)(2)(A)(ii)(IV), and the legislative history makes clear that "[t]he Commission was established as the 'ultimate administrate review body' under the Act due to the recognition that 'an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.'" *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 29, 1979) (citing S. Rep. No. 95-181, at 13 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 601, 635 (1978)). The Supreme Court has also recognized the *unique* role of the Commission in formulating a uniform and comprehensive interpretation of the Mine Act. *Compare Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (affirming the Commission's role as the arbiter of questions of interpretation of the Mine Act) with *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-58 (1991) (emphasizing the narrowness of the holding that the OSH Act did not grant OSHRC the authority to interpret OSHA regulations); *see also Speed Mining, Inc.,* 28 FMSHRC 773 (Sept. 2006) (Chairman Duffy, concurring) (concurrence provides a detailed examination of the differences in the OSH Act and the Mine Act).

[29] See *DJB Welding*, 32 FMSHRC 728, 736 (June 2010) (ALJ) (inspector not obligated to delay inspection or wait longer than reasonable for a representative to arrive, citing *F.R. Carroll, Inc*., 26 FMSHRC 97, 98 (Feb. 2004 (ALJ) (operator who was "too busy" to accompany inspector had responsibility to designate another representative).

record, that justification is a red herring. All inspections preclude advance notice and operators are charged with this knowledge. The Secretary failed to establish that affording Respondent an opportunity to provide an escort for inspector Hatcher would compromise any protection against advanced notice of the inspection. On the contrary, Stephenson testified that regular inspections with multiple inspectors are common at the WLPM. Tr. 405, 438. Normally, during such inspections, MSHA provides Respondent with an opportunity to obtain a company representative for each inspector before the beginning of the inspection. Tr. 406, 416. Before such inspections, the inspectors would not tell the representatives where they were going to inspect so as to reduce any likelihood of advanced notice. Tr. 406-07, 494. These inspection procedures worked and the Secretary has not alleged any problems of advanced notice at the WPLM. Tr. 504. Therefore, on this record, the Secretary's generalized concern over the possibility of advanced notice do not override the Respondent's section 103(f) right to be given an opportunity to aid in each portion of the impact inspection, including Hatcher's inspection.

In addition, I find it telling that Hatcher's notes state "Impact Inspection" in the space used to identify a company representative, suggesting that MSHA may think that such inspections are exempt from 103(f) requirements. At the very least, it would appear that Hatcher never intended for there to be a company representative with him during the impact inspection.

I reject any argument that Stephenson was an operator representative, who was given an opportunity to accompany Hatcher during his inspection. After transporting Hatcher to the 1st West belt, Stephenson was required to drive further inby and drop inspector Stanley off.

I also reject the argument or any suggestion that section 103(f) rights do not apply in impact inspections. Rather, I agree with Respondent that the Secretary cannot justify MSHA's failure to offer an opportunity to an operator representative to accompany inspector Hatcher simply by characterizing the September 12, 2011 inspection as an "impact inspection" designed to preclude advance notice. I note that inspector Morris, on cross examination, conceded that the impact inspection was part of a regular EO1 inspection. Tr. 436. More importantly, the Commission has held that walkaround rights under Section 103(f) apply to *all* inspections. *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994) (issue of miners' representative). In fact, one Commission judge has characterized the right of a mine operator to be afforded an opportunity to be present and to accompany an inspector as a fundamental right and found that MSHA inspectors must make every reasonable effort to give a mine operator an opportunity to exercise its walkaround rights. *DJB Welding Corp*., 32 FMSHRC 728, 733, 735 (June 2010) (ALJ) (emphasis added).

Although impact inspections make it more difficult for operators to invoke walkaround rights, the enhanced miner safety and health that results from impact inspections outweighs this difficulty. Furthermore, operator preparation and training for impact inspection contingencies can alleviate this concern.

On the other hand, MSHA cannot employ this successful and important initiative to deny an operator its statutory right to accompany an inspector for the purpose of aiding such

inspection under section 103(f). As the Commission has stated, "[w]e are not prepared to restrict the rights afforded by [section 103(f)] absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.") *Consolidation Coal Co.,* 3 FMSHRC 617, 618 (Mar. 1981). I find no clear indication in statutory language, legislative history, or regulation to limit section 103(f) rights during impact inspections.

In sum, I conclude that MSHA failed to give Respondent an opportunity to accompany inspector Hatcher for the purpose of aiding his inspection of the WLPM during the impact inspection on September 12, 2011. This failure violated Respondent's statutory walkaround rights under section 103(f) of the Mine Act.

As a remedy for the statutory infringement of Respondent's walkaround rights, I apply an exclusionary rule and determine what, if any, evidence from Hatcher's inspection of the 1st West belt should be excluded if Respondent can demonstrate prejudice in the preparation or presentation of its defense. *SCP Invs. LCC,* 31 FMSHRC at 835-37 (citing *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004); *Pullman Power Prods., Inc. v. Marshall*, 655 F.2d 41, 44 (4th Cir. 1981); *Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Chicago Bridge*, 535 F.2d at 376; *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975); *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (Jan. 1980); *Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979); *Able Contractors, Inc*., 5 OSHC 1975 (Oct. 1977)).

c. The Constitutional Due Process Issue

Before addressing an exclusionary rule remedy for the statutory infringement of Respondent's walkaround rights, I first address Respondent's argument that the erroneous denial of its right to be given an opportunity to participate in Hatcher's inspection was a violation of constitutional due process. I do so because an argument can be made based on non-precedential decisions of Commission judges that a denial of due process may be grounds for vacating citations otherwise jurisdictionally and substantively valid, i.e., a potentially stronger remedy than application of an exclusionary rule. *See SCP Invs., LLC*., 32 FMSHRC 119, at 124-25 (Jan. 2010) (ALJ after remand) (*citing American Coal Co.*, 29 FMSHRC 941, 952-53 (Dec. 2007)); *Gates & Fox Co. v. OSHRC*, 790 F.2d 1189, 1193 (9th Cir. 1982) (considerations of due process prevent imposition of a civil penalty and validation of a citation otherwise properly issued); *DJB Welding*, 32 FMSHRC at 734-35 (suggesting, even after the Commision's decision in *SCP Investments*, that a violation of walkaround rights that results from an abuse of discretion provides a sufficient basis for vacating citations). It is troubling that the Secretary does not even address the Respondent's due process arguments on brief, even though the Secretary was clearly on notice at the hearing that Respondent was raising this constitutional issue when Respondent unsuccessfully moved to vacate the citations written by inspector Hatcher. Tr. 398-400.

In its remand in *SCP Investments*, Commissioners Young and Cohen noted that "[t]he only possible basis to overcome the [jurisdictional] statutory language would have to be

constitutional in nature, such as a violation of the Due Process Clause," a "complex issue" not presented in that case. 31 FMSHRC at 834, fn. 14. Extant Commission case law establishes that violations of due process are grounds for vacating citations otherwise jurisdictionally and substantively valid. *American Coal Co.*, 29 FMSHRC at 952-53 (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d at 1193). Consequently, the constitutional issue presented in this case is whether MSHA's denial of the Respondent's statutory section 103(f) walkaround right to accompany inspector Hatcher when he wrote citations on the 1st West belt line was a due process violation. Especially cognizant of the judge's analysis of this issue on remand from the Commission in *SCP Investments*, I conclude that MSHA's conduct during the subject impact inspection constituted a constitutional violation of procedural due process.

The Fifth Amendment provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Clearly, no deprivation of life occurred here. Nor do I find any deprivation of a liberty interest. Concededly, the Supreme Court recognized in *Board of Regents v. Roth*, that the definition of liberty must be "broad" and include "not merely the freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of . . . conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." 408 U.S. 564, 576-78 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923)). Despite this broad definition, the *Roth* court did not look to the "weight but to the nature of the interest at stake" and held that the opportunity to keep a teaching positions at a state university, or other government job was not comparable to those freedoms enunciated in *Meyer*. 408 U.S. at 575. Similarly, I find that the mandatory language in section 103(f) creating a statutory right in an operator representative to be given an opportunity to accompany an MSHA inspector for the purpose of aiding in an inspection does not implicate a major loss of personal freedom or liberty such that due process protections must be accorded. *Compare Goss v. Lopez*, 419 U.S. 565 (1975) (ten-day suspension from high school implicates liberty interest), *and Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation), *and Morrisey v. Brewer*, 408 U.S. 471 (1972) (parole revocation), *with Sandin v. Conner*, 515 U.S. 472 (1995) (mandatory language in state prison regulations will not create a liberty interest for placement in solitary confinement because of prison misconduct unless the deprivation imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

The property interest analysis is more difficult. The *Roth* Court recognized that a property interest is "a legitimate claim of entitlement" that arises, not from the Constitution itself, but is created and defined "by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 576-78. Thus, Respondent must demonstrate that some authoritative source of law "establishes a definite standard to guide the decision . . . rather than confiding the decision to the discretion of the administering authorities." *See Gilbert v. Frazier*, 931 F.2d 1581 (7th Cir. 1991). For example, in *Goldberg v. Kelly*, where the Court finally abandoned the right-privilege distinction, the welfare claimants had a property interest at stake because the underlying federal legislation provided that

individuals who met certain criteria had a legal right to receive welfare payments. 397 U.S. 254, 261-63 (1970); *see also Mathews v. Eldridge*, 424 U.S. 319 (social security benefits).

Here, Respondent has demonstrated a legitimate claim of entitlement to be given an opportunity to accompany inspector Hatcher during his inspection of the 1st West belt. Like in *Goldberg v. Kelly* and *Mathews v. Eldridge,* this right is grounded in federal statute, specifically section 103(f) of the Mine Act. The denial of Respondent's statutory right to be given an opportunity to accompany inspector Hatcher during the impact inspection for the purpose of aiding such inspection also operated to deprive Respondent of an opportunity to provide exculpatory information or a different version of the facts during the course of the inspection, which could have been relied on during participation in the post-inspection conferences at the mine, and in its defense of the civil penalty petition at trial. Obviously, any civil penalty assessed compels Respondent to relinquish money, which is a tangible property interest.

Despite the Secretary's silence, I recognize that an injury to a protected property interest does not qualify as a deprivation if the injury is inflicted through mere negligence rather than deliberation. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986). On this record, however, I find that MSHA made a deliberate decision to limit walkaround rights during the impact inspection. Two facts lead inexorably to this conclusion. Lead field office supervisor Miller instructed Stephenson not to make any phone calls with the foreseeable result that Stephenson, without disobeying the government edict, could not obtain sufficient company representatives. Second, Hatcher's notes indicate that no company representative was needed because this was an impact inspection.

Since I have determined that a constitutionally protected property interest was infringed, I next address what procedures the Constitution requires for the violation. In *Matthews v. Eldridge*, the Court endeavored to maintain flexibility in due process analyses based on the particular situation presented. The Court looked to three factors in order to determine what process is due.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if, any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. at 334-35 (1976) (citing *Goldberg v. Kelly,* 397 U.S. at 263-271).

Addressing the first factor, the deprivation of Respondent's private interest to accompany inspector Hatcher for the purpose of aiding in his inspection is readily apparent. A major objective of the Mine Act is to encourage the efforts of mine operators and miners "to prevent the existence of . . . [hazardous] conditions and practices in . . . mines." 30 U.S.C. § 801(e).

Accordingly, section 103(f) of the Act confers the right of representatives of mine operators and miners to accompany inspectors during inspections "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). *See SCP Invs*. LLC, 32 FMSHRC 119, 126-27 (Jan. 2010) (ALJ). Skirting the statutory walkaround requirement during an impact inspection or otherwise could deprive the inspector of important information that would have been supplied to him by the operator representative had one been given an opportunity to accompany the inspector. *Cf., SCP Invs. LLC*, 31 FMSHRC at 843 (Jordan, Commr., dissenting).

With regard to the second factor, I have determined that MSHA's instant impact inspection, as carried out consistent with Miller's directive that Respondent not make any phone calls, erroneously deprived Respondent of its statutory right to be given an opportunity to accompany inspector Hatcher during his inspection of the 1st West belt. The Secretary, having failed to even address the complex due process argument raised by Respondent, obviously has failed to proffer any additional or substitute procedural safeguards for protecting Respondent's walkaround rights.[30] But this does not mean that there are none. Even though the statutory walkaround violation that I have found constitutes a denial of due process because of the erroneous denial of Respondent's right to be given *an opportunity* to participate in Hatcher's inspection,[31] I find that any process due for violation of this statutory right is constitutionally satisfied by application of an exclusionary remedy as explained by the Commission plurality in *SCP Investments*. This finding accounts for the Commission's unanimous conclusion that even MSHA's intentional failure to honor statutory walkaround rights under section 103(f) does not prevent MSHA from taking enforcement action under the last sentence of that provision, which precludes vacature. *SCP Invs. LLC*, 31 FMSHRC at 831.

Finally, turning to the Government's interest, including the function involved and the fiscal and administrative burdens that [any] additional or substitute procedural safeguards would

[30] On remand in *SCP Investments,* the judge rejected the Secretary's assertion that a close-out conference is an acceptable substitute for walkaround rights. He found clear legislative history that Congress did not intend to empower the Secretary to arbitrarily deny section 103(f) walkaround rights in favor of a substitute procedure. 32 FMSHRC at 127-28.

[31] On remand in *SCP Investments*, the judge found "[i]t is clear that the denial of Stone's right to accompany the inspector deprived the mine operator of its statutory right to provide exculpatory information during the course of the inspection." 32 FMSHRC at 125. It is not clear to me that there is any such statutory right. Rather, section 103(f) provides a right to be given "an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a), for the purpose of aiding such inspection . . . ." Providing exculpatory information and aiding the inspection are not necessarily the same. The judge then found "a denial of due process because of the erroneous denial of Stone's right to participate in the inspection," and applied the *Matthews v. Eldridge* factors "for determining whether a violation of due process has occurred," instead of for determining what process is due for the termination of a clear and tangible property interest, such as the social security benefits at issue there. *SCP Invs. LLC*, 32 FMSHRC at 126 (citing *Matthews v. Eldridge*, 424 U.S. at 334-35).

entail, I have no doubt that impact inspections, which are designed for surprise and to preclude advance notice, enhance miner safety and health. But MSHA can still employ this successful and important initiative without denying an operator its statutory right to be afforded an opportunity to accompany each inspector on an impact inspection for the purpose of aiding the inspection under Section 103(f). MSHA's provision of this mandatory but qualified right imposes no significant fiscal or administrative burden on MSHA's inspection regime.

In fact, affording Respondent an opportunity to participate in Hatcher's inspection, furthers, rather than burdens, the Government's interest in encouraging a safer mining environment. There can be little doubt that Respondent's representatives are familiar with the particular conditions that are unique to the WLPM. A representative of a mine operator can alert an inspector to potential dangers based on familiarity with the mine. Mine operator representatives, like miner representatives, are assets to a successful mine inspection, which seeks to identify hazardous conditions and require remedial actions to alleviate the dangers. *See SCP Invs. LLC*, 32 FMSHRC at 126. Accommodating walkaround rights does not result in any significant administrative burden other than having to deal with a representative who may point out hazards, offer justifications, proffer mitigating circumstances, and collect evidence that may support a perspective contrary to the inspector's view at hearing.

Accordingly, MSHA must accommodate an operator's statutory walkaround rights during an impact inspection with as little vitiation as is necessary to perform its inspection function effectively without advance notice. Here, MSHA has not done that. Miller's directive precluding any phone calls to invoke a statutory right, was less designed to preclude advance notice, already outlawed under section 103(a), than a purposeful effort to preclude Respondent's representatives from accompanying the three inspectors. Hatcher's notes bolster this inference. MSHA had many options available to afford Respondent an opportunity to aid in the impact inspection. And since MSHA failed to do so, an exclusionary rule can be applied to remedy the violation and provide a sufficient procedural safeguard should the operator demonstrate that it was prejudiced by the violation.

d. The Exclusionary Rule and Evidence of Prejudice

Applying an exclusionary rule pursuant to the plurality opinion of the Commission in *SCP Investments*, I determine whether MSHA's actions during the impact inspection prejudiced Respondent. Under this approach, once a determination is made, as here, that an operator's walkaround rights were violated, the Commission determines what prejudice, if any, resulted from the violation and what, if any, evidence proposed for admission by the Secretary should be excluded because of prejudice to the operator, i.e., some, none, or all of the evidence resulting from the inspection. 31 FMSHRC at 836-37.

Relying on the judge's post-remand decision in *SCP Investments*, Respondent argues that an arbitrary denial of section 103(f) rights is prejudicial per se, regardless of whether it interferes with an operator's ability to defend itself. R. Br. 78-79 (citing *SCP Invs.*, 32 FMSHRC at 128-29). While I am sympathetic to this argument, the Commission requires a showing of actual

prejudice to the preparation or presentation of the defense. *See, e.g., Long Branch Energy*, 33 FMSHRC 1960 (Aug. 2011) (ALJ), *rev'd*, 34 FMSHRC 1984, 1992 (Aug. 2012) (Duffy, Comm'r, dissenting) (rejecting Supreme Court's "danger of prejudice" factor enunciated in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993), and requiring that the prejudice be "real" or "substantial" and demonstrated by a specific showing tied to "the preparation and presentation of the operator's case."); *Chicago Bridge,* 535 F.2d at 374, 377 (essentially rejecting company argument that to allow the Secretary to bypass the statutory walkaround right will permit the inspection process to operate on the employer in an "inherently prejudicial manner," and emphasizing *both* substantial compliance with the walkaround right and the failure of the company to demonstrate "any concrete prejudice to its defense by the exclusion from the inspection party"). On this record, however, Respondent has made a sufficient case that it was actually prejudiced in the preparation or presentation of its typical defense to the citations.

Actual prejudice occurs when an operator can show that the denial of section 103(f) rights resulted in an inability to prepare or present its defense on the merits before the Commission. *See SCP Invs. LLC*, 31 FMSHRC at 835 (Aug. 2009) (citing *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (Jan. 1980); *Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979); *Able Contractors, Inc*., 5 OSHC 1975 (Oct. 1977)). For example, an operator's ability to defend itself is adversely affected by the absence of an opportunity to provide material contemporaneous information at the time of the inspection. *SCP Invs. LLC*, 32 FMSHRC at 128-29; *but see Marshall v. W. Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977) (a showing that a large number of citations were withdrawn and a small number of citations were sustained after a complaint was filed, coupled with the fact that an employer had to post all citations at the workplace, do not establish prejudice to an operator's ability to defend on the merits); *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (a claim that failure to comply with the walkaround provision could create labor-management problems is not the type of prejudice contemplated by the OSHA)**.** Rather, actual prejudice occurs when the operator makes a specific showing that the misbehavior prejudiced it in preparing or presenting its defense. *A. J. McNulty & Co.*, 19 OSHC 1121, 1125 (Oct. 2000) (finding no prejudice since the operator's representatives learned of the violations almost immediately after the inspector observed them); *see also Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979). Essentially, this actual prejudice requirement puts the burden on the operator to establish the speculative possibility that the inspection would have revealed different facts or the operator would have been aided in preparation of its typical defense to the citations.

On remand in *SCP Investments*, the judge recognized the difficulty in applying an exclusionary hearing to determine what information, if any, would have been provided during the inspection in defense of each citation.

> Having been deprived of the opportunity, we will never know what information Stone would have provided during the December 2005 inspection. Any testimony he now may give concerning what he might have said is entitled to little weight because it is remote in time and self-serving. In other words, the Secretary's denial of Stone's due process has undermined the value of Stone's testimony.

> Certainly, the Government should not benefit from its own misconduct. Rather, two Commissioners suggested that I determine, in view of the denial of Stone's 103(f) walkaround right, whether "none, some, or all of the evidence resulting from the inspection" should be excluded. 31 FMSHRC at 836-37.
>
> Once due process issues arise, all direct and indirect evidence obtained as a result of a government official's abuse is excluded. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (suppression of "fruit of poison tree"); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) . . . . Having given the Secretary the opportunity to address the due process issue, and, having determined that Stone's right to due process was violated, all evidence obtained as a result of the inspector's observations of the mine conditions during the inspection must be excluded. *Weeks, supra*.
>
> I decline to exclude all direct and indirect evidence obtained as a result of MSHA's violation of an operator's walkaround rights. In my view, such a result essentially compels exclusion without initial assessment of the prejudice issue in application of an exclusionary rule.

Given the difficulty of determining what evidence would have been presented had an operator's statutory rights not been violated by MSHA, I am of the view that a practical, flexible and fact-based test of prejudice should take into account the dynamic nature of the mining industry. Accordingly, when an operator is put on notice of the safety or health violation at issue, it is prejudiced if it is unable to go and observe the condition or practice cited as the inspector saw it in order to defend itself against the alleged condition. After all, the operator has only been deprived of the opportunity to accompany the inspector and observe or test as the inspector did. If this opportunity is still available, the operator is not actually prejudiced by the denial of the opportunity to observe and test. Although there may be a denial of the opportunity to timely proffer mitigating circumstances to the inspector, the operator can still raise mitigating circumstances in an attempt to reduce a negligence determination after the fact and at trial.

In this case, Respondent has offered some evidence to demonstrate that it was prejudiced in its ability to prepare its defense to the unescorted Hatcher citations. Respondent focuses on specific prejudice that is best illustrated by Citation No. 8431251.

1. Citation No. 8431251

Citation No. 8431251 alleges an S&S violation of section 75.400 for accumulations present along the 1st West belt line. P. Ex. 10. Stephenson credibly testified, and Respondent essentially demonstrated throughout the hearing, that for citations involving an alleged

accumulation of combustible material, Respondent's walkaround representative would typically take a sample of material to determine the combustibility content (Tr. 411-12), take a heat reading to determine the amount of heat the alleged frictional ignition source would generate (Tr. 411), and take measurements and/or photographs to provide additional information about the condition. Here, because MSHA failed to afford Respondent an opportunity to accompany inspector Hatcher to aid his inspection, Respondent had no opportunity to gather such specific evidence in defense of Citation 8431251. In short, because Respondent was not afforded the opportunity to provide a representative to accompany inspector Hatcher along the 1st West belt line, Respondent was precluded from gathering the very types of evidence in defense of Citation No. 8431251 that it relied upon for its defenses of Order No. 8030700, Order No. 8428378, Citation No. 8428798 and Citation No. 8436403, discussed herein.

It is undisputed that Respondent was denied any opportunity to sample the material cited to determine its combustibility content. The standard, 30 C.F.R. § 75.400, requires an accumulation of combustible material. Respondent argues that such evidence would have been particularly critical because the Secretary's three photographs of the condition (P. Ex. 11) arguably shows material consisting of incombustible white rock dust. R. Br. 82. If Respondent could show that the material cited was not combustible coal pressings, but incombustible, rock-dusted material, there would be no violation of the standard and the citation could be vacated. Respondent has made a colorable showing that it was denied this opportunity.

In addition, Respondent argues that it was denied any opportunity to take a heat reading of the alleged frictional ignition source to determine if the roller that was in contact with the coal pressings was capable of generating heat sufficient to produce an ignition or smoldering fire, i.e., the basis for Hatcher's S&S finding. *See* Tr. 528-30.[32] Although extant Commission case law is not sympathetic to this argument for overturning an S&S finding, Respondent was denied the opportunity to support the arguments it has raised in an effort to convince the Commission otherwise. Further, although Hatcher determined negligence to be high because the operator had been put on notice about citations of this nature, Respondent was denied any opportunity to take measurements or photographs of the alleged condition to counter Hatcher's testimony that the condition was open and obvious, such that a belt examiner knew or should have known about it. Tr. 532. Moreover, Respondent was denied the opportunity to present any mitigating circumstances to inspector Hatcher at the time of the inspection or shortly thereafter based on observations made by its representative.

Applying the exclusionary rule in light of Respondent's prejudice arguments, I exclude all evidence that resulted from the unescorted inspection, including the Secretary's photographs and Hatcher's testimony proffered in support of Citation 8431251. Such exclusion is appropriate because Respondent's section 103(f) walkaround rights were violated and Respondent has demonstrated sufficient prejudice because it was denied the opportunity to observe, test, and/or photograph the alleged combustible material and frictional heat source in the same condition that the inspector observed them. *See SCP Inves.,* 31 FMSHRC at 835; *Chicago Bridge*, 535 F.2d at

[32] Hatcher took no measurements of the depth of the cited coal pressings because the belt was running. Tr. 525.

378; *Marshall,* 560 F.2d at 952. Upon such exclusion, there is insufficient independent evidence to support Citation 8431251 and the proposed penalty.

2. Citation No. 8431250

I next turn to Citation No. 8431250 alleging that Respondent violated section 75.333(h) because the Kennedy equipment doors separating the intake air from belt air at cross cut #13 were not being maintained to serve the purpose for which they were intended. In its *SCP Investment* decision, the plurality found that evidence may be excluded "when the employer can demonstrate prejudice." *SCP Invs. LLC*, 31 FMSHRC at 835 (citations omitted). When addressing the question of prejudice in *Chicago Bridge*, the Seventh Circuit noted that the Secretary bears the burden of proof on the citation and the "company has not attempted to demonstrate that this burden has not been met, nor has it offered evidence to demonstrate prejudice." 535 F.2d at 377, n. 15. Although Respondent has not made any *specific* prejudice argument on brief with respect to Citation No. 8431250, Respondent has at least attempted to demonstrate that the Secretary has not met his burden of proof when an exclusionary rule is applied because it argues that all evidence should be excluded.

The Secretary attempts to prove the violation alleged in Citation 8431250 through Hatcher's observation and testimony that air was leaking through the top and bottom of the doors to the belt line based on the chemical smoke test that Hatcher performed, and from which Respondent was excluded. According to Hatcher, the top of the west door had a hole that was one to three inches in width and five inches in length, while the bottom of the east door had a hole that was three to twelve inches in width and six feet in length. I conclude that Respondent was not prejudiced by these measurements because it could go back and check them shortly after notice of the violation. But the violation turns on whether the doors were serving their intended purpose to separate the intake air from the belt air, not on whether the doors were damaged. Although Respondent could go back after the fact and observe the dimensions of the holes in the door, the Secretary provided no evidence, separate from Hatcher's testimony based on the chemical test that he performed, which would establish that the doors were not serving their intended purpose. The violation was only established by the chemical test, which the operator was unable to observe or challenge. A representative of Respondent was not given an opportunity to be present to recreate the chemical test or challenge its methodology or reliability. The Secretary failed to establish by any independent evidence that the extent of the holes in the damaged doors necessarily established that the doors were not being maintained to serve their intended purpose. While it may be possible to make such an inference had the case been tried differently, in the absence of such evidence on this record, I decline to draw the inference.

Applying the exclusionary rule in light of the foregoing, I find that Respondent has been prejudiced by its inability to observe and challenge Hatcher's chemical test and his testimony based on that test. Accordingly, I exclude such evidence. Upon such exclusion, there is insufficient evidence to support a violation of the standard, as written, or the proposed penalty.

3. Citation No. 8431252

Finally, I address Citation No. 8431252, which alleges a violation of section 75.1731(b) because the bottom return belt on the 1st west belt line was not properly aligned and was rubbing steel hanger brackets at three specified locations, and because the bottom return belt was in contact with a stand on the south side of belt at cross cut #10, and had cut through the two-inch steel stand at cross cut #37 for a depth of 1¾ inches. Again Respondent has not advanced any *specific* prejudice argument on brief with respect to this Citation, but has at least attempted to demonstrate that the Secretary has not met his burden of proof when I apply an exclusionary rule because all evidence from the inspection should be excluded. I decline to exclude such evidence.

The violation turns on whether the belt was misaligned and rubbing the brackets and cutting into the stands. Respondent was not prejudiced by Hatcher's testimony or the photographs he took concerning this violation because Respondent could go back and check the belt alignment and its contact points with the brackets and stands shortly after notice of the violation, and Respondent could observe the violation in essentially the same condition as inspector Hatcher observed it.

Accordingly, I affirm Citation No. 8431252 as non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected. Although Respondent was denied the opportunity to timely proffer mitigating circumstances to the inspector in an effort to reduce the high negligence determination, the operator had an opportunity but failed to raise any mitigating circumstances after the fact in the closeout conference or at trial. Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $1,203.

E. Bench Decision Granting Respondent's Motion to Vacate Order No. 8428701

1. The Alleged Violation

At the end of the hearing, the undersigned granted Respondent's request for a bench decision to vacate Order No. 8428701. Tr. 1056-57. MSHA inspector Fazzolare wrote that Order alleging that Respondent had not conducted a pre-shift examination of the right-side set of rooms in Unit 5 during the midnight shift on May 9, 2011. P. Exs. 38, 39, at 12; Tr. 723-24.

Order No. 8428701 was issued pursuant to section 104(d)(2) and initially alleged a violation of 30 C.F.R. § 75.360(a)(1), as follows:

> There was no evidence of a pre-shift examination being conducted on MMU 015-0, rooms to the right on the number 5 unit, for day shift production crew.

> There were no D, T & I's in any of the three entries of the rooms. The last time there was evidence of a pre-shift examination was 05/08/2011 for the oncoming midnight shift.
>
> Standard 75.360(a)(1) was cited 2 times in two years at mine 1103054 (2 to the operator, 0 to a contractor).

The Order was designated S&S because highly likely to result in a permanently disabling injury, with nine persons affected. The Order was also alleged to be the result of high negligence and an unwarrantable failure. P. Ex. 38.

Near the end of the hearing, the undersigned granted the Secretary's Motion to Plead in the Alternative and allege a violation of 30 C.F.R. § 75.360(f), which states that the pre-shift examination shall be certified at each working place by DTIs (date, time, and initials). Tr. 1056.

The issues presented are whether a violation of either alternatively pled standard in Order No. 8428701 was established; whether any such violation was properly designated S&S and/or an unwarrantable failure; whether the gravity and negligence determinations were proper; and the appropriate amount of any penalty.

The Secretary argues that Respondent violated 30 C.F.R. § 75.360(a)(1) as alleged in Order No. 8428701 because it failed to conduct a pre-shift examination of three entries on the right side of the MMU 015 Unit. Alternatively, the Secretary argues that Respondent violated 30 C.F.R. § 75.360(f) when it failed to certify the pre-shift examination by date, time, and initials in the three entries on the right side of the MMU 015 Unit.

Respondent argues that the undersigned appropriately granted Respondent's motion to vacate at the close of the hearing because no violation occurred. Even assuming arguendo that any violation occurred, Respondent argues that the gravity, S&S, high negligence, and unwarrantable failure findings are excessive and not supported by the record evidence, and the specially assessed penalty of $52,500 is inappropriate.

2. Factual Background

a. The Secretary's Evidence

Inspector Fazzolare issued Order No. 8428701 at 9:30 a.m. on May 9, 2011 because he found a hazard in the No. 1 entry, which was cut too wide, and he could not find any DTI tags in the three right-side entries of the MMU 015 Unit. Tr. 723-724, 728. Fazzolare testified that it was obvious to the casual observer that the width of the entry was "wider than the law permits." Tr. 730. Fazzolare designated Order 8428701 as significant and substantial because the excessively wide width of the #1 entry contributed to the hazard of a roof fall, which should have been identified by the pre-shift examiner during his examination, and this condition was highly likely to result in permanently disabling injuries, such as multiple broken bones. Tr. 728-33; P.

Ex. 38.[33] Fazzolare determined that the mine examiner had not conducted a pre-shift examination of the three right-side entries in violation of § 75.360(a)(1). Tr. 723-724.[34] Fazzalore did not know who the pre-shift examiner was and never spoke to him. Tr. 741.

Fazzolare determined that undiscovered hazards, including but not limited to the wide entry contributing to a roof fall hazard, would affect nine miners on the unit. Tr. 732-33. Fazzolare also testified that methane gas buildup was another concern in the absence of a pre-shift inspection. Tr. 732. The Secretary argues that Fazzolare's determination regarding the likelihood and severity of injury was reasonable, particularly given the history of roof falls at the WLPM. Tr. 730.

Fazzolare testified that he could have cited the condition as a violation of section 75.360(f) because of the absence of the DTIs. Tr. 724.[35] Fazzolare testified that the hazard of not having DTIs in place is that miners would not know whether a pre-shift examination has been performed or whether hazards exist in a particular area of the mine. Tr. 730. When asked by the undersigned, why he did not cite § 75.360(f), Fazzolare testified that "[o]nce I found the wide spot in the entry, I was convinced that no pre-shift had been performed in them three entries." Tr. 751-52.

---

[33] Respondent argues that Order 8428701 should be designated as non-S&S and unlikely because the citation issued for the wide #1 entry was designated non-S&S and unlikely. The Secretary counters that the failure to discover hazardous conditions must be viewed in the context of continued mining operations, and the wide-entry citation was issued before Fazzolare discovered the failure to perform the pre-shift examination, and it was a contributing factor in Fazzolare's S&S designation for Order 8428701. Tr. 750-51.

[34] Section 75.360(a)(1) requires as follows:

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

[35] Section 75.360(f) requires as follows:

> At each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

Fazzolare determined that Respondent's negligence was high and the violation was an unwarrantable failure because he determined that the preshift examiner, an agent of the operator, made a conscious decision not to do the pre-shift and no one on his shift knew of any hazards. Tr. 735. Fazzolare determined that the hazard within the #1 entry was obvious, existed for at least one shift, and would have been noticed by an examiner had a pre-shift been conducted. Tr. 728- 31; P. Ex. 39, at 3 and 12.

During the third day of hearing, the Secretary moved to plead in the alternative that the conditions set forth in Order No. 842870 also violated section 75.360(f). Tr. 736, 738. The undersigned initially denied the motion because it should have been made at the outset of the hearing, particularly since the Secretary was aware through pre-trial conference calls that the Order essentially involved a credibility dispute as to whether a pre-shift was done (Tr. 739), and the allegation that there were no DTIs could be substantially different from the allegation that no preshift examination was done, particularly in the context of the unwarrantable failure designation. Tr. 738. At the conclusion of the hearing, however, the undersigned reconsidered, granted the motion to amend, and issued a bench decision, which vacated Order No. 8428701 on credibility grounds under either standard. Tr. 1056.

As further explained below, the undersigned credited the testimony of third-shift mine examiner Norman Risley, that he conducted a pre-shift examination of the right-side rooms, the left-side rooms, and the panel entries (Tr. 758); that Risley walked to each face, checked for methane or other gas, examined the bolts, roof and ribs, and ensured that ventilation curtains were hung (Tr. 759); and that Risley wrote the date and time and his initials on a paper tag that was hung from a roof bolt with wire at each entry. Tr. 759-60; *see also* R. Ex. 6 (statement given to compliance manager Grounds the next day). The undersigned also credited scoop operator Tim Whiting's testimony, which partially corroborated Risley's testimony that he hung the tags, because Whiting credibly testified that he saw Risley do so at the number 3 face. Tr. 770-71, 775. Finally, the undersigned credited the testimony of all of Respondent's witnesses that they saw Risley in the right-side rooms. *See generally* Tr. 1056-57.

b. Respondent's Evidence

Third-shift certified mine examiner, Norman Risley, credibly testified that during the midnight shift of May 9, 2011, he conducted a pre-shift examination of the right-side and left side faces and set of rooms on Unit 5. Tr. 754-58. Risley also pre-shifted the two rescue chambers, the power center, transformer, and the tailpiece on Unit 5. Tr. 759.

Risley was required to conduct his examination within three hours of the start of the oncoming day shift, which began at 7:00 a.m. Accordingly, Risley began his pre-shift examination about 4:00 a.m. Tr. 723, 727-28, 756-57.

Risley credibly testified that he examined the right-side rooms, the left-side rooms, and the panel entries. Tr. 758. Risley walked to each face, checked for methane or other gas, examined the bolts, roof and ribs, and ensured that ventilation curtains were hung. Tr. 759. At

each entry, Risley wrote the date and time and his initials on a paper tag that was hung from a roof bolt with wire. Tr. 759-60; R. Ex. 6 (statement given to compliance manager Grounds the next day). When asked by the undersigned whether he specifically remembered hanging the tags, Risley testified affirmatively and recalled that he asked scoop operator Tim Whiting to move out of his way so he could get to a face to hang a tag. Tr. 760-61.

On direct examination, Risley was shown Respondent's Exhibit 11. That exhibit was a section 104(a) citation that inspector Fazzolare wrote under 75.220(a)(1) for failure to follow the approved roof control plan because the no. 1 entry exceeded the 20-foot width set forth in the plan by approximately one and three quarter feet over a six-foot distance. Risley testified that he never noticed the condition during his examination. Tr. 761.

Risley had left the mine for the day by 9:30 a.m., i.e., the time Fazzolare wrote the Order (P. Ex. 38) alleging a violation of 75.360 (a)(1) because there was no evidence of a pre-shift examination conducted for the right side rooms on Unit 5 for the day shift production crew. Tr. 763. The next day, compliance manager Grounds spoke to Risley about the Order in the examiner's room where Respondent keeps its books. Tr. 76-62. Risley told Grounds that it was a bunch of bull because Risley made the rooms and that Grounds should check with Whiting, who was present at the time. Tr. 762-63. The Secretary's cross of Risley was minimal, with little value. Tr. 765.

Scoop operator Whiting credibly testified that he was working the midnight or third shift (11 p.m. to 7 a.m.) on May 8-9, 2011, when he observed Risley conduct a pre-shift examination of the right-side rooms on Unit 5. Tr. 766-69. Whiting was sitting in his scoop in the no. 3 room waiting to clean that room after the roof bolters finished bolting a fresh cut. Tr. 769-70. While waiting there, Whiting saw Risley walk by and into the entry of the no. 3 room, conduct his examination, and hang a paper tag with wiring on a roof bolt plate to post DTIs. Tr. 770-71, 775. From where he was sitting, Whiting could not see the no. 1 and 2 rooms. Tr. 771.

As Risley apparently continued his examination of the other right-side rooms, section foreman Keith Hawkins instructed Whiting to go outby and grab the wet duster and start dusting the faces. Tr. 771-72. Whiting then used the scoop to run the hydraulically operated wet duster on the right and left-side rooms. Whiting received assistance from left-side scoop operator, Nick Courtney, who operated the hose. Tr. 772-73.

After the Order was written by Fazzolare, Risley told Whiting about it, presumably the next day. Whiting testified that Risley appeared upset and told Whiting that he had made the examination. Tr. 773-74. Whiting told Risley that Whiting saw him hang a tag in the no. 3 room. Whiting offered to vouch for Risley before compliance manager Grounds. Tr. 773-74. On the basis of the record before me, I have no basis to conclude that they conspired to produce false testimony under oath.

Grounds took a statement from Whiting the day after the Order was issued. R. Ex. 8. Whiting confirmed the accuracy of the statement except for the last notation, which states that

Risley "was going toward the face of Room #3 to make his examination." *Id*. Whiting testified that he watched Risley actually walk up to the no. 3 face to hang the tag. Tr. 775. In the absence of any impeachment or effective cross examination on this issue, I credit Whiting.

Whiting expressed the belief that the pressure from the dust and water that came out of the wet duster blew the tag(s) down. Tr. 775-76. On cross, Whiting acknowledged that the tags might still be present on the mine floor, although equipment ran through the area. He further acknowledged that the wires "would probably still be there." Tr. 775-76. The Secretary argues that this is significant because neither Fazzalare nor the two employees who accompanied him could find any wires, tags, or other evidence of DTIs for the prior shift in the three entries on the right side. Tr. at 724-26, 729, 731, 735, 751. Thus, the Secretary argues that the lack of DTIs on the right side for the prior shift establishes a violation of section 75.360(f).

Section foreman Keith Hawkins also testified that he observed Risley make an examination of the right-side rooms of Unit 5 on the morning in question. Tr. 779-80. Hawkins was checking on repairs to the miner that were made between 3:15 and 4:30 a.m. (R. Ex. 4). Hawkins was engaged in conversation with shift leader Cliff Dillard and Whiting in the intersection of entry no. 1 and room no. 3, when he observed Risley walk by and use a spotter to make the face in the right-side rooms. Tr. 780-81, 786. Hawkins did not observe whether Risley hung any tags. Tr. 782.

The next day, when Hawkins heard about the Order, he went to see Grounds to tell him that Hawkins had seen Risley go up in the face and use a spotter. Tr. 783. Hawkins testified that R. Ex. 7 accurately reflects the conversation he had with Grounds. The Secretary declined to cross examine Hawkins. Tr. 783.

Shift leader Dillard also testified that he observed Risley conduct a pre-shift examination of the right set of rooms of Unit 5 during the midnight shift on May 8-9, 20011. Tr. 785-86. Dillard corroborated Hawkins's testimony that they were talking in the intersection of entry no. 1 and room no. 3. Dillard testified that he saw Risley walk out of the no. 1 room and across the no. 2 room, and then out past Dillard and Hawkins and end up in the no. 3 room. Dillard specifically testified that he saw Risley go in and out of each of the three rooms on the right side, but did not see Risley hang any tags. Tr. 786, 788-89.

Dillard testified that Hawkins told him about the Order the next day and Dillard was shocked because he saw Risley there the day before to make the examinations. Tr. 786-87. Dillard testified that Risley would typically hang his DTIs on a roof bolt in the second row from the face on the right or return air side of the entry where an air reading was taken. Tr. 789.

Dillard confirmed that Respondent's Exhibit 9 was an accurate statement of what was discussed with Grounds on May 10, 2011. Tr. 787. Respondent's Exhibit 9 states, inter alia, that "[i]f the examiner tags are not twisted, the wet duster can knock the tags down from the roof bolt plates." Neither the Secretary nor Respondent ever asked Risley whether he twisted the tags.

Compliance manager Grounds testified that Respondent's walkaround representative Vernon Dunn called the surface and informed Grounds that inspector Fazzolare was going to issue the Order. Tr. 791. Grounds spoke with members of the crew the next day and prepared written statements from Risley, Hawkins, Whiting, and Dillard. Tr. 791-92; *see also* R. Exs. 6-9. After the interviews, Grounds concluded that Risley had conducted the pre-shift examination of the right-side rooms on unit 5 during the third shift on May 9, 2011. Accordingly, Risley did not receive any discipline. Tr. 792.

On cross, Grounds testified that he did not go underground to check on the condition cited in the Order. Rather, Grounds spoke with Dunn, who informed him that no initials were identified or tags found on the right side, but DTIs had been identified on the left side. Tr. 794-95.

On rebuttal, and in support of the Secretary's alternative pleading, inspector Fazzolare testified that he issued Order 8428701 because he could find no evidence of a pre-shift or DTIs in the 3 entries on the right side. Tr. 797-98. Fazzolare testified that he did see enough DTIs in the left side entries and the advanced entries to ensure that Respondent had pre-shifted those areas. Tr. 798, 802. He further testified that in his experience, it was unlikely that a tag wired to a roof bolt would fall down, and that it was "impossible" for all three tags to have disappeared. Tr. 798-99. Fazzolare further testified that if a wet duster caused a tag to fall down, the wire would be left on the roof bolt, and he did not see any evidence of that. Tr. 799.

Respondent declined to cross examine Fazzolare on rebuttal.

In response to questioning from the bench, Fazzolare testified that he traveled with Dunn to the face in each of the rooms on the right side. After discovering the wide spot in the last room, Fazzolare asked Dunn to help him find the DTIs to show that the examiner had been there. Fazzolare told Dunn that if you can find one set of DTIs (in the right side rooms), I will not issue the Order. Tr. 799-800.

The Secretary argues that at most, Respondent's witnesses established that Risley made a pre-shift examination of the left side and main set of entries and the #3 entry on the right side. Although several of Respondent's witnesses saw Risley in the three right-side entries, none saw Risley hang a tag in the #1 and #2 entries and none testified as to the length of time Risley was in each of these entries. Tr. 770-71, 773, 775, 782, 786-88, 792. The Secretary argues that Respondent's witnesses failed to refute Fazzolare's testimony regarding the absence of the tags or other DT&Is in the right-side entries. Thus, the Secretary argues that the evidence, even considered in the light most favorable to Respondent, shows a violation of section 75.360(f) for the #1 and #2 right-side entries. Given Risley's failure to identify the excessive width in the #1 entry as a hazardous condition, the Secretary further argues for a violation of section 75.360(a)(1). Tr. 724, 729-30, 761.

3. Legal Analysis

As noted, at the close of the hearing, the undersigned granted Respondent's motion to vacate Order No. 842870 and found that no violation of section 75.360(a)(1) or section 75.360(f) had occurred. Tr. 1056-57. I credited Risley's testimony that he conducted a pre-shift examination of the right-side rooms, which was corroborated by all of Respondent's witnesses. Tr. 1056. I further credited Risley's testimony that he hung tags denoting his DTI's in the right-side rooms, which testimony was partially corroborated by Whiting, who observed him hang one such tag at the number 3 face. Tr. 1056. Having reviewed the record, I reaffirm my credibility findings and also credit section foreman Hawkins that he saw Risley walk by and use a spotter to make the face in the right-side rooms. Tr. 780-81, 786.

The fact that the DTI's were not present when Fazzolare conducted his inspection at 9:30 a.m. does not establish that Risley did not hang the tags when he conducted his examination about 4 a.m. On questioning from the undersigned, Risley specifically testified that he hung all three tags on the right-side entries. Tr. 760. Whiting corroborated Risley's testimony for the right-side number 3 room. Tr. 770. It is conceivable, given the use of the wet rock duster after Risley conducted his examination, that the tags were blown down due to the pressure of the machine combined with the heavy mixture of dust and water it sprays. Tr. 775.

I find it possible that the pressure or force from the mixture of dust and water emanating from the wet duster after Risley conducted his examination blew the paper tags down and rendered them irretrievable, especially if the tag wires were not twisted in place. Tr. 775. It was certainly not impossible, as Fazzolare testified, particularly with equipment running through the area and the pressure of the machine combined with the heavy mixture of dust and water that it sprays. Tr. 775-76. While the wires would probably still be there, the Secretary failed to establish the exhaustiveness or specific location of Fazzolare's search for said wires. As Fazzolare acknowledged, "[o]nce I found the wide spot in the entry, I was convinced that no pre-shift had been performed in them three entries." Tr. 751-52. In my view, Fazzolare had made up his mind that no pre-shift had been performed and did not diligently search for the DTIs or attempt to speak to the examiner Risley.

Clearly, Fazzolare relied on his issuance of Citation No. 8426700, which alleged that the no.1 room was wide by less than two feet for a distance of six feet in length, as evidence that no pre-shift examination was performed. Tr. 728; R. Ex. 11. Such reliance is suspect. It is likely that the cited area was mined after Risley conducted his examination because it was inby the last open crosscut and mined recently. The Secretary failed to show that the condition was present when Risley was scheduled to conduct his pre-shift examination. Tr. 748. The mere fact that Fazzolare observed the condition cited in Citation No. 8428700 does not establish that Risley did not conduct the examination, particularly when Risley and essentially four other witnesses confirmed that he did.

I was convinced during the hearing by Risley's demeanor and clear and adamant testimony upon questioning from the undersigned that he conducted a pre-shift examination of

the right-side rooms and that he hung three tags denoting his DTI's in the right-side rooms. Tr. 760. Risley's testimony that he examined the right-side rooms was corroborated by Whiting, Hawkins and Dillard, each of whom observed him do so. Tr. 770, 779-80, 786. Risley's testimony that he made the examinations by DTI's is partially corroborated by Whiting, who observed him hang a tag at the number 3 face. Tr. 770, 775. Accordingly, I reaffirm my bench decision and vacate Order No. 842870.

VII. Order

WHEREFORE, the parties' joint settlement motion and agreement made on the record and set forth in Joint Exhibit 2 is **GRANTED**. It is **ORDERED** that Citation/Order Nos. 8030991, 8030700, 8428798, and 8428776 be modified to reduce the level of negligence from "high" to "moderate;" Citation No. 8030992 be modified to reduce the level of negligence from "moderate" to "no negligence;" Citation Nos. 8436403, 8030992, 8428798, and 8428776 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation; and Order No. 8030700 be modified to change the type of action from a section 104(d)(2) order to a section 104(a) citation; and that Citation Nos. 8428701, 8431251, and 8431250 be vacated. It is further **ORDERED** that the operator pay an a penalty of $116,662 for all litigated citations and $192,754 for all settled citations for a total penalty of $309,376 within thirty days of this order.[36]

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

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

Distribution:

Letha Miller, Esq. & Breyana Penn, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5710

Arthur M. Wolfson, Esq. & Jason P. Webb, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Ave., Suite 1500, Pittsburgh, Pennsylvania 15222

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

June 20, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-47-M A.C. No. 04-01787-332496
v.	:	
GORDON SAND COMPANY Respondent	: :	Gordon Sand Company

DEFAULT DECISION

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The case involves four citations issued under section 104(a) and a proposed civil penalty of $400.00. A conference call was scheduled in this case on May 14, 2014, but Gordon Sand Company chose not to participate in the call. A conference call is equivalent to a court appearance and is especially important in a case designated for Simplified Proceedings. Gordon Sand Company also failed to file an answer or enter its appearance in this case, as required Commission Procedural Rule 102(c), which would have provided me with critical contact information. 29 C.F.R. § 2700.102(c).

On May 14, 2014, I issued an order to show cause against Gordon Sand Company. In the show cause order I directed Gordon Sand Company to explain why it should not be held in default for its failure to participate in the conference call and enter its appearance in the case. I warned Gordon Sand that its failure to file a satisfactory response to my order by June 11, 2014, would result in an entry of default against Gordon Sand and the assessment of the Secretary's proposed penalty of $400.

Gordon Sand Company failed to respond to my order to show cause.[1] Consequently, Gordon Sand Company is in **DEFAULT**. 29 C.F.R. § 2700.66. The four citations at issue are **AFFIRMED** as written by the MSHA inspector. I have reviewed the citations and the six penalty criteria in Section 110(i) of the Act. Based on this review I find that the penalties

[1] The order to show cause was sent to Gordon Sand Company via certified mail. The return receipt card was returned to the Commission with the signature of one of its agents dated May 19, 2014. I also note that in another case, Gordon Sand Company failed to appear at a scheduled hearing and I held the company in default. *Gordon Sand Company*, 30 FMSHRC 235 (March 2008).

proposed by the Secretary are reasonable and are hereby **AFFIRMED**. Gordon Sand Company is **ORDERED TO PAY** the Secretary of Labor the sum of $400.00 within 30 days of the date of this decision.[2]

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

Distribution:

D. Scott Horn, Conference & Litigation Representative, Mine Safety & Health Administration, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687 (First Class Mail)

George E. Gordon III, Gordon Sand Company, 28310 Industrial Blvd, Suite F, Hayward, CA 94545-4436 (Certified Mail)

RWM

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

June 23, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2010-877-M A.C. No. 01-02985-220540 (1KJ)
v.	:	
SAIIA CONSTRUCTION, LLC, Respondent.	:	Mine: Omya Alabama Plant
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	Docket No. SE 2012-119-M A.C. No. 01-02985-272123A
v.	:	Mine: Omya Alabama Plant
FREDERICK LOONEY, Agent of SAIIA CONSTRUCTION, LLC, Respondent.	:	

DECISION

Appearances: Melanie L. Paul, Esq., Office of the Solicitor, Atlanta, Georgia, for Petitioner;

John Hargrove, Esq., Bradley Arant Boult Cummings, LLP, Birmingham, Alabama, for Respondents.

Before: Judge Paez

This case is before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(c). In dispute are one section 104(d)(1) citation issued to Saiia Construction, LLC ("Saiia") and a companion section 110(c) penalty assessment issued to Frederick Looney ("Looney"), alleging his personal liability as an agent of Saiia. To prevail, the Secretary must prove his charges "by a preponderance of the credible

evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The single alleged safety violation in this case was issued to Saiia as a contractor at the Omya Alabama Plant limestone quarry on March 31, 2010. Citation No. 8546029 charges Saiia with a violation of 30 C.F.R. § 56.14100(c) for operating a front-end loader with safety defects in the stockpile area.[1] The Secretary designated the citation as significant and substantial ("S&S")[2] and as the result of Saiia's unwarrantable failure[3] to comply with a mandatory health or safety standard. In addition, the Secretary characterized Saiia's level of negligence as high and proposes a penalty of $12,563.00. Lastly, the Secretary proposes that Looney pay a penalty of $3,900.00 under section 110(c) of the Mine Act in connection with Citation No. 8546029.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. SE 2010-877-M and SE 2012-119-M to me, and I held a hearing in Birmingham, Alabama.[4] The Secretary presented testimony from MSHA Inspector DeWayne Ogden, retired MSHA Inspector Harry

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[1] Section 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(c).

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

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

[4] In this decision, the hearing transcript, the Secretary's exhibits, and Oak Grove's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively. The parties also admitted a list of stipulations in a joint exhibit, which is abbreviated as "Ex. J–1."

Wade, MSHA Mechanical Engineer James L. Angel,[5] Saiia front-end loader operator Steve Honeycutt, Saiia Supervisor Frederick Looney, and Thompson Tractor Company Field Service Advisor Stephen Sadler. Saiia and Looney (collectively, "Respondents") presented testimony from Thompson Tractor Company Technical Communicator Mark Schropp, Thompson Tractor Company Field Service Technician David Coston, and Saiia Safety Manager Richard Leemhius. The parties filed closing briefs. Respondents also filed a reply brief.

II. ISSUES

The Secretary argues that the condition of Saiia's front-end loader was properly cited as a violation, that the allegations underlying the citation are valid, and that the penalty he has proposed for Saiia is appropriate. (Sec'y Br. at 6–21, 23–24.) The Secretary also contends that his charges and proposed penalty under section 110(c) are valid and appropriate. (*Id.* at 21–25.) In contrast, Respondents dispute the fact of violation, the Secretary's allegations regarding gravity and negligence, and the section 110(c) charges against Looney. (Resp't Br. at 5–14; Resp't Reply at 2–4.)

Accordingly, the following issues are before me: (1) whether the cited condition violated the Secretary's mandatory health or safety standards regarding mobile equipment; (2) whether the record supports the Secretary's assertions regarding the gravity of the alleged violation, including whether it is S&S; (3) whether the record supports the Secretary's assertions regarding Saiia's negligence, including the unwarrantable failure determination, in committing the alleged violations; (4) whether the record supports holding Frederick Looney liable under section 110(c); and (5) whether the Secretary's proposed penalties against Saiia and Looney are appropriate.

For the reasons set forth below, Citation No. 8546029 is **AFFIRMED** as S&S, as an unwarrantable failure, and resulting from Saiia's high negligence, and **MODIFIED** to reduce the likelihood of injury to "reasonably likely." Additionally, the section 110(c) charges against Frederick Looney are **AFFIRMED**.

III. FINDINGS OF FACT

A. Saiia's Operations at the Omya Alabama Plant

Saiia is a contractor for the Omya Corporation and removes overburden and limestone material at the Omya Alabama Plant limestone quarry. (Tr. 39:24–40:5, 248:18; Ex. G–6 at 6.) In February and March 2010, Saiia operated a Catepillar ("CAT") 966H front-end loader five days a per week to scoop material, move it from place to place, and load haul trucks in the "off-road"

[5] Wade and Angel testified via telephone. (Unpublished Order at 2 (May 3, 2013); Unpublished Order at 2 (May, 8, 2013).) In addition, Angel was qualified as an expert "in the field of safe operation of diesel-fueled[,] earth[-]moving machines." (Tr. 173:12–174:3.)

area of the mine. (Tr. 48:8–15, 50:24–51:25, 52:9–21, 54:16–55:4, 97:17–23, 114:7–10, 116:19–25.)

At the time, the "off-road" area was used as a storage area for limestone material between the quarry's pit and plant areas. (Tr. 52:9–53:5.) The off-road area was gravelly, with large rocks—also known as pinnacles—embedded in the ground and protruding between two and six inches above the surface. (Tr. 63:24–64:24, 114:23–24; Ex. G–1.) The area also contained large loose rocks. (Tr. 65:1–2.) These pinnacles and loose rocks would cause the loader to bounce, sway, or loose traction. (Tr. 64:12–15, 65:2–7.) In addition, the off-road area included at least six stockpiles of wet limestone material that were approximately ten-feet high. (Tr. 53:2–12, 86:13.) The off-road area was slightly graded and included elevated berms. (Tr. 53:25–54:12, 62:19–23.)

Saiia rented this CAT loader from Thompson Tractor on February 16, 2010. (Ex. J–1; Ex. G–12.) According to the rental agreement, Thompson Tractor performed all required maintenance on the loader. (Ex. G–12; Tr. 152:21–153:1, 207:13–208:4.) However, Saiia was permitted to make minor repairs to the loader, such as replacing broken hoses. (Tr. 153:2–10, 154:2–4, 154:24–155:5.) Saiia maintenance man Jamie Minton was responsible for coordinating Thompson Tractor's maintenance activities at the Omya Alabama Plant. (Tr. 140:6–25, 147:3–11, 148:3–11, 293:11–14.)

The loader was approximately thirty-five-feet long, fifteen-feet high, and ten-feet wide. (Tr. 51:3–17.) Using an eight-to-ten-foot-wide bucket, the loader operator picked up material and moved it from one place to another. (Tr. 51:14–19, 56:2–18, 115:3.) The loader traveled approximately ten or fifteen miles per hour in open areas, but it slowed to five or ten miles per hour when moving between stockpiles or transporting material. (Tr. 55:20–56:1.)

The loader's steering assembly includes both a steering wheel and a steering column, which are distinct parts of the steering assembly. (*See, e.g.*, Tr. 177:7–178:24.) The steering wheel sat atop the steering column, and the steering column was generally locked into place. (Tr. 177:22–178:24.) According to the CAT loader's Operation and Maintenance Manual, the steering column requires service if the column itself is capable of moving more than one inch in any direction. (Ex. J–1.)

B. Mine Inspection – March 31, 2010

In response to hazard complaints regarding the safety of mobile equipment, Inspector DeWayne Ogden performed an inspection of the Omya Alabama Plant on March 31, 2010. (Tr. 39:13–23.) Ogden informed Omya and Saiia management of the reason for his investigation, then examined Saiia's preshift examination records. (Tr. 40:14–41:9.) In his review, Ogden noted that the steering column on the CAT loader had been listed as "loose" or "broken" several times beginning in mid-February 2010. (Tr. 41:11–16, 42:6–44:7, 100:11–101:25, 105:16–110:20; Ex. G–2.)

Ogden then met with the loader operator who had prepared these reports, Steve Honeycutt. (Tr. 44:8–11.) After climbing up onto the machine, Ogden discussed the preshift reports and condition of the loader with Honeycutt. (Tr. 44:22–45:3, 117:14–22.) At that point, Honeycutt shook the steering column to demonstrate the lateral amount of movement in the column. (Tr. 45:1–3, 117:23–118:4.) Although Ogden did not measure the movement, he estimated it to be approximately six inches from center to one side. (Tr. 46:7–13.) Honeycutt testified that the movement was four or five inches. (Tr. 102:10–11, 104:15–23, 109:9–12, 126:17–127:4, 127:19–128:23; Ex. G–13.)

Ogden then spoke with Supervisor Looney and asked if he was aware of the condition. (Tr. 47:15–18.) According to Ogden, Looney indicated that he was aware of the movement in the steering column but did not remove it from service because he had no other loader available for use.[6] (Tr. 47:18–23.) Ogden then discussed the condition of the loader with Thompson Tractor Field Technician Coston, who was at the Omya Alabama Plant site to work on another piece of mobile equipment. (Tr. 48:8–21, 274:11–13; Ex. G–14.) After Coston observed Honeycutt move the steering column, Ogden testified that Coston agreed that the loader was unsafe for operation.[7] (Tr. 48:22–49:7, 49:20–50:5; Ex. G–14.)

Ogden also sought input from Inspector Wade, who was also already present at the Omya Alabama Plant to investigate a highwall failure. (Tr. 47:24–48:7, 80:13–81:2.) Wade observed Honeycutt move the steering column and testified that the column moved approximately six to eight inches from center to side. (Tr. 49:20–50:4, 81:10–82:6.) According to Wade, Supervisor Looney told him that Saiia did not want to spend money to repair the loader because it was a rental. (Tr. 83:16–22.)

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[6] Looney does not dispute that he was aware of the condition. (Tr. 133:6–22;Ex. J–1.) However, he personally operated the loader in February and March 2010. (Tr. 139:12–15, 142:19–145:5, 145:25–146:2, 149:18–22, 151:23–25.) He testified that he did not remove the loader from service because he did not believe the loader to be unsafe. (Tr. 141:4–10, 145:11–13, 146:9–19, 149:9–25; Ex. J–1.) He also testified that he informed Saiia's maintenance man, Jamie Minton, about the condition of the loader every time Honeycutt reported it. (Tr. 148:3–8, 150:25.)

[7] At the hearing, Coston agreed that he observed wear in the pins and bushings of the steering column, as well as side-to-side movement in the column itself. (Tr. 261:20–262:15, 267:23–268:20.) However, Coston claimed that Ogden told him "I know this machine has some problems. . . . [D]on't tell me there is nothing wrong with it." (Tr. 261:8–12.) Coston also stated that he did not tell Ogden that the loader was unsafe to operate. (Tr. 263:1–3, 270:14–17.) Instead, Coston claims that he said it was up to the inspector. (Tr. 262:14–17.) Nevertheless, Coston admitted that the steering column's movement required repair and stated that it could present a safety hazard in certain circumstances. (Tr. 273:11–274:5; Ex. G–14.)

As a result of this inspection, Ogden issued a section 107(a) imminent danger order directing Supervisor Looney to remove the loader from service. (Ex. G–1.) He also issued Citation No. 8546029, which alleged the following:

> The Caterpillar 966H front[-]end loader (S/N: A6D1193) in the off[-]road stockpile area was being operated with a defect affecting safety and was not taken out of service. The defective steering components exposed the loader operator to fatal injuries when they failed. The Caterpillar certified technician inspected the steering on the loader and stated that it was unsafe to operate. The loader was used daily, at least 5 times a week, to maintain the stockpiles in the off[-]road area. Frederick Looney, Supervisor[,] stated that he knew this condition existed and it has been reported to him 4 separate times on pre-operational checks. Frederick Looney, Supervisor[,] engaged in aggravated conduct constituting more than ordinary negligence. This is a[n] unwarrantable failure to comply with a mandatory standard. This violation is a factor cited in [an] imminent danger [order].

(*Id.*) Ogden marked "fatal" injuries as "highly likely," designated the violation as S&S, and characterized Saiia's level of negligence as "high." (*Id.*)

On April 15 and 16, 2010, Saiia, Thompson Tractor, and their counsel met at Thompson Tractor's facility in Shelby County. (Tr. 196:6–14, 203:16–204:15, 210:12–220:20; Ex. R–9.) Safety Manager Leemhius and Technical Communicator Schropp testified that the group performed a self-examination of the CAT loader. (*See, e.g.*, Tr. 210:12–220:20.) According to Leemhius and Schropp, they measured the movement of the steering column, took timing tests of the steering wheel's responsiveness, and produced videos of the loader in operation in Thompson Tractor's parking lot.[8] (*See, e.g.*, Tr. 210:12–220:20; *see also* Ex. R–12; Ex. R–13.)

[8] I have significant concerns regarding the veracity of Saiia's mid-April examinations because no MSHA personnel were present for Saiia's self-examination of the CAT loader. Saiia claims to have made no repairs to the loader between the time of the citation and the April 15 and 16 self-examination. (Resp't Br. at 3.) Saiia also claims to have invited MSHA to this examination in an undated, unsigned letter and fax. (*See* Resp't Br. at 3; Ex. R–2; Tr. 278:20–279:5.) Curiously, Respondents did not explain why Saiia—which was represented by counsel at the time—did not document the delivery of the invitation to MSHA. Regardless of whatever miscommunication occurred, MSHA was not present for these examinations. I recognize and appreciate Respondents' representation that no repairs had been made to the loader. Yet without MSHA personnel present to observe these tests or the loader itself, the results of Saiia's self-examination are sufficiently questionable that I accord them no weight.

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 56.14100(c) – Defects Affecting Safety on Mobile Equipment

Section 56.14100(c) requires operators to (1) remove from service (2) items with defects (3) affecting safety. 30 C.F.R. § 56.14100(c); *see Dix River Stone, Inc.*, 32 FMSHRC 1779, 1784 (Nov. 2010) (ALJ). A defect is "a fault, a deficiency, or a condition impairing the usefulness of an object or a part." *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (Aug. 1984) (citing *Webster's Third New International Dictionary* 591 (1971); U.S. Department of Interior, Bureau of Mines, *Dictionary of Mining, Mineral and Related Terms* 307 (1968).) Because section 56.14100(c) is a broadly worded safety standard, the Commission applies the "reasonably prudent person test" to determine whether a "a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action . . . ." *Lafarge North America*, 35 FMSHRC 3497, 3500–01 (Dec. 2013).

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

Corporate directors, officers, or agents are liable under section 110(c) when they know or had reason to know of a violative condition, and fail to act to correct the condition. *See* 30 U.S.C. § 820(c); *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003). Section 110(c) liability "is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012).

C. Significant and Substantial Violations

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be

more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981). Moreover, the Commission clarified "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 33 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure of Operator to Comply with Mandatory Standards

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

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). These factors are viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC at 353. All relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Id.*

E. Penalty Assessment – Section 110(i)

Section 110(i) of the Mine Act outlines six criteria I must consider in assessing civil penalties: the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). These same section 110(i) factors are also applicable when assessing penalties in section 110(c) cases. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764–66

(Aug. 2012). In the section 110(c) context, the "relevant inquiries include whether the penalty will affect the individual's ability to meet his financial obligations and whether the penalty is appropriate in light of the individual's income and net worth" but should "not include the size of the mine [or] . . . the penalties levied against the corporation." *Id.* at 1764–65.

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

A. Further Findings of Fact

1. Steering Column Movement

At the hearing, the Secretary and Respondents presented conflicting testimony and evidence regarding the amount of movement found in the CAT loader's steering column. The Secretary contends that the steering column moved between four and eight inches from center to side. (Sec'y Br. at 7–8.) Moreover, the Secretary disputes the veracity of Saiia's self-examination on April 15 and 16. (Sec'y Br. at 8–10.) In contrast, Respondents contend that Saiia and Thompson Tractor's mid-April self-examination demonstrates that the steering column moved only one inch from center to side and one inch from front to back. (Resp't Br. at 3.)

The evidence before me overwhelmingly supports a finding that the CAT loader's steering column moved approximately six inches from center to side. First, operator Honeycutt indicated that the steering column moved between four and five inches and repeatedly marked the steering column as loose or broken in his preshift reports.[9] Second, Inspectors Ogden and Wade each observed Honeycutt manipulate the steering column from just a few feet away and estimated that the steering column moved between six and eight inches. Third, Field Technician Coston characterized the movement of the steering column as "excessive." (Tr. 270:18–273:2; Ex. G–14.) Finally, it is uncontroverted that the manufacturer's instructions suggest replacing the bushing and pin when movement in the steering column exceeds one inch. (Ex. J–1; Ex. G–5; Ex. R–3; Ex. R–14.) Indeed, the bushing and pin were replaced in this loader after the issuance of the citation. (Ex. G–4.) This evidence all strongly suggests that the loader's steering column moved between six and eight inches from center to side. Moreover, I have accorded no weight to Saiia's mid-April self-examination. *See* discussion *supra* footnote 8.

[9] Honeycutt repeatedly characterized the amount of movement as four or five inches from center to side. (Tr. 102:10–11, 104:15–23, 109:9–12, 126:17–127:4.) However, when Respondents' counsel asked about the amount of movement, Honeycutt claimed the *total* amount of movement from left to right was four or five inches. (Tr. 128:10–22.) This "clarification" contradicted the bulk of his testimony. Critically, it also contradicted a statement he made during MSHA's section 110(c) investigation. (Ex. G–13 ("[Y]ou could move [the steering column] . . . about 4 or 5 inches in *all* directions.") (emphasis added).) Given the evidence before me, I therefore credit Honeycutt's testimony that the steering column moved four or five inches from center to side.

In addition, Respondents argue that Inspectors Ogden and Wade did not physically measure, test, or document the movement of the steering column. (Resp't Br. at 2–3, 5–6; Resp't Reply Br. at 2.) Thus, Respondents contend that the Secretary has not demonstrated that the steering column moved. (Resp't Br. at 2–3, 5–6; Resp't Reply Br. at 2.) I recognize that certain circumstances may require fine measurements. *See Lafarge North America*, 35 FMSHRC at 3501–02. Such precision is not necessary in this case. Inspectors Ogden and Wade were standing just a few feet away when they estimated the steering column's movement. Given their proximity to the steering column and the amount of movement they observed, Ogden and Wade need not have used a tape measure to establish that movement or to confirm it exceeded the one-inch limit that the CAT loader's manual suggests.

Based on the evidence before me, I therefore find that the steering column moved approximately six inches from its center position to either side.

2. Supervisor Looney's Rationale For Allowing Continued Operation of the CAT Loader

According to Inspector Ogden, Supervisor Looney indicated that he did not remove the CAT loader from service because Saiia had no other loader available for use. Additionally, Inspector Wade claimed that Looney admitted Saiia did not want to spend money to repair the loader's steering column because it was a rental. Thus, the Secretary insists that Respondents did not remove the loader from service and have it repaired for financial reasons. (Sec'y Br. at 18–19.) In contrast, Looney repeatedly and consistently testified that he did not remove the loader from service because he had personally operated it and did not believe it was unsafe. (Tr. 139:12–15, 141:4–10, 142:19–145:5, 145:11–13, 145:25–146:2, 146:9–19, 149:9–25, 149:18–22, 151:23–25.)

Three factors convince me that Looney allowed the loader to continue to operate because he believed it was safe. First, Looney was a credible and believable witness. As with almost all operator-agents, Looney had an incentive to provide self-serving testimony. Instead, Looney neither evaded questions nor equivocated regarding facts that subjected him to liability in this case. Such candor suggests to me that Looney is a credible witness. Second, loader operator Honeycutt also credibly testified that he found the loader to be safe. (Tr. 122:11–22, 123:16–21.) Honeycutt's opinion—like Looney's—may not have been objectively reasonable given the facts of this case. *See* discussion *infra* Part V.B.1. Yet, Honeycutt's opinion supports a finding that Looney likewise found the loader to be safe. Finally, it is unclear whether Saiia would have been responsible for any of the relatively small repair charges or that the repairs would have taken more than a few hours. (Tr. 223:10–14, 254:12–255:5, 298:8–11; Ex. G–4.) In light of these relatively small or nonexistent costs, I have serious doubts regarding Saiia's financial incentive to forgo repairs in this case.

Given the above factors, I credit Supervisor Looney's testimony that he allowed the CAT loader to continue in service because he believed the loader remained safe to operate.

B. Citation No. 8546029 – Saiia

1. Violation

In this case, Inspector Ogden found the CAT loader in operation during his inspection. I have also found that the loader's steering column moved approximately six inches from center to side, and it is uncontroverted that the steering column required repairs. Indeed, operator Honeycutt characterized the steering column as "broken" several times in his preshift reports. I therefore determine that the steering column contained a defect and that the loader had not been removed from service.

Consequently, this case turns on whether a reasonably prudent person with knowledge of the facts particular to the mining industry would recognize that the steering column's movement affected the safety of the loader. At the hearing, Respondents' counsel repeatedly elicited testimony regarding timing tests designed to gauge the performance of the steering system. (*See, e.g.*, Tr. 71:22–72:22.) Respondents claim that the movement in the steering column did not affect that actual steering system. (Resp't Br. at 4–5; Ex. G–7 at 5; Ex. G–8 at 6; Ex. G–9 at 6) Respondents therefore conclude that the steering column movement "cannot affect safety" because the steering system functioned properly. (Resp't Reply Br. at 2.)

Nevertheless, Respondents' argument fundamentally misunderstands the Secretary's theory. Regardless of whether the steering wheel would properly engage the loader's steering mechanism, the Secretary contends that the *movement in the steering column itself* affected the operator's ability to control the loader when making a sharp turn. (Sec'y Br. at 11; *see also* Tr. 179:23–180:9, 182:4–183:14, 252:3–12.) The Secretary also argues the conditions found in the off-road area increased these dangers because they would jostle the steering wheel in the operator's hands. (Sec'y Br. at 11; Ex. R–15 at 2.) As MSHA Engineer Angel succinctly explained:

> The thing about mining is that conditions change rapidly, trucks coming in, stockpiles building up to confine the space of the operation. Because conditions change, the routine operation of the vehicle, the loader, may not continue. But the loader operator may get himself into a position where emergency steering is required, abrupt change of direction is needed to avoid a truck, to reposition the machine because he's off position or something like that. And in that case, the loss of . . . control, an accident is more likely.

(Tr. 185:25–186:10.) Given the context in which this loader operated, I conclude that the function of the steering system is irrelevant to whether the movement of the steering column itself affected safety.

Respondents also note that Honeycutt and Looney found the loader safe to operate. (Resp't Br. at 6, 10; Resp't Reply Br. at 3.) Although I believe both witnesses testified honestly, *see* discussion *supra* Part V.A.2, the question before me is whether a reasonably prudent person would recognize that the steering column defect constituted a hazard requiring corrective action.

Here, the CAT loader operated in a rocky, uneven, and slick stockpile area in tandem with other pieces of oversized mobile equipment. The area also contained grades and berms. Inspectors Ogden and Wade and MSHA Engineer Angel each credibly testified that the moving steering column would affect the loader operator's ability to maintain control of the machine in this off-road environment. (Tr. 57:12–58:8, 61:18–62:10, 82:24–83:2, 85:12–18, 86:6–86:18, 180:14–181:9; 185:1–5, 186:3–25.) On the day of the inspection, Thompson Tractor Field Technician Coston also indicated that in certain circumstances the movement of the steering column would constitute a safety hazard. (Tr. 273:3–274:5.) Similarly, Saiia Safety Manager Leemhius conceded that if the steering column was "actually broken," the condition presented a safety hazard. (Tr. 300:4–7.)

Looking at the evidence before me, I therefore determine that a reasonably prudent person familiar with the facts of this case would recognize the existence of a defect requiring corrective action. Given the mobile equipment, slight grades, and berms present in the stockpile area, emergency maneuvers could mean the difference between an accident and continued safe operations. In this environment, a loader operator needs complete control of the machine at all times. Yet, the loader in question operated in uneven terrain that could jostle a driver's hands at precisely the time a quick turn is necessary. Thus, a reasonably prudent person would recognize that several inches of movement in the steering column presented dangers requiring corrective action.

In view of the above, the Secretary has demonstrated all three required elements. Accordingly, I conclude that the movement in the loader's steering column constitutes a violation of 30 C.F.R. § 56.14100(c).

2. Gravity and S&S Determinations

Saiia's violation of section 56.14100(c) establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard; that is, whether the violation provides a measure of danger to safety. Here, Inspectors Ogden and Wade and MSHA Engineer Angel credibly testified that the violative conditions contributed to a safety hazard of flipping the loader, colliding with other pieces of machinery, or overtraveling the berms surrounding the off-road area. Indeed, in concluding that the movement in the loader's steering column constituted a violation, I have determined that a reasonably prudent person would recognize that such movement in the steering column constituted a defect affecting safety. Similarly, I determine that the violations contributed to discrete safety hazards of flipping the loader, colliding with other machinery in the off-road area, and overtravelling the area's berms. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this case are highly likely to be fatal, and I recognize that Ogden issued an imminent danger order in this case. (Ex. G–1; Tr. 61:18–62:10.) Although the likelihood and severity of injury will be readily

apparent in some contexts, *see, e.g.*, *Blue Diamond Coal Co.*, 36 FMSHRC 541, 569 (Feb. 2014) (ALJ) (indicating that falling mine roof is likely to cause serious or fatal injuries), fatal injuries are not comparably self-evident in the case before me. Yet, the Secretary provided no details regarding the height of the berms in question or the size and speed of the haul trucks and other vehicles operating in the off-road area. Instead, he relies on the opinions of Inspectors Ogden and Wade to demonstrate that the injuries in this case would be reasonably serious. These are significant gaps in the Secretary's case, and I am left to puzzle my way through the evidence to determine whether fatal injuries are highly likely to result if a CAT loader moving at five to fifteen miles per hour overturned, overtravelled the berms, or collided with another piece of machinery. Critically, I note that the Secretary's own expert never indicated that the movement in the steering column was highly likely to lead to an accident. Instead, MSHA Engineer Angel stated that steering column movement made a loss of control accident "more likely." (Tr. 186:9–10.) In light of the aforementioned gaps and Angel's testimony, I am not convinced that fatal injuries are *highly* likely.

Nevertheless, I recognize that the opinion of an experienced inspector is entitled to significant weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that the substantial evidence supported an ALJ's S&S determination). Inspector Wade, specifically, has significant experience inspecting mines. (Tr. 78:2–79:21.) He observed the conditions in which the loader operated and concluded that injuries from losing control of the machine would be serious. (Tr. 81:12–83:9, 85:9–18.) Despite my reservations, Wade's opinion and the size of the loader itself convince me that these hazards would result in fatal or serious injuries. Given the evidence before me, I therefore determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and has satisfied *Mathies*' third and fourth elements. However, he has not demonstrated that reasonably serious injuries are highly likely.

Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S. In addition, Citation No. 8546029 is **MODIFIED** to lower the likelihood of injury from "highly likely" to "reasonably likely."

3. Negligence and Unwarrantable Failure Determinations

The Secretary has designated this violation as an unwarrantable failure and characterizes Saiia's negligence as high. In support of his allegations, the Secretary points to the length of time this condition existed, claims that Safety Manager Leemhius and Supervisor Looney failed to

examine the steering column in response to Honeycutt's repeated reports, and suggests that Saiia prioritized continued operations over miner safety.[10] (Sec'y Br. at 18–20; Ex. R–16 at 2.)

As I noted, "intentional misconduct" is one of the types of conduct upon which an unwarrantable failure determination may be made. *See* discussion *supra* Part IV.D. The Secretary claims that Saiia chose to continue production rather than remove the loader from service for repairs because it had no other loader equipment available. Nevertheless, I do not find the Secretary's argument to be persuasive. Nothing in the record convinces me that Saiia eschewed repairs in favor of continued production.[11] Likewise, the absence of a second loader is insufficient to infer such a willful disregard of miner safety. Many operators may not have redundant tools or auxiliary machinery on hand—particularly large or expensive equipment like a CAT loader—but conscientiously remove such equipment from service when repairs are needed. I therefore decline to infer intentional misconduct simply because Saiia did not have a second loader available for use.

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[10] Respondents' briefs focused little attention on these issues, tersely claiming that the Secretary's negligence and unwarrantable failure allegations should be overturned because "the operators of the loader and the owner of the loader who drove it do not believe [it] . . . was unsafe or that any standard was violated." (Resp't Br. at 12; *see also* Resp't Reply Br. at 3.) Although I believe Looney testified honestly regarding his opinion of the loader's safety, a "good faith" belief alone does not establish a safe harbor for violative conduct. A good faith belief only mitigates unwarrantable failure and negligence if it is *also* objectively reasonable. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2941–43 (Sept. 2013).

Given my conclusion that a reasonably prudent miner would have recognized that the steering column defect presented dangers requiring corrective action, Looney's "good faith" belief that the loader was safe is not objectively reasonable based on the facts before me. *See* discussion *supra* Part V.B.1. Moreover, I have accorded little weight to Schropp's testimony that the loader was safe to operate because his inspection occurred more than two weeks later with no representative of MSHA present. *See* discussion *supra* footnote 8. I therefore determine that Looney and Schropp's opinions regarding the safety of the loader do not mitigate Saiia's conduct.

[11] I note that Thompson Tractor repaired the loader's fuel system on March 19, 2010. (Ex. R–10; Tr. 206:2–9.) From one perspective, those repairs might support an inference that Saiia prioritized production over safety because it sought repairs to an item that affected the operation of the loader—the fuel system—while ignoring an item that only affected miner safety. Yet Honeycutt and Looney each credibly testified that they did not believe the loader to be dangerous. *See* discussion *supra* Part V.A.2. Although these opinions were not objectively reasonable, they do not necessarily imply *intentional* misconduct in failing to have the steering column fixed. Consequently, I do not view the repairs to the loader's fuel system to be evidence that Saiia prioritized production over miner safety.

Looking to the other types of aggravated conduct, four aggravating factors support the Secretary's unwarrantable failure allegation. First, the loader's steering column appears to have been defective from the first day it was delivered to the Omya Alabama Plant in mid-February 2010. Honeycutt reported the steering column as loose or broken six times in the six weeks between the loader's arrival and Inspector Ogden's inspection on March 31, 2010. (Ex. G–2.) Accordingly, this violative condition lasted for several weeks. Second, these continued reports establish that Saiia had knowledge of the condition. Third, the Secretary has satisfied his burden of proving this violation to be properly designated as S&S, but I have modified the citation to lower the likelihood of injury from "highly likely" to "reasonably likely." *See* discussion *supra* Part V.B.2. Finally, I have also found that the steering column moved several inches from center to side. *See* discussion *supra* Part V.A.1. This safety defect was therefore obvious.

On the other hand, three mitigating factors weigh against the Secretary's allegations. First, nothing in the record suggests that Saiia was on notice that greater efforts were necessary for compliance. In fact, Saiia's history of previous violations reveals no previous violations of section 56.14100(c). (Ex G–3.) Second, the Secretary introduced no evidence of other safety defects on the loader. Thus, the violation was not extensive. Third, Supervisor Looney did take *some* steps to abate the violative condition. Specifically, Looney referred the steering column to maintenance personnel at the mine site. Looney's efforts to abate the violation were insufficient and his opinion that the loader was safe is objectively unreasonable, but he did take affirmative steps to address the violative condition.

Based on the determinations above, the Secretary's unwarrantable allegation may appear to be a somewhat close call. Importantly, the Commission has indicated that a supervisor's failure to stop a violation supports a finding of unwarrantable failure. *Virginia Slate Co.*, 24 FMSHRC 507, 513 (June 2002) (noting the high standard of care applicable to supervisors and indicating that "supervisor's involvement in a violation should be considered in an unwarrantability analysis of the violation.") (citations omitted). In this case, Looney's role as a supervisor responsible for removing the loader from service supports an unwarrantable failure determination. He is an agent of the operator (Ex. J–1), he was aware of a defect affecting safety, and he allowed the condition to persist for six weeks. These dangers are precisely the type the Secretary had in mind when he promulgated section 56.14100(c). *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32,496, 32,505 (Aug. 25, 1988) ("Powered haulage accidents and machinery and equipment accidents in metal and nonmetal mines are among the leading causes of fatalities and serious injuries. . . . Self-propelled mobile equipment is specifically required to be examined prior to use on each shift where it is to be placed in operation. This specific requirement is included in the standard in view of the fact that defects affecting safety become more critical when they occur on a piece of equipment which is mobile throughout the mine."). Despite his own subjective belief, Looney failed to satisfy his obligation to remove from service a piece of mobile equipment with an obvious safety defect. No matter how well-intentioned his actions, his failure constituted a serious lack of reasonable care.

In light of Supervisor Looney's failure to recognize the danger involved, I conclude that the Secretary has met his burden of proving unwarrantable failure. Similarly, I conclude that the Secretary has demonstrated Saiia's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.").

C. Section 110(c) – Supervisor Frederick Looney

Supervisor Looney stipulated that he is an agent of the operator. (Ex. J–1.) He also admitted he was the employee responsible for removing the loader from service, but contended that he did not believe that the loader was unsafe. (Tr. 132:22–133:1, 134:23–25,141:4–10, 145:11–13, 146:9–19, 149:9–25.) Nevertheless, his good faith belief does not mitigate his negligence. Indeed, a knowing violation occurs when an individual knew or had reason to know of the violative *condition*, not when the individual knowingly violates the law. *See Ernest Matney*, 34 FMSHRC at 783 (citations omitted). In this case, the facts available to Looney were sufficient to recognize that the defect in the steering column affected safety and required repair. Instead, Looney allowed the loader to continue in operation for six weeks.

The Mine Act demands a high level of care from supervisors, and Looney's mistaken belief that the loader was safe did not satisfy this important duty. Rather, his failure to recognize these safety hazards ultimately exposed miners to potential dangers for an extended period of time. I therefore determine that Looney failed to act. Moreover, his involvement proved to be a critical factor in my conclusion that Saiia engaged in aggravated conduct. In light of Looney's status as an agent, his knowledge of the steering column's safety defect, and his failure to remove the loader from service, I conclude that the Secretary has satisfied his burden of proving Supervisor Looney's individual liability under section 110(c) of the Mine Act.

D. Penalties

1. Saiia's Penalty

The Secretary has proposed that Saiia pay a penalty of $12,563.00 for Citation No. 8546029. Two of the section 110(i) factors weigh strongly against assessing the Secretary's proposed penalty. First, I note that MSHA's own Assessed Violation History Report lists only eight violations at the Omya Alabama Plant in the previous fifteen months. None of these eight violations involved section 56.14100(c), nor were these violations subject to enhanced enforcement under section 104(d) of the Mine Act. Moreover, only one such citation merited an S&S designation. Thus, this modest history of previous violations mitigates against the Secretary's proposed penalty. Second, nothing suggests that Saiia failed to make a good faith effort to achieve rapid compliance with the safety standard after Inspector Ogden issued this citation. In fact, it appears Saiia immediately took the loader out of service. (Tr. 135:16–24.)

On the other hand, I have upheld the Secretary's S&S, unwarrantable, and negligence designations. Such conclusions might ordinarily support the Secretary's proposed penalty.

However, I modified Citation No. 8546029 to reduce the likelihood of injury from "highly likely" to "reasonably likely." Accordingly, I am not convinced that Saiia's conduct was so grave as to justify the Secretary's proposed penalty of $12,563.00. Instead, the reduced likelihood of injury suggests to me that leniency is appropriate. Further, I have credited Supervisor Looney's honestly held belief that the CAT loader in question was not dangerous. Although this opinion was not objectively reasonable, I understand why Saiia acted as it did. No matter how mistaken Saiia and Looney were, Respondents' conduct was neither intentional nor reckless. Moreover, Looney did take some (though ultimately ineffective) steps to request repair of the steering column.

Looking at the remaining section 110(i) factors, nothing in the record suggests the proposed penalty is inappropriate for the size of Saiia's business. In addition, the assessed penalties will not impair Saiia's ability to remain in business. (Ex. J–1.) Yet, in weighing the section 110(i) criteria, I am not convinced the Secretary's proposed penalty is appropriate. Significantly, Saiia's limited history of violations, the reduced likelihood of injury, and an absence of intentional misconduct or recklessness each suggest that a smaller civil penalty is appropriate. I also note that the Secretary's point system for penalties suggests a penalty of $5,645.00 for this citation as modified. *See* 30 C.F.R. § 100.3. However, the Secretary's point system is not binding on Commission Judges, *see Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008), and I determine that a $5,645.00 penalty does not adequately reflect Saiia's unwarrantable conduct. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $7,500.00.

2. Supervisor Looney's Penalty

Given the facts and circumstances before me, I likewise conclude that the penalty the Secretary has proposed for Supervisor Looney is inappropriate. His opinion in this case was objectively unreasonable, and his failure to act resulted in a lengthy hazard to miners. However, the reduced level of gravity and absence of intentional misconduct or recklessness again suggest that some leniency is appropriate. In addition, the Secretary provided no evidence regarding Looney's involvement in past violative conduct or that he impeded attempts to abate the violation in good faith after the citation had been issued.

Looney did not present evidence regarding either his ability to meet his financial obligations or his net worth, but he did testify as to his annual earnings. (Tr. 130:7.) Moreover, he indicated that he does not have any agreement whereby Saiia will pay the penalty assessed to him individually. (Tr. 130:15–18.) In the interest of maintaining Looney's privacy, I will refrain from publishing details regarding his salary. However, I note that the Secretary's proposed penalty would represent a somewhat significant percentage of Looney's pay. I therefore infer that this penalty would affect Looney's ability to meet his financial obligations.

In view of the above penalty criteria, I conclude that a smaller penalty is appropriate in this case. Thus, I assess a civil penalty of $1,000.00 against Looney under section 110(c).

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8546029 is **AFFIRMED** as S&S and unwarrantable, but is **MODIFIED** to reduce the likelihood of injury from "highly likely" to "reasonably likely." In addition, the section 110(c) charge against Frederick Looney is **AFFIRMED**. Saiia is **ORDERED** to **PAY** a civil penalty of $7,500.00 within 40 days of the date of this decision. Likewise, Looney is **ORDERED** to **PAY** a civil penalty of $1,000.00 within 40 days of the date of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2014

SECRETARY OF LABOR on behalf of ROBERTO VEGA, Complainant,	: : :	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2014-300-DM SE-MD 14-19
v.	:	
CANTERA EL TUQUE, INC., Respondent,	: :	Mine: Cantera El Tuque Mine ID: 54-00483

DECISION AND ORDER

Appearances: Summer C. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Secretary of Labor.

Javier González-Montañez, Esq., Gonzalez, Machado, Roig & Sanchez Ramos, LLC, San Juan, Puerto Rico, for Respondent

Before: Judge Moran

DECISION AND ORDER REINSTATING ROBERTO VEGA[1]

A temporary reinstatement hearing was held in this matter on June 13, 2014, in San Juan, Puerto Rico. For the reasons which follow, the Court finds that the application was not frivolously brought and consequently it is ordered that Roberto Vega be reinstated to his former position, with all attendant benefits, effective immediately.

Temporary Reinstatement under the Mine Act

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

[1] This decision also disposes of the Respondent's Motion for Summary Decision. *See infra* at 4.

Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

Section 105(c)(2) of the Mine Act provides in relevant part that "Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint."

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990) ("*JWR*"). *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

The Commission itself "has repeatedly recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.' [*JWR* supra] It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) ("*Chicopee Coal*"). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *See, id.* at 719; *Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). *Id.* at n. 2." *Sec. obo Rodriguez v. C.R. Meyer and Sons Co.* 2013 WL 2146640 at *5 (May 2013).

"Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that 'if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.' 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner 'is supported substantial evidence and is consistent with applicable law.' *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). Neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Chicopee Coal* at 719. A temporary reinstatement hearing is held for the purpose of determining 'whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d at 744. "Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered." *Sec'y of Labor, on behalf of Curtis Stahl v. A&K Earth Movers Inc*., 22 FMSHRC

233, 237 (ALJ) (Feb. 2000)." *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

Findings of Fact and Conclusions of Law

At the hearing, the Complainant, Roberto Vega, testified. Mr. Vega stated, credibly, in the Court's estimation, that he was employed by the Respondent, Cantera El Tuque, from December 1, 2012 until April 17, 2014, as a supervisor. In that capacity, he reported to Mr. Enrique Golderos, the owner of the Respondent Mine. Tr. 9-10. Mr. Vega stated that he spoke with MSHA Inspector Villahermosa during February 2014 and that the conversation included Mr. Vega's remarks to the inspector about certain unsafe conditions at the mine. Tr. 18. Citations were issued by the Inspector during that time and presented to Mr. Vega. Mr. Vega then informed Mr. Golderos about the citations that were issued. Mr. Vega affirmed during his testimony that he identified safety hazards at the mine. These included fugitive dust, equipment with defects, such as a non-functioning emergency brake and back-up alarm on a loader, among other issues. Mr. Vega stated that he identified these safety issues to the inspector and as a consequence, citations were issued to the mine. Tr. 19-21.

Subsequently, the same Inspector returned to the mine during March 2014 to follow-up on the citations he had previously issued. Tr. 25. The loader which had been cited during the February inspection was still unrepaired and the Inspector issued an Order, barring future use of it until the violative condition was abated. *Id.* During the March follow-up inspection, Mr. Vega spoke with the Inspector about other safety concerns he had about the mine. The Court finds that these safety concerns were communicated to the MSHA Inspector and that those concerns were not negligible.

Upon questioning by the Court, Mr. Vega testified that he had discussions with Mr. Golderos about these, and other identified safety concerns, on several occasions. Tr. 26. These conversations occurred after the citations had been issued and Mr. Vega stated that Mr. Golderos never took any action regarding those concerns. Tr. 27. Beyond this, Mr. Vega asserted that, in conversation with Mr. Golderos, he was advised that he needed to "learn" how to speak with MSHA inspectors. In the context presented, Mr. Vega stated, he construed this to mean that he was to lie to the inspectors.

During cross-examination and repeatedly during the proceeding, Counsel for the Respondent attempted to interject testimony regarding its claim that Mr. Vega was actually fired due to economic reasons at the mine. See, for e.g. Tr. at 37.

The Court found that the government established, through the testimony of Mr. Vega, its prima facie case that the claim was not frivolously brought. This was based upon the Court's conclusion from that testimony, finding that the witness was credible, that he made safety complaints, both to the MSHA Inspector and to the owner, and that, in close proximity in time, he was fired from his job with the mine. The Court added that it was not aware of *any* Commission level decision in support of considering the Respondent's claim that Mr. Vega was discharged for economic reasons. Tr. 45-47. In fact, case law points to the opposite conclusion. As noted by the Secretary in its Motion in Limine, the decisions regarding *Secretary of Labor on*

behalf of Joseph M. Ondreako v. Kennecott Utah Copper Corp., 2003 WL 23416466 (Oct. 9, 2003), *aff'd* 25 FMSHRC 585, make this conclusion clear.

As the Court noted, "So what I have here is Mr. Vega's testimony, which I deem to be credible upon observing him, that he is an employee of this mine, or was; that he made safety complaints to an MSHA inspector, which I found to have been credible testimony; and then that adverse action followed within a reasonable period of time following those complaints." Tr. 56.

In the face of the Respondent's contention that its defense "has to do with, that on prior occasions, both the witness as well other employees, brought safety issues before the respondent and the consequence was never employee termination. And at the end of the day this court will have the opportunity to see, in this proceeding that's being held, that there were other motivations that have nothing to do with safety, which were the ones that moved this employee to request this remedy," the Court tried to explain that such weighing of competing versions for the employee's termination is outside the scope of a temporary reinstatement proceeding. Tr. 60-61.

The Respondent, in defense, called one witness, Ms. Magda Marie Rivera. Ms. Rivera, declared to be an employee of the Respondent, stated that the mine had approximately 25 employees in early 2013 but today has only 14 employees. Tr. 70. Again, the Respondent attempted to show, this time through the testimony of Ms. Rivera, the "real reasons, the true reasons, why [Mr. Vega] was fired," and again the Court advised that consideration of such testimony would necessarily involve a weighing of competing stories, and that this would be outside of the proper scope of the temporary reinstatement proceeding. Tr. 73-74.

At the conclusion of the testimony, the Respondent asked that the Court take "judicial notice" that, under Puerto Rico's labor law, during layoffs an employer must terminate the employee with the least seniority. The Court advised that it did not believe that such considerations were material to the proceeding but that the parties could submit cases in support of their respective positions on that point, if such case law existed. The Respondent has not identified such case law to support its contention.

On June 16, 2014, the Secretary, via email, noted the Court's "request at the close of hearing on June 13, 2014, to identify any case law supporting the proposition that state law could affect a temporary reinstatement proceeding." The Secretary advised that it "found no case law supporting such a proposition. Furthermore, Section 506 of the MSH Act states that the MSH Act preempts state law where it conflicts with the '[MSH] Act or with any order issued or any mandatory health or safety standard. 30 USC 955.'" Based upon that response, the Secretary asserted that "the Puerto Rico statutes that Respondent's counsel alluded to during the hearing are not relevant to this temporary reinstatement proceeding."

Respondent's Motion for Summary Decision

The Secretary noted that the Respondent filed a summary judgment motion at the time it responded to the Secretary's Motion in Limine. The Respondent's "Request for Summary Judgement" [sic], asserts that "[t]he decision to separate Mr. Vega from his work duties

responded to an adverse financial condition of Respondent, a fact that has not been disputed by Applicant." Motion at 1. The Motion goes on to assert that Mr. Vega was one of a number of employees that were laid off as a result of the Respondent Mine's "adverse financial condition," and that he was so informed by the mine's President, Mr. Golderos, that the mine's economic condition was the basis for the termination. *Id.* at 2.[2]

As that motion was filed just two days before the temporary reinstatement proceeding, the Secretary had not filed a response at the time of the hearing. The Secretary elected to respond to the Respondent's motion orally, at the close of the hearing. It contended that the Respondent's motion was premature as it goes to the merits of the underlying discrimination proceeding and therefore is outside of the "frivolously brought" issue to be decided at this juncture. Further, the Secretary contended that, even assuming for the sake of argument that the motivation for Mr. Vega's termination could be raised, there are factual disputes involved, and therefore that summary judgment is not appropriate. Tr. 83-84. The Court agrees with the Secretary's arguments.

As referenced earlier in this decision, the scope of a temporary reinstatement proceeding is very limited. Considering that the basis advanced in the Request for summary judgment goes beyond the scope of this proceeding, as it would entail a weighing of different narratives as to the basis for the Complainant's termination, summary decision is not appropriate. Accordingly, the Request is DENIED.

Conclusion

The Court has noted that the testimony on the subject of protected activity, and whether adverse action was motivated in any part by such activity, came solely from the Complainant, Mr. Vega. Against this was the Respondent's attempt to show that the miner's discharge was due to economic conditions at the mine. However, the fundamental problem with that approach is that the temporary reinstatement application is not the proceeding for the resolution of such competing narratives. Rather, the Court must focus upon whether there is credible substantial evidence presented to show that protected activity occurred, that adverse action resulted, and that there was evidence of a nexus between those events. Here, as noted, the Court finds that: the record at the application proceeding provided substantial evidence of the Complainant's engaging in protected activity, voicing his concerns over several safety matters; that management was made aware of these concerns; and that an adverse action, in the form of termination, occurred within a time frame thereafter which was sufficiently close in time to establish, on this record, and within the context of temporary reinstatement, that the application was not frivolously brought.

While the Court has found that Mr. Vega's complaint of discrimination was not frivolously brought, it is fully recognized that the Commission has noted that the period of reinstatement may be tolled in some circumstances. A layoff for economic reasons *may* provide such a basis for tolling, but that is a very fact-specific inquiry. *See*, *e.g.*, *Sec. obo Gatlin v.*

[2] Respondent submitted a "Memorandum of Law in Support of Summary Judgement" [sic] on June 19, 2014. Because the Court denies the Respondent's Motion, there is no need to await a Response from the Secretary.

Kenamerican Resources, 31 FMSHRC 1050, 2009 WL 3412973 (Oct. 2009), *Sec. obo Ratliff v. Cobra Natural Resources*, 35 FMSHRC 394, 2013 WL 865606 (Feb. 2013). The Respondent may initiate this process by filing a motion to toll the economic reinstatement, which motion must fully set forth the basis for that relief. Of course, the motion must provide documentation in support of the claim for tolling. The Secretary will need to timely respond to the motion and then seek discovery in order to make its own evaluation of the bona fides of the Respondent's claim for relief. As the Court explained in a conference call with the parties on June 24, 2014, various scenarios may ensue upon the completion of the discovery and the evaluation of that information by the Secretary. It is possible, for example, that the Secretary may concede that tolling is appropriate or that it is not justified. On the other hand, it may be that the Respondent may step back from its motion and withdraw its claim that tolling should be applied. It is also possible that a hearing may be required to resolve factual disputes about the Respondent's employment situation and the appropriateness of Mr. Vega's inclusion in that layoff, given the finding that his claim was not frivolously brought.

Regardless of the outcome of any potential motion to toll the period of economic reinstatement, the Secretary continues to have the obligation, following the issuance of this Decision and Order, to complete its investigation of the underlying discrimination complaint as soon as possible. Section 105(c)(3) of the Mine Act requires the Secretary to notify the complainant of whether it intends to file a discrimination complaint on the complainant's behalf within 90 days of receiving the miner's initial complaint. If the parties settle the underlying discrimination case, counsel for the Secretary is directed to promptly notify the Court. Similarly, prompt notification to the Court is required if the Secretary determines that the Respondent did not violate section 105(c) of the Mine Act.

ORDER

On the basis of the foregoing, the Court finds that the Secretary presented sufficient evidence at the hearing in Puerto Rico to establish that this discrimination complaint was not frivolously brought. Accordingly, it is **ORDERED** that the Respondent immediately reinstate the Complainant, Roberto Vega, as of the date of this ORDER, to his former position, or its equivalence, at the same rate of pay and benefits that he was receiving at the time of his termination. The Secretary is directed to provide a status report of its discrimination investigation within 30 days of this decision. The Court retains jurisdiction over this temporary reinstatement proceeding.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

June 12, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2013-301
Petitioner	:	A.C. No. 01-00851-315187-01
	:	
	:	Docket No. SE 2013-352
v.	:	A.C. No. 01-00851-317727
	:	
	:	Docket No. SE 2013-368
	:	A.C. No. 01-00851-319550
OAK GROVE RESOURCES, LLC,	:	
Respondent	:	Docket No. SE 2013-399
	:	A.C. No. 01-00851-320606-01
	:	
	:	Mine: Oak Grove Mine

ORDER REQUIRING SECRETARY'S PRE-HEARING STATEMENT

Before: Judge Feldman

These proceedings require a determination of the evidentiary criteria that must be demonstrated to support the imposition of enhanced civil penalties provided in section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 ("Act" or "New Miner Act"), for an alleged repeated flagrant violation. 30 U.S.C. § 820(b)(2). Section 110(b)(2), which became effective on August 17, 2006, following the Sago and Darby Mine disasters, increases the maximum civil penalty for extremely hazardous violations deemed "flagrant." Section 110(b)(2) provides:

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

30 U.S.C. § 820(b)(2) (emphasis added).

A primary subject in these matters is 104(d)(2) Order No. 8520664 in Docket No. SE 2013-368, issued on October 3, 2012.[1] The order alleges a repeated flagrant violation under section 110(b)(2) of the Act based on an alleged violation of the mandatory safety standard in section 75.400 of the Secretary's regulations that is attributable to high negligence.[2] 30 C.F.R. § 75.400. Order No. 8520664 states:

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

Section 75.400, which prohibits combustible coal dust accumulations, is the most frequently cited mandatory standard in underground coal mines. For example, citations concerning section 75.400 violations constituted 10.47 percent of all citations issued in 2013, and currently constitute 10.61 percent of all citations issued in 2014. MSHA, *Most Frequently Cited Standards*, www.msha.gov/stats/top20viols/top20viols.asp (accessed June 12, 2014).

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[1] Docket Nos. SE 2013-301, SE 2013-352 and SE 2013-399 have been consolidated with Docket No. SE 2013-368 for judicial efficiency and because included therein is a citation that the Secretary relies on as a predicate for the alleged flagrant violation in Order No. 8520664.

[2] Section 75.400 provides:

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

30 C.F.R. § 75.400.

Background

Section 8(b) of the New Miner Act required the Secretary to "promulgate final regulations with respect to penalties" to codify the new enhanced penalty structure. Pub. L. 109-236, § 8(b), 120 Stat. 501 (2006). To implement special assessments for flagrant violations, MSHA issued notices of proposed rulemaking for section 100.5(e) in the Secretary's Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties. 30 C.F.R. §100.5(e), 71 Fed. Reg. 53054 (Sept. 2006); 71 Fed. Reg. 62572 (Oct. 2006). The notice-and-comment provisions of the APA require the Secretary to provide "[an adequate] description of the subjects and issues involved" to support a flagrant violation. 5 U.S.C. § 553(b)(3). On March 22, 2007, MSHA issued a final rule regarding its procedures for proposing enhanced civil penalties under the New Miner Act. 30 C.F.R. §100.5(e). However, the final provisions of section 100.5(e) merely repeat the statutory language in section 110(b)(2), without providing adequate notice with respect the evidentiary criteria necessary to support a flagrant designation .[3] 72 Fed. Reg. at 13622.

The Commission has previously had the question of the required elements for a repeated flagrant violation before it on several occasions based on requests for review of interlocutory decisions of Commission Judges who had addressed this issue. *Conshor Mining, LLC*, 34 FMSHRC 349 (Feb. 2012) (granting interlocutory review); *Wolf Run Mining Company*, 35 FMSHRC 536 (Mar. 2013) (remanding for reconsideration of whether a violation was properly designated as flagrant). On each occasion, the Secretary removed the subject flagrant violation designation, thus precluding a final Commission ruling on this question. *Conshor*, 34 FMSHRC 571 (Mar. 2012) (vacating the order granting interlocutory review); *Wolf Run*, __ FMSHRC __ (Apr. 14, 2014) (ALJ) (approving settlement). However, in its remand order in *Wolf Run*, prior to the withdrawal of the relevant flagrant designation, the Commission concluded that the plain language of section 110(b)(2) supports that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. 35 FMSHRC at 541, *citing* 30 U.S.C. § 820(b)(2).

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[3] Section 100.5(e), as promulgated, provides:

> Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than $220,000. For purposes of this section, a flagrant violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

30 C.F.R. §100.5(e).

However, in *Wolf Run*, the Commission did not address: whether such previous violations must be unwarrantable; whether the prior violations must have violated the same mandatory standard as the condition alleged to be flagrant; and whether there is a specified time period for the occurrence of such previous violations. The Commission had no basis for doing so as the Secretary did not clearly articulate in his opening brief, or during oral argument, the relevant parameters concerning prior conduct. The Secretary avers that any parameters for predicates that he considers for a repeated flagrant violation are merely guidelines for enforcement personnel. Sec'y Resp. at 9. As such, the guidelines are not based on the Secretary's statutory interpretation and are beyond the scope of this proceeding. [4]

The Commission also has never addressed the requisite degree of gravity necessary for a flagrant designation. The degree of gravity is determined by the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citations omitted). In this regard, the Secretary acknowledges that "gravity is essentially a function of (1) the potential for injury and (2) the likely nature of such injury." Sec'y Resp. at 3.

Even if the Secretary ultimately prevails in this matter with respect to the issues of the fact of the violation and the significant and substantial ("S&S") and unwarrantable designations in Order No. 8520664, a hearing cannot proceed without determining the proper evidentiary requirements for demonstrating a repeated flagrant violation under the statutory provisions of section 110(b)(2). Consequently, on March 19, 2014, an Order Scheduling Briefing ("Order") was issued requesting the Secretary to address a number of substantive issues concerning the criteria necessary to support a repeated flagrant violation. 36 FMSHRC 815 (Mar. 19, 2014) (ALJ).[5] The Secretary's response was filed on April 22, 2014. Oak Grove's reply to the Secretary's response was filed on May 8, 2014.[6]

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[4] Guidelines, such as those contained in Procedure Instruction Letters ("PILs"), that provide guidance to enforcement personnel are not mandatory standards. Such PILs do not establish a binding norm and therefore are not subject to the APA. Consequently, given the advisory nature of the Secretary's parameters for charging that a flagrant violation is repeated in nature, a rulemaking proceeding is not required. 5 U.S.C. § 553(b)(3)(A); *see also*, *Nat'l Mining Ass'n*, 589 F.3d 1368, 1371 (11th Cir. 2009).

[5] Included among the issues the Secretary was directed to address was whether a notice-and-comment rulemaking was necessary if the Secretary was proposing a binding norm with respect to the parameters for predicates for repeated flagrant violations. 38 FMSHRC at 820. The Secretary has not proposed a binding norm with respect to whether predicate violations must have violated the same standard as that alleged to be flagrant, and whether there is a specific time period for, or frequency of, such prior violations. In the absence of a binding norm, a rulemaking is not required. Accordingly, this Order deals solely with a *Chevron* analysis of whether the Secretary's interpretation of section 110(b)(2) is reasonable. *See* page 5-6, *infra*.

[6] Oak Grove's reply has been considered, although not specifically referenced in this Order. The focus of this Order is the reasonableness of the Secretary's interpretation and application of the evidentiary burden that must be met to support a repeated flagrant designation under the provisions of section 110(b)(2).

In response to the March 19, 2014, Order, the Secretary agreed that "both reckless and repeated flagrant designations require violations that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Sec'y Resp. at 6. In other words, the Secretary acknowledges that a violation which does not otherwise satisfy the gravity requirements in section 110(b)(2) cannot be elevated to a flagrant violation solely based on prior predicate violations. With respect to the requisite degree of gravity, the Secretary has departed from his prior position that a flagrant violation requires a likelihood of injury of at least a permanently disabling nature,[7] now arguing that most lost workday injuries are sufficient to support a flagrant violation. Sec'y Resp. at 3.

With respect to distinguishing the terms "flagrant" and "S&S," obviously, all flagrant violations are S&S, however, not all S&S violations are flagrant.[8] The Secretary fails to adequately distinguish violations that are only S&S from S&S violations that are properly designated as flagrant. In so doing, the Secretary seeks to greatly expand the scope of the flagrant provisions of section 110(b)(2) beyond that contemplated by Congress. Consequently, as discussed below, the Secretary's interpretation of the section 110(b)(2) criteria for a flagrant violation is unreasonable.

I. Chevron Framework

A definitive articulation of the elements necessary for a repeated flagrant violation that is consistent with the statutory language and the legislative intent is essential for implementing the flagrant provisions of section 110(b)(2). The Commission has traditionally established the parameters for the Secretary's burden of proof with respect to charges brought under the Act. *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999) (noting longstanding caselaw reflecting the Commission's authority to interpret the Mine Act and adopt specific tests or standards for adjudication, such as the evidentiary requirements for S&S designations and for personal liability) (citations omitted). The vague and inconsistent criteria proffered by the Secretary for demonstrating a repeated flagrant violation has created a void that must be filled by the Commission. As the factors considered by the Secretary with respect to timeframe, number of previous violations, and whether such previous violations must cite the same mandatory standard, are merely guidelines, the focus shifts to whether the Secretary's interpretation of the statutory gravity criteria for a flagrant violation is both reasonable and consistent with the relevant legislative history.

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[7] The Secretary's initial guidelines for repeated flagrant violations required that the cited condition pose a potential injury or illness of at least a permanently disabling nature. *Conshor*, 33 FMSHRC 2917, 2920 (Nov. 28, 2011) (ALJ) (citing PIL Nos. I06-III-04, I08-III-02). The Secretary has also departed from his initial guidelines requiring at least two prior unwarrantable failure violations of the same mandatory standard that were cited within the fifteen month period preceding the issuance of the alleged flagrant violation. *Id.*

[8] Judge Paez has similarly noted that the 'significantly and substantially contribute to a hazard' language in section 104(d)(1), that provides a basis for an S&S designation, is notably different from the provisions of section 110(b)(2) that provide a basis for the gravity element of a flagrant designation. *Stillhouse Mining, LLC*, 33 FMSHRC 778, 800 (March 28, 2011) (ALJ).

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, *Inc*., 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). The examination to determine whether there is a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Id.; see Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

A. **Chevron I** - Congress has directly addressed that flagrant violations can only be reserved for the most blatant and egregious violations

The operative statutory definition of "flagrant" provided by Congress is:

> [T]he term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

Placing the statutory definition in the context of the legislative history, although enhancement of safety is a fundamental concern, it is clear that the intent of the New Miner Act, which was enacted in the aftermath of the Sago and Darby Mine disasters, was to address, and hopefully prevent, violations that could proximately cause future tragedies. The Senate Report that accompanied the New Miner Act stated:

> The year 2006 began with the tragic loss of 12 miners at the Sago Mine in West Virginia, followed closely by the deaths of

> two miners at the Alma Mine, also in West Virginia; and some 4 months later by the deaths of 5 miners at the Darby Mine in Harlan County, Kentucky. The death toll in the first 5 months of the year was nearly 50 percent higher than the entire previous year. Additionally, the rise in coal production in the last few years raises the committee's concerns that there is the potential for a return to higher numbers of accidents and fatalities. Improvements in safety come about because of a continued re-examination and revision of safety and regulatory practices in light of experience. These tragedies serve as a somber reminder that even that which has been done well can always be done better.

Committee on Health, Education, Labor, and Pensions, S. Rep. No. 109-365, *Mine Improvement and New Emergency Response Act of 2006*, at 2 (Dec. 6, 2006).

In construing statutory language, it is fundamental that:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.

2A *Sutherland Statutory Construction* § 46:5 (7th ed.). In this regard, the "Act's overall enforcement scheme . . . provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). Thus, the Act provides increasingly severe sanctions: for S&S violations cited under section 104(a); for violations attributable to unwarrantable failures under section 104(d) which subject operators to a maximum penalty of $70,000.00; and for flagrant violations under section 110(b)(2) which subject operators to a maximum penalty of $220,00.00.

The fact that Congress intended that it is only the most blatant and egregious violations that can be cited under section 110(b)(2) is clear from the language of the statute that characterizes the subject violation as "flagrant." A flagrant act is defined as conduct that is "[c]onspicuously bad, offensive, or reprehensible." *The American Heritage Dictionary* 667 (4th ed. 2009). The American Heritage Dictionary includes the following discussion of relevant synonyms:

> *flagrant, glaring, gross, egregious, rank*: [t]hese adjectives refer to what is conspicuously bad or offensive. *Flagrant* applies to what is so offensive that it cannot escape notice: *flagrant disregard for the law*. What is *glaring* is blatantly and painfully manifest: *a glaring error; glaring contradictions*. *Gross* suggests a magnitude of offense or failing that cannot be condoned or forgiven: *gross ineptitude; gross injustice*. What is *egregious* is outrageously bad:

> *an egregious lie*. *Rank* implies that the term it qualifies is as indicated to an extreme, violent, or gross degree: *rank stupidity; rank treachery*.

Id. (emphasis in original). As discussed below, it is the conspicuously bad, offensive, or reprehensible nature of the cited violation with respect to its significant risk of causing death or serious bodily injury that warrants designating the violation as flagrant. However, although the plain language of section 110(b)(2) requires that the violation be egregious, the specific threshold criteria to warrant a designation of a flagrant violation requires interpretation of the statutory provisions.

B. **Chevron II** - The Secretary's interpretation of the gravity requirements in section 110(b)(2) with respect to the causation, likelihood, and severity of injury, is unreasonable

In *Wolf Run*, the Secretary alluded to any "fail[ure] to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant" as an adequate predicate for a repeated flagrant designation. 35 FMSHRC at 539 n. 5 (citing S. Opening Br. at 17). In his response to the March 19, 2014, Order, the Secretary now asserts that in order to demonstrate a repeated flagrant violation, it must be demonstrated that the operator:

> (1) Knew of one or more [. . .] predicate violations, (2) failed to make reasonable efforts to eliminate the prior violation(s) known to the operator, and (3) that one or more of these [prior] violations reasonably could have been expected to cause death or serious bodily injury.

Sec'y Resp. at 10. Thus, the Secretary now asserts that any predicate violation relied upon to support a repeated flagrant violation must be a known violation that satisfies the "threshold gravity and negligence required by section 110(b)(2)." *Id.* at 11. As the Commission has determined that the previous violation history is a relevant consideration, and the Secretary has acknowledged that the requisite degree of gravity for reckless and repeated flagrant violations is the same, the only remaining issue for resolution is the degree of gravity required to satisfy a repeated flagrant violation. *See* pages 3-4, *supra.*

1. The March 19, 2014 Order

As a general matter, the Order required the Secretary to compare the degree of gravity required for a flagrant designation under section 110(b)(2) with the degree of gravity required for the statutory term "significant and substantial" contained in section 104(d)(1) of the Act,

the criteria for which has been articulated in *Mathies* and its progeny.[9] 36 FMSHRC at 817-18, *citing Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984). In this regard, the Order directed the Secretary to consider the distinction, if any, between the Commission's determination that an S&S finding "requires that the *hazard contributed to* [by the violation] will result in an event in which there is an injury," with the language of section 110(b)(2) that the *violation itself* must be the actual or expected proximate cause of death or serious bodily injury. *Id.* at 818, *citing U.S. Steel Mining,* 6 FMSHRC 1834, 1836 (Aug. 1984) (citing 3 FMSHRC at 3-4) (emphasis added); *see also Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (holding that the third element of *Mathies* only requires the Secretary to prove a reasonable likelihood that the hazard contributed to by the violation will cause injury, not that the violation itself will cause injury). In briefing this matter, the Secretary was also directed to be mindful of the fact that an S&S analysis is based on a variety of changing conditions normally encountered during continued mining operations in the presence of an unabated hazard. 36 FMSHRC at 818, *citing U.S. Steel Mining,* 7 FMSHRC 1125, 1130 (Aug. 1985) (citing 6 FMSHRC 1573, 1574 (July 1984)).

2. The Secretary's Proffered Interpretation in Response

As previously noted, the Secretary has acknowledged that gravity is a function of the likelihood and seriousness of an injury. Sec'y Resp. at 3. With respect to the potential likelihood of injury, the Secretary argues there is essentially no distinction between routine S&S and flagrant gravity requirements. In this regard, the Secretary states "there is no material distinction between the 'reasonably likely to result' inquiry [under the third element of *Mathies*] and the 'reasonably could have been expected to cause' inquiry under section 110(b)(2)." *Id.*

With respect to causation as it relates to the likelihood of injury, the Secretary acknowledges that a prerequisite for a flagrant violation is that "*the violation itself*" must be reasonably expected to cause death or serious injury. Sec'y Resp. at 4 (emphasis in original). The Secretary distinguishes this from an S&S violation, which only requires that "*the hazard contributed to by the violation*" must be reasonably likely to contribute to an event that causes injury of a reasonably serious nature. *Id.* (emphasis in original). However, the Secretary maintains that this distinction is not substantive, and only shifts the burden of proof. *Id.* Rather, the Secretary argues that, "[n]evertheless, this distinction does not support a conclusion that [flagrant] violations require greater gravity than [S&S] violations." *Id.*

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[9] In order to establish that a violation is properly designated as S&S, the Secretary must prove:

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

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

With respect to the severity of the potential injury, the Secretary argues that "most injuries that result in lost work days/restricted duty" can be properly designated as flagrant violations. Sec'y Resp. at 3. Obviously, all injuries involving serious bodily injury are injuries of a reasonably serious nature. However, as discussed below, the question is whether lost workday injuries that do not result in any residual debilitating and/or permanent impairment constitute serious bodily injuries as contemplated by section 110(b)(2).

The Secretary argues that his litigating position in administering the Mine Act before the Commission is entitled to full *Chevron* deference. Sec'y Resp. at 14. However, the Secretary's litigating position is only entitled to *Chevron* deference if his trial strategy is based on a reasonable interpretation and application of the subject statutory provisions.[10] In this matter, an analysis is required to determine whether deference is owed to the Secretary's proffered interpretation with respect to his comparison of the degree of gravity required for a violation that is only S&S in nature and a violation that is properly designated as both S&S and flagrant. In determining whether the Secretary's statutory interpretation is reasonable, it is essential to distinguish the terms 'proximate cause,' 'reasonably be expected to cause,' and 'serious bodily injury' as they relate to flagrant violations, from the terms 'contributing cause,' 'reasonable likelihood,' and 'injury of a reasonably serious nature,' that are hallmarks of an S&S designation.

3. Disposition

a. Proximate Cause vs. Contributing Cause

In addressing the meaning of proximate cause in section 110(b)(2), it is necessary to differentiate a proximate cause from a contributing cause. A flagrant designation requires the subject violation to be the substantial and proximate cause of a death or serious bodily injury that has occurred, or could be reasonably expected to occur. A proximate cause is "a cause that directly produces an event and without which the event would not have occurred." *Black's Law Dictionary* 213 (7th ed. 1999). Synonyms include "direct cause," "primary cause" and "legal

[10] The Secretary's reliance on *Excel* and *Simola* for the proposition that the Secretary's litigation position is entitled to *Chevron* deference is misplaced. *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 543 (Mar. 2012). In both *Excel* and *Simola*, the Secretary's legislative stance was adopted on appeal because it was based on his reasonable interpretation of statutory provisions that was consistent with the legislative history and goals of the Mine Act. In *Excel*, the Court found that the Secretary's interpretation of the appropriate methodology for calculating average dust concentrations was reasonable in view of the text of the relevant provision, the role of the provision in the overall enforcement of the Act, and the "longstanding duration" of the interpretation. 334 F.3d at 7-11. Similarly, in *Simola*, the Commission concluded that the Secretary's proffered interpretation with respect to the applicability of the personal liability provisions of Section 110(c) of the Act to agents of limited liability corporations was "consistent with the text of section 110(c)" and "fully consistent with the legislative history." 34 FMSHRC at 550.

cause." *Id.* The magnitude of the seriousness of a flagrant violation, given its close causal connection to death or serious bodily harm, or the reasonable expectation thereof, differentiates a flagrant violation from an S&S violation.

A contributing cause is "a factor that – though not the primary cause – plays a part in producing a result." *Id.* at 212. An S&S finding "requires that the *hazard contributed to* [by the violation] will result in an event in which there is an injury." *U.S. Steel Mining,* 6 FMSHRC at 1836. Thus, unlike a flagrant violation which is a primary cause of the potential injury itself, an S&S violation is a contributing cause to the existence of a hazard that may ultimately result in injury. This is a significant substantive distinction, rather than only a manifestation of the required burden of proof as asserted by the Secretary. Sec'y Resp. at 4. This substantive distinction, which the Secretary denies, renders the Secretary's interpretation of the gravity requirements in section 110(b)(2) unreasonable.

b. Reasonably Expected vs. Reasonable Likelihood

The term "reasonably," as in "reasonably expected" for a flagrant designation, or "reasonably likely" for an S&S designation, in context, means "rationally," "adequately," or "sufficiently." *Roget's 21st Century Thesaurus* (3rd ed. 2009), *available at* http://thesaurus.com. The comparison between the terms "expected" and "likely" is a matter of degree. Synonyms for "expected" include "certain," "about to happen," and "impending." *Id.* Synonyms for "likelihood" include "chance," "possibility," "prospect," "tendency," and "trend." *Id.* In other words, an expected event is much more certain to occur than a likely event. It is clear that the probability of injury is far greater when miners are exposed to flagrant violations as compared to violations that are only S&S, particularly in view of the proximate causal role played by such egregious violations. Thus, the Secretary's contention that there is no material difference between the "reasonably likely to result" standard under *Mathies* and the "reasonably could have been expected to cause" standard under section 110(b)(2) is unpersuasive. *See*, Sec'y Resp. at 3.

c. Bodily Injury vs. Injury of a Reasonably Serious Nature

Although the Secretary now argues that a potential injury associated with a flagrant violation need only result in lost workdays, it is significant that the Secretary initially believed that the potential injury must be evaluated as at least permanently disabling. *See* Sec'y Resp. at 3; *see also* n. 7, *supra.* Moreover, the degree of severity of injury contemplated by the statute must be viewed in the context of well-accepted principles of statutory construction. The meaning of doubtful words in an ambiguous statute may be determined by "the coupling of words denot[ing] that they should be understood in the same general sense." 2A *Sutherland Statutory Construction* § 47.16 (7th ed.). Associating the expectation of a "serious bodily injury" with the expectation of death evidences a Congressional intent that only grave injuries, or the reasonable expectation of such injuries, are contemplated by section 110(b)(2). When read in context, the statute clearly contemplates a grave injury resulting in either a significantly debilitating and/or a permanently disabling injury, as evidenced by a life altering or life threatening condition. Such injuries must be distinguished from acute and transitory injuries which resolve within a reasonable period of time.

Moreover, although there are material differences, it is significant that both a section 107(a) imminent danger order and a section 110(b)(2) flagrant violation require the same degree of injury, i.e., one that can be reasonably expected to cause death or serious bodily injury. *Wyoming Fuel Company*, 14 FMSHRC 1282, 1291 (Aug. 1992) (holding that an imminent danger order requires an expectation of "death or serious physical harm" before the hazardous condition can be eliminated). It is noteworthy that section 104(d)(1) provides that if an inspector finds that "conditions created by [a] violation do not cause imminent danger, the violation [could still be of] such nature as could significantly and substantially contribute to the cause or effect of a coal or other mine safety or health hazard." In promulgating section 110(b)(2), Congress required that a flagrant violation must pose the same risk of death or serious bodily injury as required for an imminent danger, rather than an injury of a reasonably serious nature as required for an S&S violation. Thus, Congress, in effect, recognized that flagrant violations are significantly more serious than most S&S violations. Consequently, the Secretary's interpretation that most actual or potential lost workday injuries satisfy the requisite severity of injury required by section 110(b)(2) is unreasonable.

It is noteworthy that imminent danger orders and flagrant violations do not conflict with, nor are they substitutes for, each other. While both require remedial urgency, an imminent danger requires a miner's actual exposure to the danger posed by the hazardous condition. Moreover, unlike a flagrant violation, an imminent danger order may be issued regardless of the obviousness of the hazard, and without regard to whether the hazard is attributable to the negligence of the mine operator. In addition, an imminent danger order may be issued even if the hazardous condition does not constitute a violation of a safety standard. In fact, the plain language of section 107(a) states that imminent danger orders can be issued in conjunction with citations seeking a penalty under the provisions of Section 110.[11]

[11] Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine
>
> . . . the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. *The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.*

30 U.S.C. 817(a) (emphasis added).

As a final note, limiting the flagrant provisions of section 110(b)(2) to only the most serious of violations, as intended by Congress, will not materially adversely affect deterrence. The most effective means of achieving compliance is the deterrent effect of 104(d)(1) withdrawal orders issued under the Mine Act that explicitly require stoppages of production until abatement is achieved. *See*, *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC __, slip op. at 13 (May 2014) (dissenting), *citing Amax Lead Co.*, 4 FMSHRC 975, 978-79 (June 1982) (holding that unwarrantable failure withdrawal sanctions are among the strongest compliance incentives provided by the Act's enforcement scheme). A significant loss of production is a far greater economic loss, particularly for moderate and large operators, than civil penalties proposed under the Act. Although the deterrent effect of civil penalties must not be trivialized, the more important role of a flagrant violation charge is that it hopefully will shock the conscience of, if not disgrace, a recalcitrant mine operator. Such designations may also expose operators to greater civil liabilities for the death or serious injuries that such violations may cause.

ORDER

In view of the above, **IT IS ORDERED** that, in order for the Secretary to establish that the cited condition in Order No. 8520664 constitutes a repeated flagrant violation under section 110(b)(2), the Secretary must bear the burden of demonstrating the following criteria:

(1) A repeated flagrant violation is a flagrant violation[12] that is demonstrated by either

   (a) a repeated failure to eliminate the violation properly designated as flagrant, or

   (b) a relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.[13]

(2) A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.

(3) A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.

[12] A condition designated as a repeated flagrant violation may also be attributable to reckless conduct. Such violations may warrant higher civil penalties under section 110(b)(2).

[13] This criterion adopts the Secretary's belief that a previous violation relied upon as a predicate must "demonstrate the threshold gravity and negligence required by section 110(b)(2)." *See* page 8, *supra, citing* Sec'y Resp. at 11.

(a) A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.

(b) A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.

(c) Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

The Commission's rules authorize the Judge to require parties to submit pre-hearing statements that will avoid unnecessary proof, advance rulings on the admissibility of evidence, and aid in the expedition of the hearing or the disposition of the case. *See* 29 C.F.R. §§ 2700.53(a)(2), (a)(6) and (b). Accordingly, **IT IS ORDERED** that the Secretary provide, **in writing, within 21 days of the date of this Order**, a statement regarding whether or not the conditions cited in Order No. 8520664, as well as the conditions in any predicate citations the Secretary relies on to establish the subject repeated flagrant violation, satisfy each of the above enumerated evidentiary criteria.[14]

With regard to elevating the cited condition to flagrant, the Secretary should state why the subject condition and its predicate conditions are so conspicuously bad and hazardous that they cannot reasonably escape notice. In this regard, the Secretary's position that the subject conditions could be reasonably expected to substantially and proximately cause death or serious bodily injury should be supported by identification of sources of ignition,[15] if any, that are located in proximity to the cited accumulations. The Secretary should also identify any other aggravating factors deemed relevant.

In specifically describing the aggravating factors relied upon, the Secretary should be mindful of MSHA's Program Policy Manual concerning enforcement of section 75.400, which states, in pertinent part:

> Accumulations of coal dust, loose coal, or the combination of the two offer serious fire and explosion hazards and must be removed from the mine if, in the judgment of the inspector, they would lead to an intensification or spreading of a fire or an explosion. In evaluating whether the coal dust and loose coal would lead to an

[14] The failure to timely provide the requested detailed pre-hearing statement may result in deletion of the repeated flagrant designation.

[15] The terms "sources of ignition" and "potential sources of ignition" are not synonymous. It is not uncommon for coal dust to accumulate on the mine floor along conveyors and in proximity to belt rollers. I assume that the Secretary is not arguing that violations of section 75.400 based on accumulations in proximity to, or that are touching, properly functioning rollers constitute *per se* flagrant violations.

> intensification or spreading of a fire or an explosion, *the inspector should consider all the facts concerning the deposit. For example, float coal dust, loose coal and/or coal dust deposited near working faces and in active haulage entries, where sources of ignition are likely to be, are more hazardous than similar deposits in back entries. . . .*
>
> In citing a violation, the inspector should describe fully the conditions and practices, such as the location, dimensions, etc. Imminent danger conditions normally can be considered to exist when *accumulations of coal dust*, float coal dust, loose coal, and other combustible materials are *exposed to probable explosion and fire ignition sources, and the conditions observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous conditions are eliminated.* There may be times when the inspector's interpretation of what is an accumulation of float coal dust, loose coal and coal dust and/or other combustible materials will differ with the opinion of others. However, the inspector should base his decision upon the facts surrounding each occurrence, and document such facts as the dimensions, type, specific location, and all other related factors. The inspector's decision as to what is an accumulation must be an objective one based on the facts or circumstances surrounding each occurrence.

V MSHA Program Policy Manual, Sec. 75.400, at 46-47 (Feb. 2003) (updated Feb. 2014) (emphasis added).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 2014

LESLIE A. PRIDE	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2010-318-D
v.	:	MSHA Case No. MADI CD 2009-11
	:	
HIGHLAND MINING COMPANY, L.L.C.	:	
Respondent	:	
	:	Mine: Highland 9 Mine
	:	Mine ID: 15-02709

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Gill

This case is before me upon a complaint of discrimination, brought under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Act"). Discrimination proceedings are governed by procedural rules found at 29 C.F.R. Part 2700, Subpart E (Complaints of Discharge, Discrimination or Interference). The complainant, Leslie A. Pride ("Pride"), filed an appeal to this court on December 3, 2009. The operator, Highland Mining Company, L.L.C. ("Highland"), filed a motion for summary decision on June 29, 2011. After reviewing the pleadings and the record, I find that Highland is not entitled to judgment as a matter of law and deny Highland's motion.

Facts

Pride began working for Highland on February 23, 2006. *Pride V.S.* ¶ 1. Pride injured his back while attempting to lift a 70-pound tank of acetylene during his work at Highland in August, and again in May, 2006. *Id.* at 2. After each incident, Pride requested that Highland write an accident report, and Highland refused on the grounds that the injury was due to a pre-existing condition and thus was not work-related. *Id.*

Following an examination in October, 2006, Pride's physician determined that his injury was work-related, and that he should not continue working. *Exhibit A*. Pride ceased working in October, 2006. *Id.* at 5. Highland offered Pride payment for sickness and accident benefits beginning in October 2006, with the stipulation that he would have to pay those benefits back

should he obtain worker's compensation benefits. *Id*. at 11. On October 19, 2007, Highland notified Pride of his suspension with the intent to discharge. *Exhibit D*. [1]

On April 14, 2009, MSHA contacted Pride due to ongoing investigations about Highland's repeated failure to issue safety reports, and encouraged him to file a discrimination complaint. *Pride V.S.* ¶ 9. Following the investigation, MSHA cited Highland for repeated violations of Title 30 Code of Regulations for failure to issue safety reports. *Exhibit D*.

Because he does not have an injury report on file, Pride has been denied worker's compensation benefits. *Pride V.S.* ¶ 7. Pride has also experienced delays in receiving UMWA pension, health card, and social security benefits. *Id*. at 8.

Discussion of Relevant Law

When considering a motion for summary decision, the standard is set out in Commission Procedural Rule 67, which states that a motion for summary decision shall be granted only if, on the basis of the entire record, there is no genuine issue of material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). The Commission "has long recognized that '[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary decision is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

[1] In 2007, Pride was charged with, and ultimately convicted for, trafficking over five pounds of marijuana. Pride objects to and contests the admission of any information related to such charges on the grounds that it is irrelevant to his discrimination claim. Commission rule § 2700.63 states that "relevant evidence… that is not unduly repetitious or cumulative is admissible." *See also* 5 U.S.C. 556 (exclusion of irrelevant, immaterial, or unduly repetitious evidence). I conclude that the evidence concerning Pride's marijuana charge is irrelevant for the purposes of determining whether his discrimination claim survives summary decision. Such evidence may be relevant at a hearing on the merits.

To establish a *prima facie* case of discrimination under Section 105(c) (1)[2] of the Act, Pride bears the burden of establishing that he engaged in protected activity and that the adverse action complained of was motivated by that activity. *Sec'y of Labor Ex Rel. Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (Apr.1981) (quoting *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981)). A *prima facie* case thus requires evidence sufficient to support a conclusion that (1) the individual engaged in activity protected under the Act, (2) the individual suffered adverse action, and (3) the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2786; *Robinette*, 3 FMSHRC at 817.

The burden of proof for a prima facie case "is lower than the ultimate burden of persuasion." *Turner v. Nat'l Cement of CA*, 33 FMSHRC 1059, 1065 (May 2011). Factors considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Sec'y of Labor on behalf of Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011). The *prima facie* case may be rebutted by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818, n. 20.

Analysis

Pride claims that the discrimination occurred when Highland refused to file the injury reports in violation of Title 30 of the Code of Federal Regulations. He argues that this resulted in an unjust denial of his worker's compensation benefits.

Highland argues that Pride's claim should be dismissed as a matter of law for four reasons: that Pride filed his discrimination complaint in an untimely manner; that he did not

[2] Section 105(c) (1) of the Act, 30 U.S.C. § 815(c) (1) states in relevant part:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

engage in any protected activity; that he did not suffer an adverse employment action; and that his complaint does not seek a remedy available to him under 105(c).

The dispositive questions are whether, viewing all of the evidence in the light most favorable to Pride, there are genuine issues of material fact, and whether Highland is entitled to judgment as a matter of law. For reasons outlined below, I hold both that there are genuine issues of material fact, and that Highland is not entitled to judgment as a matter of law.

I. Untimeliness

Highland argues that because Pride filed his request approximately two and a half years after the statutory time period had elapsed, and nearly five years after the alleged discrimination occurred, his complaint should be dismissed for untimeliness.

Section 105(c)(2) of the Act states, "any miner… who believes that he has been… discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The Commission has held that this 60-day time limit may be extended given a showing of "justifiable circumstances." *Herman v. IMCO Services*, 4 FMSHRC 2135, 2137 (Dec. 1982); *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984). There is no bright-line standard for determining whether justifiable circumstances exist. Circumstances that could establish justifiable circumstances include the miner bringing the complaint to the attention of another agency or to his employer within the 60-day period, or the miner failing to meet the time limit because he is misled about, misunderstands, or is ignorant of his rights. *Hollis* at 24.

Pride does not contend that there were justifiable circumstances that would excuse his delay in filing. However, even if there are no such circumstances, Highland is not entitled to judgment as a matter of law for untimeliness because it has not provided evidence that it has suffered material legal prejudice due to Pride's delay in filing his discrimination complaint.

A complaint may be dismissed, even if justifiable circumstances are shown, where the mine operator can show prejudice such as loss of critical evidence or unavailability of a witness. *Fulmer v. Mettiki Coal Corp.*, 30 FMSHRC 523, 525 (June 2008) (ALJ). The Commission has held that evidence of prejudice is a primary consideration in determining whether to grant an extension. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1387 (Dec. 1999). The Commission has likewise held that, "absent a showing of material legal prejudice," a complaint should not be dismissed for untimeliness. *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (Nov. 1994); *see also Sec'y of Labor on behalf of Hale v. 4-A Coal Company, Inc.*, 8 FMSHRC 905, 909 (June 1986) (prejudice is the "requisite foundation" for a dismissal based on untimeliness); *Sec'y of Labor v. Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981) ("basic principle of administrative law that substantive agency

proceeding, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice").

Here, Highland has failed to show prejudice. The operator has not shown a loss of critical evidence, nor has it shown the unavailability of any key witnesses. Highland argues that prejudice is inherent in a delay of over 2 years, and that prejudice could be "reasonably inferred" from the extensive delays in prosecuting the case. *Sec'y of Labor v. Curtis Crick*, 15 FMSHRC 735 (Apr. 1993) (ALJ). However, the principle in *Crick* is not applicable in this case. For one, Pride has filed a pro se complaint. Additionally, and more importantly, *Crick* does not involve a discrimination complaint, but rather concerned a civil penalty involving equipment defects. For these reasons, I find the principle in *Fulmer* – that while memories may have faded, Denison must show "concrete prejudice attributable to delays" – controlling in this case. 30 FMSHRC at 530. Thus, Pride's complaint should not be dismissed for untimeliness.

II. Protected Activity

As outlined above, a *prima facie* case requires that Pride show he engaged in an activity protected by the Act. Section 105(c) (1) enumerates five rights protected under the Act: (i) filing a complaint related to the act, including a complaint notifying the operator of an alleged danger or safety or health violation; (ii) being subject to medical evaluations and potential transfer under standards published pursuant to Section 101; (iii) instituting or causing to be instituted any proceeding related to the Act; (iv) testifying in any proceeding related to the Act; and (v) exercising any statutory right afforded by the Act.

Pride does not allege that he engaged in any of the enumerated activities listed above. Rather, Pride argues that he suffered discrimination because he was refused injury reports from his accident.

In a case involving complaints about the issuance of an inaccurate report following a miner's accident, the evidence established that the complainant was seeking to establish his right to an additional ten percent increase in payments under his workman's compensation benefits, and that the inaccuracy of the report constrained him from doing so. *Mooney v. Sohio Western Mining Co.*, 4 FMSHRC 440, 444 (Mar. 1982) (ALJ). The judge held that if the complaints were "motivated by a sincere belief ... that such matters were related to safety and health conditions of the mine, it would constitute protected activity." *Id.* On review, the Commission upheld the decision of the ALJ, but specifically declined to "address whether the judge erred in determining that Mooney's complaints upon his return to work were not protected simply because of their monetary basis." *Mooney v. Sohio Western Mining Co.*, 6 FMSHRC 510 (Mar. 1984).

This case can be distinguished in several ways. First, the operator in *Mooney* issued an inaccurate injury report, whereas here Highland failed to issue two injury reports. A failure to issue a report has a much stronger bearing on the health and safety of the mine than a complaint

that is largely accurate with regard to health and safety conditions. Additionally, in its investigation of Highland's mine, MSHA noted 13 prior instances of Highland failing to report on-the-job injuries, which support a reasonable inference that a genuine health and safety issue exists there. *Exhibit D*. Finally, the decision in *Mooney* was written after a full hearing, and was based on a credibility judgment with regard to the complainant's motive. Such a determination would be inappropriate here, at the summary decision stage. My role in the summary decision phase is to determine whether a factual dispute exists, not to resolve it. That determination is reserved for hearing, where the parties can present their evidence, and I can the make the credibility determinations required for a factual determination of these issues.

A reasonable fact-finder could find that Pride was motivated, in whole or in part, by a concern for health and safety. However, assuming *arguendo* that Pride was solely motivated by monetary concerns, in light of the fact that Highland outright refused to issue an injury report at all, and in light of the repeated instances of Title 30 violations, Pride's activity could be protected even if it was solely motivated by pecuniary concerns. The complainant's motive is relevant, if not necessarily controlling, for the purposes of determining whether he has made a *prima facie* case of discrimination. Pride's motive must at least be considered before I can determine whether his activity is considered protected activity. Thus, based on the available evidence, I cannot make a conclusive determination with regard to whether Pride engaged in protected activity.

III. Adverse Action

Highland contends that a refusal to issue safety reports does not constitute adverse action as understood under Section 105(c) (1) of the Act. Adverse action is defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010). However, the Commission has also recognized that while "discrimination may manifest itself in subtle or indirect forms of adverse action," nevertheless, "an adverse action 'does not mean any action which an employee does not like.'" *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984) (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981). The Commission has held that the test articulated by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006), should be applied in Mine Act cases to ascertain whether adverse action has occurred. *Sec'y of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012). Under the *Burlington* standard, adverse action consists of action that would have been "materially adverse to a reasonable employee." *Id.* This means "that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.*

Here, Pride explicitly states in his complaint that he was not fired, suspended, or laid off as a result of his request for an accident report. *Exhibit B*. Indeed, Pride actually argues that he

should have been laid off from employment per Highland's company policy of automatic termination for employees that cannot return to work after 52 weeks of sick leave. *Pride V.S.*, 3. Instead, Pride asserts that the adverse action taken against him by Highland consisted of a refusal to issue accident reports.

On the basis of the record, viewing the evidence in the light most favorable to the complainant, I conclude that Highland's refusal to issue a safety complaint constitutes adverse action. Highland's actions go beyond mere action that an employee does not like. Rather, Pride has presented evidence that Highland has engaged in a pattern of denying injury reports to miners in violation of Title 30. *Exhibit D*. The legislative history of the Mine Act, in relevant part, states:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977).

I conclude that a refusal to issue injury reports falls under the penumbra of the "more subtle forms of interference." One of the major purposes of the discrimination protections contained in the Mine Act is to encourage miners to take an active role in enforcement of the Act. "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." *Id.* Taking an active role in enforcement certainly includes requesting injury reports, as the judge in *Mooney* admits. 4 FMSHRC at 444. Repeated refusal to issue injury reports interferes with this right, and discourages miners from requesting those reports in the future.

Additionally, Pride seeks unemployment, social security, and medical card benefits, which he cannot obtain without an injury report on file. If true, this suggests that the action taken has grave impacts on the quality of Pride's life. Thus, although Highland's actions do not fall under the umbrella of common forms of discrimination, they fall within the penumbra of the "more subtle forms of discrimination," because a reasonable finder of fact could determine that Highland is effectively using its denial to issue an injury report as a tool to inflict harm upon Pride.

In light of the purpose of the Act, the negative effects of the action on Pride, and the potential effect it could have on future injury reports by other miners, I conclude that Highland's actions constituted adverse action.

IV. Causal Nexus

In addition to establishing protected activity and adverse action, a *prima facie* case requires evidence that the adverse action was motivated, in whole or in part, by the protected activity.

The sufficiency of the motivation element of its *prima facie* case depends on inferences that can be reasonably drawn from the record. The Commission has frequently stressed the importance of inferential evidence when making out a *prima facie* case, because it is unlikely that there will be direct evidence of discrimination when it has occurred: "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *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).

The court in *Chacon* identified several characteristic marks of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complaint. *Id.* at 2510. Additionally, with regard to motivation, "circumstantial evidence… and reasonable inferences drawn thereof may be used to sustain a prima facie case." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510). It would therefore be inappropriate to grant summary decision, where multiple mutually incompatible interpretations could reasonably be drawn from agreed-upon facts in a case. *Empire Electronics Co v. U.S.*, 311 F.2d 175, 180 (2d. Cir. 1962); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4 (Jan. 2007). "When the inferences which the parties seek to have drawn deal with questions of motive," the issue of multiple possible inferences becomes particularly important. *Empire Electronics*, 311 F.2d at 180.

Here, there is sufficient evidence for a reasonable fact-finder to conclude that Highland's refusal to issue the injury reports was motivated by Pride's request for issuance of the injury reports. A coworker has averred that Pride informed both his immediate supervisor and the safety director, James Allen, of his injury. *Roper Aff.* A reasonable fact-finder could infer that Highland was aware of Pride's request for the injury report. Additionally, the refusal followed almost immediately after the complaint, and Highland maintained its refusal to issue the injury report several times after the initial request, supporting an inference of coincidence in time between the protected activity and alleged discrimination. Finally, there is evidence that Highland has refused to issue injury reports to several miners over an extended period of time which allows for a potential inference of animus towards the requests for injury reports. On these facts, a reasonable fact-finder could infer that Highland's refusal to issue the injury reports was motivated, in whole or in part, by Pride's request for the injury report.

V. Remedy

Pride seeks specific performance as his remedy: he requests that the Commission order Highland to issue the injury report. Highland contends that this is not a remedy afforded to miners under section 105(c) of the Act, and that he is not seeking "tangible relief."

The Commission has held that, "so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies

appropriate to varied and diverse circumstances." *Sec'y of Labor v. Azko Nobel Salt Inc.*, 19 FMSHRC 1254 (July 1997) (quoting *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982) (vacation pay and hearing expenses in addition to back pay)) (restoration of prior position following a discriminatory demotion). This notion is supported by the text of Section 105(c)(2) which states, in relevant part:

> The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation *as the Commission deems appropriate*, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

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

Pride seeks neither reinstatement nor back pay. His request for relief is unique, and presents a case of first impression. I hold that, in line with the discretion afforded to judges under Section 105(c) (2) in providing appropriate remedies, the remedy Pride seeks is appropriate. While it may not fully "make him whole" with regard to the alleged discrimination, it would at least partially ameliorate the harm Pride has suffered. Were it not for the alleged discrimination, Pride readily admits that he would have been terminated after a maximum of 52 weeks of sick leave, but he would have benefitted from UMWA and medical benefits starting from that point onwards. Issuing the injury reports would allow Pride to enjoy future benefits, even if it does not make him whole with respect to past benefits. Thus, I conclude that Pride has not sought relief that necessitates dismissal as a matter of law.

Because Highland is not entitled to judgment as a matter of law, I will deny the motion, and the case will proceed to hearing.

WHEREFORE, the motion for summary decision is **DENIED**.

/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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June 24, 2014

AUSTIN POWDER COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 2012-116-R
v.	:	Citation No. 7040091;01/20/2012
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID: 36-00884 E24 Mine: River Hill Coal Company
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2012-172 A.C. No. 36-00884-281523 E24
v.	:	
AUSTIN POWDER COMPANY, Respondent	:	Mine: River Hill Coal Company

ORDER REQUIRING JOINT STIPULATIONS AND RESUBMISSION OF MOTIONS AND EXHIBITS FOR SUMMARY DECISION

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties submitted cross-motions for summary decision on May 16, 2014 and responses on June 11, 2014. In total, the motions consisted of over 1,180 pages, including exhibits and briefs, in addition to seven full length DVDs. This volume of information is generally not appropriate for motions for summary decision. In addition, the parties did not submit a set of stipulated facts. Instead, the Secretary filed a 55 page statement consisting of 181 facts.

In its response, the Respondent states that the Secretary ignored specific facts. The Secretary has alleged numerous facts such as a unity of corporate ownership between Austin Powder Company and each of its subsidiaries which Respondent has refuted. Thus, it appears that there are disagreements regarding facts that are material to a determination of whether the parent corporation and this particular subsidiary at issue here are a unitary operator; the very issue upon which the parties seek a summary decision.

In a conference call, the Respondent stated that it did not stipulate to the set of facts that the Secretary submitted, but that it would not object to the facts if the judge reviewed the underlying documents that the Secretary stated his facts were based on. This would effectively require me to carefully review each exhibit (1000+ pages and seven DVDs), make a determination as to what information in each is material to the issue at bar, cross-reference it with the Secretary's list of unstipulated facts and then cull through the Respondent's motion and brief to determine whether they are in agreement with those facts. Essentially, the parties seek the court to do their homework for them.

In addition, the parties submitted motions that contained information and arguments seeking a determination on whether all of Respondent's subsidiaries should be considered a unitary operator with Austin Powder Company.[1] I do not have broad and unfettered jurisdiction to consider or decide whether all of Austin Powder's subsidiaries share a similar parent-subsidiary relationship and whether they should be considered a unitary operator. These motions for summary decision arise as a result of a partial settlement of the underlying citation accepted by a former ALJ of this Commission.[2] Reserved was the issue of whether the parent company's size and points for past violations should be considered in proposing the appropriate penalty for the citation issued to the River Hill Coal Company. Only this particular issue, involving the River Hill Coal Company mine, is before me, and only information about this mine and its corresponding subsidiary, Austin Powder Northeast, LLC, and its relationship with Austin Powder Company will be considered in ruling on these cross-motions.

Respondent has focused on the manner in which MSHA made its determination under the *Berwind Natural Resources*[3] decision to determine whether this subsidiary should have an independent mine id number. It appears that Respondent would seek a determination whether MSHA acted arbitrarily or capriciously in making this determination although it correctly acknowledges that I do not have jurisdiction to make such a determination. This information is therefore irrelevant and will not be considered by me.[4]

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[1] There are several other dockets involving violations issued to other Austin Powder subsidiaries that are assigned to other ALJs and are not before me.

[2] Judge William Steele issued a Decision Approving Partial Settlement on May 2, 2013. He has since retired and this docket was reassigned to me on January 2, 2014.

[3] *See Berwind Natural Resources Corp, et al,* 21 FMSHRC 1284 (1999).

[4] The Secretary had filed a motion *in limine* to exclude evidence of MSHA's determination that Austin Powder and its subsidiaries constituted a unitary operator. The motion was denied by Judge Steele for several reasons, generally related to the fact that such evidence may be helpful to him at trial and there being no risk of prejudice in a bench hearing. I find that the consideration of this evidence on cross-motions for summary judgment relating solely to the issue of the appropriate penalty for this citation is overly burdensome, irrelevant, and as stated above, raises an issue beyond my jurisdiction herein.

WHEREFORE, it is **ORDERED** in accordance with the guidelines provided above that the parties shall cull out the relevant facts from each of the documents, DVDs etc. submitted with their respective motions and reduce them to a Joint Stipulation of Material Facts citing the specific supporting exhibit by number and page or DVD number. The joint stipulated facts shall pertain only to this mine and Austin Powder Northeast, LLC and its relationship to the parent company. It is **FURTHER ORDERED** that any information included in any motion not set forth in the stipulated facts is also referenced by exhibit number, page and line number. It is **FURTHER ORDERED** that the parties resubmit supporting documents, DVD's etc. that are relevant only to the relationship between this cited mine, Austin Powder Northeast, LLC, and Austin Powder Company. It is **FURTHER ORDERED** that each party shall resubmit its motion in support of summary decision based on the joint stipulated facts and that the motions shall be no more than 30 pages in length. The joint stipulated facts, motions and exhibits shall be submitted within 3 weeks (21 days) of this order. Extensions will not be granted absent good cause.

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

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June 26, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2013-47
Petitioner,	:	A.C. No. 11-03189-300361-01
	:	
v.	:	Docket No. LAKE 2013-123
	:	A.C. No. 11-03189-303475
M-CLASS MINING, LLC,	:	
Respondent.	:	Mine: MC #1 Mine

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

Before: Judge Miller

These cases are before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent, M-Class Mining, filed a Motion to Compel. Subsequently, the Secretary filed a Response to the Motion. For the reasons set forth below, I **DENY** Respondent's Motion.

The above captioned dockets include four 104(d)(2) orders issued to M-Class in June and August of 2012. Respondent represents, in its motion, that the parties reached a settlement of one of the four orders. Three orders remain in dispute.

In April of 2013 M-Class learned that MSHA was conducting a 110(c) special investigation into the facts and circumstances surrounding the three remaining orders. These cases were stayed until April 1, 2014 in hope that MSHA would be able to complete its investigation and the 110(c) matter could be consolidated with these cases. However, MSHA was unable to complete the investigation prior to the expiration of the stay, and these matters were set for hearing on July 23, 2014. On May 1, 2014 I issued an Order Denying Motion to Extend Stay explaining that MSHA had ample time to complete its investigation given that the citations and orders had been issued approximately two years prior. The Secretary, in his response to M-Class's Motion to Compel, indicates that the investigation remains "open" but does not explain the status of the case.

Prior to the stay of these matters, in December of 2012, M-Class filed discovery requests with MSHA seeking "all documents relating to the . . . special investigation of the incident(s) that is (are), in part, the subject of this matter including but not limited to, copies of . . . investigators' notes; photographs; transcripts of interviews; tapes of interviews, memoranda; reports and draft reports, notes, correspondence and records of any other MSHA personnel." Mot. Ex. 1 p. 7. The Secretary objected to the "vague, overly broad and burdensome" request, which "seeks to discover information protected by the confidential informant privilege, attorney-client privilege, attorney work product privilege and deliberative process privilege." Mot. Ex. 2

p. 11. The Secretary also responded that the special investigation being undertaken as a result of the violative conditions found by the MSHA Inspectors was currently open and active, and therefore, the documents related to the special investigation would not be produced. *Id*. at 11-12.

On June 3, 2014 M-Class filed the Motion to Compel in which it seeks to have the court compel the Secretary to "complete responses to *Respondent's First Set of Interrogatories and Requests for Production of Documents* and to authorize the deposition of Special Investigator Robert Bretzman." Mot. 1. M-Class argues that, while the Secretary asserts that various privileges apply to the documents sought, he does not specifically identify those documents and fails to identify the basis for non-disclosure of the documents in the special investigation file. *Id*. at 3. Further, Respondent argues that, because the Secretary has not produced a privilege log, it is "left to speculate what MSHA is withholding and cannot evaluate the appropriateness of MSHA's objects." *Id*. at 4. Respondent states that the Secretary's assertion of a blanket privilege is inappropriate and that it is well-settled law that certain documents associated with a Section 110(c) investigation are discoverable and a blanket refusal to produce any material from the file is inappropriate. In making its argument, Respondent relies in part on Judge Feldman's decision in *Root Neal & Company*, 21 FMSHRC 135 (July 1999) (ALJ) in which he directed the disclosure of certain documents after the 110(c) investigation had been completed and a decision made that an agent case would not be pursued by MSHA. I am not bound by the decisions of other administrative law judges but, nevertheless, I find that Judge Feldman's case is distinguishable from the instant matter. *Id*. at 838. Here, the investigation has not been completed and MSHA has not yet determined whether it will pursue charges.

On June 9, 2014 the Secretary filed a response to the motion. The Secretary asserts that the 110(c) "investigation is currently open, and until such time as the results are reviewed, finalized, and the decision is made whether to proceed with a case against Respondent's agents personally, the Secretary argues that the information contained in the Special Investigator's file is subject to privileges outlined in the Secretary's response" to Respondent's discovery request. Sec'y Response 2. The Secretary also argues that special investigations are conducted by MSHA in anticipation of litigation and, accordingly, a privilege attaches to the information sought by Respondent. *Id*. Further, because Respondent cannot demonstrate that it is unable to gather substantially the same information by other means without undue hardship, the Secretary need not turn over any of the documents sought. *Id*. at 2-3. The Secretary also notes that, because the investigation remains open, counsel for the Secretary is not in possession of any of the requested documents, and only has the documents pertaining to the orders at issue in LAKE 2013-47 and LAKE 2013-123, all of which have been provided to Respondent in preparation for the hearing into the orders in question. *Id*. at 3. Finally, the Secretary notes that, at present, the issue of "whether . . . agents of Respondent willfully disregarded the standards is not before this court[.]" *Id*. Rather, the only issues before the court are whether the alleged violations occurred and if the violations constituted an unwarrantable failure to comply. Based on the foregoing, the Secretary asserts that privilege protects the documents sought, and, because any deposition testimony from Investigator Bretzman would be related to protected documents, the deposition is unnecessary. *Id*. at 4.

Commission Procedural Rule 56 permits discovery by a number of methods, including production of documents and deposition. 29 C.F.R § 2700.56(a). The rule further provides that

parties "may obtain discovery of any *relevant, non-privileged matter* that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R § 2700.56(b) (emphasis added). In the event a party fails to respond to a discovery request, or objects to a request, the party seeking discovery may petition the court to compel the non-moving party to respond. 29 C.F.R § 2700.59.

Respondent, M-Class, has petitioned the court to compel the Secretary to produce (1) documents generated as part of MSHA's special investigation into potential 110(c) charges against an agent of Respondent, and (2) the special investigator for deposition. As the Secretary notes, the investigation into the 110(c) matter is ongoing, and is a separate matter from the violations that are at issue in this case. I agree with the Secretary that the documents contained in the special investigation file are subject to the work product, deliberate process and informant privileges. I also find that the deposition of the special investigator is not appropriate given that the information he has gathered is subject to the same privileges. Further, I find that, given the questioned relevance of the information sought as it relates to this proceeding, the fact that the investigation has not been completed, and the ability of the Respondent to obtain substantially the same information on its own accord, the Respondent's motion should be denied. Finally, I noted that, unlike a FOIA request, there is no requirement that a party responding to discovery prepare a privilege log and particularly prepare a privilege log for a file that is not a part of the cases at issue here.

It is important to distinguish this penalty proceeding against the mine operator from potential 110(c) proceedings against agents of the mine. While run-of-the-mill penalty proceedings against mine operators are initiated for, among others, the purpose of obtaining judgments against operators for violations of the Act, 110(c) proceedings are initiated for the purpose of obtaining judgments against individual agents of a mine. Unlike standard penalty proceedings, 110(c) charges are preceded by a special investigation conducted by a MSHA Special Investigator. Generally, the investigation is initiated following the issuance of citations or orders to the mine operator. The investigation commonly includes interviews of employees of the operator, some of whom may be confidential miner informants. Often, a representative of the mine is present for statements given to the investigator that are not subject to the informant's privilege, and most information obtained through these interviews is available to the mine operator. The investigation eventually results in a report and MSHA decision whether to file 110(c) charges. The special investigation into whether to charge agents is conducted for the sole purpose of determining whether the agents should be assessed a separate penalty and, therefore, is undertaken wholly in anticipation of that litigation. While the two proceedings are frequently consolidated and heard at the same time, MSHA is often slow in completing its investigation and, in order to keep the facts and evidence associated with the original violation from becoming stale, the underlying orders are sometimes heard on their own as any other penalty case. See e.g., *Capitol Cement Corp*., 21 FMSHRC 883 (Aug. 1999)

The instant proceedings involve petitions for penalty filed by the Secretary against Respondent for four alleged violations of mandatory standards. While the Secretary acknowledges that a 110(c) investigation has been undertaken, the investigation is not complete and MSHA has yet to reach a decision whether to charge individual agents of the mine. As a result, at present, no 110(c) proceeding exists and consolidation of the issues is impossible. In

the event the Secretary completes the special investigation and an agent case is filed with the Commission, it is possible that the 110(c) proceeding could be consolidated with the above captioned dockets and at that time, the special investigation file may be subject to discovery requests However, until that occurs, the scope of this proceeding is limited to operator liability for the four alleged violations contained in the above captioned dockets. Therefore, discovery of the special investigation file and deposing the special investigator has no place in this case. Instead this is a normal penalty case and, based on the Secretary's representation to the court, all documents relevant to the underlying orders have been produced by the Secretary.

The Secretary has asserted that multiple privileges attach to the requested materials. I agree. First, I find that the work product privilege attaches to the investigatory file documents sought by the Respondent. In *Asarco Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990) the Commission explained that the work product privilege is a "qualified immunity against discovery." A party may withhold otherwise discoverable materials if they are (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that party's representative. *Id*. at 2558; Fed R. Civ. P. 26(b)(3). Here, the materials sought by M-Class meet all three elements of the test.

The materials sought by M-Class are documents and tangible things prepared by a party to the case. The discovery request seeks, in pertinent part, "all documents relating to the . . . special investigation of the incident(s) that is (are), in part, the subject of this matter including but not limited to, copies of . . . investigators' notes; photographs; transcripts of interviews; tapes of interviews, memoranda; reports and draft reports, notes, correspondence and records of any other MSHA personnel[.]" Mot. Ex. 1 p. 7. The Commission has acknowledged that it is not required that the materials "be prepared by or for an attorney." *Asarco Inc.*,12 FMSHRC 2548, 2558 (Dec. 1990). Clearly the items sought are documents and/or tangible things produced by the special investigator or other representative of the Secretary. I find that the materials meet the first and third elements of the work product test.

The materials sought were prepared in anticipation of litigation. The phrase "prepared in anticipation of litigation" was defined in *Hickman v. Taylor*, 329 U.S. 495, 505(1947) where the court framed the issue as being "the basic question" of whether one party's counsel may "inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation." The Commission has stated that a "major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) . . . of the Mine Act." *Asarco Inc.*,12 FMSHRC 2548, 2559 (Dec. 1990). Accordingly, materials generated in the course of the special investigation are prepared in anticipation of litigation. Here, the materials contained in the special investigation file were generated, and are possibly still being generated, in anticipation of potential charges against individual agents of the mine. The Commission has recognized that, where "two cases are closely related," the "documents prepared for one case have the same protection in a second case." *Id*. While MSHA has yet to decide whether to pursue an agent case, given that any potential agent case will stem from the facts and circumstances surrounding the orders at issue in this proceeding, these cases are clearly "closely related." As a result, the protection afforded the materials in the special investigation file, which were generated in anticipation of a 110(c) proceeding, extends to the instant proceeding, thereby satisfying the second element of the work product test.

While the materials satisfy the Commission's three part test, they may be subject to discovery "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). I find that no such showing has been made. Respondent speculates that the information in the file would be beneficial "at trial for impeachment and refreshing recollection." Mot. 6. The Commission has acknowledged that "by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a 'substantial need' for purposes of the work-product privilege." *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997). Further, and as noted by the Secretary, the discoverable information contained in special investigation reports consists of interviews of employees of the mine operator; information which is certainly possible for the mine operator to obtain on its own accord. I find that Respondent has not demonstrated a substantial need for the material in the special investigation file, and the contents of the file are protected by the work product privilege. Moreover, I find that the special investigator's deposition testimony "would only be relevant insofar as being related to the documents" which I have already found to be subject to work product privilege. Accordingly, I refuse to compel the Secretary to produce Special Investigator Bretzman for deposition.

I note that, presumably, the special investigation file includes documents related to the underlying orders at issue in the above captioned cases. While that information may be in the special investigation file, the Secretary represents that all information pertaining to the orders at issue in these dockets has already been turned over to Respondent. As a result, I need not compel production of those documents, which are likely to be duplicative of those already in the possession of Respondent. To the extent that the Secretary has not turned over discoverable documents generated prior to the initiation of the 110(c) investigation, he is ordered to do so.

I also find that the informant privilege applies to the materials sought by M-Class. In *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1982) the Commission recognized that the informant privilege allows the Secretary to "withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA]." *See* 29 C.F.R. § 2700.61 (requiring that a judge "shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.") In *Asarco Inc.*, 14 FMSHRC 1323, 1329-1330 (Aug. 1992) the Commission explained that the privilege protects from disclosure material that "tend[s] to reveal an informant's identity." Here, the Secretary has asserted that the information contained in the special investigation file is protected by the informant's privilege. As previously stated, special investigation files routinely contain interviews and statements of miner informants. Undoubtedly, interviews and statements of miner informants, as well as reports mentioning the names of those informants, would reveal the informant's identity and are subject to the privilege.

The informant privilege may be defeated if a judge conducts a balancing test and determines that the "respondent's need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest," *Bright Coal Co.* at 2526. I find that Respondent has failed to make such a showing. Factors to be considered in conducting this

balancing test "include whether the Secretary is in sole control of the requested material or whether . . . [M-Class] ha[s] other avenues available from which to obtain the substantial equivalent of the requested information." *Id*. I have already explained that the discoverable information contained in special investigation files consists of interviews of employees of the mine operator; information which is certainly possible for the mine operator to obtain on its own accord. As a result, I find the balance does not tip in favor of disclosure of the information. Moreover, to reiterate, the Secretary represents that information in the 110(c) investigation file is not being relied upon to support the Secretary's penalty case against the mine operator. Respondent speculates that the information in the file would be beneficial "at trial for impeachment and refreshing recollection." Mot. 6. However, I find that the need to impeach or refresh the recollection of potential witnesses does not overcome the Secretary's need to maintain the privilege to protect the public interest and is not "essential to fair determination." *Bright Coal Co*. at 2526.

The 110(c) special investigation has not been completed, MSHA has not decided whether to charge an agent of the operator, and the issue of agent liability is not before me. Given the objective of 110(c) investigations and the government's interest in the investigation not being obstructed, it would be inappropriate for the court to compel the production of the investigation documents and deposition of the special investigator prior to the conclusion of the investigation. Moreover, it would be inappropriate for the court, prior to the completion of the investigation, to order an *in camera* review of the documents for the purpose or analyzing whether privilege attaches.

With the scope of this proceeding in mind, I find that, based on the information presently before me, it is unlikely that the documents and deposition testimony sought in Respondent's Motion to Compel are relevant to the above captioned proceeding, and that, even if they are relevant, as discussed above, they are subject to the work product and informant privileges. All information necessary for the successful defense of the orders at issue in this case has been provided by the Secretary and is otherwise available to the operator through the mine. Additionally, when a mine operator challenges a citation or order, I assume that they do so in good faith and that they have investigated the matter and are aware of all of their defenses to the citation or order. A special investigation into the actions of an agent of the operator will not alter or add to the reasons the mine has for contesting the underlying orders.

The threshold issue of any discovery dispute is whether or not the information sought is relevant. Rule 56 makes clear that, even in the event that evidence is not privileged, it must still be relevant in order to be discoverable. Here, the information sought by Respondent is related to the issue of agent liability. The issue of agent liability is not before me and, therefore, MSHA's investigatory documentation and the investigator's deposition testimony, which presumably would not include first-hand knowledge of the events in question, is unlikely to be relevant to the underlying orders at issue.

Finally, while I find no merit to the Secretary's argument that the file is not in the hands of the attorney for MSHA, I find, as discussed above, that the file is subject to privilege and is not required to be disclosed. The file contains a separate and distinct investigation, and that investigation occurred after the violations that are alleged in this case were issued. While the file

is in the hands of the Secretary, it does not, as noted, contain information that is being withheld, that would be relevant to the underlying citations at issue in this case. The mine operator can be prepared for hearing based upon the files in these cases and the information disclosed by the Secretary without the disclosure of any further material that was gathered solely for the purpose of determining whether or not a separate penalty should be assessed against an agent of the operator. However, that file and information contained therein may be required to be disclosed when and if an agent case is filed.

Respondent's Motion to Compel is **DENIED**.

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

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