April 2013

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ADMINISTRATIVE LAW JUDGE ORDERS

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Secretary of Labor, MSHA v. Hunt Martin Materials, LLC, Docket No. CENT 2012-78-M. (Judge Simonton, March 25, 2013)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2011-223-M
v.	:	A.C. No. 44-05172-243390
SHENANDOAH STONE, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 29, 2012, the Commission received from Shenandoah Stone, LLC ("Shenandoah") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On September 30, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Shenandoah's perceived failure to answer the Secretary's February 17, 2011 Petition for Assessment of Civil Penalty.

Shenandoah asserts that it timely answered the penalty petition on February 18, 2011. Shenandoah's counsel submits a certificate of service and a fax confirmation sheet to that effect. Commission records indicate that the Show Cause Order was returned to the sender due to an insufficient address. Shenandoah states that it does not have a record of receiving the Show Cause Order and that the order was sent to the physical mine address rather than its mailing address. Shenandoah further states that it received a delinquency notice on June 15, 2012, and promptly contacted the Commission. The Secretary does not oppose the request to reopen, and notes that she received Shenandoah's answer to the assessment petition.

Having reviewed Shenandoah's request and the Secretary's response, we conclude that this case should be reopened because the operator filed a timely response to the penalty petition and did not receive the Show Cause Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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April 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-738
v.	:	A.C. No. 15-19129-245843
FOOLS GOLD ENERGY CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 13, 2012, the Commission received from Fools Gold Energy Corporation ("Fools Gold") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On June 28, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Fools Gold's failure to answer the Secretary's April 29, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Fools Gold's answer within 30 days, so the default order became effective on July 29, 2011.

Fools Gold asserts that it contacted the Conference Litigation Representative ("CLR") soon after the petition was filed, but has not heard back from the CLR since. The Secretary does not oppose the request to reopen, but notes that the CLR placed several unreturned calls to Fools Gold on May 9 through May 23, 2011. The record shows that the Show Cause Order was delivered on June 30, 2011. The Secretary further notes that MSHA mailed a delinquency notice to Fools Gold's address of record on January 5, 2012, which was returned undelivered. MSHA then forwarded this delinquency to the U.S. Department of Treasury for collection on February 20, 2012.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

We note that the petition, delinquency notice, and Show Cause Order were mailed to the same address, which still appears to be Fools Gold's current address of record. It is the operator's responsibility to notify MSHA of any change to its address.

Having reviewed Fools Gold's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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April 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-251-M
v.	:	A.C. No. 40-00071-239925
MAYMEAD MATERIALS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 22, 2012, the Commission received from Maymead Materials, Inc. ("Maymead") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On May 6, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Maymead's perceived failure to answer the Secretary's February 10, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Maymead's answer within 30 days, so the default order became effective on June 6, 2011.

Maymead asserts that it timely answered the petition on March 9, 2011, and encloses a copy stamped by MSHA as received on March 16, 2011. Maymead further states that it sent MSHA another copy of its answer, as a response to the Show Cause Order. The Secretary does not oppose the request to reopen, and notes that the Conference Litigation Representative ("CLR") received Maymead's answer to the Show Cause Order, dated May 30, 2011. The CLR also notes that he filed a motion to approve settlement with the Commission on March 28, 2012.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Maymead's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2011-440
v.	:	A.C. No. 44-07207-254762
POWELL MOUNTAIN ENERGY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 6, 2012, the Commission received from Powell Mountain Energy, LLC ("Powell") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 12, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Powell's failure to answer the Secretary's July 5, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Powell's answer within 30 days, so the default order became effective on February 13, 2012.

Powell asserts that it timely contested the proposed assessment, but never received the penalty petition at its new address. Powell's counsel discovered this delinquency while negotiating other cases with MSHA. The Secretary does not oppose the request to reopen, but notes that the penalty petition and Show Cause Order were mailed to the same address of record and were not returned undelivered. The record shows that the Show Cause Order was delivered on January 17, 2012. The Secretary states that the operator's address of record was changed on July 12, 2011. The Secretary also notes that Powell requested to reopen another motion for this same reason, on January 31, 2012. Docket No. KENT 2011-686. The Secretary maintains that it is the operator's responsibility to keep an accurate address of record, to have a forwarding address set up with the post office, and to forward documents that it receives to its legal counsel if necessary.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Powell's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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. Powell shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 3, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2011-474-M
v.	:	A.C. No. 44-00167-253311
WOODWAY STONE COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 20, 2012, the Commission received from Woodway Stone Company ("Woodway") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On February 7, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Woodway's failure to answer the Secretary's June 23, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Woodway's answer within 30 days, so the default order became effective on March 9, 2012.

The record shows that the Show Cause Order was delivered on February 13, 2012. Woodway asserts that it had negotiated a settlement in this case. The Secretary does not oppose the request to reopen for the limited purpose of allowing the submission of her motion to approve settlement, filed April 2, 2012. The Secretary further states that the Conference Litigation Representative ("CLR") was unaware of the default order when she filed the settlement motion.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Woodway's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-1063-M
v.	:	A.C. No. 23-00542-258847 A431
ROBINSON CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 22, 2012, the Commission received from Robinson Construction ("Robinson") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 3, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Robinson's perceived failure to answer the Secretary of Labor's August 4, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Robinson's answer within 30 days, so the default order became effective on February 2, 2012.

Robinson asserts that it answered the penalty petition in 2011, but did not send it by certified mail. Robinson's safety director further states that he is unfamiliar with the contest process. The Secretary does not oppose the request to reopen but notes that the Department of Labor's Mine Safety and Health Administration ("MSHA") did not receive an answer to the penalty petition.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Robinson's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-297-M
v.	:	A.C. No. 21-02848-233783
STERZINGER CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 24, 2012, the Commission received from Sterzinger Construction ("Sterzinger") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On February 13, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Sterzinger's failure to answer the Secretary's November 7, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Sterzinger's answer within 30 days, so the default order became effective on March 15, 2012.

Sterzinger asserts that it timely answered the Show Cause Order on February 29, 2012 and mailed it to MSHA. The Secretary does not oppose the request to reopen for the limited purpose of allowing her submission of a motion to approve settlement, filed September 11, 2012. The Secretary states that she received Sterzinger's response to the Show Cause Order.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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).

Having reviewed Sterzinger's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2011-913-M
ADMINISTRATION (MSHA)	:	A.C. No. 47-02872-260930
	:	
v.	:	Docket No. LAKE 2011-914-M
	:	A.C. No. 47-02872-260930
MOUNTAIN STONE CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 3, 2012, the Commission received from Mountain Stone Corporation ("Mountain") a motion seeking to reopen two penalty assessment proceedings and relieve it from the default orders entered against it.[1]

On January 10, 2012, Chief Administrative Law Judge Lesnick issued two Orders to Show Cause which by their terms became Default Orders if the operator did not file an answer within 30 days. These Orders to Show Cause were issued in response to Mountain's failure to answer the Secretary of Labor's September 7, 2011 Petitions for Assessment of Civil Penalty. The Commission did not receive Mountain's answers within 30 days, so the default orders became effective on February 10, 2012.

Mountain asserts that it never received the penalty petitions or Show Cause Orders and that they were returned undelivered. Mountain states that it learned of this problem on September 26, 2012, after it was contacted by the Department of Treasury. Mountain further states that it has now changed its address of record to its president's home address. The Secretary does not oppose the requests to reopen and notes that Mountain had requested a change of address on September 26, 2012. The Secretary urges the operator to ensure that its address of record is accurate and future mailings can be received at that address.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2011-913-M and LAKE 2011-914-M, both captioned *Mountain Stone Corporation*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Having reviewed Mountain's request and the Secretary's response, we conclude that these cases should be reopened because the operator did not receive the Show Cause Orders. Accordingly, these cases 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-525-M
v.	:	A.C. No. 09-00705-252500 X33
HOWARD SHEPPARD, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 18, 2012, the Commission received from Howard Sheppard, Inc. ("Howard") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On February 13, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Howard's perceived failure to answer the Secretary of Labor's June 1, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Howard's answer within 30 days, so the default order became effective on March 15, 2012.

Howard asserts that it had filed an answer on June 13, 2011, and negotiated a settlement on February 14, 2012. Howard further states that it received a delinquency notice dated June 14, 2012. The Secretary does not oppose the request to reopen for the limited purpose of allowing the submission of his motion to approve settlement, filed May 1, 2012. The Secretary further states that the Conference and Litigation Representative ("CLR") had settled this case in good faith prior to receiving the Show Cause Order.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Howard's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-595-M
v.	:	A.C. No. 01-03273-255745
RARE RED ROCK	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 18, 2012, the Commission received from Rare Red Rock ("RRR") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 18, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to RRR's failure to answer the Secretary's July 6, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive RRR's answer within 30 days, so the default order became effective on February 21, 2012.

RRR asserts that its owner died on February 15, 2012, and its vice president was then assigned to handle MSHA correspondence. RRR further states that it hired an independent counsel to avoid further deficiencies. RRR enclosed a copy of a delinquency notice dated June 14, 2012, and a collection notice from the Department of Treasury dated September 10, 2012. The Secretary does not oppose the request to reopen. However, the Secretary notes her concern about seven other cases which had become delinquent in 2012. The Secretary urges the operator to contact MSHA to discuss these delinquencies.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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).

Having reviewed RRR's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-710-M
v.	:	A.C. No. 31-00014-261081
HARRISON CONSTRUCTION COMPANY, DIVISION OF APAC-ATLANTIC, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 24, 2012, the Commission received from Harrison Construction Company, Division of APAC-Atlantic, Inc. ("Harrison") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On April 19, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Harrison's failure to answer the Secretary of Labor's August 15, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Harrison's answer within 30 days, so the default order became effective on May 21, 2012.

Harrison's counsel asserts that she never received the petition or order in this case. Counsel further states that she contacted the Department of Labor's Mine Safety and Health Administration ("MSHA") as soon as she received the delinquency notice dated July 5, 2012. The Secretary does not oppose the request to reopen but notes that the penalty petition, the Show Cause Order, and the delinquency notice were mailed to the operator's address of record. The Secretary further states that the operator should contact counsel upon receiving MSHA correspondence in order to avoid similar problems in the future.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Harrison's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-347-M
v.	:	A.C. No. 02-00024-272861 1PL
KVAERNER INDUSTRIAL CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 6, 2012, the Commission received from Kvaerner Industrial Construction, Inc. ("Kvaerner") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default orders entered against it.

On August 20 and 23, 2012, Chief Administrative Law Judge Lesnick issued two identical Orders to Show Cause, addressed to Kvaerner and its counsel, which by their terms became Default Orders if the operator did not file an answer within 30 days. These Orders to Show Cause were issued in response to Kvaerner's failure to answer the Secretary's January 23, 2012 Petition for Assessment of Civil Penalty.

Kvaerner asserts that it timely answered the Show Cause Orders on August 31, 2012. The record indicates that the Commission received Kvaerner's response on September 4, 2012. The Secretary of Labor does not oppose the request to reopen, and notes that MSHA received Kvaerner's response to the Show Cause Orders.

Having reviewed Kvaerner's request and the Secretary's response, we conclude that these cases should be reopened because the operator filed a timely response to the Show Cause Orders. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-34
v.	:	A.C. No. 46-09138-195569
EAGLE CREEK MINING, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 20, 2012, the Commission received from Eagle Creek Mining, LLC ("Eagle Creek") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On December 21, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Eagle Creek's perceived failure to answer the Secretary's November 3, 2010 Petition for Assessment of Civil Penalty.

Eagle Creek asserts that it timely answered the penalty petition on December 2, 2010. Eagle Creek's counsel submits a copy of the answer date-stamped by the Commission as received on December 7, 2010. Eagle Creek further states that it was unaware that its answer was not docketed until it received a letter from the Department of Treasury on June 12, 2012. The Secretary does not oppose the request to reopen, but notes that she did not receive Eagle Creek's answer to the penalty petition.

Having reviewed Eagle Creek's request and the Secretary's response, we conclude that this case should be reopened because the operator filed a timely response to the penalty petition. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-1228
v.	:	A.C. No. 46-01368-248495
APOGEE COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 13, 2012, the Commission received from Apogee Coal Company, LLC ("Apogee") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On June 27, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Apogee's perceived failure to answer the Secretary's May 2, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Apogee's answer within 30 days, so the default order became effective on July 30, 2012.

Apogee asserts that it filed a timely answer to the penalty petition on May 18, 2011. Apogee states that it did not receive the Show Cause Order until November 28, 2012, after contacting MSHA regarding a delinquency notice on November 13, 2012. The record indicates that the Show Cause Order was delivered on July 6, 2012. The Secretary does not oppose the request to reopen and notes that MSHA received the operator's answer to the penalty petition.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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).

Having reviewed Apogee's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2011-177-M
v.	:	A.C. No. 37-00064-251637
CUMBERLAND QUARRY CORP.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 26, 2012, the Commission received from Cumberland Quarry Corp. ("Cumberland") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On August 30, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Cumberland's perceived failure to answer the Secretary of Labor's June 1, 2011 Petition for Assessment of Civil Penalty.

Cumberland asserts that it timely answered the penalty petition on June 20, 2011, but the answer was only sent to the Department of Labor's Mine Safety and Health Administration ("MSHA") and not the Commission. Cumberland's consultant discovered the delinquency on MSHA's Data Retrieval System, and immediately contacted MSHA on July 13, 2012. Cumberland further states that it did not receive the Show Cause Order. The record indicates that the Show Cause Order was returned to sender due to having no mail receptacle. The Secretary does not oppose the request to reopen, and notes that she received Cumberland's answer to the penalty petition. The Secretary also notes that a delinquency notice was mailed to the operator's address of record on June 15, 2012, but was returned undelivered due to having no mail receptacle. The Secretary urges the operator to ensure that its address of record is accurate and future mailings can be received at that address.

Having reviewed Cumberland's request and the Secretary's response, we conclude that this case should be reopened because the operator filed a timely response to the penalty petition and did not receive the Show Cause Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-749-M
v.	:	A.C. No. 35-03702-245915
ROCK N ROAD QUARRY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 29, 2012, the Commission received from Rock N Road Quarry ("Rock") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On May 2, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Rock's failure to answer the Secretary's April 29, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Rock's answer within 30 days, so the default order became effective on June 4, 2012.

Rock asserts that it either did not receive the Show Cause Order or filed it with something else not realizing what it was. The record indicates that the Show Cause Order was delivered on May 7, 2012. Rock encloses a copy of a delinquency notice dated November 13, 2012. The Secretary does not oppose the request to reopen.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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).

Having reviewed Rock's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2011-250-M
v.	:	A.C. No. 17-00319-259868
HARRY C. CROOKER & SONS, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 18, 2012, the Commission received from Harry C. Crooker & Sons, Inc. ("Crooker") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On March 15, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Crooker's failure to answer the Secretary of Labor's August 10, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Crooker's answer within 30 days, so the default order became effective on April 16, 2012.

Crooker asserts that it timely responded to the Show Cause Order on March 19, 2012. Crooker encloses a copy of the answer, which appears to have been mailed to St. Louis. On September 19, 2012, the Commission sent Crooker a letter asking it to explain what procedures it had implemented to prevent future defaults. In response, Crooker's safety director states that he is the only person working in the office, and that he will clearly identify due dates on correspondence from the Department of Labor's Mine Safety and Health Administration ("MSHA") in the future.

The Secretary does not oppose the request to reopen. The Secretary notes, however, that the operator's response to the Show Cause Order was not sent to the correct address. The Secretary urges the operator to ensure that it sends all future documents to the provided address,

and warns that she will not accept use of incorrect addresses as excusable error in future mailings.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Crooker's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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April 4, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2011-60-M
v.	:	A.C. No. 30-03254-238304
D.A.S. SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 22, 2012, the Commission received from D.A.S. Sand & Gravel ("DAS") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On January 5, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to DAS's perceived failure to answer the Secretary's January 6, 2011 Petition for Assessment of Civil Penalty.

DAS asserts that it never received the Show Cause Order because its owner was out of town in January 2012 and the post office returned the letter as undeliverable. DAS further states that it contacted MSHA after receiving a delinquency notice dated June 14, 2012, but received no response. DAS contacted the Commission after receiving a letter from the Department of Treasury, dated August 8, 2012. The Secretary of Labor does not oppose the request to reopen, and states that the Northeast District MSHA office received the operator's timely answer to the penalty petition on February 4, 2011.

Having reviewed DAS's request and the Secretary's response, we conclude that this case should be reopened because the operator filed a timely response to the penalty petition and did not receive the Show Cause Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 8, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-506-M
v.	:	A.C. No. 33-04479-185941-01 N508
DIGGER MCCRAY EXCAVATING, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 801 et seq. (2006) ("Mine Act"). On November 7, 2012, the Commission received from Digger McCray Excavating, LLC ("Digger") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On July 6, 2010, Chief Administrative Law Judge Lesnick issued an Order to Show Cause in response to Digger's perceived failure to answer the Secretary's July 27, 2009 Petition for Assessment of Civil Penalty. The order directed the operator to file an answer within 30 days. The Commission did not receive Digger's answer within 30 days, so an Order of Default was issued on February 2, 2011.

Digger asserts that the Show Cause Order was mailed to an old address, which has been inaccurate since 2007. Digger further states that it discovered the delinquency after it was contacted by a debt collection agency from the Department of Treasury. The Secretary does not oppose the request to reopen. The Secretary states that MSHA received a timely answer to the penalty petition dated August 25, 2009. The Secretary notes that it appears that a change of address was made with MSHA at some time, but the address was not changed on the Contractor ID Report. The Secretary urges the contractor to contact MSHA and update its address of record.

Having reviewed Digger's request and the Secretary's response, we conclude that this case should be reopened because the operator had served a timely answer on the Secretary and apparently did not receive the Show Cause Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Ruels, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 8, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-385-M
v.	:	A.C. No. 09-00111-247298 5BR
CVB INDUSTRIAL CONTRACTING, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 28, 2012, the Commission received from CVB Industrial Contracting, Inc. ("CVB") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On October 5, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to CVB's failure to answer the Secretary's April 21, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive CVB's answer within 30 days, so the default order became effective on November 7, 2011.

CVB asserts that "information concerning this citation and supporting documentation was sent to the wrong places to be reviewed." The Secretary does not oppose the request to reopen. The Secretary encloses a copy of CVB's timely response to the Show Cause Order, which was mistakenly mailed to MSHA, but not the Commission on October 18, 2011.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed CVB's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 8, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-824-M
v.	:	A.C. No. 31-02045-263365
HANSON AGGREGATES SOUTHEAST, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 17, 2012, the Commission received from Hanson Aggregates Southeast, LLC ("Hanson") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On April 19, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Hanson's failure to answer the Secretary's September 28, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Hanson's answer within 30 days, so the default order became effective on May 21, 2012.

Hanson asserts that the penalty petition and Order to Show Cause were mailed to the Rougemont Quarry, a small operation with very little staff. Hanson states that employees at the quarry did not understand that they had to forward the penalty petition to its regional corporate office and counsel. In addition, the record indicates that the Show Cause Order was returned to sender due to there being no mail receptacle.

Hanson's counsel was contacted by MSHA's Conference Litigation Representative ("CLR") on June 6, 2012, and only then received a copy of the penalty petition. The Secretary states that the page with counsel's name and address was not attached to the original contest package received by the CLR who prepared the penalty petition. On July 11, 2012, the CLR notified Hanson's counsel that the case was in default. The Secretary does not oppose the request to reopen, but notes that the operator should contact counsel upon receiving MSHA

correspondence in order to avoid similar problems in the future. The Secretary also urges the operator to ensure that its address of record is accurate and future mailings can be received at that address.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). 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 judge's order here has become a final decision of the Commission.

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, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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).

Having reviewed Hanson's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
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April 8, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-1404-M
v.	:	A.C. No. 10-02202-260530
DIAMOND CREEK MILL, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 30, 2013, the Commission received from Diamond Creek Mill, Inc. ("Diamond") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On June 25, 2012, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Diamond's failure to answer the Secretary's September 13, 2011 Petition for Assessment of Civil Penalty.

Diamond asserts that it never received the Show Cause Order because the zip code on the envelope appears to be incorrect. The Secretary of Labor does not oppose the request to reopen.

Having reviewed Diamond's request and the Secretary's response, we conclude that this case should be reopened because the operator did not receive the Show Cause Order. Accordingly, this case is 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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April 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of DUSTIN RODRIGUEZ	:	Docket No. WEST 2013-618-DM
v.	:	
C.R. MEYER AND SONS COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER DENYING MOTION FOR STAY

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 17, 2013, Administrative Law Judge William S. Steele issued a decision and order temporarily reinstating Dustin Rodriguez to employment with C.R. Meyer and Sons Company ("C.R. Meyer"), pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 35 FMSHRC __, slip op. at 25. On April 23, 2013, C.R. Meyer filed a petition for review of that decision and order with the Commission, accompanied by a motion to stay the judge's order reinstating the miner. On April 24, 2013, the Secretary of Labor filed a response in opposition to the motion for stay, and requested that the Commission deny the motion. For the reasons that follow, we deny the motion for stay.

I.

Factual and Procedural Background

The facts of this case are set forth in detail in the judge's April 17, 2013 decision and order. Slip op. at 5-18. On February 25, 2013, Mr. Rodriguez filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that C.R. Meyer's discharge of him on January 25, 2013, while he was working for it on its contract project at Molycorp Inc.'s Pass Mine and Mill in Mountain Pass, California, amounted to discrimination in violation of section 105(c) of the Mine Act. The Secretary filed an Application

for Temporary Reinstatement on March 25, 2013, requesting an order requiring the operator to temporarily reinstate Mr. Rodriguez to his former position of journeyman pipefitter.[1] C.R. Meyer requested a hearing, which was held on April 10, 2013.

Two days prior to the hearing, the Secretary filed a motion in limine, seeking an order from the judge limiting the evidence that the operator could present at the temporary reinstatement hearing, including evidence with respect to establishing that its obligation to reinstate Mr. Rodriguez pursuant to section 105(c)(2) was temporarily tolled in this instance due to economic reasons. At the hearing, the judge ruled that C.R. Meyer could not introduce any evidence on the issue of tolling of reinstatement, though he did permit a proffer by its counsel regarding that evidence. Slip op. at 4, 22-23; Tr. 9-10, 114-18.

The operator has limited its petition for review of the judge's reinstatement order to his finding on the issue of tolling the reinstatement obligation and the evidentiary ruling he made on the issue. The operator is not challenging the judge's conclusion that the Secretary established that Mr. Rodriguez's application for temporary reinstatement had not been frivolously brought.

II.

Disposition

In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay pending review of a temporary reinstatement decision or order must make an adequate showing with respect to the four factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) a likelihood that the moving party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. The court there also made clear that a stay constitutes "extraordinary relief." *Id.*; *see also W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). Accordingly, the Commission's temporary reinstatement procedural rule provides that the Commission will stay a judge's order temporarily reinstating a miner "only under extraordinary circumstances." 29 C.F.R. § 2700.45(f).

The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996). Where a probability of success on the merits is established, an inadequate showing with regard to the other three factors nevertheless still prevents the grant of a stay pending review. *Virginia Petroleum*, 259 F.2d at 926. Even assuming arguendo that the operator here has established a likelihood of such

[1] In an order issued April 19, 2013, the judge amended his decision to make the clerical correction of properly stating the date of the Secretary's application.

success, we find that it has failed to adequately satisfy the other factors and failed to make the required showing of "extraordinary circumstances."[2] Thus we deny its motion for stay.

A. Whether C.R. Meyer Will Suffer Irreparable Harm Should a Stay Not Issue

C.R. Meyer argues that it should not have to pay Mr. Rodriguez wages and benefits during its appeal of the judge's reinstatement order, given that there is allegedly no work available for him with the company. It further contends that it expects to ultimately prevail in the discrimination case, but will be irreparably harmed because it will not be able to recover the sums it paid to Mr. Rodriguez in the meantime under the reinstatement order. Mot. at 3. The Secretary responds that there is nothing preventing the operator from placing the miner in any position for which he is qualified, and thus benefitting from his work while he is temporarily reinstated. S. Resp. at 14-15.

"It is . . . well-settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Virginia Petroleum*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Moreover, like the proceeding before the judge, the review process is an expeditious one.[3] Consequently, we cannot agree there will be substantial harm to the operator in having to comply with the temporary reinstatement order in the meantime.

As for Meyer's second argument, it is one that, if accepted, would effectively nullify the temporary reinstatement provisions of the Mine Act. A reinstated miner might not ultimately succeed on the merits of his discrimination claim. However, there is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided. *See Sec'y of Labor on behalf of Bowling v. Perry Transport, Inc.*, 15 FMSHRC 196, 197-98 (Feb. 1993). In return, the operator would receive the services of the miner, should it want to make use of them.

Consequently, we disagree with the operator that not staying the temporary reinstatement order while we consider its appeal will lead to it suffering irreparable harm. The economic cost

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[2] Given our conclusions on the other three factors, there is no need to address at this time the fourth factor of the operator's likelihood of success on appeal before the Commission.

[3] As the Secretary acknowledges in his response to the stay (S. Resp. at 3-4), he has only until April 30, 2013, to respond to C.R. Meyer's petition for review. Commission Procedural Rule 45(f) provides that, upon receipt of the Secretary's response, the Commission will issue a decision affirming, reversing, or remanding the judge's reinstatement order within ten days in most instances. *See* 29 C.F.R. § 2700.45(f).

it bears will be relatively short-lived, and can be mitigated by making use of Mr. Rodriguez's services.

B. Whether Other Interested Parties Would be Adversely Affected by a Stay

In enacting the Mine Act, Congress stated the essential reasoning behind the temporary reinstatement remedy: "The Committee feels that this temporary reinstatement is 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. Conf. Rep. No. 95-461, at 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1315 (1978) ("*Legis. Hist.*"). There is nothing in the record in this case that leads us to believe that Mr. Rodriguez somehow falls outside the scope of Congressional concern about the need for immediate temporary relief for miners who may have been discharged for making safety complaints. Consequently, we conclude that Mr. Rodriguez would be adversely affected by the stay requested by C.R. Meyer.

C. Whether a Stay Would Serve the Public Interest

While a stay of the judge's temporary reinstatement here may serve the private interest of C.R. Meyer, we fail to see how it would serve the public interest, as set forth by Congress in the Mine Act's temporary reinstatement provisions. Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). The legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, *Legis. Hist*. at 624. Recognizing the important role that individual miners play in ensuring a safe and healthy working environment, Congress was also acutely aware that "mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity." S. Rep. No. 95-181, at 35, *Legis. Hist*. at 623. We thus conclude that the public interest clearly is better served by denying a stay of the temporary reinstatement order.

III.

Conclusion

For the foregoing reasons, we deny C.R. Meyer's motion for stay of temporary reinstatement pending appeal. The judge's order remains fully in effect, and, as stated by the judge, as of April 17, 2013, C.R. Meyer "is ORDERED to provide immediate reinstatement to Rodriguez, at the journeyman pipefitter's rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge." Slip op. at 25.

/s/ Mary Lu Jordan, Chairman
Mary Lu Jordan, Chairman

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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April 1, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2013-120-M
Petitioner,	:	A.C. No. 01-00052-306167
	:	
v.	:	
	:	
WADE SAND & GRAVEL CO., INC.,	:	
Respondent.	:	Mine: Wade Sand & Gravel Co., Inc.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION & ORDER GRANTING THE SECRETARY'S CROSS MOTION FOR SUMMARY DECISION

This case before me on a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On February 1, 2013 Respondent filed a Motion for Summary Decision (the "Motion") and Brief in Support of the motion ("Respondent's Brief"). On February 11, 2013 the Secretary filed a Motion for Extension of Time to File Opposition to Respondent's Motion, which was granted by the undersigned. On March 1, 2013 the Secretary filed a Cross Motion for Summary Decision and Opposition to Respondent's Motion for Summary Decision (the "Cross Motion") with accompanying brief. ("Secretary's Brief"). Finally, on March 11, 2013, Respondent filed an Opposition to the Secretary's Opposition to Respondent's Motion. ("Respondent's Opposition").

This case involves one 104(a) citation issued to Wade Sand & Gravel Co. ("Wade" or "Respondent") for an alleged violation of Section 56.14107(a) of the Secretary's regulations.[1]

[1] The regulation cited requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The citation described the alleged violative condition as follows:

> The side guard panel on the diesel-powered A/C welder, mounted on the Ford Diesel maintenance truck, was missing, exposing the engine cooling fan and other moving parts. The Truck is owned by Wade Sand and Gravel, and operated by contractor, EWE. Standard 56.14107a was cited 1 time in two years at mine 0100052 (1 to the operator, 0 to a contractor).

The inspector determined that an injury was unlikely to be sustained, but that if one were sustained it could reasonably be expected to be of a permanently disabling nature. He further determined that the alleged violation was not significant and substantial, that one employee was affected, and that the negligence was moderate.

The Secretary has proposed a civil penalty in the amount of $1,026.00. The parties have represented that Respondent does not contest the underlying violation or the citation as written, that no facts are in dispute, and that the only issue remaining in contest is the "operator's history of previous violations" criterion, which, pursuant to Section 110(i) of the Act, must be considered in assessing a civil penalty in this matter.

I. DISCUSSION

Commission Procedural Rule 67 sets forth the following grounds for granting summary decision:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67. The parties have agreed that there are no genuine issues as to any material fact and that the issue at hand can properly be decided based on the record before me. For the reasons that follow, Respondent's motion is **DENIED**, while the Secretary's cross motion is **GRANTED**.

The Mine Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(i). In order to carry out that duty, the Secretary promulgated Part 100, 30 C.F.R 100, which set up a point system and formula for proposing penalties for alleged violations of the Mine Act. The point system attempts to quantify the six civil penalty criteria set forth in Section 110(i) of the Act[2]. After a point total is arrived at, a civil penalty corresponding to that point total is proposed. At issue in this matter is the Secretary's calculation of points for the "history of previous violations" criterion. Specifically, the parties dispute whether the Secretary, in calculating the points for the history of violations for purposes of proposing a civil penalty, may rely upon not only those violations that occurred and have been paid or finally adjudicated in the

[2] The six civil penalty criteria set forth in Section 110(i) of the Act are as follows:

> [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).

15 months prior to the subject alleged violation, but also those violations that occurred outside of the 15 month window but became final orders during the 15 month window.

Respondent argues that the Secretary incorrectly calculated the penalty in this matter. Specifically, Respondent asserts that the Secretary, in proposing his penalty, incorrectly considered certain violations in calculating VPID and RPID points. Resp. Br. 2-3. Respondent argues that the Section 100.3(c) clearly and unambiguously requires that two criteria must be established before VPID points can be imposed: (1) "there must be at least ten prior violations which occur within fifteen months of the violation at issue" and (2) "at least ten of those prior violations must have been paid or adjudicated within this same fifteen-month period." Resp. Br. 3-4. Despite the clear meaning of the plain language, MSHA's application contradicts such. Resp. Br. 6. Wade asserts that "violation," as used in Section 100.3(c), is distinct from "final order" and that "[i]f MSHA meant for the regulation to count final orders in the preceding fifteen-month period, instead of the occurrence of violations, it should have stated so." Resp. Br. 6. Therefore, Respondent has requested that summary decision be entered in its favor and "modify the proposed penalty assessment" accordingly, which "will reduce the VPID points to 0 and the RPID points to 0[,]" thereby lowering the penalty amount assessed to reflect the lower number of penalty points." Resp. Br. 12.

The Secretary asserts that MSHA properly calculated the proposed penalty and that the penalty, as proposed, "is an appropriate penalty for the judge to assess in light of WSG's history of violations." Sec'y Br. 1. The Secretary argues that Section 100.3(c) is ambiguous in that it "does not specify the operative date that the agency will use when looking back over the preceding 15 months: the date the MSHA inspector observed and cited the operator's condition or practice as an alleged violation under the Act, or the date that MSHA's penalty assessment became a final order of the Commission." Sec'y Br. 7. Given this ambiguity, the Secretary asserts that the Commission must defer to his reasonable interpretation that "violation," as used in Section, 100.3(c), means not only those violations that have occurred and been accepted by the operator in the prior 15 month period, but also those violations "that have been converted from alleged violations to violations legally validated by a final order within the preceding 15 months, whether through the operator's decision not to contest, . . . a Commission-approved settlement agreement, . . . or the Commission's substantive adjudication." Sec'y Br. 7-8. The Secretary asserts that MSHA has relied upon this interpretation since the 2007 version of Section 100.3 went into effect, and that the preamble to the final rule, as well as the Program Policy Manual, bolster this interpretation. Sec'y Br. 8. The Secretary argues that such an interpretation is logical in that "it ensures that all violations validated by final Commission orders will count at some point in time toward an operator's history of violations. Sec'y Br. 9.

The Secretary argues that summary decision should enter in his favor "because MSHA's treatment of the history or violations criterion reflects the Secretary's statutory and regulatory interpretations, policy choices, and enforcement expertise – functions that Congress delegated to the Secretary under the Mine Act's split enforcement model." Sec'y Br. 2. Further, he asserts that "even if the Judge makes an independent, *de novo* finding with respect to the effect of the operator's violation history on the assessed penalty, the statutory and regulatory text, the legislative history, and persuasive policy arguments counsel in favor of considering the contested violations and assessing the civil penalty as proposed. Sec'y Br. 2.

The Commission has recognized the right of mine operators to petition for review of the Secretary's application of Part 100 as it relates to the calculation of civil penalties proposed pursuant the regulation. *Drummond Company, Inc.*, 14 FMSHRC 661 (May 1992). Here, Respondent alleges that the Secretary has departed from the plain and unambiguous meaning of Section 100.3(c), and, in doing so, has proposed an incorrect civil penalty. The Secretary disputes this allegation.

With regard to interpreting the language of a regulation, the Commission has stated the following:

> [T]he "language of a regulation … is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing C*onsumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference … is not in order if the rule's meaning is clear on its face." (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Dynamic Energy, Inc., 32 FMSHRC 1168, 1172 (Sept. 2010). The Commission has held that a regulation may be ambiguous when it is able to be understood by well-informed persons in two or more ways. *Island Creek Coal Co.*, 20 FMRSHC 14, 19 (Jan. 1998).

Section 100.3(c) states, in pertinent part, as follows:

> *(c) History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations. . . .

30 C.F.R. § 100.3(c) (Tables omitted). I find that the language of the cited section is ambiguous. The 2007 rule added the following pertinent language to the second sentence of Section 100.3(c): "or have become final orders of the Commission[.]" In doing so, and as appropriately noted by the Secretary, "Section 100.3[c]'s first two sentences permit[ted] two interpretations: (1) that assessed violations that have become final orders of the Commission will be included in determining an operator's history as of the date they become final; or (2) that such violations are only counted if they occurred, were cited as violations, and became final in the preceding 15-month period." Sec'y Br. 6. The Secretary correctly notes that these conflicting interpretations are due to the fact that the regulation does not spell out what date MSHA should use when evaluating a mine's 15 month history. Given this lack of information, and resulting ambiguity, I must look to see whether the Secretary's proposed interpretation of the standard is "reasonable."

The Commission has held that "the Secretary's interpretation of a regulation is reasonable where it is 'logically consistent with the language of the regulation and … serves a permissible regulatory function.'" *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted)). The Secretary asserts that "violation," as used in Section, 100.3(c), means not only those violations that have occurred and been accepted by the operator in the prior 15 month period, but also those violations "that have been converted from alleged violations to violations legally validated by a final order within the preceding 15 months, whether through the operator's decision not contest, . . . a Commission-approved settlement agreement, . . . or the Commission's substantive adjudication." Sec'y Br. 7-8. I have already found that this proposed interpretation could reasonably be gleaned from the language of Section 100.3(c). While Respondent asserts that this interpretation ignores regulatory history of this particular provision, the Secretary asserts that since the promulgation of the 2007 rule, MSHA has consistently relied upon the interpretation put forth by the Secretary. The language of the preamble to the final rule is especially telling. The preamble states as follows:

> Several commenters expressed concern with the Agency's proposal to use violations that have become final orders of the Commission, stating that this will encourage operators to increase penalty contests to avoid counting the violation in an operator's history. MSHA included the insertion of the phrase "final orders of the Commission" to clarify the Agency's practice, in existence since 1982, to use only violations that have become final orders of the Commission in determining an operator's history of violations. This practice will continue to provide a measure of fairness by not including in an operator's history those violations that are in the adjudicatory process which may ultimately be dismissed or vacated. *As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final.*

Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed Reg. 13,592, 13,604 (March 22, 2007). While Section 100.3(c) makes clear that citations and orders that are presently in contest are not counted in the Secretary's determination of an operator's "history of previous violations," the preamble to the 2007 rule bolsters the reasonableness of the Secretary's interpretation. I find that the preamble clearly expresses MSHA intent to use the date a contested penalty "becomes final" when determining an operator's history of previous violation. To find otherwise and accept Wade's interpretation of Section 100.3(c) would lead to an absurd result which would encourage mine operators to contest all citations and draw out the litigation in the hope that no final order of the Commission would be issued before the passage of 15 months. If such were allowed to occur the operator would be able to avoid all accountability for any history of violations it has developed. Certainly that cannot be the intention of either the Mine Act or the Secretary's regulations. I find that the Secretary's interpretation of the standard is logically consistent with the language of the regulation and serves a permissible regulatory function. Given that that the Secretary's interpretation has been sustained, and the record reflects that the proposed penalty was properly calculated, Respondent's motion is **DENIED**. The Secretary's motion as it relates to being granted deference to her interpretation of the standard is **GRANTED**. However, the Commission, not the Secretary is the final authority on the amount of penalty to be assessed.

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. Once the Secretary petitions the Commission, and the Commission exerts jurisdiction over the matter, it becomes the Commission's task to assess the penalty based on the six statutory penalty criteria set forth in Section 110(i) of the Act:

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

30 U.S.C. § 820(i). In assessing a penalty for a violation of the Mine Act, the Commission and its judges do so *de novo*, and are not bound by the Secretary's proposed penalty or point system. *Walker Stone Co. Inc*., 12 FMSHRC 256, 260 (Feb. 1990).

In *Jim Walter Resources*, 28 FMSHRC 983, 994-995 (Dec. 2006) the Commission stated the following:

> The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. . . . *Id*. (citing *Sellersburg Stone Co.*, 5 FMSHRC 287,

> 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts … with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984)
>
> . . . .
>
> The Commission has previously held that the reference in section 110(i) to an "operator's history of previous violations" refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment. *See Jim Walter Res., Inc.*, 18 FMSHRC 552, 556-57 (Apr. 1996).

In Spartan Mining Company, 30 FMSHRC 699, 723 (Aug. 2008) (citations omitted), the Commission, stated that:

> "'when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission.' In *Cantera Green*, the Commission clarified that '[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.'"

I have reviewed the history of violations for this mine. In my review of the history, which has included an evaluation of the materials before me, as well as information regarding this mine available on MSHA's Mine Data Retrieval website, it is clear that this operator has reduced its number of violations over the past few years. However, I note that the "history of previous violations" is one of only six factors that must be considered. Moreover, any apportionment of points in the Secretary's system to one factor over another is not binding, nor is it part of my analysis in this matter. Here, the parties have represented that no material facts are in dispute and Wade has stipulated to the appropriateness of the penalty to the size of the business, the level of gravity and negligence determined by the inspector, that the penalty will not have effect on the Wade's ability to continue in business, and that Wade demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The Secretary

proposed a penalty of $1,026.00 for Citation No. 8549940. I **GRANT** the Secretary's motion as it relates to his request that the penalty be assessed as originally proposed.

Finally, I take notice of Respondent's contention that there is an element of the penalty proposal process over which the Respondent has no control, i.e., the timing of when final orders of the Commission are entered. However, any prejudice the Respondent experiences as to the uncertainty of when an order will be finalized is certainly outweighed by the fact that the violation was never considered for purposes of history while it was in contest. To accept the Respondent's arguments in this matter would ignore that the "history of previous violations" criterion is designed to account for all violations. While the Secretary's regulations may not adequately account for long ago issued citations and orders that become final within the 15 month window, Commission judges, who are not bound by the same restrictions can certainly do so.

II. ORDER

Given that no issues remain to be decided, I **AFFIRM** Citation No. 8549940 as written. Wade Sand & Gravel is hereby **ORDERED** to pay the Secretary of Labor the sum of $1,026.00 within 30 days of the date of this decision.

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

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April 2, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-108-D
o/b/o Douglas A. Pilon	:	NC MD 2010-03
Complainant	:	
	:	
v.	:	
	:	
ISP MINERALS, INC.,	:	Mine: Kremlin Plant
Respondent.	:	

FINAL ORDER

On March 1, 2013, I issued a decision finding ISP Minerals, Inc. ("ISP") discriminated against the Complainant. In that decision, I ordered ISP to reinstate Pilon to his former position as a kiln operator, purge his personnel file of any negative references regarding his discrimination complaint and to post a notice at the Kremlin Plant Mine that it will not violate section 105(c) of the Mine Act. I further found that Pilon was entitled to back pay with interest including overtime since the time of his suspension on March 2, 2010, minus any interim wages earned during his period of temporary reinstatement. I awarded other damages including attorney's fees and any non-covered medical expenses. I retained jurisdiction over the matter until the parties either submitted an agreement as to these damages or requested a supplementary hearing on the issues. In addition, I requested the parties submit their respective positions concerning the Secretary's request for imposition of a monetary penalty against ISP over which I retained jurisdiction as well.

On April 1, 2013, the Secretary filed a joint Proposed Stipulation & Settlement Agreement signed by counsel for the Secretary and ISP. The proposed settlement agreement addresses each of the matters over which I retained jurisdiction in this matter to fully compensate Pilon. Having reviewed the agreement, I find that it is satisfactory.

I hereby ORDER the following:

1. That Douglas Pilon is entitled to back pay (including interest) in the amount of $11,272.10 for the period between March 2, 2010 and July 2, 2010.

2. That Douglas Pilon is entitled to attorney's fees and costs in the amount of $7,369.93.

3. That Respondent shall pay Douglas Pilon $18,642.03 within 30 days of the issuance of this Final Order.

4. That Douglas Pilon did not incur any medical coverage expenses during the period of March 2, 2010 through July 2, 2010 and therefore no amount shall be owed.

5. That the penalty of $10,000 requested by the Secretary is approved and shall be paid by ISP within 30 days of the issuance of this Final Order. Payment shall be sent to: U.S. Department of Labor, P.O. Box 790390, St. Loius, MO 63179.

6. That, pursuant to the statutory relief provided at 30 C.F.R.§805(c), Douglas Pilon is entitled to rehiring or reinstatement to his former position of kiln operator at Respondent's Kremlin Plant. Respondent shall engage in good faith negotiations with Douglas Pilon regarding front pay in lieu of such reinstatement. Should an agreement not be reached by April 15, 2013, Pilon shall be reinstated to his former position of kiln operator at ISP's Kremlin Plant.

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

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April 5, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2010-931-M
Petitioner,	:	A.C. No. 03-01773-000221607
	:	
v.	:	Docket No. CENT 2011-93-M
	:	A.C. No. 03-01773-000234194
	:	
DRUM SAND & GRAVEL, INC.,	:	
Respondent.	:	Mine: Drum Sand & Gravel, Inc.

DECISION

Appearances: For the Secretary: Pamela F. Mucklow, Esq., Denver, CO
For the Respondent: Kent Tester, Esq., Clinton, AR

Before: Judge Tureck

These cases are before me on two *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Drum Sand & Gravel, Inc. ("Respondent"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§815 and 820 (" Mine Act"). The first, filed on November 18, 2010, was docketed as CENT 2010-931-M. It alleges eight violations of the Mine Act and assessed $10,150 in penalties. The second, filed on April 21, 2011, was docketed as CENT 2011-93-M. It alleges a single violation of the Mine Act and assessed a penalty of $3,600. Respondent contends that four of the citations should be vacated and the penalties reduced in the other five.

On motion by the Secretary, the two cases were consolidated for hearing and decision. A formal hearing was held in Memphis, Tennessee on January 31 and February 1, 2012. At the hearing, Government Exhibits 1-22, 17-A and 18-A, and Respondent's Exhibits 1 and 2, were

admitted into evidence,[1] and each party provided testamentary evidence. Both parties then filed post-hearing briefs, the last of which was received on May 25, 2012.

Findings of Fact and Conclusions of Law

Respondent operates a sand and gravel mine in Harrisburg, Arkansas. At the time of the hearing, five people worked at the mine, including the company's owner and president, Jeff Drum, and its office manager and health and safety coordinator, Tiffany Manuel. Seven people, including Drum and Manuel, worked at the mine at the time of the inspection. TR2 6, 91-92.

MSHA conducted an inspection of the Mine over three days, from April 19-21, 2010. The inspection was conducted by Steve Medlin, who had been a mine inspector for MSHA since August, 2002. He arrived at the Mine at about 11:00 a.m. on April 19th, where he met Ms. Manuel. Manuel had just started working for Respondent that morning. Medlin had inspected the Mine before, so he knew who was in charge. TR1 28. He asked to see Mr. Drum, but he was not at the Mine. He then asked to see Tony Ezel, who was the mine foreman. TR1 26-27. So Manuel called Ezel, who met Medlin at the scale house, and Medlin began his inspection by driving around the entire mine with Ezel for about an hour in the mine's pick-up truck. TR1 127-28. Medlin issued Citations 6568738 through 6567843 on April 19th; he issued Citations 6567844 through 6567846 on April 20th. He returned to the Mine on April 21st to go over the paperwork and to have a close out conference. TR1 62.

The nine citations issued by Medlin will be addressed seriatim.

CENT 2011-93-M

Citation 6567840

This citation alleges a violation of 30 C.F.R. §56.14207,[2] which requires the wheels of unattended vehicles to be chocked or turned into a bank when parked on a grade. The vehicle in question was a front-end loader. The citation states that injury is unlikely, but could reasonably be expected to be fatal; the violation is not significant and substantial (hereafter "S&S"); one person would be affected; negligence was high, and the violation was immediately terminated by chocking the wheels. Respondent was assessed a penalty of $3600 as a special assessment pursuant to §100.5(a) for this violation.

[1] Citations to the record of this proceeding will be abbreviated as follows: GX – Government Exhibit; RX – Respondent Exhibit; TR1 and TR2 - Hearing Transcript from day 1 and day 2, respectively.

[2] All of the regulations cited in this decision are contained in Title 30 of the Code of Federal Regulations.

Respondent does not contest the occurrence of the violation, but contends that the penalty is excessive. Respondent alleges that its negligence was moderate, not high, and the gravity of the violation was low. It contends that the penalty should be based on a determination of 74 penalty points rather than 104 which, under the penalty conversion table found at §100.3(g), would reduce the penalty to $343. However, the penalty, as a special assessment, was not based on the penalty conversion table. Rather, it was based on MSHA's determination that the violation was serious and Respondent's negligence high.

I find the imposition of a $3,600 penalty here puzzling even though §56.14207 is one of the Rules to Live By. The citation states that an injury was unlikely. In fact, there was no likelihood of an injury. The front-end loader's bucket was on the ground, the parking brake was set, and the grade on which the loader was parked was only two percent. GX 1-3; TR1 47, 53. Further, Medlin had the loader moved to the steepest grade at the Mine that the loader traveled and had it parked there with a full load, and the parking brake held. TR1 53, 66-69. Also, the bucket and the back left wheel of the loader may have been parked in the gravel (TR2 28-29), which would have impeded the loader's movement.
Moreover, the violation was found to be not S&S.

Nevertheless, that §56.14207 is one of the Rules to Live By is material. MSHA places great emphasis on violations of these rules, since they account for a large percentage of miners' deaths. TR1 50-51. Due to the emphasis MSHA places on the Rules to Live By, it would be difficult to believe that Respondent was unaware of them. Accordingly, I agree with the Secretary that Respondent's negligence in not chocking the wheels of the loader was high. I also agree that an injury caused by the loader if it rolled down the grade could be fatal. But since in this case there was no likelihood of injury, that an injury from a violation of §56.14207 could be a fatality has little application here.

Based on the above, I find that a penalty of $500 is appropriate for the violation of §56.14207 in this case.

CENT 2010-931-M

Citation 6567838

This citation alleges a violation of §56.4101, which requires warning signs prohibiting smoking and open flames to be posted where fire or explosive hazards exist. Specifically, it is alleged that Respondent did not have a warning sign prohibiting smoking or an open flame posted in the immediate vicinity where oxygen and acetylene tanks were stored. The citation states that injury is reasonably likely and could reasonably be expected to be lost workdays or restricted duty; the violation is S&S; one person would be affected; negligence was high; and the violation was immediately terminated by the posting of a warning sign. MSHA assessed a penalty of $2,106 for this violation based on assigning 98 penalty points for the violation and giving Respondent a ten percent reduction for good faith.

Respondent has not challenged MSHA's contention that these tanks could present fire and explosion hazards. Respondent also concedes that there was no warning sign in the vicinity of the area where the tanks were stored when Medlin was conducting the inspection of the Mine. However, Respondent contends that one was posted as late as the morning of the inspection, and cannot explain when or how it disappeared. TR2 31, 71. Medlin agreed that there had been a warning sign on his previous inspections of the Mine. TR1 94-97. Further, MSHA concedes that there was an area outside the scale house that had been set aside by Respondent for smoking. It was about 38 feet from the tanks (TR2 31) and did not present a hazard; in fact, Medlin used to smoke there. TR1 85, 105. There would have been no reason for someone to smoke closer to the tanks. Apropos of this, Medlin took three photographs in regard to this citation. Two show the smoking area by the scale house, one of which is a close-up showing about two dozen cigarette butts. GX 7, 8. The third is of the tanks and the surrounding area. GX 5. Although Medlin contends that he saw a cigarette butt as close as ten feet to the tanks, in this photograph no butts are visible.

Why Medlin took photographs showing cigarette butts in an area where there is no contention that smoking was unsafe, but failed to take a photograph of the one butt it is contended caused a hazard, is inexplicable. Even if there was a single butt as close as ten feet to the tanks, it would not prove that people were smoking there. There are undoubtedly many possible explanations for finding a single butt ten feet from the tanks even if no one was smoking there, a likely one being that it blew over from the smoking area. There is no credible evidence that anyone smoked nearer to the tanks than 38 feet, and the Secretary agrees that smoking that far from the tanks was not hazardous.

Although the citation contends that an injury was reasonably likely due to the absence of a warning sign near the tanks, I find that an injury was unlikely. Since there was a designated smoking area only about 38 feet from the tanks which, judging from the number of cigarette butts in the area, was used regularly, there would have been no reason for anyone to smoke close enough to the tanks to create a hazard. The absence of cigarette butts near the tanks is evidence that smoking did not occur there. Further, I find Respondent's negligence to have been moderate, not high. High negligence requires an absence of mitigating circumstances, but there are mitigating circumstances here. Medlin testified that a warning sign had been present in his previous inspections of the Mine. In addition, I believe that Respondent was unaware that warning sign was missing.

Reducing the gravity of the violation from reasonably likely to unlikely reduces the gravity points from 30 to 10. Reducing the negligence from high to moderate lowers the penalty points from 35 to 20. A reduction of 35 points from the 98 calculated by MSHA leaves 63 penalty points. Under the penalty conversion table, 63 points equates with a penalty of $142. When reduced by ten percent for good faith, as MSHA did for each citation other than Citation 6567838, the resulting penalty equals $127.80.

Finally, I find that this violation was not S&S. 30 U.S.C. § 814(d)(1) provides:

> 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 a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, 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 finding in any citation given to the operator under this [Act].

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is "significant and substantial":

> [T]he 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. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); *see also*, *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

Here, the violation did not result in a safety hazard, and injury was unlikely because there is no credible evidence that anyone smoked away from the designated smoking area. Accordingly, the violation was not S&S.

Citation 6567839

This citation alleges a violation of §56.16006, which requires that valves on compressed gas cylinders be protected by covers when being transported. It states that oxygen and acetylene tanks without guards on the valves were being transported in the bed of the plant service truck (a pick-up truck). The citation further states that injury is reasonably likely and could reasonably be expected to be fatal; the violation is S&S; one person would be affected; negligence was moderate; and the violation was immediately terminated by installing guards over the valves of the tanks.

Respondent states in its brief that it contests the likelihood of injury and the severity of injury due to the violation, and argues that the penalty points should be reduced from 98 to 79,[3] lowering the penalty from the $2,106 assessed to $512. Resp.'s Brief at 5-6. It points out that Medlin saw the oxygen and acetylene tanks in the bed of the pick-up truck as soon as Ezel drove up to pick him up for the inspection (TR1 113), and there is no evidence Medlin did not notice that the valves of the tanks were uncovered. Yet he rode in the truck with Ezel for at least an hour during his inspection while there were no guards on the valves of the tanks. TR1 127-28. Respondent contends that if an injury was likely as a result of the violation, Medlin would not have ridden in the truck for an hour. That is a reasonable argument. Moreover, the evidence establishes that the truck is not driven on public roads, considerably lessening the likelihood of injury. However, if an injury was to occur, I accept Medlin's testimony that the injury could be fatal. TR1 114-18. Respondent did not present any evidence to the contrary.

Under these circumstances, I find that an injury was unlikely due to the violation, although if an injury did occur it could be fatal. Moreover, the moderate negligence determination by the inspector is reasonable, and Respondent has not challenged it. Accordingly, the points for likelihood of injury should be reduced from 30 to 10, which leaves a total of 78 points. The penalty for 78 points is $473. When reduced by ten percent for good faith, the penalty becomes $425.70.

Finally, I find that this violation was not S&S, since it did not contribute to a discrete safety hazard. Had this violation actually caused a hazardous condition, Medlin would not have ridden in the truck with the uncovered tanks for an hour.

Citation 6567841

This citation alleges a violation of §56.14132(a), which requires manually operated horns to be maintained in functional condition. The Secretary alleges that the horn on a front-end loader did not work. The citation states that injury was reasonably likely and could reasonably be expected to be permanently disabling; the violation is S&S; one person would be affected; negligence was moderate; and the violation was terminated within two hours. The penalty was assessed at $946, based on 88 penalty points.

Respondent does not dispute that the horn failed to work during Medlin's inspection. But Ms. Manuel testified that the horn worked at the pre-shift examination that morning (TR2 94-97), and the Secretary does not contend otherwise. TR1 142. Although the Secretary argues that negligence was moderate because the front-end loader operator should have known that the horn was not working, the evidence does not suggest that the operator would have had a reason to know that the horn was not working after the pre-shift examination. Medlin concedes that the operator may not have needed to use the horn between the pre-shift examination and his

[3] Respondent's counsel appears to be as mathematically challenged as most lawyers. He argues that likelihood of injury should be lowered from 30 points to 10, and severity of injury from 20 points to 5. This would lower the total points assessed from 98 to 63, not 79.

inspection. TR1 143. Under these conditions, I find that Respondent was not negligent in the occurrence of this violation.

Respondent also argues that there was no likelihood of injury due to the violation because there was a site awareness program in place and all of the miners communicated by radio. Resp.'s Brief at 7. Respondent did not explain this contention, and I fail to see why either of these factors would reduce the likelihood of injury.

Finally, I find that this violation was S&S. Although a vehicle's horn is not needed often, when it is needed - to warn another vehicle or a pedestrian of imminent danger - the horn is an essential safety device. In those situations where a horn is needed, a non-functioning horn clearly poses a discrete safety hazard which is reasonably likely to result in an injury; and since a front-end loader is a large and heavy vehicle, that injury is likely to be serious. Therefore, the requirements for an S&S violation are met.

Respondent contends that the penalty points determined by the Secretary should be reduced from 88 to 53, with the assessed penalty accordingly reduced to $112. These reductions are not explained, and the bases for these reductions are obscure. Reducing negligence from moderate to none, as I have found, provides a reduction of 20 penalty points. Under the penalty conversion table, 68 penalty points equates with a penalty of $212. With a ten percent reduction for good faith, I impose a penalty of $190.80 for this violation.

Citation 6567842

This citation alleges a violation of §56.14103(c)(2), which requires that mobile equipment not be modified to obscure a driver's visibility necessary for safe operation. Specifically, it is alleged that the rear side window of a front-end loader has been removed and the opening was covered in opaque white plastic. The citation states that injury was reasonably likely and could reasonably be expected to be lost workdays or restricted duty; the violation is S&S; one person would be affected; negligence was high; and the violation was terminated within two hours. MSHA assessed a penalty of $2,341 for this violation based on 98 penalty points. However, in her brief, the Secretary argues for the imposition of a $2500 penalty. She contends that Medlin filled out the citation incorrectly, and meant to check "fatal" in box 10(b) of the citation form rather than "lost workdays or restricted duty". Sec'y's Brief at 24 n.7.

The only evidence presented by the Secretary to support the violation is a photograph of the side of the front-end loader showing plastic covering most of the window opening (GX 13) and Medlin's testimony of what he thinks can be deduced from this photo. The photograph shows that the piece of plastic did not cover the entire window area. Somewhere between a quarter and a third of the window opening from the bottom was uncovered. Respondent argues that this photograph fails to show "exactly how obstructed the miner's view was . . ." since it was taken from outside the loader and not from the operator's seat. Resp.'s Brief at 7; *see also* TR1 154-55. Medlin conceded that a photograph from inside the cab of the loader would have been more helpful in determining what the operator could see than the one he took from outside,

and that he had the opportunity to take such a photograph. TR1 168. Morever, the photograph was not taken right away. Rather, by the time the photograph was taken the plastic had been removed from the window. To show how the window appeared with the plastic covering in place, Ezel is holding the plastic over the window opening. TR1 162-63. But it does not look like Ezel is holding the plastic all the way to the top of the window opening, and the unobstructed opening when the loader was operating may have been larger than the photograph indicates. Medlin also admitted that it was possible that the operator would have been able to reach the plastic and lift it while he is backing up if he was not operating the bucket at the time. TR1 163-64. Further, Medlin did not measure the window opening or the part of the window opening which was not obstructed, so precisely how much of the window opening was unobstructed cannot be determined. TR1 150.

Section 56.14103(c)(2) is violated only if the obstruction to the driver's visibility affects the safe operation of the vehicle. In this respect, it is relevant that the cab of front-end loaders is high off the ground. *See* GX 1-3, 13. To see other vehicles or pedestrians, the operator would be looking down rather than at eye level. The photograph of the obstructed window opening of the front-end loader indicates that the operator of the loader would have been able to look down through the uncovered part of the opening to see other vehicles and pedestrians. Further, the operator would have had full visibility to the right side of the loader through the door, and to the rear through the rear window. Therefore, I find that the Secretary has failed to prove that the operator's vision was impaired in a way that would have affected the safe operation of the loader. Accordingly, no violation of §56.14103(c)(2) occurred, and Citation 6767842 is vacated.

Citation 6567843

This citation alleges a violation of §56.14132(b)(1)(i), which requires mobile equipment to have an automatic reverse-activated alarm signal when the operator has an obstructed view to the rear. By motion dated January 10, 2012, the Secretary moved to amend this citation to plead in the alternative a violation of §56.14132(a), which requires mobile equipment to have audible warning devices maintained in functional condition. Without objection, the citation was amended to plead a violation of this section of the regulations in the alternative.

The Secretary alleges that the reverse-activated alarm of a track hoe did not function. The citation states that injury is unlikely and could reasonably be expected to be lost workdays or restricted duty; the violation is not S&S; one person would be affected; negligence was high; and the violation was terminated the following morning. A penalty of $425 was assessed for this violation. Respondent argues that this citation should be vacated because the track hoe was not in operation at the time of the inspection.

Section 56.14132(b)(1)(i) applies only when the operator of mobile equipment has an obstructed view to the rear, and having an observer to signal when it is safe to back up can take the place of an automatic reverse-activated signal alarm. It clearly applies only when the equipment is in motion. Since the track hoe was not in motion during the inspection (TR1 180),

Respondent could not have violated this section of the regulations. As the Secretary obviously realized in moving to amend the citation, §56.14132(a) is the section of the regulations applicable to the facts in this case. This section is not dependent on the equipment actually being in use at the moment; a violation occurs if the applicable warning devise is not in working condition.

Medlin testified that he had Ezel check the auto-reverse alarm and it did not work. TR1 179, 184. Jeff Drum testified that sometime between a few days and a few weeks before the inspection the track hoe had gotten stuck in deep mud in the pit. TR2 47-48; *see also* TR1 178-79. Ezel told Medlin that the alarm was probably full of mud. TR1 179. There is no evidence that the track hoe had been used since it had gotten stuck in the mud. In fact, Medlin testified that it had not been operated without the reverse alarm working. TR1 185. Medlin also testified that Ezel would not have known the reverse-activated alarm was not functioning until he had him test it during the inspection, presumably because the track hoe had not been used since it got stuck in the mud. *Id.*

Despite the fact that the automatic reverse-activated signal alarm did not work when it was tested, I hold that Respondent did not violate §56.14132(a). Section 56.14100(a) requires a pre-shift examination of self-propelled mobile equipment before it is placed in operation *on that shift*, and §56.14100(b) requires defects on such equipment to be corrected "in a timely manner to prevent the creation of a hazard to persons." Section 56.14132(a) must be interpreted with these related regulations in mind. Since the track hoe was not going to be used on April 19th, a pre-shift examination was not required. Further, since it was not going to be used, there was no hazard to persons which had to be corrected at that time. Accordingly, since Respondent was not required to conduct a pre-shift examination of the track hoe, and since no safety hazard was going to be created, it would be inconsistent with §§56.14100(a) and (b) to hold that the failure to maintain the automatic reverse-activated signal alarm on a piece of equipment which was not going to be used could violate §56.14132(a). Holding otherwise would require mine operators to conduct pre-shift examinations of each machine at a mine regardless of whether it was going to be used during that shift, which not only would be inconsistent with §56.14100(a) but would be onerous and serve no purpose. Therefore, this citation is vacated.

Citations 6567844 and 6567845

These citations allege a violation of §62.120, which states: "If during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program . . . ." The citations allege that noise samples were taken on April 20th of a utility worker (Ezel) and front end loader operator (Pablo Martinez), respectively, that exceeded the action level (*see* §62.101), but the miners were not enrolled in a hearing conservation program. The citations state that injury is reasonably likely and could reasonably be expected to be permanently disabling; the violations are S&S; one person would be affected by each violation; negligence was moderate; and the citations were terminated on May 17, 2010. However, during his testimony, Medlin stated that he made a mistake in listing

the likelihood of injury as reasonably likely. TR1 201. He should have listed injury as unlikely, according to the citation writing handbook. TR1 199. He testified that the assumption is that if the action level is exceeded, the miners would be enrolled in a hearing conservation program, which would prevent a hearing loss. TR1 200-01. He also testified that these violations were not S&S. TR1 207.

It is Respondent's position that no violations occurred since they were not under an obligation to enroll Ezel and Martinez in a hearing conservation program until it discovered they were exposed to noise in excess of the action level. Once Respondent was informed that Ezel and Martinez were exposed to noise levels in excess of the action level, Respondent instituted a hearing conservation program and the violations were terminated. GX 17a, 18a.

During the inspection, four miners were subjected to noise monitoring. Only Ezel and Martinez exceeded the action level. TR1 211. Further, during previous inspections, the noise to which Respondent's miners were exposed never reached the action level. TR1 195. Drum testified that Respondent never monitored its miners' noise exposure. TR2 50. He did not believe there was a requirement to do so, and he had never been cited for a noise violation. TR2 51. However, he is wrong that there is no requirement to monitor miners' noise exposure - §62.110(a) imposes such a requirement. Nevertheless, Respondent was not charged with the failure to establish a noise monitoring system; Respondent was charged with failing to set up a hearing conservation program "during any work shift a miner's noise exposure level exceeds the action level . . . ." The Secretary's case rests on speculation that since Ezel and Martinez were exposed to noise levels in excess of the action level on April 20, 2010, they must have been exposed to such noise levels previously, and therefore a hearing conservation program should have already been in place. But speculation cannot take the place of concrete evidence; and that Ezel and Martinez were exposed to noise levels in excess of the action level on those days does not mean they were exposed to such noise levels previously. When MSHA previously inspected the mine, noise levels did not equal or exceed the action level. Further, Respondent offered plausible explanations for why Martinez and Ezel may have been exposed to more noise that day than usual. The loader's air conditioner was not working, so Martinez was operating the loader with the door open; further the right rear window was missing. TR1 206. In regard to Ezel, the air conditioner in the control shack was off, and he had the window open. TR1 224; RX 1, at 2. Medlin also noted that the CB radio was "very loud" and the music radio was playing "pretty loud". RX 1, at 2. He did not ask Ezel whether he always played the radios that loudly or why he had the window open rather than the air conditioner on.

Since there is no evidence to support a finding that Martinez and Ezel were exposed to noise levels at or above the action level prior to the inspection on April 20, 2010, and Respondent enrolled both miners in a hearing conservation program in a timely manner once it was determined that they were exposed to noise levels in excess of the action level, the Secretary has failed to prove that Respondent violated §62.120. Therefore, Citations 6567844 and 6567845 must be vacated.

Order 6567846

This order alleges a violation of §46.8(a)(1), which requires that a newly hired miner be provided with no less than eight hours of annual refresher training. By motion dated January 25, 2012, the Secretary moved to amend this order to a violation of §46.8(a)(2), which requires providing miners with refresher training not later than 12 months following the previous refresher training. Section 46.8(a)(1) had been cited incorrectly in the order since the alleged violation concerned Jeff Drum's failure to obtain refresher training, and Drum was not a newly hired miner. Without objection, that amendment was accepted.

The order states that injury is reasonably likely and could reasonably be expected to be lost workdays or restricted duty; the violation is S&S; one person would be affected; and negligence was high. Drum was ordered withdrawn from the mine until he completed his refresher training. Drum testified that he completed the training by watching eight hours of videos within two days of the inspection. TR2 18. Respondent was assessed a penalty of $971 for this violation.

Respondent contends that Drum was not a miner at the time of the inspection, and therefore he did not have to undergo refresher training. Alternatively, Respondent argues that "because of the circumstances and the very short duration of noncompliance, which was only three weeks", the penalty should be reduced to $112.

Section 46.2(g)(1)(i) defines "miner" as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations." Section 46.2(h) defines "mining operations" as "development, drilling, blasting, extraction milling, crushing, screening, or sizing minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials from within the mine from these activities."

Drum is the sole shareholder of Respondent. At the time of the hearing he was working as a laborer at the mine on a regular basis, due to a reduction of the number of employees working there between the time of the MSHA inspection and the hearing. TR2 6, 9. But he was not working regularly as a laborer at the time of the inspection. At that time, he was working primarily at his cattle farm, which is adjacent to the mine. TR2 10. Tony Ezel was the plant foreman, and had been for four or five years prior to the inspection. TR2 11. Drum testified about his regular activities at the mine at the time of the inspection as follows:

> A. I would usually come in the office at 7:00 in the morning and when it got to 8:00, I would leave. . . .
>
> . . .
>
> Q. And what would you do in the office from 7:00 to 8:00?

A. I would usually get caught up on the day before, . . . make my telephone calls. If they were out of diesel or order stuff such as that, you know. If they needed parts, find out if they needed parts, go get them, such, you know, just a gofer.

Q. Okay

A. And just see that things were going like they were supposed to be going . . . .

. . . .

Q. Sir, did you work at all?

. . . .

A. [S]o like if they've had something that, you know, that they thought they was - someone would get injured or something they couldn't do, they'd call me, I'd come and do it. I either hired the person - I'd either do it myself or hire someone to get whatever done so, you know, to continue operating.

TR2 12-14. *See also* TR2 48.

Consistent with this testimony, Drum testified that when the track hoe became stuck in deep mud, he and his brother were the ones who pulled it out. TR2 14, 48. Further, he testified that he would drive around the mine four to five times a day to check things out. TR2 16-17. He also brought the mail to the mine between 12:30 and 1:00 p.m. every day. TR2 86.

Despite Respondent's protestations, I find that Drum was a miner on April 19-20, 2010. He clearly meets the first part of the definition of a miner since he worked at the mine every day. He also meets the second part of the definition. Although Ezel was the mine foreman, Drum took an active role in the mining operations. He would drive around the mine several times a day, presumably to assure that things were running smoothly, and would perform labor in the mine when necessary. Accordingly, I find that he was engaged in mining operations.

Since Drum was a miner, §46.8(a)(2) requires that he undergo refresher retraining within one year of his previous training. The inspection occurred more than a year after Drum had last completed refresher training, so he was in violation of that section of the regulations.

The next issue to be resolved is the degree of Respondent's negligence. The Secretary contends that Respondent's negligence was high because Drum admitted to Medlin that he knew he was supposed to undergo the training but postponed it because he did not have time. TR1 244-45. I accept Medlin's testimony that this conversation occurred. However, Medlin

forthrightly admitted that he has changed his mind regarding the likelihood of injury. Since Drum was only three weeks late in his training, an injury due to the violation was unlikely. TR1 245-46. Further, Drum testified that he completed the training by watching eight hours of videos within two days of the inspection. TR2 18. Although Medlin believes that Drum's short period of violation affects only the likelihood of injury, I find it also is relevant to mitigate the degree of negligence. Another factor which mitigates against a finding of significant negligence is that Drum testified that he is certified to teach the miner refresher training, and has been so certified for many years. TR2 18. Therefore, it is hard to see how his failure to attend the training in a timely manner was significant, and I find that Respondent's negligence was low. Reducing Respondent's negligence from high to low reduces the penalty points found for this violation from 87 to 62, which in turn lowers the penalty from $971 to $131.

ORDER

Based on the foregoing, ***IT IS ORDERED*** that:

Citation 6567840 - Likelihood of injury is modified from "unlikely" to "no likelihood", and the penalty is reduced from $2,106.00 to $500.00.

Citation 6567838 - Likelihood of injury is reduced from "reasonably likely" to "unlikely", negligence is reduced from "high" to "moderate", "significant and substantial" is changed to "not significant and substantial", and the penalty is reduced from $2,106.00 to $127.80.

Citation 6567839 - Likelihood of injury is reduced from "reasonably likely" to "unlikely", "significant and substantial" is changed to "not significant and substantial", and the penalty is reduced from $2,106.00 to $425.70.

Citation 6567841 - Negligence is reduced from "moderate" to "none", and the penalty is reduced from $946.00 to $190.80.

Citations 6567842, 6567843, 6567844 and 6567845 are vacated.

Order 6567846 - Likelihood of injury is reduced from "reasonably likely" to "unlikely", negligence is reduced from "high" to "low", and the penalty is reduced from $971.00 to $131.00.

Respondent shall pay a penalty in the amount of $1,375.30 within 30 days of the date of this *Decision*.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 5, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2010-1236 A.C. No. 01-01851-230779-01
v.	:	
OAK GROVE RESOURCES, LLC Respondent	:	Mine: Oak Grove
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2011-782 A.C. No. 01-00851-262907
v.	:	
DONNY BIENIA, employed by OAK GROVE RESOURCES, L.L.C, Respondent	:	Mine: Oak Grove

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Moran

In this matter arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act," or "Act"), several haulage cars traveled completely out of control for nearly a mile at the Respondent's Oak Grove mine. At issue are whether the Order, issued in the wake of that runaway cars event, which Order was based upon a previously issued notice to provide safeguard, is valid. That determination depends upon the validity of the safeguard and whether that safeguard applied to this event. If the Respondent's challenges are rejected and the safeguard and order are affirmed, additional issues then come into play. Those involve whether the Order was properly designated as "significant and substantial" and whether

the named individual respondent, Mr. Donny Bienia, is accountable under section 110(c) of the Act.

For the reasons which follow, the Court affirms each of the Secretary's contentions in these matters.[1]

FINDINGS OF FACT

On May 24, 2010, Mine Safety and Health Administration ("MSHA") Inspector Gregory David Willis was at the Respondent's mine, conducting a regular inspection. As this is a large mine, it takes a full quarter (i.e. three months) to inspect it and at that time Inspector Willis was one of the resident inspectors there. Tr. 28. At some time after the usual noon lunch time, as the Inspector prepared to eat, he opened his lunch box and found a handwritten note inside it. He recognized the note as a complaint, that is, a section 103(g) complaint under the Mine Act.

The complaint was anonymous but the Inspector took the additional step to sanitize it, so that mine personnel would not be able to discern the individual who made the complaint. Tr. 28-29. To accomplish that, the Inspector rewrote the complaint to capture, but not distort, its essence. As this was not part of his regular E01 inspection, he recorded the 103(g) complaint as a separate event, for which it was designated as an E03 matter. Tr. 31.

Inspector Willis then began, that same day, his investigation for the newly arisen 103(g) complaint.[2] Tr. 32. He gave mine officials and the UMWA representative the first page of what is now Exhibit 7, reflecting his handwritten recopying of the note's assertions. The individuals given what later became Exhibit 7 were listed on the first page of the Inspector's notes for his 103(g) investigation, as reflected in Exhibit 3. The Inspector then spoke with Dave Ingle, who at that time was the mine's day shift general foreman. Mr. Ingle advised the Inspector that he did have knowledge of the event described in the 103(g) complaint. Tr. 36. The Inspector then conducted his first interview concerning the matter, beginning with Andrew Teel, who was an outby utility man on the Main North 3 section. The track involved was the main line at the mine.

[1] Raised ostensibly only for the purpose of preserving the issue for appeal, yet argued extensively in its post-hearing brief, the Respondent also contends that Oak Grove Resources, LLC is not liable for 110(c) matters, on the basis that it is a limited liability company, as opposed to a corporation. Tr. 130. R 2. Respondent acknowledges that the Commission has spoken to the issue of LLC liability in its decision in *Secretary v. Simola*, 34 FMSHRC 539, 2012 WL 894524, (March 2012), in which it held that "section 110(c) applies to corporate operators and the limited liability shield of an LLC is a corporate characteristic." *Id.* at *550. This issue is discussed *infra.*

[2] The Inspector interviewed miners who were involved, with Mr. Ingle's interview being conducted last. During his interviews, Inspector Willis noted that there has been a safeguard, which he believed addressed this problem, since 1991. Tr. 69. The Inspector did not interview Mr. Bienia then, but tried to do that later, on June 7, 2010. Tr. 71. Mr. Bienia declined to be interviewed. Tr. 72.

Tr. 55. Thus, it is the main line for moving men and materials in and out of the mine. Mr. Teel informed the Inspector that he was directly involved with the incident. Teel advised the Inspector that at the time of the incident he needed to "spot," that is to locate or move into position, "haulage" or "flatcars." Such cars are used to haul supplies into and out of the mine. The haulage cars or flatcars were also described during the hearing as "supply cars" and "rail cars," but the terms all refer to the same cars in issue here.

However, Mr. Teel had a problem which was in the way of accomplishing his goal of the needed "spotting" because he had no locomotive or anything else to couple up the cars so that they could be moved. Tr. 40. As the rail cars are not self-powered, they are moved by another piece of equipment. Typically, this will be done by mantrips and locomotives; both of which are rail mounted and equipped with couplers. Tr. 45. Previously, the day shift had "spotted" two of the flatcars to be unloaded. This was able to be accomplished because those cars were in line with the crosscut. By being located in line with the crosscut, there was sufficient space so that the cars could be accessed for a "low track," which is a small forklift,[3] to come in from the side and unload the supplies. Tr. 41. Exhibit 9, which is a sketch created by the Inspector, helps to illustrate and to gain a general idea of the cars and their location before they became runaways.[4] The location of a "car stop" is also depicted in the drawing as between the 3rd and 4th cars. As the name suggests, a "car stop" has the purpose of keeping rail cars from moving. This is accomplished by securing it against a railcar wheel. In the Inspector's sketch, the numbers 1 through 6 represent the supply cars at the scene, with car number 1 representing the most outby position. Tr. 46. Despite its shortcomings, the drawing is useful, in the Court's view, because it depicts the essential problem: cars had to be moved up to a crosscut in order to provide sufficient space to access the supplies on them, so that they could be unloaded.

Thus, the problem faced by Mr. Teel was, after a supply car was unloaded, the next car had to be moved into the crosscut, so that the low track could access it and unload the supplies on it. Mr. Teel went to Mr. Donny Bienia, his supervisor, for help in accomplishing this task. Tr. 48. Mr. Bienia was at that time operating a "scoop," which is a small front end loader. Tr. 49. Instead of a bucket, this scoop was equipped with a push out blade, which blade allows it to do just that – push material. Working together to accomplish the task of moving the next supply car so that it could be lined up with the crosscut, Mr. Teel hooked up the wire rope from the scoop's winch to the side rail of the number 3 rail car. That wire rope or "cable" has a hook with a safety catch on it and it was that hook that was attached to a "side rail' of the number 3 rail car. The side rail is simply a rail running down the sides of the car. Its purpose is to secure tie down straps, or "binders." By using the tie down straps and securing them to the side rails, items being

[3] The low track is diesel powered, and rubber tired, and has a small forklift on it. Tr. 42. It is used to move supplies.

[4] The drawing is of limited use because the scoop depicted in it was actually located near the 3rd and 4th cars. Thus, one examining GX 9 should disregard the conflicting indication that the scoop was above (i.e. inby) the 6th car and pay attention only to the second reference to the scoop, where it actually was located, near the 3rd and 4th cars. The parties agreed that the location near the 3rd and 4th cars depicts the more accurate location of the scoop at that time.

carried on the rail car can be secured. By way of an analogy, Inspector Teel advised that it was essentially the same arrangement used by18 wheeler highway trucks to secure their loads. Tr. 52. Accordingly, as this was not a tie down and side rail arrangement, securing the hook to a side rail is not the normal use of a side rail.

Upon attaching the hook to the side rail, Mr. Teel then removed the car stop. As shown in the Inspector's drawing, there was a second car stop about 30 feet outby the number 1 rail car.[5] The Inspector was clear that the car stop depicted between the number 4 and number 3 cars was removed and, upon doing that, the two men began to let the cars move. This was done by Mr. Bienia, as he was operating the scoop with its winch, connected as it was to a car's side rail. Tr. 54. Mr. Teel told the Inspector that after the hook was attached to the side rail, the stop was removed from between the No. 3 and No. 4 cars and the cars began rolling away. Tr. 56. It was later determined that this occurred because the side rail weld broke on the car where the hook was attached. Tr. 56. Once that happened, the hook was no longer holding the car to which it was attached.[6]

Inspector Willis also interviewed Robert Tartt, the mine's headerman.[7] Tr. 57. He worked at a belt heading, a location where one belt discharges to another one as the coal is transported out of the mine. That belt line is separated, one entry over, from the track entry. At the time of the incident, Tartt happened to have gone over to the track entry to get some bags of rock dust. This was outby the area where the loose cars were now traveling and it was then that he heard the sounds of a trip coming down the track. However, when he looked in the direction of the sounds, he saw no block lights.[8] Tartt was close to an area where the track curves. Even though he saw no light, his ears informed him that something was coming quickly, so he broke and ran across the track, seeking safe harbor in a short spur track. Fortunately, Mr. Tartt made it to the spur track before the cars went by him on the track "running faster than Amtrak," as he expressed it, by which analogy he of course meant they were moving very fast. Tr. 65.

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[5] The Inspector was uncertain whether there were two car stops or one, but again, this is not central to the issue in this decision.

[6] As noted, after the mishap, the mine found that the weld had broken where the hook had been attached to car's metal railing along the side of the car. The railing was also referred to as a "stopping" by Mr. Bienia. Tr. 146. While Respondent's Counsel tried to have Mr. Bienia agree that the side rail or strap has strength, he advised that usually these are used to hold items that are *in* the car, by running across the top of the car's load.

[7] The headerman is the belt heading attendant. His duties include being in the belt entry, where the belt discharges onto the next belt line, and to keep loose material shoveled at that location. Tr. 57. In that job, he was located one entry over from the main line.

[8] Block lights are installed in hilly, curved, or other hazardous areas of a track with reduced visibility to alert miners of equipment on the track. Tr. 59-62. In this mine, the block lights are triggered manually, not by the passage of the equipment itself on the track. Tr. 60.

Inspector Willis also interviewed the aforementioned Mr. Dave Ingle, who is the mine's general foreman. When the Inspector first spoke with him, Mr. Ingle pulled out a notepad and told the Inspector that his notes reflected that the event *did* occur. Tr. 67. He then advised that the mine had done an investigation of the incident.[9] This was conducted by Ingle and included Mr. Fisher, Mr. Bienia, Mr. Teel and Mr. Hafera. Tr. 67. The mine's investigation was made on May 13, 2010 and it included conclusions as to how it would remedy this to avoid a recurrence. Tr. 69.

On the following day, May 25th, Inspector Willis returned to the mine and issued the section 104(d)(2) Order in issue in this proceeding, Number 8518376. Tr. 70-71. Government Exhibits 2 and 4 reflect the safeguard upon which that Order relies, Number 3013658, issued March 25, 1991.[10] Although he did not know if a safeguard had been issued at the mine for this problem, the Inspector figured there was one because he knew "we don't move cars like that . . . [as it's] an unsafe way to move cars." Tr. 73. He expressed that moving cars in the manner done in this instance was not a common practice and that, if no safeguard *had* been issued, he would have issued one then. Inspector Willis explained that the method used at the mine in this instance was an unsafe practice; "if you're go[ing] [to] move cars, you need . . . a sure way of holding the cars. In other words, couplers." Tr. 74. Couplers in a mine are essentially what one visualizes with surface trains. That is, it is a mechanical lock, which is spring loaded. With these, they can be unlocked only by manually pulling a lever, which then releases its spring. That action allows the two halves of the couplers to come apart. Tr. 74-75. The Inspector added that, "[f]or locomotives or track-mounted equipment you will have a coupler and, plus, you'll have two safety chains." Tr. 74.

As compared to this incident, where the cable and hook were used, the Inspector expressed that the arrangement was an unsafe practice and that the car chock, being placed some 30 feet away, did nothing to ameliorate the problem. A car chock, or "wheel chock" as it sometimes called, is to be placed right under the wheel, not some distance away from it. Tr. 75. When not placed right under the wheel, but rather some distance away, a vehicle with sufficient momentum will run right over such a chock, as happened here.[11] Inspector Willis added that in

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[9] While Ingle advised the Inspector that an investigation had been done by the mine, he did not know if a report had been created by it. However, the Inspector noted that because Ingle showed him his handwritten notes, he thought it likely that a report had been created, as such information is used in safety talks. Tr. 86. The government did not request production of the mine's report. Tr. 88. When the Court later inquired whether the Respondent intended to offer its report of the accident for the record, Counsel stated that it was not his intention and that he viewed it as unnecessary to do so. Tr. 108. Then, Respondent's Counsel reversed course and decided to enter the report after all, introducing it through Mr. Hedrick. Tr. 109.

[10] During E01 Inspections, MSHA Inspectors will have the mine's safeguards with them, along with other relevant documents pertaining to the mine, such as its roof control plan. Tr. 73.

[11] The Inspector opined that it was more likely that a car would derail, rather than run

(continued...)

the instance which prompted the issuance of the original safeguard, a 5/8ths cable with a safety hook was used. Further, unlike when a coupler is used, there were no safety chains employed as a back-up mechanism.

In issuing the section 104(d)(2) order being litigated here, the Inspector stated that the safeguard had been in effect for some 19 years and he noted that a member of management was operating the scoop involved with the incident. Tr. 80. The Inspector expressed that he viewed Oak Grove as having violated that safeguard because it required "only equipment such as track motors and other approved equipment being used in moving supply cars on the track." Tr. 81. A scoop would not constitute such "other approved equipment" for moving a supply car. Tr. 82. Accordingly, Inspector Willis affirmed that use of a scoop would be in violation of this safeguard. Tr. 82. The Inspector advised that the hazard in this instance was "the running away of cars with no means . . . no sure means of controlling them." Tr. 83. He further explained that the safeguard calls for track motors or other approved equipment, which in his view called for "other track-mounted equipment that [one] can actually have a rigid coupling and approved coupling ..." Tr. 83.

Although objected to twice,[12] the Court allowed the Inspector to answer with his view as to the hazard identified in the safeguard. He expressed that it is "[m]oving cars - - moving supply cars with a wire rope, or a cable, whatever you want to call it, and the hazards being there, . . . you don't have a piece of equipment on track with the cars which makes that piece of equipment in line with the cars, whether it be on one end or the other, rigidly coupled to the cars. Plus, the safety chains that are probably required in another safeguard, if I had my guess, that are

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[11](...continued)
over such a chock, because the car stop was some 12 inches high. As this was an aside, and not what actually happened, this is not of any significance to the issues to be decided here. As noted, the Inspector stated that there was a chock some 30 feet down the track but that when the weld on the car rail broke, the cars began to roll. Tr. 77. While it was unclear exactly what happened with the car stop some 30 feet outby, apparently it simply fell over when the cars came racing up to it and made contact. The important point is that it did not stop the cars from their uncontrolled movement down the track. Later, in response to questions from the Court, the Inspector clarified that the car stop is marked on the lower or bottom third of Gov. Ex. 9, (i.e. the Inspector's sketch of the scene), and below the words "car stop," there are two lines of text with lines drawn through them. This is the depiction of the outby "car stop" through which the runaway cars sped past. Thus, that outby car stop did nothing to stop the cars. In short, that car stop did not function to stop anything at the time of the incident. Tr. 85.

[12] Counsel for Respondent's objection was that the Inspector's view was simply speculation and that the inspector who issued the safeguard was not present to identify the hazard which prompted its original issuance. Tr. 83. However, the Court considered the Inspector's view to be relevant to the determination of the hazard addressed by the safeguard and therefore allowed the answer.

also attached. So you've got - - you've pretty well got a means of holding those cars and controlling those cars."[13] Tr. 84.

Referring to the particular safeguard cited by Inspector Willis here, and the words employed several years ago by the inspector who originally issued that safeguard notice, back in 1991, Counsel for the Respondent read into the record that " . . . two long wall utility men [were] observed moving three flatcars of supplies on the long wall section track with a diesel powered scoop, and . . . [t]hey were pulling cars with three-eighth inch diameter rope." Tr. 95.[14] Inspector Willis agreed that not all scoops have winches and he did not know if the scoop in 1991 did, or did not, have a winch.[15]

[13] Although the Court considers *none* of the following to be material to the issues here, on cross-examination the Inspector agreed that the mine investigated the matter and that they developed, in counsel's words, "a plan of action." Tr. 89. Shown Respondent's Ex. 7, a list, the Inspector agreed that it includes all of the safeguards at the mine and that there are something on the order of 49 such safeguards at this mine. Tr. 90. Inspector Willis did not know if the safeguard in issue was based on the particular criteria in that Part 75 standard. Without specifically agreeing that the mine has "stop block" safeguards issued to it, he agreed that the purpose of a stop block is to keep equipment from running away. Tr. 92.

[14] It is noted that Respondent's Counsel presented R's Ex. 5 to the Inspector, inquiring whether it appeared to be a safeguard issued to Oak Grove in 1988. The Inspector then agreed that safeguard, (*which is not in issue in this proceeding*), was modified to reflect 75.1403-10(e), as the correct criterion to be cited. Tr. 94. Respondent's Counsel intention behind these questions was a belief that this would shed light upon the safeguard in dispute here with respect to moving cars with a scoop. Tr. 94. The Court finds that is not the case and that the contention is not meritorious.

[15] Respondent's Counsel then posed a series of questions about exactly what the miners *might* have been doing back in 1991 when that safeguard was issued. For example, Inspector Willis was asked if the miners *might* have been performing their activity on a vehicle with no winch and if they *might* have been simply adjusting [the cars'] position on the track as opposed to actually moving the equipment. Tr. 96. Respondent's Counsel also inquired about Inspector Willis' knowledge about other particulars at the time the 1991 safeguard was issued, such as whether the long wall was downhill or uphill into the section. Tr. 97. Similar questions were posed by Respondent's Counsel as to what might have been in the mind of the inspector who issued the citation back in 1991, including, for example, if he were concerned if one would need to get between a car and the scoop to release a wire rope. From the Court's perspective, the implications behind these lines of questioning reflects a viewpoint that, if adopted, would impose such stringent restrictions on a given safeguard notice that it would only apply to *exactly* the same conditions as those stated in the original safeguard, with the effect that safeguards would be essentially ineffective notices and consequently produce a result at odds with the intent behind the statutory provision included by Congress.

The Inspector did agree that in 1991 the miners were using a wire rope as a substitute for a coupler. Tr. 98. He also agreed that the safeguard did not state that its purpose was to prevent runaway cars, nor that it was issued to deal with a wire rope breaking, nor with miners getting between a scoop and cars. Tr. 99. Inspector Willis, upon agreeing that he was "[f]airly" familiar with MSHA's program policy manual and upon being directed to Respondent's Ex. 3 at page 3 and the general haulage criteria, also agreed that the Manual provides that the inspector should document the conditions which provide the basis for the issuance of the safeguard notice and identify the nature of the hazard to which it is directed. Tr. 101.

Although Inspector Willis agreed with counsel for the Respondent that the safeguard notice did not *expressly* identify the nature of the hazard, he cogently noted that he didn't know what the policy manual provided about that subject at the time that safeguard was issued, back in 1991. Tr. 102. The Inspector then added:

> I think what a lot of people don't understand is the people that write these safeguards, they're not lawmakers as in judicial law as in trained. It's coal miners writing safeguards to coal miners and with that being said, we all understand what the safeguard means. What it says. We all understand about using cables in mines. We all understand how your are supposed to move cars around if that makes sense [to the questioner, Respondent's Counsel] . . . [however, he agreed that the inspector who issued the safeguard] did not *expressly* state what the hazard would be. No, sir, he sure did not."

Tr. 102-103.[16] (emphasis added).

The Court inquired of Inspector Willis what is was about the 1991 safeguard that caused him to conclude that it applied in this instance. The Inspector expressed that it was the second paragraph of the safeguard that caused him to reach that view. Tr. 109. He elaborated that "[i]t fit the scenario the best out of the safeguards that I read that was at the mine." Tr. 110. He felt that it was an unsafe practice and that caused him to issue the paper, but he did not know immediately if there had been a safeguard issued. If no safeguard had been issued, he would

[16] A string of subsequent questions seemed to the Court to be immaterial but they are included here for the sake of completeness. Though unclear as to the point by Respondent's Counsel, Inspector Willis agreed that he was shocked that the cars didn't derail as they went around a corner. The Inspector also agreed that when Mr. Tartt was escaping the oncoming hazard, there were crosscuts on either side of the track near the belt head. Tr. 105. Thus, Mr. Tartt could have decided to go back towards the belt, instead of crossing the track as he did. Respondent's Counsel also tried to distinguish that the mine was not actually moving the cars by pushing or pulling them with the scoop. Instead, they were moving the cars by winding or letting out the winch. Tr. 106-107. As best the Court can determine, this was asked to attempt to distinguish the particular circumstances here from those when the safeguard was issued, all with the purpose of curtailing the breadth of the safeguard to the point of making it a nullity. Apparently with the same purpose behind the questions, the Inspector also agreed that the cars were not being moved any long distance. Rather, they were moved just enough to the next open hole so that a given car could be unloaded. Tr. 107.

have issued one. Tr. 110. The Inspector further explained that his order itself explained his reasoning, noting that it "[r]equires only equipment such as track motor or other approved equipment to use in moving supply cars on the track in the mine." Tr. 111. For the most part, this would mean using the diesel (or a battery-powered) locomotive, but mantrips with couplers and safety chains could be used to move cars around too. Tr. 111-112. The Inspector confirmed that, to comply with this safeguard, it was essential that the equipment be track mounted. Tr. 113.

Additional questions were propounded concerning the Inspector's Order, relating to the hazard and level of negligence. The Inspector marked the gravity as "highly likely" because he concluded that the harm could have occurred. By that, he meant if the practice cited were to continue, it would be highly likely that injuries would result. He marked it as potentially fatal, because of the hilly terrain underground. In the event of a runaway, with more hills, there would be increased speed and more blind spots. Tr. 115. Further, this event occurred on the main line track and so it is where everyone that works at the mine travels during a day. Tr. 116. Further, the Inspector's conclusions regarding this were based on what actually occurred, not some speculation as to what could have happened. Tr. 116. Thus, the Inspector took note that the cars ran away for some "3900 feet up and down hills."[17] Tr. 116. What is more, one of the runaway cars was loaded with 20 foot sections of two-inch steel waterline. Tr. 116. Some of those pieces of steel waterline came off a car near where Mr. Tartt fled for safety. Tr. 116. Further, if that car had struck another mantrip those steel pieces would've effectively become "missiles." Tr. 117. Some of Oak Grove's mantrips are open; that is, not all of its mantrips are enclosed. It was also possible that Mr. Tartt could have been in the track or right next to it and not heard the oncoming cars. He also could have been struck by flying steel pieces. Fatal consequences could have resulted. Tr. 118. In determining that the violation was S&S, the Inspector felt the accident was highly likely to occur and that injuries would be of a reasonably serious nature as well. Tr. 118. In marking the violation as an unwarrantable failure, that determination was based on the fact that Mr. Bienia was operating the scoop and as he was in a management position, he should have been aware of the safeguards' requirements. Tr. 119.[18] The Court agrees with and adopts the Inspector's negligence and gravity rationale. Oak Grove and Mr. Tartt, and Mr. Bienia too, for that matter, were extremely fortunate that no fatal or maiming injury occurred here.

The Respondent called Donald Andrew Bienia, who is presently the mine's outby supervisor. Tr. 132. Along with Oak Grove, Mr. Bienia is a Respondent in this proceeding.

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[17] With a mile being 5,280 feet, that means the cars traveled approximately 3/4ths of a mile before coming to rest.

[18] While Respondent's Counsel tried to make inroads on the Inspector's determinations of likelihood by asking if that assessment would change if the mine adopted its corrective actions, based upon the mine's review of the accident, the Court sustained objections to that line of questioning as immaterial. Tr. 120-121.

At the time of the incident Mr. Bienia was a face foreman. As part of his testimony, referring to prior employment at another mine, at some unclear point in time,[19] Mr. Bienia contended that mine cars were moved using wire rope and a winch.[20] Tr. 136. The Court would simply note that this practice, alluded to by Mr. Bienia in his answers, was some 35 years prior to the accident involved here. Further, an unsafe practice isn't transformed into something else simply by claims that it had been done before. Only the Inspector actually spoke to the safety of the practice carried out by Mr. Bienia and Mr. Teel. The Inspector effectively stated that it was unsafe and that it was well understood by the mining community to be an unsafe practice. This was not refuted, as no one among the Respondent's witnesses asserted that the practice engaged here was a safe one. Of course, the events here also underscore the accuracy of that view.

Mr. Bienia described the idea for the winch and wire rope arrangement as one arrived at mutually between Mr. Teel and him. Continuing with his recounting of the event, Mr. Bienia stated that on May 12, 2010, Mr. Teel asked him for some help in moving mine cars. Tr. 137. According to Bienia, Teel needed the fourth car moved so that he could access and remove an electrical box on that car with his low track. Bienia then drove the scoop to the location and turned the scoop on an angle with its bucket facing outby. Tr. 138. The cars, as sketched on GX 9, had the electrical box on the 4th car and, beginning with the first car outby, that car had the aforementioned pipe. According to Mr. Bienia, the 2nd and 3rd and 5th cars were empty, while the 6th car had miscellaneous items. The Court would note that as half of the cars were empty, this testimony only serves to highlight how woeful the rope and winch arrangement was; the cars could not be held, though half of them were empty.

In terms of the car stops,[21] Mr. Bienia stated that there was one between the 3rd and 4th cars, holding the cars in position, with the fourth car resting against that stop. Tr. 140. There was a second car stop about 30 feet outby, and both of these car stops are reflected in GX 9. The plan was to move the fourth car about ten feet outby so that it could be accessed for unloading. Tr. 141. When asked if the plan was to push or instead to pull the cars with the scoop, he stated that he "pulled [the scoop] in on an angle so that we could use the winch rope and hook it to the third car. Winch up enough, take the stop out of - - that was between the third and fourth car, and then let the winch off about ten feet to where Mr. Teel could [access the electrical] box . . ." Tr. 141. They needed to pull the cars first because of their collective weight against the car stop between the third and fourth car. Tr. 141-142. All six cars were connected.

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[19] For this testimony, though it was unclear, Mr. Bienia seemed to be talking about practices at Maple Creek Mine in 1975. Tr. 135.

[20] Later, Mr. Bienia stated that it "was the first time" he had used the winch and wire rope arrangement to move supply cars, by which the Court concludes he apparently meant at *this* mine. Tr. 153.

[21] Mr. Bienia described the car stop as a wish bone like shaped apparatus, about a foot and a half in height and weighing about 30 pounds. The stop would be centered over the rail and then a pin was placed under it, connecting the two wishbone ends.

Tr. 142. Mr. Teel hooked up the rope to the car, while Mr. Bienia ran the winch. As he was in the scoop, Mr. Bienia could not see just where Mr. Teel attached the hook on the car. Tr. 157.

Mr. Bienia was able to pull the cars up sufficiently to allow the car stop to be removed, but as soon as they did that, the cars began moving outby. Tr. 142. Shocked over that development, Bienia turned his scoop into the cars to try to stop them from continuing to move. However, in this attempt, the scoop's bucket caught the uncoupler handle between the third and fourth car. While the scoop held the 4th, 5th and 6th cars, the other inby cars, numbers 1 through 3, continued moving. Tr. 143. He then got out of the scoop and began running to catch up to the moving cars. This response was inherently dangerous, as Mr. Bienia was running alongside the moving cars while simultaneously looking for something to throw under a car wheel, such as a crib block or a piece of timber. Tr. 144. In fact, Mr. Bienia subsequently acknowledged that running alongside the 5 ton rail cars, and seeing if there was something he could throw in front of the runaway cars, was hazardous *for others to attempt*, but he somehow believed that *he* could safely do it. Tr. 149. Unsuccessful in finding a means to stop the cars' movement, the cars then began to pick up significant speed, so much so that he could not keep up with the runaway cars anymore.[22] Tr. 144. At that point both Bienia and Teel had used mine phones to alert the mine of the runaway cars.[23]

Despite all that transpired, Mr. Bienia thought the "scoop, winch rope, and hook" arrangement was a safe procedure, as he had used that technique before to spot cars at another mine. Tr. 145. When asked if, under this method, the scoop was being used to push or pull the cars, Bienia informed that "[t]he winch was going to do all the work." Tr. 145. The Court would note that this is a matter of semantics. While true that the winch was intended to pull or release the rope, it was *a part of the scoop*, and therefore indistinguishable from the scoop.

Mr. Bienia testified that at the time of the incident's occurrence, he had no awareness of the safeguard in issue. He stated that he was unaware of the subject safeguard and, for that matter, any safeguards, at least as practices described as "safeguards." Instead, he relied upon what he described as "common practice and common understanding." Thus, while he knew about "practices," he didn't know them to be "safeguards" as that was a new term to him. Tr. 154-155. Further, he was unable to recall that he was ever advised to become familiar with the safeguards at the Oak Grove Mine. Tr. 157. In an attempt on redirect to rehabilitate the witness' testimony, Mr. Bienia, agreed that he knew many "rules" at the mine, though he did not know of

[22] Bienia confirmed that there was a stop block outby the last car (i.e. car no. 1), stating that it was about 30 yards outby that car. As noted earlier, GX 9 reflects the approximate position of the car stop as in the lower third of that exhibit, with car no. 6 being at the top. By the time Bienia began running alongside the cars, they had already run through the car stop. Tr. 150.

[23] Their idea was that the mine would then radio miners to warn them of the runaway cars.

the term "safeguard" and that he knew of no "rule" prohibiting moving supply cars with a rope and a winch.[24]

John Henry Hedrick, III was also called as a witness.[25] Concerning the incident here, Mr. Hedrick stated that he was part of the investigation which followed. Paul Hafera, David Ingle, Mr. Teel, Mr. Bienia, Tom Fisher, evening shift foreman, and Tom Wakefield, the miners' representative for the investigation, were involved with the investigation as well. In the course of his investigation, Mr. Hedrick observed that both Mr. Teel and Mr. Bienia displayed a "questioned look" when he alluded to the term "safeguard," but that they may have recognized, apart from the term, what a safeguard covered. Tr. 171. After the runaway cars incident, MSHA prepared a list of the mine's safeguards and they were explained in shift meetings as the "safety rules" and where those rules could be found at the mine. Tr. 172. With some assistance from Respondent's Counsel, Hedrick agreed that people at the mine knew such rules existed but that they didn't know them by the term "safeguard." Tr. 172. Continuing, Hedrick affirmed that Teel and Bienia knew the substance, that is, how to move cars on the track, but did not apply the specific word "safeguard" to that process. Tr. 172. Thus he maintained that Teel and Bienia knew what one could and could not do when moving cars on a track. Tr. 172.

As to the issue of using a winch cable to move cars, as was done here, neither Teel nor Bienia understood it was a prohibited practice. Hedrick too, after reviewing the safeguard in issue, also concluded that it did not apply to the circumstances cited here. This conclusion was based on his view that "[t]he safeguard referenced moving cars on the tail track, pulling cars out with a scoop and a rope. The rope takes the place of a coupler and positioning cars either out of a kickback or out of a - - off the tail track." Tr. 173. Thus, he viewed that as different from this occurrence, where they were spotting cars. Tr. 173. As he expressed it:

> if [one] put the scoop in front of the cars and use[d] the scoop to move the cars, either push or pull them with a rope, or whatever, that is what is addressed by the safeguard.

Tr. 174.

Accordingly, it was Mr. Hedrick's opinion that the safeguard was addressing spotting or moving a car on the "tail track."[26] Tr. 177. Later, Mr. Hedrick stated that the safeguard

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[24] Although a matter distinct from determining liability, the Court commented at the conclusion of Bienia's testimony that it recognized having to testify about the matter must have been a difficult experience for him and that it considered his testimony to have been forthright. Tr. 164.

[25] At the time of this testimony Mr. Hedrick was the mine's surface superintendent. Prior to that, from May 2010 to about April 2011, he was the mine's safety manager. Tr. 167. Among other aspects of his background, Mr. Hedrick has a degree in mining engineering.

[26] The term "tail track" was not explained. While not a finding of fact, an internet mining (continued...)

prohibits using scoops and wire ropes to move cars on the track. Tr. 190. Faced with this unwelcome response, Counsel for the Respondent then inquired what Hedrick meant, whereupon he stated that he *meant* "[t]aking cars out the tail track, taking cars out of a kickback, setting up a section" and that this was different from moving cars to spot them. Tr. 191.

Mr. Hedrick was not at the mine when the safeguard was issued in 1991 and his interpretation was based on "[b]eing involved in the - - the man trips and why they were equipped with couplers and why they were equipped with certain locking brakes." Thus he believed the safeguard originated to allow man trips to move cars. Hedrick described moving cars and spotting cars as the same type of work. Tr. 178. Although Mr. Hedrick described several steps the mine took after the incident to address it, with the intent to prevent a recurrence, those steps did not involve any change of policies as to having a motor available to move cars. Tr. 179.[27] The mine's report, R's Ex. 8, was entered and Mr. Hedrick identified himself as the author. Tr. 180-182.

Summary and comment regarding the Parties' Contentions for this Safeguard Notice.

Respondent begins by noting that safeguards are issued without notice and comment rulemaking and that the Commission has described that quality as a "crucial" distinction.[28] R's Br. at 6. A safeguard, it states, "must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed." *Id.* at 7.[29] While not in agreement with the Commission's position, Respondent concedes that the Commission has stated that, although a safeguard "need not delineate the potential harms" it addresses, it still must specify a hazardous condition and specify a remedy for it. *Id*. at 8.

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[26](...continued)
engineering source describes this as a form of track layout for trip loading in which the track can be extended. The Court would simply note that the safeguard notice makes no mention of "tail tracks" and that this subject amounts to a distraction.

[27] Respondent's Counsel viewed the mine's policy changes following the incident as mitigating factors. The Court questioned whether mitigating factors can be considered when they involve actions taken *after* an incident occurred, inviting Respondent's Counsel to cite authority for that perspective. No authority has been supplied for the contention. Respondent's Counsel asserted that there was no obligation to report the incident under 50.20, because no one was injured. That may be true, but the Court notes that was fortuitous for Oak Grove, and for Mr. Tartt, who narrowly escaped injury.

[28] Respondent cites to *Southern Ohio Coal Co.* ("*SOCCO I*"), 7 FMSHRC 509, 512 (Aug. 1985)

[29] Apart from Commission decisions, Respondent also cites to MSHA's Program Policy Manual ("PPM") and its advice as to the practices an inspector should follow when issuing a safeguard notice. As noted *infra*, the Commission has spoken to the Policy Manual in this context.

Respondent then turns to the Commission's recent decision in *American Coal*,[30] offering its take on it. It notes, as an example, that for one of the 12 safeguard notices the Commission affirmed, the safeguard specified the nature of the hazard and specified a remedy.[31] Respondent then compared that safeguard's affirmance with the one safeguard notice it invalidated in that decision. That invalidated safeguard notice applied to all long wall units, requiring that hydraulic manifolds, hoses, and CIU shield control boxes were to be mounted to provide maximum walkway clearance between the pan line cable tray rail and shield components and, if safe clearance could not be so provided in those areas, the conveyor was to be shut off and the electrical isolation switch opened before travel occurred in those areas. The Commission, as Respondent points out, held that the inspector failed to describe the conditions which he observed that led to the issuance of the safeguard. The Commission stated that while it could be inferred that the manifold and hoses were not mounted to provide maximum walkway clearance, the safeguard did not state if "some or all of th[o]se conditions were observed by the inspector." *Id*. at 9, citing *American Coal* at 9.

Respondent also refers to a decision issued by the undersigned in which this Court held that while the safeguard in dispute spelled out what was required of the mine – that cars on main haulage roads were not to be pushed, it did not describe the hazard intended to be addressed. Instead, at the hearing, the MSHA witness offered his interpretation of the hazards it addressed. Respondent correctly adds that this Court also determined in that decision that the hazard was not "so plainly obvious that it need not be stated." *Id*. at 10, citing this Court's decision *in a different* Oak Grove safeguard matter.[32] 33 FMSHRC at 850-851.

On those bases, Respondent concludes that for a safeguard to be valid, while the harms don't have to be stated, the hazardous condition must still be identified and the "conditions [ ] described in such a way that the hazard is evident." *Id.* Applying this description, Respondent asserts that the safeguard in issue here does not meet the requirements set forth by the Commission in *American Coal.* Reading from the text of the underlying safeguard invoked in the present litigation, Respondent attempts to distinguish its applicability from the practice which brought about the section 104(d)(2) order here. In this regard, Respondent points out that the underlying safeguard makes note that flat cars were being *pulled* with a 5/8" diameter wire

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[30] Respondent failed to provide a citation to *American Coal*, but it is referring to the Commission decision dated August 30, 2012, found at 2012 WL 4026649.

[31] That safeguard notice stated that there were accumulations of water and coal fines in a longwall walkway, that those accumulations created a hazard for those traveling that area and that all longwall walkways were to be free of such accumulations where they were such as to affect safe travel.

[32] The Respondent quite properly cites to this Court's decision in *Oak Grove Resources v. Secretary of Labor,* 33 FMSHRC 846, 2011 WL 2441301 (March 28, 2011) (presently on appeal before the Commission). This is not the forum to relitigate the determination made in that decision. However, in light of the Commission's subsequent decision in *American Coal*, the Court's analysis of a safeguard's validity has been substantially informed and applied here.

rope, whereas in the present litigation the mine was "spotting" the cars, moving them a short distance. Witnesses for the Respondent expressed at the hearing that the tasks were dissimilar and that the original safeguard was speaking to using a wire rope as a coupler.

The Court would interject here that when the Court relates the Respondent's reading of the safeguard, that should not be blurred as any kind of an endorsement of that perspective. In the Court's view, for example, the safeguard can also fairly be read as requiring moving supply cars on mine track only with the use of "track motors or other approved equipment." Indeed, the safeguard literally requires just that, expressing that "only equipment such as track motors or other approved equipment be used in moving supply cars on the track in the mine." Exhibit G 4. That safeguard requirement was imposed in the context of the inspector having observed three flat cars of supplies being moved with a scoop as it pulled those cars with a wire rope. The Court also considers it to be noteworthy that, as to the applicability of the safeguard challenged here, with the hazard being plainly obvious, it does not expressly specify a hazardous condition. The Respondent's view is that the safeguard itself is defective by this failure. R's Br. at 12.

Noting that the Secretary has the burden of proof to show that the citation issued here is within the scope of the safeguard, and reminding again that, as safeguards do not come about through notice and comment rulemaking, they "must be bounded by a rule of interpretation [that is] more restrained," the Respondent emphasizes that they "must be construed strictly." R's Br. at 13-14. This approach, Respondent adds, balances the Secretary's authority to require a safeguard with the "operator's right to fair notice of the conduct required of it by the safeguard." *Id*. at 14. Under its view, a citation which attempts to go beyond the "specific hazards and conditions" addressed in the safeguard, must be vacated.

The Respondent also cites to the Commission's decision in *Green River Coal Co.*, 14 FMSHRC 43, (Jan. 1992), as support for its view. There, the safeguard was upheld but a subsequent citation relying on it was vacated because, while both addressed obstructions in travelways, the obstructions differed fundamentally in their "nature, cause, and remedy." Although in both cases a clear travelway of at least 24 inches was not provided, the safeguard came about from roof supports creating the insufficiently wide travelway, whereas the citation arose from a roof fall, which then created the insufficient width.[33] Respondent finds another example in the Commission's *Bethenergy Mines* decision, 15 FMSHRC at 982, 1993 WL 395186, June 1993, where the safeguard identified a lack of a 24 inch walkway along a longwall section and a citation relying upon it identified two belt lines with less than that clearance. In vacating the citation, the Commission held that the travel impediments, though both resulted in less than 24 inches of clearance, arose from substantially different causes. While the safeguard arose from a fence which had been erected and because a belt had been placed too close to a rib,

[33] It is worth noting that, in neither the upheld safeguard, nor in the citation relying upon it, was the hazard expressly identified. Accordingly, these two cases cited by the Respondent are instances when the nature of the hazard is plain to all: less than 24 inches of travelway is insufficient.

the citation's inadequate walkway came about from coal sloughage and other unintentional sources.[34]

The Secretary maintains that, by Commission precedent, a valid safeguard must state the hazard against which it is directed and the actions required to remedy or prevent the occurrence of the condition or practice. Sec. Brief at 15, citing *SOCCO I*. The Secretary takes note that the Commission has expressed that, in recognition that safeguard notices are written in the field by mine inspectors, not a team of lawyers, reviews of such notices is not a semantic exercise. It submits that these principles were reiterated in the Commission's *American Coal* decision. In one of three examples mentioned by the Secretary from that *American Coal* decision, safeguard no. 4054971, it notes that a miner was observed being hoisted in a cage with its gate in the open position. The notice then required that the gates on all cages be in the closed position when cages are hoisting or lowering miners. The Commission upheld the safeguard as specifying the nature of the hazard and the remedy for it. Of importance to the analysis of the validity of a safeguard, the Secretary observes that it is not necessary to explicitly state that an open gate presents a danger of falling, as "common understanding and experience" implicitly inform that to be the case. Sec. Br. at 18. The Court agrees with this contention. Put another way, a safeguard is not required "to state the obvious" to pass muster. *Id.* at 21.

Discussion.

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 . . ."

The Commission has spoken to the issue of safeguards on many occasions, but its most recent decision on the subject in *American Coal* neatly ties in and summarizes its law on the issue. 34 FMSHRC 1963, 2012 WL 4026649, Aug. 2012. In *American Coal* the Commission reviewed its precedent, beginning with its holding in *Southern Ohio Coal Co.*, 7 FMSHRC 509, at 512, ("*SOCCO I* "), noting that a safeguard notice must identify with specificity the "nature of the hazard" at which it is directed and "the conduct required" to remedy that hazard. It explained that the requirement to identify "the nature of the hazard" is met where the safeguard specifically identifies hazardous conditions. In *SOCCO I*, rocks and cement blocks in a travelway were identified as the hazard and the safeguard required the mine to provide at least 24 inches of clearance on both sides of conveyor belts. The Commission held that the attempt to apply that safeguard to water accumulation in the travelway was beyond the class of hazards identified in the safeguard notice. Accordingly, it held that an obstructed travelway created by water accumulation was not covered by the safeguard notice identifying rocks and blocks as the source of impeding the clear travelway.

[34] It is important to note that the hazard was not expressly stated, it being well understood. In fact, though not in the text of the safeguard notice, *the Respondent acknowledges* that "slipping, tripping and falling hazards" were behind the safeguard's issuance. R's Br. at 16.

In the second of the three well-known Southern Ohio Coal Company safeguard cases., *SOCCO II*, 14 FMSHRC 748, (May 1992), the Commission reiterated that a safeguard which specifies hazardous conditions and provides a remedy is valid. It added that where a safeguard is based on the specific conditions at the cited mine and a determination that those conditions presented a transportation hazard, it is valid. Particularly important as applied to this litigation, the Commission stated in *SOCCO II* that the safeguard *facially* specified a hazardous condition. Notably, the safeguard notice *did not formally utter the words that it was hazardous* that the mine lacked a sufficient number of shelter holes. Instead, it stated that there were no shelter holes along a 400 foot section of the mine's supply track and that shelter holes were to be provided. Because the lack of shelter holes along that 400 foot section presented a plainly hazardous condition, there was no need to express the obvious.

The Commission repeated this principle in its third *Socco* decision, 14 FMSHRC 748 (May 1992) (" *SOCCO III* "), where the safeguard notice identified that only 6 inches of clearance was present for a scoop being operated along a supply track. The safeguard required that at least 36 inches of clearance be provided. In upholding the safeguard's statement that there was only 6 inches of clearance as sufficiently identifying the hazard, the Commission did not treat the notice's sufficiency by applying a grammatical test. Thus, while true that the safeguard did not assert that 6 inches of clearance was insufficient clearance nor that such small clearance thereby created a hazard, the Commission would not allow the notice to be invalidated, because it was both obvious that 6 inches of clearance was insufficient and because the safeguard informed the mine that the remedy to be provided was at least 36 inches of clearance.[35]

Accordingly, the Commission's review, in *American Coal*, of its safeguard decisions summed up that if the safeguard specifies a hazardous condition and specifies a remedy, the safeguard will be deemed valid. *American Coal* at *5. It added that the word "hazard" in the safeguard provision means "hazardous conditions" and asserting a hazardous condition expresses the nature of the hazard and that the notice need not express the particular harm. Emphasizing this point, the Commission agreed with the judge's expression that there was no requirement to name the harm or risk because any hazard may pose multiple risks and therefore the inspector need not identify each and every risk or harm.[36] *Id*. at * 6.

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[35] *SOCCO III* was only remanded for the judge to determine if the safeguard was issued because of the specific conditions at that mine and that the inspector so issued it because he considered that small clearance to be a hazard, which was to be corrected by providing the 36 inches of clearance. On remand**,** although the judge still found the safeguard to be deficient, on the basis that it did not identify the hazards to the scoop operator, the Commission noted in its *American Coal* decision that the judge's inclusion of such a requirement, that is, to require a listing of the harms, was contrary to *SOCCO I*'s holding. Instead, the requirement is for the safeguard to "state a hazardous condition and a remedy." *American Coal* at *6. Of course, that judge's requirement to identify the hazards was not binding on the Commission in any event.

[36] Respondent Oak Grove has also made mention of MSHA's Program Policy Manual ("PPM"), but little needs to be said about that Manual because, as the Commission took note in

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The Commission then proceeded in *American Coal* to address the facial validity of the particular safeguards under challenge. There is no need to exhaustively discuss each of the 13 safeguards discussed by the Commission in *American Coal* because there is some analytical commonality to them. A few examples from that decision follow.

Speaking to safeguard no. 7582643,[37] issued because of the lack of a clear travelway along the length of a long wall face, created by the presence of coal and gob along that travelway, and requiring that those walkways be free of "all extraneous materials that would affect the safe travel of miners," the Commission held that the safeguard was valid, as it specified the nature of the hazard: coal and gob affecting safe travel, and the remedy: that the walkway be free of extraneous materials. It is worth noting that the safeguard did not state that coal and gob in the travelway affected safe travel because, in the context of the order and upon reading the remedy, it was obvious that it would be superfluous to do so. Written by mine inspectors, not by a legal team, the safeguard imparted the nature of the hazard, and the remedy to deal with it, in a commonsense manner. This approach makes sense in the real world. It would hardly be useful if, instead of a plain spoken identification of the nature of the hazard and the remedy to deal with it, the safeguard notice was ladened with legal verbiage which required a separate team of lawyers to figure it out and then, quite likely, argue further over its construction.

In another matter, a construction tractor, identified as a "CT 10," pulling a trailer loaded with crib ties, was the subject of safeguard no. 4272082. There, the tractor was pulling the trailer with a belt chain. The safeguard required "a proper coupling device" for that particular tractor as well as for "all other mobile equipment used at [the] mine to transport materials and equipment." The Commission rejected American's assertion that the safeguard failed to specify both the hazard and the corrective measures, finding that, on its face, the safeguard identified both the hazard and the remedy. *Id*. at *10. This is another example demonstrating that, within the context of the common knowledge of those working in mining, when inherently unsafe practices are described, there is no need to formally utter a pronouncement that a practice is unsafe or hazardous, nor must the *specific* remedy be commanded. Further, the remedy, measured against the performance standard that only a "proper coupling device" be used, assists

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[36](...continued)
American Coal, such manuals do not constitute "rules of law that are binding on the Secretary or the Commission." *Id*. at *6. The Court would add that, even on its own terms, the Manual does not command particular inclusions within a safeguard notice, employing "should," not "shall," language.

[37] The same result, finding the safeguard valid, was produced in safeguard no. 4054826, where it similarly identified some items, such as rock, "rib rash" and "other extraneous materials," along a travelway and stated the remedy, that the walkway be free of "debris and extraneous material." As to whether a particular object was "extraneous," the Commission held that this was "partially a question of fact" to be decided by the judge following the evidentiary hearing.

the mining community by not restricting the remedy to a particular device, as long as it is proper for coupling.

The one safeguard found by the Commission to be deficient in *American Coal* involved long wall units in which "hydraulic manifolds, hoses and CIU shield control boxes" were not mounted in a manner to provide "the maximum walkway clearance between the pan line cable tray rail and the shield components." The safeguard went on to provide that if such safe clearances could not be provided, the conveyor would have to be shut off and the electrical isolation switch at the head gate opened before miners traveled past such areas.

Determining that the safeguard was insufficient, the Commission held that the nature of the hazard was not described with sufficient specificity in that the inspector issuing the safeguard did not state that the cited conditions were observed. Accordingly, while the Commission conceded that it could be *inferred* that the conditions were so observed, at least in that instance it concluded that the inspector did not sufficiently express that the conditions were so observed.[38] *Id*. at *12.

With the Commission's guidance in mind, it is time to turn to the challenges to the citation issued here. The entire text of the safeguard upon which the government relies provides:

> The two longwall utility man were observed moving 3 flat cars of supplies on the longwall section track with a Diesel powered Scoop (Note) They were pulling the cars with a 5/8" dia[meter] Wire Rope. This notice to provide safe guard requires only Equipment Such as Track Motors or other approved Equipment be used in moving supply cars on the Track in the mine.

Safeguard notice number 3013658, issued May 25, 1991.

By comparison, the Citation in issue in this proceeding, Citation No. 8518376, Gov. Ex. 2, states, in relevant part:

> On 5-12-2010 . . . an incident occurred at this mine that endangered the lives of miners working underground. A Section Foreman was using the winch of a scoop to move 3 supply cars; with 1 of the cars being loaded with 20 foot sections of 2 inch metal water pipe. The supply cars were located at the end of the Main North 3 track. The 3rd car inby was attached to the winch cable. The hook on the end of the cable became disconnected from the supply car causing the 3 most

[38] This *does not mean* that, to be valid, a safeguard notice must actually state that the condition was "observed." For example, in the same *American Coal* decision, where a safeguard stated that a "PV55 was not equipped with a sealed-beam headlight . . . [and that] all personnel carriers [ ] be equipped with a functional sealed beam headlight or its equivalent . . .," in the context it was clear that the condition *was observed* by the inspector. *Id.* at * 12.

> outby supply cars (coupled together) to roll outby. There was a positive stop located approximately 30 feet from the cars, that when contacted by the cars, fell over allowing the supply cars to continue to gain momentum and travel outby with no one in control of the cars. The cars came to rest at cross cut 20 on 11 West track. The distance traveled by the supply cars was 3.900 feet.

Clearly, the underlying safeguard meets the Commission's test because it implicitly specifies the hazardous condition and explicitly provides the remedy for it. With the valid safeguard, the citation in issue here, clearly falls within its purview. In fact, it would be difficult to imagine a scenario that would be closer than the one cited here. For that reason, a prolonged discussion is both unnecessary and unwarranted.

The underlying safeguard was issued upon the inspector *observing* flat cars being moved by a scoop which was pulling the cars with a wire rope. An inherently unsafe practice, the notice then set forth the remedy, directing that only approved equipment be used *to move supply cars* on the mine's track. Though not essential, the notice then put forth "track motors," as one example of an approved piece of equipment to move such cars.

In both the underlying safeguard and the Citation issued for its violation, the commonalities are rife: both involved the use of a scoop to move mine cars and both were doing so with wire rope/cable. Focusing upon distractions such as whether there was pulling or pushing going on, is to miss the point that scoops and cables are not a safe, nor approved, means to move mine cars.[39] Accordingly, considering the Commission's recent guidance in *American Coal*, together with the admonition that safeguards are not created by a drafting team of lawyers, the Court concludes that the safeguard in issue is valid and that it applies to the cited condition. This conclusion also comports with the recognition that a legal analysis and commonsense should not be mutually exclusive endeavors.

[39] The Respondent's approach to safeguards would so restrict such notices such as to make them useless in anything beyond the *exact* condition cited. Consistent with its narrow interpretive perspective, the Respondent argues that while the safeguard was dealing with *pulling* cars through the mine by a scoop using a wire rope and that the scoop was only to pull cars with a rigid coupler, here, it maintains, somewhat astoundingly, that the power on the scoop was different, being supplied by the winch on the scoop, as opposed to the scoop itself. R's Br. at 21.

Remaining Issues

A. Respondent's contention that there was no unwarrantable failure[40].

Respondent maintains that "there was a reasonable good faith belief that a violation did not exist [on the grounds that] Mr. Hendrick . . . believed that the safeguard did not apply to the cited condition." R's Br. at 24. Respondent finds support for this belief on the basis that the safeguard refers to "pulling the cars" with a wire rope and that this is somehow different from moving them a short distance with the use of a wire rope on a winch mounted on a scoop. It also contends that, by the mine's obtaining mantrips with couplers *after* the incident, that "suggests" that the "use of the wire as a coupler" was the "issue in the safeguard." *Id.* Last, Respondent asserts that Mr. Bienia's belief that his actions were not improper point to a lack of unwarrantability and that this belief was supported by his prior actions at another mine where he spotted cars using a wire rope and winch arrangement.[41]

For the Secretary's part, it maintains that as the violation occurred as "a direct consequence of the actions of Mr. Bienia [who is] a supervisory employee at the mine who was not only aware of the violative action but also was an active participant in its commission [and that all three aspects:] the violation, the high level of negligence, and the unwarrantable failure allegations [have been] clearly established." Sec. Br. at 21-22. Nor, it asserts, does "Mr. Bienia's claim that he was unaware of [the safeguard in issue constitute] a defense to a finding that he violated [the] Safeguard . . . [since] ignorance of the law is not a defense . . . " *Id.* at 22, (citations omitted). The Secretary also submits that Mr. Bienia's testimony lacked credibility because his claim that he was aware of most of the safeguards at Oak Grove, but not the one in issue, is by that very claim, not believable. Though the Secretary suggests that the foregoing is enough to question the claim that Mr. Bienia did not know of this safeguard, the Secretary notes

[40] Oak Grove, while preserving the issue of whether the violation was S&S, advises that "[i]t will not brief further the S&S issue because Oak Grove treated the incident as a serious one that required remedial action." R's Br. at 21, n. 5. The Secretary notes that, as to whether a violation of a safeguard notice *can ever* be designated as "S&S," that issue has been decided, citing *Wolf Run Mining Co. v. Sec. of Labor,* 659 F.3d 1197 (D.C. Cir 2011). Sec. Br. at 24-25. Certainly, by even the most conservative application of *Mathies*, the 104(d)(1) order here was S&S and the Court so finds.

[41] As with several arguments Respondent made, the Court is at a loss to appreciate their value. Here, for example, in the context of the issue of unwarrantability, Respondent notes that there was a car stop outby, positioned to stop the cars. Respondent does acknowledge that the car stop stopped no cars. Another contention, the point of which is unclear on the subject of unwarrantability, is that Oak Grove investigated the incident and took steps to prevent its recurrence. Respondent, acknowledging that the Court questioned that action's applicability in determining unwarrantability, states that "it would be antithetical to the purpose of the Act to fail to take in[to] account such actions." R's Br. at 24-25. As noted, Respondent provides no authority for this contention.

that Mr. Hedrick stated that Mr. Bienia *did know* of it, but that the mine concluded the safeguard simply did not apply to the situation which gave rise to the incident. Sec. Br. at 23.

Though the Respondent appears to have conceded the gravity aspect, the Secretary notes that the Inspector listed it as "highly likely to cause a fatal injury to one person" and that, as the incident occurred on the main line track, other miners would be exposed to runaway cars. Sec's Br. at 23. Of course, there was, the Secretary also notes, the very close call Mr. Tartt experienced. The Court has already addressed this issue, and finds that the gravity was highly likely, reasonably could be expected to result in permanently disabling injury or a fatality and most definitely significant and substantial.

The term "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," "intentional misconduct," "indifference," or the "serious lack of reasonable care." Id. at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See, Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The evidence of record demonstrates that there was an unwarrantable failure here. Not only did supervisory personnel know of the hazardous method employed, the supervisor, Mr. Bienia, conducted the unsafe practice himself, along with the collaboration of employee Teel. Thus, the action taken here was a conscious decision to deal with the movement of cars in the manner employed. Matters were not helped by the supervisor's lack of awareness that there is a safety practice known as "safeguards." This unfamiliarity with the term takes into account testimony that Mr. Bienia stated that he was aware of the substantive requirements of nearly all the mine's safeguards, save this one, but that he never associated the label "safeguard" with those. It is noteworthy that no one from the Respondent's side came forward at the hearing with a claim that the technique employed here was a salutary practice, which should be employed in future efforts for moving cars. On the other hand, the Inspector was firm that the practice employed was unsafe and well-understood to be so. As supervisors are held to a heightened standard of care regarding safety matters, and as there was an intentional, though inexcusably unwitting, violation of the safeguard involved here, the conclusion that the violation was unwarrantable is inescapable and the Court so finds that to be case here. *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995); *Youghiogheny*, 9 FMSHRC at 2011.

B. Respondent's contention that no penalty should be imposed under Section 110(c).

Respondent contends that the evidence does not establish that there was a knowing violation. In this regard, it quotes the Commission's statement that "an individual acts knowingly where he is 'in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" R's Br. at 40, citing *REB Enterprises, Inc., Harold Miller and Richard Berry,* 20 FMSHRC 203, 211 (March 1998).[42] To establish this, Respondent maintains, mere negligence, and even high negligence, is not sufficient, as unwarrantable failure must be shown. Citing an administrative law judge decision, Oak Grove adds that, if one reasonably believes that a particular practice is safe, no 110(c) liability should attach. R's Br. at 41.

Applying its stated recounting of the test to the facts, Respondent states that "no finding that Mr. Bienia knowingly authorized, ordered or carried out a violation" can be made, apparently because he held a "good faith belief that a violation did not exist." R's Br. at 41. To support that assertion, Respondent offers two points: *Mr.Hedrick's belief* that the safeguard did not apply to the cited condition; and the claim that because the safeguard refers to *pulling* the cars, that is different from "spotting" cars, because the latter only involves moving them a short distance. It adds that, as Mr. Bienia had for years spotted cars using a wire rope and a winch, he reasonably did not believe that was an improper practice.[43]

Section 110(c) provides that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d) of this section." 30 U.S.C. § 820(c).

The Commission has established the test for determining a "knowing" violation in such circumstances, stating "If a person in a position to protect safety and health fails to act on the

[42] Respondent omits to mention, from the same passage it quoted, that the Commission also stated that "the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law." 20 FMSHRC 203, at *210-211.

[43] Oak Grove also adds to this argument in its challenge to 110(c) liability that Mr. Bienia checked to be sure there was a car stop outby. While Oak Grove then admits the car stop stopped none of the cars, it still argues that "it was positioned to do so." R's Br. at 42. The Court would simply note that the safeguard notice says nothing about a car stop as a remedy, or method for moing supply cars, nor does it refer to car stops at all. While the foregoing disposes of the car stop contention, the Court would add that it is bold to refer to a car stop as an ameliorating factor when there was no testimony that such placement is considered to be an acknowledged practice to stop runaway cars. At best, on this record, a car stop would cause a derailment, which is hardly a sound plan to deal with runaway cars and, again, car stops have nothing to do with this safeguard.

basis of information that gives him knowledge or *reason to know* of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd* 689 F.2d 623 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983)(emphasis added). It is true that a section 110(c) violation requires more than ordinary negligence by requiring that the corporate officer's conduct must be "aggravated." *Wyoming Fuel,* 16 FMSHRC at 1630 and *Emery*, 9 FMSHRC at 2003-04.

Although the Court has a high regard for Mr. Bienia, as a person, that is distinct from the analysis to be applied in determining whether there is section 110(c) liability. Mr. Bienia, as a member of management, had a duty to know of the safeguards at the mine. Thus, he had reason to know that the actions he initiated with Mr. Teel ran contrary to the safeguard and, beyond that, had reason to know that it was an inherently dangerous manner to move supply cars that way. Accordingly, in this case, the Court must find that such liability has been established.

The determination of an appropriate penalty is another matter. For that, the Court is to make findings for each of the statutory penalty criteria. This includes considering things such as the individual's income, family support obligations, the appropriateness of the penalty in light of the person's job responsibilities, and his/her ability to pay. Consistent with the foregoing, the individual's history of violations, and negligence, the gravity and whether there was a good faith abatement are all to be factored into the assessment of a penalty.

There is no indication that Mr. Bienia has any prior knowing violations of the Mine Act. The size of business criterion is not applicable. There is nothing in the record to indicate that even the proposed penalty would impact the ability of Mr. Bienia to meet his day-to-day financial obligations nor that such penalty would be inappropriate considering the individual's income and net worth, as no evidence was presented on those aspects either. The negligence and gravity have already been discussed and were taken into account by the Court in arriving at the penalty herein imposed. Good faith abatement is a non-factor in terms of the penalty for Mr. Bienia as well.

Upon consideration of the evidence in the case and the application of that evidence to the statutory criteria, the Court imposes a civil penalty of $500.00 (five hundred dollars) against Mr. Bienia.

C. Respondent's contention that Section 110(c) of the Mine Act , 30 U.S. C. § 820(c), applies only to agents of Corporations.

Respondent here contends that Mr. Bienia, as an agent of a limited liability company is not subject to individual liability under section 110(c). It is Respondent's belief that since the language of the provision *literally* states that "[w]henever a *corporate operator* violates a mandatory health or safety standard . . . any director, officer, or agent *of such corporation*[44] who knowingly authorized, ordered, or carried out such violation, . . . shall be subject to the same

[44] *Italicization* added by the Court to highlight the Respondent's central contention.

civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section," that is the end of the discussion. (emphasis added).

In support, Respondent cites to *Donald Guess, employed by Pyro Mining*, 15 FMSHRC 2440, (Rev. Comm. 1993), *aff'd* 52 F.3d 1123 (D.C. Cir. 1995)("*Guess*"), in which the agents of a partnership were themselves corporations. A section 110(c) matter, the Secretary sought to hold Pyro employees liable under that provision. Respondent describes that "[t]he targeted agents moved for summary decision on the issue and argued that the language of section 110(c) unambiguously restricts individual liability to certain individuals associated with corporate mine operators." R's Br. at 27. It is true that the Commission in 1995 bought into the literal reading argument presented.

Now, at the outset it should be noted that, in the case of the Respondent's argument, there is little to no presentation as to why this result makes sense for this remedial statute and there is a good reason for that absence – there is no good reason to put forward. The literal words are presented as sufficient because that is all the Respondent has to offer. Though Respondent asserts that "Congress has spoken to the issue," the answer is that "*really, Congress has not done so at all*." That is to say, Congress nowhere asserted that "limited liability companies" are not covered under the Mine Act and the reason such a description will nowhere be found is because it would be inane. While the Respondent tries to muster 110(c) arguments to justify distinctions between corporations and limited liability companies, it produces next to nothing in that regard, offering: "they are creations of an agreement, like partnerships, as opposed to statute, like corporations,"[45] and it produces literally nothing in terms of any logic-based claim to support its assertion. Therefore, it is left where it began ... because the literal language refers to a *corporate* officer, that is that.[46]

In 2012, the Commission revisited the 110(c) liability question. *Sec. of Labor v. Simola, employed by United Taconite LLC,* 34 FMSHRC 539, 2012 WL 894524 (May 2012) (*Simola*). Judge Feldman dispatched the claim initially, noting in his Order denying respondent's motion to dismiss for lack of jurisdiction that: "Here, Congress obviously did not consider the applicability of section 110(c) to agents of LLCs because the operation of mines as LLC entities occurred after the legislation was adopted. Accordingly, the focus shifts to whether the Secretary's interpretation of section 110(c) is reasonable." at 32 FMSHRC 421, at * 423, 2010 WL 1514426. With that observation in mind, the judge added: " Simola, in essence, seeks to differentiate a limited liability company from a corporation based on its Internal Revenue Service tax treatment despite the fact that both business entities shield agents from personal liability. Thus, Simola relies on a distinction without a difference. As the purpose of section 110(c) is to pierce the

[45] R's Br. at 28

[46] This Court's analysis here does not question the right to make such a literally-based claim. A literal reading, but only a literal reading, supports Respondent. Some read the Bible literally, and do so with sincerity, but a growing number do not literally believe that God created the heavens and the earth in six days. Literalism can only carry one so far, whether interpreting the Bible's words or the Mine Act's.

corporate-like liability shield, the Secretary's interpretation that the provisions of section 110(c) apply to agents of mine operators operating as both corporate and limited liability companies is manifestly reasonable and consistent with the intent of the legislation. " *Id.*

In affirming Judge Feldman's decision, the Commission, noted: "The initial step under a *Chevron I* analysis is to decide whether Congress directly addressed the question of whether an agent of an LLC can be held liable under section 110(c). That provision states that agents of corporations can be held personally liable, but does not mention agents of LLCs. However, it is important to recognize that Congress could not have been expected to expressly mention LLCs in section 110(c) because LLCs did not effectively exist in 1977 when Congress passed the Mine Act. Although the legislative history of section 110(c) provides valuable guidance as to Congressional intent in passing the provision, the legislative history likewise does not directly address liability for agents of LLCs."[47] *Simola*, 34 FMSHRC 539 at *543-544.

Speaking further to that legislative history, the Commission noted that "[i]n later passing section 110(c) of the Mine Act, Congress stated that it intended to hold individual officials as well as corporate entities responsible for violations in order to induce greater compliance with the Mine Act. *546. With that observation, it noted that " [t]he Sixth Circuit [has] explained that section 110(c)'s legislative history demonstrated Congressional intent to provide an additional compliance incentive to certain employees working within a corporate structure [by highlighting that] [i]n a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operator. Subsection [110(c)] attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act." *Id.* at *547 (Citations omitted).

Accordingly, based on the foregoing the Court rejects Oak Grove's claim that limited liability companies are outside of section 110(c)'s coverage.

[47] The Commission placed *Guess* in context, stating " . . . Simola reads too much into the Commission's decision in *Guess*. In that case, the Commission rejected the Secretary's attempt to extend section 110(c) to an agent of a partnership. 15 FMSHRC at 2443. We concluded that the entity in question was in fact a partnership, despite its being composed of two corporations. Our acknowledgment of section 110(c)'s application to corporations can hardly be construed as excluding LLCs, since in that case we had no occasion to consider an entity such as an LLC. *Simola* at *545. It also noted that "[t]he agent of a limited liability company, like the agent of a corporation, (and unlike the agent of a partnership) is shielded from personal liability. Although LLCs are hybrid entities, it is undisputed that LLCs possess the distinctive corporate quality of limited liability, which Congress specifically intended to address when it enacted section 110(c)." *Id.*

Penalty Determination regarding SE 2010 1236 for Citation Number 8518376

This penalty imposition regarding SE 2010 1236 pertains only to Citation Number 8518376. Other citations were part of this docket and those other matters have been disposed of in earlier Orders.

Each of the penalty criteria set forth in Section 110(i) of the Mine Act were duly considered by the Court. Evidence of record, either through testimony or admitted exhibits, speaks to each of the penalty elements. Given the entire record, the Court would be well justified in imposing a penalty greater than the $50,700.00 which was proposed through a special assessment. However, the Court has concluded that upon consideration of each of the penalty criteria to adopt the same amount as that arrived through the special assessment.

ORDER

On the basis of the foregoing, the Court imposes a civil penalty against Oak Grove Resources, LLC in the sum of $50,700.00 and a civil penalty in the sum of $500.00 against Respondent Donny Bienia. The Respondents are **ORDERED TO PAY** the respective sums to the Secretary of Labor within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2013

SECRETARY OF LABOR, MSHA on behalf of COBY MATHESON, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 2013-570-DM
	:	RM-MD 13-04
v.	:	
CML METALS CORPORATION, Respondent	:	GDC Crusher #1
	:	Mine ID 42-01927 A3858

DECISION AND ORDER REINSTATING COBY MATHESON

Appearances: Francesca Cheroutes, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO, representing the Secretary of Labor (MSHA) on behalf of Coby Matheson.
Bryan J. Pattinson, Esq., and Michael F. Leavitt, Esq., Durham Jones & Pinegar, P.C., St. George, UT, representing CML Metals Corporation.

Before: Judge L. Zane Gill

This matter is before me on an Application for Temporary Reinstatement filed on March 5, 2013, by the Secretary on behalf of Coby Matheson, pursuant to Section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2). Matheson filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA) on January 14, 2013. The complaint alleged that Matheson was terminated for activity protected under the Mine Act. In his Application for Temporary Reinstatement, the Secretary contends that Matheson's complaint was not frivolous and seeks an order temporarily reinstating Matheson to his former position as an operator for the Respondent, CML Metals Corporation ("CML"), at GDC Crusher #1 Mine pending the final hearing and disposition of this case. CML filed a Request for Hearing on March 6, 2012. The parties stipulated that any reinstatement would be economic.[1] An expedited hearing on the application was held on March 27, 2013, in Cedar City, Utah.

For the reasons that follow, I grant the application and order Matheson's temporary reinstatement.

[1] Sec'y's Witness & Ex. List & Stip'd Facts, p. 2.

SUMMARY OF THE EVIDENCE

Stipulations

Prior to the hearing, the parties stipulated to the following facts[2]:

1. Respondent is an operator within the meaning of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801 et seq.
2. ODC Crusher #1, Mine ID. 42-01927 is subject to the jurisdiction of the Mine Act.
3. Complainant, Coby Matheson, was a "miner" within the meaning of §§ 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g) and 815(c).
4. The Administrative Law Judge has jurisdiction in this matter to decide whether the complaint of discrimination filed by Coby Matheson pursuant to § 105(c) (2) of the Mine Act was frivolously brought.
5. On or about January 14, 2013, Coby Matheson filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA Case No. RM-MD-13-04.
6. Should this Court order Reinstatement, the parties have agreed that economic reinstatement is appropriate.

During the hearing, the parties stipulated to the following facts regarding the testimony of Dani Eaton:

1. Dani Eaton would testify that she did not work on December 31st or January 1st.
2. If Dani Eaton were directed to cut a check or if a check needed to be cut on December 30th, the check would not be cut until January 2nd
3. Dani Eaton would not have seen the email sent on the 30th until January 2nd.
4. Respondent's Exhibit 4 will be admitted
5. Respondent's Exhibit 4 is CML Metals Corporation Audit Trail Report.
6. Dani Eaton would testify that the Corporation Audit Trail Report is a document that tracks her transactions. It will show that on January the 2nd, at 1:23 p.m., she began drafting the check marked with a star and an underline, and that she cut the check at 1:28 p.m.

Summary of Testimony

Coby Matheson worked at CML's ODC Crusher #1 plant from between April and June of 2012 to either December 30, 2012, or January 2, 2013. (Tr. 10:8-10; 168:17-23; 65:2-68:21; 126:24-127:1; 154:19-155:4; Sec'y's Witness & Ex. List & Stip'd Facts p. 2; Resp. Ex. 3) This facility processes an iron tailings slurry and thickens it for transport. A series of conveyor belts is used to dry, compress, and transport the slurry after it is treated inside the facility. (Tr. 31:7-33:6) At the time he was terminated, Matheson worked on the horizontal belt presses at the plant.

[2] Sec'y's Witness & Ex. List & Stip'd Facts, p. 2.

(Tr. 9:13-15; 116:6-10) William "Gene" Olsen ("Olsen"), Trevor Savage ("Savage"), and Jon Harms supervised Matheson. (Tr. 110:19-111:9; 149:4-18; 168:7-16)

Matheson had a verbal altercation with Zach Harms before beginning his shift on the morning of December 30th, 2012. Zach Harms is the son of Jon Harms, CML's Mill Manager. (Tr. 171:14-15; 168:7-12) They argued over a complaint in Matheson's paperwork about "common courtesy" issues regarding the condition certain filters were left in on the shift before Matheson's. (Tr. 103:15-104:6) Zach Harms testified that there was a "slight blow-up" during which Matheson called him a "disease and a cancer," and walked out of the locker room. (Tr. 103:15-104:6) Zach Harms immediately reported the argument to Olsen, Savage, and Jon Harms. (Tr. 104:7-16) The altercation was widely discussed by the mill employees. (Tr. 125:7-10)

During Matheson's shift, he supervised several belt presses. (Tr. 18:18-20; 22:18-21; 144:4-19) Olsen testified that Matheson was also responsible for watching an additional conveyor belt and making sure that it did not "stack up," and that Matheson had sent someone to watch that belt without a radio for communications. (Tr. 111:11-14; 144:4-19; 146:8-147:13) During Matheson's shift, a hopper on the additional belt became clogged (Tr. 33:13-21), the belt stacked up, and the belt system at the plant had to be shut down. (Tr.33:12-34:3; 35:17-36:25) Matheson went to turn off the belts, which required going to shut-off switches at several locations around the plant. (Tr. 18:23-21:3; 35:17-36:25) When belt stoppages occurred, the mine was supposed to use a lockout, tag-out procedure, wherein each person who locked a belt would write down his name in the presence of the electrician or a manager. (Tr. 40:7-15) This process had to be completed before the belts were cleaned. (Tr. 40:9-17) Matheson testified that when he turned off the belts, he did not lock them out or see anyone else lock them out. (Tr. 38:10-14) Matheson testified that the belts had not been locked out before men began working on the belts. (Tr. 38:10-14) Olsen testified that he and the electrician had indeed locked the belts out and filled in the appropriate paperwork. (Tr. 130:8-14, Gov't Ex. 4)

Matheson testified that when he came back from shutting down the belts, miners were already working on them, shoveling material off the belt. (Tr. 37:1-17) Most of the men were working from 12 to 20 feet above the ground (Tr. 37:22-38:9), but one miner was working at an estimated height of 35 feet. (Tr. 44:23-45:3) Matheson also testified that the miners working on the belts were not wearing harnesses. (Tr. 45:14-15) The belts were slick (Tr. 43:21-44:2); Matheson observed the men on the belts "slipping and sliding all over the place." (Tr. 43:7-8) He and three other CML employees, including the mine electrician, discussed the situation (Tr. 43:12-13) and decided not to get onto the belts until a lockout, tag-out was done. (43:14-17) Matheson testified that they were "disgusted" because men were on the belts before they had been locked out. (Tr. 43:13-17) Matheson told the miners working on the belt to get off as quickly as possible, and shouted at the last two miners on the belt to get them to come down. (Tr. 44:13-17; 44:19-22) Savage testified that no miners were working on the belts at that time. (Tr. 164:10-14) Jon Harms testified that no one was on the belt without harnesses (Tr. 156:9-16), and

Olsen testified that only he and the electrician were working on the belts during the clean-up period. (Tr. 129:18-130:4)

While Matheson was complaining about the safety situation with other employees and telling the temporary worker to come down from the belt, CML's Process Manager, Trevor Savage, was directing the belt cleanup by radio. (Tr. 38:22-24; 46:4-12; 149:4-18.) He was standing about 25 feet away from Matheson and the three employees Matheson was speaking to, and because the belts were turned off, he and Matheson were able to hear each other. (Tr. 38:18-39:17.)

At the hearing, Savage and Olsen described repeated issues with the quality of Matheson's work on the belts. (Tr. 151:21-152:12, Tr. 126:9-17) Olsen also testified that Matheson had allowed the belts to stack up in the past, and that he told Matheson by radio on December 30 not to let the belts stack up. (Tr. 126:9-17) Savage testified that Olsen decided to fire Matheson when Olsen found out that Matheson was involved with the belt stack-up. (Tr. 152:10-14) CML's lockout, tag-out report for December 30 indicates that the belt was locked out from 10:25 a.m. to 11:00 a.m. that day (Gov't Ex. 4), and CML's shift change report for December 30 indicates that the belts were shut down from 9:34 a.m. to 10:40 a.m. on that date. (Gov't Ex. 5) Olsen stated that Matheson was fired at 9:30 a.m. on December 30. (Tr. 126:24-127:1.) An email notifying management of Matheson's termination went out at 10:36 a.m. that same day, and stated that Matheson was terminated effective 10:00 a.m. on December 30. (Resp. Ex. 3) Savage testified that the email was sent to management and human resources (Tr. 154:19-155:4), and that it is CML's policy to send such an e-mail when an employee is terminated. (Tr. 154:11-18.) Additionally, Jon Harms testified that he received a phone call on December 30 informing him that Matheson had been terminated. (Tr. 173:6-10.)

While the belts were still shut down on December 30 , Olsen spoke to Matheson. (Tr. 127:11-128:9) Olsen testified that after the belts were shut down, Olsen told Matheson he was fired, then he accompanied Matheson to the break room where, after telling Matheson he was fired, Olsen and Matheson discussed the confrontation with Zach Harms for about 20 minutes. (Tr. 112:1-20) Olsen told Matheson that the biggest issue was the belt. (Tr. 113:9-12.) Matheson testified that he and Olsen discussed the argument with Zach Harms, but that Olsen said nothing about his being fired and only told him he needed to go home for the day. (Tr. 52:15-53:16)

After being sent home, Matheson went directly to Jon Harms' home to discuss the argument with Zach Harms, who lived at his father's house. (Tr. 56:24-58:7) Matheson returned to the Harms home later that day to speak to Zach Harms and apologize for the things he had said during the argument that morning. (Tr. 58:17-59:17) According to Matheson, after he spoke with Zach Harms, Jon Harms assured him again that he would not lose his job over the argument, and said that he would speak to Savage the next day. (Tr. 60:10-19) Matheson testified that Jon Harms told him that he was most likely going to have to take a couple of days off, but would not be fired. (Tr. 60:10-19) Matheson testified that Jon Harms promised to call

him the next morning. (Tr. 60:10-21) At the hearing, Jon Harms testified that he knew that Matheson had been terminated by the first time Matheson arrived at his house, and denied giving Matheson any indication that he would not lose his job. (Tr. 170:24-161:2; 170:11-13) Jon Harms testified that Matheson asked what he could do to get his job back, and that he promised Matheson he would discuss the termination with Savage. (Tr. 170:3-171:3)

When Matheson did not hear from Jon Harms on December 31, he called at 12:55 PM and was told by Jon Harms that Savage was unhappy with Matheson's performance on December 30. (Tr. 61:4-18; 91:6-13) Savage had told Harms that Matheson was "disrespectful and insubordinate, and…had told [Savage] that they couldn't force [him] to leave the property." (Tr. 61:4-16) After hearing this, Matheson began attempting to reach Savage by calling different phone numbers for CML. (Tr. 62:6-18; 90:9-13; 177:17-179:15) He was only able to reach Jon Harms' voice mail box, and left several voice messages there. (Tr. 62:6-18; 90:9-13) In these messages, Matheson claimed he explained his safety concerns about the failure to lockout, tag-out on December 30 and the failure of the miners to wear fall protection while cleaning the belt. (Tr. 66:17; 63:20-64:2) Matheson testified he left these messages because he was concerned that his refusal to get on the belt had negatively affected management's views of his performance on December 30, and he wanted to clarify his reasons for not getting on the belt. (Tr. 91:6-13)

Matheson testified that he continued trying to convey his safety concerns and attempting to reach Savage on January 1 and 2. (Tr. 63:20-67:23) On January 1 or 2, Matheson spoke with mill safety officer LaVoy Woolsey about the lockout, tag-out issue (Tr. 65:10-14; 65:23-66:7) Woolsey assured Matheson that he would make sure management knew about his safety concerns. (Tr. 65:15-22) On January 2, at 11:00 a.m., Matheson spoke with mill safety officer Dude Benson about his concerns regarding the lockout, tag-out issue. (Tr. 65:4-9) Benson acknowledged Matheson's statements and told Matheson that he would take care of the complaint. (Tr. 66:11-16) CML Management's practice regarding safety issues was that safety issues were to reported directly to a member of management, who would then take care of the issue immediately. (Tr. 172:7-19)

Matheson was able to reach Savage on January 2. (Tr. 66:24-67:23) Matheson testified that when he spoke with Savage, he informed Matheson that he had been fired and needed to come clean his locker out, citing "gross negligence of duty" on the belts (Tr. 68:14-15) as the reason for the firing. (Tr. 68:1-21)

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 of1977*, at 623 (1978).

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated to investigate, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis […], shall order the immediate reinstatement of the miner pending final order on the complaint." *Id.*

The Commission has established a procedure for making the reinstatement decision. Commission Rule 45(d) states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d)

As the above makes clear, the scope of a temporary reinstatement hearing is narrow, being limited to a determination as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 9 FMSHRC 1305, 1306 (Aug.1987); *aff'd sub nom. Jim Walter Res., Inc., v. FMSHRC,* 920 F. 2d 738, (11th Cir. 1990). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard.[3] *See id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The legislative history for section 105(c) reveals that Congress discussed the term "frivolous" with the understanding that a complaint is not frivolous 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 Federal Mine

[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 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)).

Safety and Health Act of 1977, at 6240625 (1978). The "not frivolously brought" standard has also been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Res., Inc.,* 920 Fed 2d. at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.,* 22 FMSRHC 153, 157 (Feb. 2000).

When determining whether a miner's discrimination claim is not frivolous, the Court is essentially required to consider the facts in the light most favorable to the claimant. When presented with conflicting evidence, judge and the Commission are not required to resolve conflicts in testimony at the temporary reinstatement stage of a discrimination proceeding. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.,* 21 FMSHRC 717, 719 (July 1999). Indeed, the Commission has determined that it is inappropriate for the Judge to make credibility determinations or resolve conflicts in testimony during a temporary reinstatement hearing. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1088 (Oct. 2009). Rather, "[a] non-frivolous issue may be shown where there is both supporting and detracting evidence in the record." *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252 (June 2012), *citing Chicopee Coal Co.*, 21 FMSHRC at 718-19. Where there is conflicting evidence in the record, there must be facts in the record that support the Secretary's theory of liability in order to meet the "not frivolously brought" standard. *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1878-79 (Aug. 2012).

To prove a prima facie case of discrimination under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner 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.,* 2 FMSRHC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 773 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.,* 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSRHC 2508 (Nov. 1981), *rev'd on other grounds sub nom*. *Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983).

An applicant for temporary reinstatement, however, is not required to prove a *prima facie* case of discrimination with the attendant requirement of proving all necessary elements at a higher evidentiary standard. The applicant must merely provide evidence of sufficient quality and quantity (substantial evidence) to allow the judge to find, by application of the "reasonable cause to believe" standard, that: (1) the applicant engaged in protected activity; and (2) that there is sufficient showing of a nexus between the protected activity and the alleged discrimination to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, other judges and the Commission have adopted elements of the full *prima facie* case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in bridging the sometimes difficult gap between alleged actions and the intentions behind them. In recognition of the fact that direct evidence of intent or motivation is rarely found, the

Commission has identified several circumstantial indicia 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 on behalf of Williamson v. CAM Mining,* 31 FMSHRC at 1089.

APPLICATION OF LAW TO THE EVIDENCE

In order to show a nexus between a miner's protected activity and his or her termination, the Secretary must first show that the miner engaged in protected activity. Here, the Secretary presented evidence of three ways that Matheson engaged in protected activity. First, there is evidence that Matheson made safety complaints to CML management on multiple occasions. From December 31 through January 2, Matheson made several phone calls to CML and left lengthy answering machine messages allegedly detailing his safety concerns. He also stated his safety concerns about the failure to lockout, tag-out to two of CML's mill safety officers, Benson and Woolsey.

Second, Matheson discussed unsafe working conditions with his co-workers during the belt shutdown on December 30, 2012. Expressing safety concerns to other miners is protected activity under the Mine Act. *Jeanlouis v. Morton Internat'l*, 25 FMSHRC 536, 545 (Sep. 2003) (ALJ). ("Suspending a miner for expressing safety concerns to a fellow miner would create a chilling effect on a miner's willingness to point out safety problems.")

Finally, Matheson ordered a temporary worker who was cleaning the belt approximately 35 feet off the ground without fall protection to come down from the place where he was working. Savage, a member of mine management, would have been able to hear him do this. The Commission has determined that the Mine Act's protections extend to concerted protected activity because section 105(c) (1) states that a miner is protected in the "exercise ... on behalf of himself or others of any statutory right afforded by this Act." *Sec'y on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 134 (Feb. 1982). In *Sec'y on behalf of Clapp v. Cordero Mining, LLC*, Judge McCarthy found that an incident in which a miner told another miner to follow a safety rule over a channel monitored by management constituted protected activity. 2011 WL 7268153, at *38 (FMSHRC Dec. 5, 2011) (ALJ).

Based on a review of the three circumstantial indicia of discriminatory intent, I find that the Secretary has also presented evidence of a nexus between Matheson's protected activity and the adverse action against Matheson. Very little evidence of animus or hostility was presented in this case. Any animus present in the record appears to be directed at Matheson's altercation with Zach Harms, and not at Matheson's protected activity. However, the evidence presented by the Secretary regarding the coincidence in time and CML management's knowledge of the protected activity is sufficient to support a conclusion that the complaint of discrimination is not frivolous.

Applying the non-frivolous claim standard, the record could support a conclusion that CML management knew of Matheson's protected activity. First, Matheson testified that Savage,

a member of mine management, was standing approximately 25 feet away from him while he was discussing the safety issues with other CML employees and ordering a temporary worker to come down from the belt. Because the equipment was all turned off at the time, Matheson testified that Savage should have been able to hear him complaining about safety concerns to the other employees and shouting at the temporary worker to come down. If confirmed as a fact, this would show that management was aware of Matheson's protected activities during the belt shutdown. Additionally, Matheson claimed to have left several lengthy voice messages detailing his safety concerns on Jon Harms' answering machine at CML. Finally, Matheson testified that he spoke to the mill safety officers about the lockout, tag-out issue on January 30th before he was terminated, and member of mine management testified that CML's policy is that safety complaints are to be reported directly and immediately to management. These facts, if proved, would support the Secretary's theory that management was aware of Matheson's protected activity. In light of this evidence, and without making any judgments as to its credibility, I find that the Secretary has established a non-frivolous issue with regard to whether CML management was aware of Matheson's protected activity.

There is also evidence on the record from which the court could conclude that the protected activity and the adverse action were close in time, and that the protected activity occurred before Matheson's termination. As with the evidence regarding knowledge of the protected activity discussed above, I make no findings as to the credibility of this evidence.

There are dramatic conflicts in the testimony and evidence relating to the time Matheson was fired and the times that the belt shutdown that precipitated Matheson's discussion of safety issues and orders to miners working on the belts. CML has presented evidence that Matheson was fired at 9:30 a.m., and that the belt shutdown that precipitated his protected activity occurred from 10:25 a.m. to 11:30 a.m. There is contrary evidence in the record, however, in the form of an email sent out at 10:36 a.m. stating that Matheson was fired at 10:00 a.m. and a CML shift change report stating that the belt shutdown occurred from 9:34 a.m. to 10:40 a.m. If credited, this evidence would suggest that Matheson was terminated almost immediately upon engaging in protected activity.

Additionally, Matheson testified that he was terminated in a phone call from Savage on January 2. He further testified that after being sent home on December 30, he was assured by Jon Harms, a manager at CML, that he would not lose his job over the incident but could expect to have a few days off. He made several phone calls and left lengthy voice messages allegedly about his safety concerns on December 31 and January 1. On January 1 or 2, he testified that he spoke to one of CML's mill safety officers about his concerns regarding the December 30 failure to lockout, tag-out at the mill site. On January 2, before he was informed by Savage that he was terminated, he spoke with another of CML's mill safety officers about the same safety issue. This evidence, if credited, tends to show proximity in time between Matheson's protected activity and the adverse action taken against him. Its presence in the record establishes a non-frivolous issue as to whether the termination occurred after, but close in time to, the protected activity.

This case involves a great deal of conflicting evidence, and CML has presented evidence which, at a trial on the merits, may constitute a complete defense to Matheson's discrimination claim. The limited scope of a temporary reinstatement hearing, however, makes credibility determinations inappropriate. In spite of the evidentiary conflicts, there are facts on the record that support a finding that Matheson engaged in protected activity as well as facts that support the finding of a nexus between that protected activity and Matheson's termination. The presence of these facts on the record shows a non-frivolous issue as to both the occurrence of a protected activity and a nexus between that activity and the adverse action, which requires a grant of temporary reinstatement.

ORDER

For these reasons, and because the parties have agreed to economic reinstatement, it is **ORDERED** that Matheson be economically reinstated to the position he held on December 30, 2012, at the same rate of pay and with the same benefits that he was entitled to on that date.

This reinstatement will end upon a final order on Matheson's complaint. 30 U.S.C. § 815(c) (2). It is incumbent upon the Secretary to promptly determine whether he will file a discrimination complaint with the Commission based on Matheson's January 14, 2013 complaint to MSHA. Section 105(c) (3) of the Mine Act requires the Secretary to notify the complainant of whether the Secretary intends to file a discrimination complaint on the complainant's behalf within 90 days of receiving the miner's initial complaint. Matheson's initial complaint was received by MSHA on January 14, 2013. Accordingly, the Secretary is **ORDERED** to advise counsel for CML and the Court of his decision by April 15, 2013. If a decision has not been made by that date, I will entertain a motion to terminate the reinstatement.

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

Distribution: *(Certified Receipt & Electronic Filing)*

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/ms

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April 10, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-1854
Petitioner	:	A.C. No. 46-01436-254778-01
	:	
	:	Docket No. WEVA 2011-1855
v.	:	A.C. No. 46-01436-254778-02
	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Mine: Shoemaker Mine

DECISION

Appearances: Rebecca J. Oblak, Esq., Bowles Rice, Morgantown, WV 26505

Andrea J. Appel, Esq. and Elaine M. Abdoveis, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, PA 19106

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act" or "Mine Act"). The Secretary of Labor has filed a Petition for Assessment of Civil Penalty pursuant to Sections 104(a) and 105(d) of the Act, 30 U.S.C. §815(d), in connection with Order Nos. 8030970 and 8033057 and Citation No. 8033058. A hearing was held in Pittsburgh, Pennsylvania on October 18, 2012. The parties subsequently submitted post-hearing briefs.

ISSUES

The general issues to be determined are whether Respondent violated 30 C.F.R. §75.400 as alleged in Order Nos. 8030970 and 8033057 and whether Respondent violation 30 C.F.R §75.360(b)(3) as alleged in Citation No. 8033058. Specific issues include whether these violations were substantial and significant in nature ("S&S") and/or constituted unwarrantable failure.

STIPULATIONS

The parties have entered into several stipulations, introduced as Parties Joint Exhibit 1. Those stipulations include the following:

1. Respondent, Consol Energy, Inc. – Shoemaker Mine is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as the "Mine Act"), 30 U.S.C. Section 802(d), at the Shoemaker Mine where the alleged Orders/Citation at issue in this proceeding were issued; and,

2. Shoemaker Mine is owned and operate by Respondent, Consol Energy, Inc.; and,

3. The operations of Respondent at the Shoemaker Mine are subject to the jurisdiction of the Mine Act; and

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Commission (hereinafter "FMSHRC") and its designated Administrative Law Judge pursuant to Sections 104, 105, 113 of the Mine Act; and.

5. The alleged Orders and Citation and terminations involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance; and

6. True copies of the above-captioned alleged Order Numbers and alleged Citation Number were served on Respondent or its agents as required by the Mine Act; and

7. Each party shall stipulate to the authenticity and admissibility of the other party's exhibits, but not to the relevancy or the truth of the matters asserted therein; and

8. Any formal MSHA computer printout reflecting Respondent's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration; and

9. The imposition of the proposed penalties will have no effect on Respondent's ability to remain in business; and

10. Respondent demonstrated good faith in the abatement of the alleged Orders and Citations at issue in this proceeding.

Joint Exhibit 1 (*see also* Transcript Page 6).[1]

[1] Hereinafter, the transcript of the proceeding shall be referred to as "Tr."

LAWS AND REGULATIONS

The citation involved in this matter, Citation No. 7033058, was issued under Section 104(a) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a)

Citation No. 8033058 deals with an alleged violation of 30 C.F.R. §75.360(b)(3) (titled "Preshift Examination"). That section provides the following:

> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:
>
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

Both Orders involved in this matter, Order Nos. 8030970 and 8033057, were issued under Section 104(d) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

> (1) 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, 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 finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized

> representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)

Order Nos. 8030970 and 8033057 deal with alleged violations of 30 CFR §75.400 (titled "Accumulation of combustible material"). That section provides the following:

> 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 CFR §75.400.

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

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

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

The 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) *emphasis added*.

The term "gravity" in the Mine Act is contained in Section 110(i), which states that in determining the appropriateness of a penalty, the Secretary must consider, among other things, "the gravity of the violation." 30 U.S.C. §820. The Secretary promulgated three factors under 30 C.F.R. §100.3(e) to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

> [T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. §100.3(e).

Pertinent regulations and well-settled Commission precedent deal with the standard for negligence under the Act. Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id*. High negligence exists when "[t]he operator knew or should have known of the violation condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*.

According to the Commission, an unwarrantable failure is defined as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission explained the judge's role in determining whether conduct is aggravated as follows:

> Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, the operator's knowledge of the existence of the violation…

> While an administrative law judge may determine, in his discretion, that some factors are not relevant , or may determine that some factors are much less important than other factors under the circumstance, all of the factors must be taken into consideration and at least noted by the judge.

IO Coal Co., Inc., 31 FMSHRC 1346, 1350-1351 (Dec. 2009).

VIOLATIONS

1. Order No. 8030970

On October 14, 2010 at 10:15 a.m. Inspector David M. Edwards ("Edwards") issued to Respondent Order No. 8030970. Edwards found:

> Accumulations of combustible material consisting of loose coal, loose fine and ground up coal, and coal dust including float coal dust deposited on rock dusted surface was [sic] being permitted to accumulate on the No. 8 Beltline from the belt regulator located at #8-50 crosscut to the belt drive and take-up area located at #8-1 crosscut. The accumulations coming in contact with the belt rollers measured anywhere from 2 to 3 feet in width and 24 inches in dept packed around he roller shaft and bearings were warm to touch. Float coal dust, black in color, was present on the bottom directly under the belt rollers approximately 6 feet in width and on the belt structure and water lines at the cited location. The conveyor belt of the No. 8 Beltline was not properly aligned from crosscut #8-46 to #8-47. The bottom belt was rubbing against the belt structure creating frictional heat which poses a fire hazard. Damaged rollers were present at crosscut #8-23 (Bottom Roller) and #8-3 crosscut (2 Bottom Rollers). Management was engaged in aggravated conduct constituting more than ordinary negligence in that the area was pre-shift and the conditions were not reported or worked on. This violation is an unwarrantable failure to comply with a mandatory standard. This mine has received 137 (75.400) citations over the past 2 years.

Government Exhibit 6.[2] Edwards noted that the risk of injury or illness for this violation was "Reasonably Likely," "Lost Workdays or Restricted Duty," "S&S" and would affect 1 person. He further found that Respondent exhibited "High" negligence with respect to this violation.

Respondent took action to terminate the condition on October 14, 2010 at 10:30 p.m. Under "Subsequent Action" Edwards noted:

> The operator had miners shoveling on the beltline from approximately 1:00 p.m. to 10:00 p.m. to complete the cleaning and the belt line was rock dusted from the belt drive to the belt regulator at #8-50 crosscut.

[2] Government exhibits will hereinafter be referred to as "GX" followed by the number.

Id. On October 18, 2010, Edwards modified the body of the Order with respect to Condition or Practice, adding:

> The heavy accumulations were present from #8-36 crosscut extending outby to #8-15 crosscut, a total distance of approximately 2,100 linear feat.

Id.

2. Order No. 8033057

On October 26, 2010 at 10:10 a.m. Inspector James Gropp ("Gropp") issued Respondent Order No. 8033057. Gropp found:

> Loose dry coal, coal dust, including float coal dust, black in color was permitted to accumulate on the active 8 South continuous miner sections on the left side, MMU 032, and the right side, MMU 016, at the following locations:
>
> 1) 15A #0 entry from the face at approximately 2+10 for a length of 80 feet outby. The accumulations were 4 to 15 ½ feet wide and were 4 to 15 inches in depth.
>
> 2) Intersection of 15A #0 and 8 South #1 at spad 6+94 where the miner had holed 8 South #2 to #1 crosscut allowing accumulations that were 15 ½ feet wide, 4 to 9 inches in depth and 10 feet in length outby the side of the intersection.
>
> 3) Intersection of 8 South #2 entry at 6+94 where the miner had holed 8 South #3 to #2 crosscut allowing accumulations 15 ½ feet wide, 4 to 19 inches in depth and 12 feet in length on the outby side of the intersection.
>
> 4) Crosscut of 8 South #4 to #3 between 6+94 to 5+75 a distance of approximately 140 feet in length, 15 ½ feet wide and 8 to 12 inches in depth.
>
> 5) 8 South #4 entry starting at approximate spad 5+20 for a length of 60 feet in length that was 14 feet in width and 12 inches in depth.
>
> 6) 8 South #6 entry starting at approximate spad location 4+15 for a distance of 30 feet inby where the miner head had scaled the right side rib maneuvering around the corner from #5 to #6 creating accumulations that were 12 to 24 inches in depth and ranged from 2 ½ feet to 6 feet in width.
>
> 7) 8 South #8 entry at 6+28 where the miner had holed the crosscut #5 to #6 that were 12 to 24 inches in depth and ranged from 6 to 15 ½ feet in width.
>
> The standard 75.400 was cited 139 times at this mine in the last two years. The operator engaged in aggravated conduct constituting more than ordinary negligence in that the mine clean up program was not being followed and

permitted accumulations to exist in the active workings of 8 South. This violation is an unwarrantable failure to comply with a mandatory standard

GX-9. Gropp noted that the risk of injury or illness for this violation was "Reasonably Likely," "Lost Workdays or Restricted Duty," "S&S" and would affect 10 persons. He further marked that Respondent exhibited "High" negligence with respect to this violation. Respondent took action to terminate the condition on October 26, 2010 at 14:10, Calloway noted:

The accumulations were cleaned and removed from the mine.

Id. On October 27, 2010 at 12:51 p.m., Gropp modified the body of the Order with respect to Condition or Practice, replacing any mention of "032" with "083," adding:

The wrong MMU number was entered for the 8 South Left side section.

Id.

3. Citation No. 8033058

On October 27, 2010 at 1:30 p.m. Gropp issued Respondent Citation No. 8033058. Gropp found:

An inadequate pre-shift examination was conducted on the midnight shift of 10-26-2010 preceding the oncoming day shift on the 8 South continuous miner sections, left side MMU 083 and right side MMU 016. The hazardous conditions of combustible coal accumulations that existed, including their locations, were not reported and entered into the pre-shift report and no actions were taken to immediately correct the obvious conditions that were noted in the Order No. 8033057.

GX-12. Gropp noted that the risk of injury or illness for this violation was "Reasonably Likely," "Lost Workdays or Restricted Duty," "S&S" and would affect 10 persons. He further found that Respondent exhibited "High" negligence with respect to this violation. Respondent took action to terminate the condition on October 27, 2010 at 1:31, Calloway noted:

The hazardous conditions cited were corrected on 10-26-2010 at 1410 hours, therefore the citation is terminated.

Id.

SUMMARY OF THE TESTIMONY

1. Testimony of Inspector David M. Edwards

A. Edwards' Qualifications and Work History

Edwards worked at MSHA's St. Clairsville, Ohio Office. (Tr. 15). He has a degree in electromechanical engineering at Belmont Technical College. (Tr. 97). Before joining MSHA, he worked for 18 years in the mining industry, all underground. (Tr. 19-20). From 2000 to 2006 he worked as a foreman at Shoemaker Mine, the mine at issue. (Tr. 21). Edwards' training as a foreman included fire boss training and his duties included pre-shift examinations. (Tr. 21). In April 2006, Edwards was laid off. (Tr. 22). Edwards joined MSHA on January 7, 2007. (Tr. 15, 22). He had 21 weeks of instruction at the Academy in Beckley, West Virginia. (Tr. 16). He also received on-the-job field training including specialized instruction on fire hazards and combustible accumulations. (Tr. 16). Edwards' other specialized certifications included foreman's papers in Ohio and West Virginia and an examiner certification for Consol. (Tr. 19, 21). He was authorized to train underground examiners and certify mine foremen. (Tr. 19).

B. Edwards' Testimony about Activities Conducted Before the Inspection

Edwards conducted an EO1 inspection on Shoemaker on October 14, 2010.[3] (Tr. 22-23). Edwards arrived at the mine at 7:15 a.m. (Tr. 24-25). Shoemaker has three portals: Golden Ridge, Whittaker, and River. (Tr. 25). Edwards met Terry Wilson, a foreman trainee, at Whittaker. (Tr. 25). Edwards had never met Wilson before and Wilson said it was his first day. Tr. (98-99). Edwards also notified the UMWA representative, Steve Lavenski, who was permitted to travel with the inspector. (Tr. 25).

Edwards testified that in order to prepare for an inspection, an inspector must review uniform mine files, the ventilation plan, the roof control plan, the emergency response plan, the mine-specific safeguards related to injuries in the past caused by transportation, the violation history, and the mines (d) series status. (Tr. 24). He also reviewed the pre-shift examination records for the areas he was going to travel. (Tr. 26, 99). He reviewed notes from the previous (midnight) pre-shift and perhaps even farther back. (Tr. 26). He will not conduct an inspection without reviewing the pre-shift examinations. (Tr. 101). Finally, Edwards filled out the inspection cover sheet (GX-7). (Tr. 32). The cover sheet shows the date of the inspection, the event number for the EO1, the arrival time and the list of records checked.[4] (Tr. 32).

[3] An EO1 inspection is a regular, quarterly inspection of the entire mine. (Tr. 23).

[4] There was an error on this form; Edwards flipped the miner's representative and the company representative. (Tr. 32). He inserted the wrong names on the lines. (Tr. 33, 98).

C. Edwards' Testimony Regarding the Inspection

i. Conditions Observed

Edwards, Wilson, and Lavenski rode inby to do the pre-operational checks to make sure that it was safe to travel. (Tr. 26). En route, Edwards observed the roof condition, rib conditions, tie line, and ventilation. (Tr. 26). The rail jeep could not be parked at 9 Belt so Lavenski took it to 7 North. (Tr. 26-27, 98). Edwards inspected the No. 9 Belt and issued no citations. (Tr. 27- 28).

After inspecting 9 Belt, Edwards and Wilson began to move down 8 Belt. (Tr. 28). The 8 Belt was approximately 5-6,000 feet long. (Tr. 28-29). Edwards reviewed roof conditions, rib conditions, ventilation, accumulations, belt structure, belt rollers, and CO monitors. (Tr. 28). In doing so, he noticed fire hazards. (Tr. 28). After determining a "fire triangle" existed, Edwards issued a withdrawal order (Order No. 8030970, GX-6). (Tr. 31). To have a fire triangle, there must be an accumulation of combustible material, an ignition source, and 20.8% oxygen. (Tr. 96-97). He ordered the belt shut down to be cleaned and realigned. (Tr. 34).

At the hearing, Edwards described each element of the fire triangle present here. First, at intermittent locations from 8-50 to 8-1 along 2,100 feet of the 5,000 foot belt Edwards noticed float coal dust and other accumulations.[5] (Tr. 29, 34, 36, 93, 138). Edwards noted the largest accumulation started at 8-36 crosscut and extended outby, towards the drive, to 8-15 crosscut.[6] (Tr. 37). On cross examination, Edwards conceded that he was not sure of how many accumulations were present. (Tr. 138-140). He believed there were five or six, though he did not write the number down. (Tr. 138-140). Edwards testified to several kinds of accumulations including loose coal, loose fine and ground-up coal, coal dust, and float coal dust. (Tr. 45). He described black float coal dust as an accumulation of combustible material with the consistency of talcum powder. (Tr. 46). Edwards saw the black float coal dust on the belt line, the belt structure, the water line, and under the belt rollers. (Tr. 41-42). He found float coal dust was on the mine surfaces as well, including rock dusted areas. (Tr. 41). Edwards observed that the float coal dust covered most of the width of the entry, including the floor, ribs, and roof. (Tr. 42, 139). He stated that float coal dust as thin as a piece of paper can be an explosion hazard. (Tr. 41). Float coal dust must be mixed with rock dust so that the combination is 80% incombustible material. (Tr. 47). While mixed rock dust and coal dust will vary in color, depending on the components, Edwards noted that black color indicates that it is mostly coal dust. (Tr. 48, 49). However, gray coal dust is still an accumulation. (Tr. 49-50). The only way to know the content of dust was to take a sample. (Tr. 47). Edwards admitted that he did not take any samples. (Tr. 137). Neither Edwards nor Wilson had a sieve. (Tr. 49).

[5] There was not a solid line of accumulations; some spots were worse than others. Tr. 93, 94.

[6] He took some measurements with the 25-foot tape measure. (Tr. 137-138). He measured the width of the accumulations by using the width of the 72-inch belt and the depth of the accumulations with the tape measure. (Tr. 137).

With respect to air quality, Edwards testified that this area had 20.8% oxygen and 0% methane (despite the fact this was a gassy mine on a five-day spot).[7] (Tr. 30).

Finally, Edwards testified to three ignition sources on the belt line: belt rubbing the structure, rollers running in accumulations, and damaged rollers. (Tr. 29-30, 34-35, 37, 39, 42-43, 130). The belt was rubbing structure at 8-46 to 8-47 crosscut. (Tr. 29-30, 34, 42, 130). Upon observing this condition, Edwards shut down the belt. (Tr. 30, 52, 130). The belt rubbing the structure was a violation of 75.1731(b) and, as a result, Edwards issued a citation. (Tr. 30). Edwards issued this as a 104(a) citation, marked as S&S.[8] (Tr. 31). Edwards explained that this condition created frictional heat against the metal parts of the belt structure. (Tr. 42-43). The belt ran so fast that it could cut through metal. (Tr. 43). The belt was warm to the touch, smoking, and smelled of burning rubber. (Tr. 43). The belt structure was hot, not just warm. (Tr. 43). Edwards asserted Wilson also felt the belt was hot. (Tr. 43). To correct this condition, the operator had to train the belt, or move it so it was no longer rubbing. (Tr. 131, 132).

In addition, Edwards observed belt rollers spinning in coal accumulations between 8-36 and 8-15. (Tr. 29, 35, 37, 39). These were the accumulations that concerned him most. (Tr. 139). Edwards testified the accumulations were about as wide as the belt. (Tr. 38). He measured them at about two or three feet deep. (Tr. 38). However, Edward's notes indicated that the belt was three feet in width and 24 inches in depth. (Tr. 38). These accumulations included wet material. (Tr. 35, 39). However, Edwards noted wet dust can dry out and become combustible. (Tr. 35). Under normal mining operations, if this was allowed to continue, Edwards believed there was a potential for a fire. (Tr. 39). The area was rock-dusted. (Tr. 35-36). However, float coal dust on top of rock dusted was still an accumulation. (Tr. 35-36).

Finally, Edwards observed damaged rollers, a violation of §75.1731(a). (Tr. 30, 35, 43). There were two damaged bottom rollers at the 8-3 crosscut and one at the 8-23 crosscut. (Tr. 43-44). When the rollers break in two, inspectors call them "pizza cutters," and all of the broken rollers Edwards found here were pizza cutters. (Tr. 45). He explained that the metal from the roller cuts into the metal shafts and creates heat. (Tr. 30, 45). He considered this a fire hazard in light of the accumulations and the 20.8% oxygen atmosphere. (Tr. 45). He testified that to correct these problems the belt must be shut down and the rollers changed out. (Tr. 131).

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[7] Edwards knew this was a gassy mine because every quarter MSHA takes a return bottle sample and sends them to the labs for analysis. (Tr. 60). This showed how much methane was liberated from the coal mine at various strategic locations in the return air for 24 hours. (Tr. 60). These numbers together dictate how often a mine needs to be on a spot inspection for methane. (Tr. 60). Shoemaker was on a five-day spot. (Tr. 60-61). This means every fifth day the mine needs an EO2 inspection for liberation of methane. (Tr. 60-61).

[8] Edwards called his supervisor, Joe Facello ("Facello"), at the mine before he returned to the field office. (Tr. 163). Edwards was not directed to issue the Order. (Tr. 163). He only called to ensure that writing 104(a) citations (for belt rubbing structure and other issues) in addition to the order was the appropriate process. (Tr. 163, 164).

Edwards contended this was "the worst belt line" he had ever seen. (Tr. 50, 126-127, 165). Edwards maintained this opinion on cross examination, though he admitted he had only taken five measurements. (Tr. 139). He claims that Wilson also said this was the worst belt he had seen at Consol. (Tr. 40).

ii. The Meaning of "Warm to the Touch" According to Edwards

According to Edwards, warm to the touch was not a term with a specific definition or temperature; it just means warmer than under normal conditions. (Tr. 117- 119). Edwards believed warm to the touch is serious; it indicates a potential ignition source. (Tr. 118, 122). Under normal mining conditions, something is wrong and will get worse. (Tr. 117, 121, 122). Similarly, Edwards did not know what temperature hot to the touch would be. (Tr. 125). The belt rubbing the structure was hot, meaning it would burn his hand. (Tr. 121). Edwards did not know how hot a roller must be or how long it must run to start a fire. (Tr. 118, 122). Edwards did not believe the exact temperature was significant; it was just important that a belt was not supposed to be warmer than room temperature. (Tr. 170-171).

Neither Edwards nor Wilson had a heat gun. (Tr. 40). He has never carried a heat gun as an AR nor has he asked an operator to test the heat of structure. (Tr. 125). Edwards took no objective tests of the frictional heat source; he just used his hand. (Tr. 132). He noted that there was smoky hot rubber. (Tr. 119). On cross examination, Edwards admitted that he was not aware of any belt fires at Shoemaker mine due to accumulations. (Tr. 142).

iii. After The Issuance of Order No. 8030970

Edwards notified Wilson that the belt or section would be down. (Tr. 51, 128-129, 160). Edwards believed Wilson informed management. (Tr. 52). Edwards believes he notified Tex Raider ("Raider"), a belt coordinator. (Tr. 52-53, 130). He did not know what time he provided notice. (Tr. 128-129). Edwards told Raider that the belt needed to be shut down and Raider promised to do so. (Tr. 53, 135). Respondent had to eliminate the ignition sources, change the rollers, and clean the accumulations. (Tr. 53, 135). The belt was shut down for an hour or an hour and a half for realignment. (Tr. 141).

Edwards went home. (Tr. 54). He testified that Afternoon Foreman Eric Turner ("Turner") called him at 10:00 p.m. (Tr. 55, 57). Turner stated the belt was trained, the rollers were changed, and the ignition sources corrected. (Tr. 56). Edwards went back to the mine (Tr. 56). All of the conditions were corrected. (Tr. 57). The belt was not running while he was underground. (Tr. 57). Edwards did not believe it was running while the citations were being abated. (Tr. 57). Edwards testified that Order No. 8030970 at page 3 states that the operator shoveled and rock dusted the belt line for approximately 9 hours. (Tr. 57-58).

D. Edwards' Testimony on the Negligence Finding in Order No. 8030970

Edwards testified that the operator exhibited high negligence. (Tr. 142). Edwards made this determination because the pre-shift exam was inadequate and the conditions were obvious and extensive. Edwards referred to the last pre-shift examination report of the No. 8 Belt before

his inspection. (GX-8, Tr. 66). The examiner was an agent of the operator and responsible for preventing accumulations of combustible material in active workings. (Tr. 64-65, 142). The examiner inspected this area and only noted that the area needed to be swept. (Tr. 143-144). Edwards also referred to Citation No. 8030971.[9] (GX-9, Tr. 66, 67). The citation was issued for an inadequate examination of the No. 8 Belt. (Tr. 67, 68). Edwards noted that the violation was final and the penalty, $9,100.00, had been paid without modification. (Tr. 68). Edwards believed the cited condition did not occur after this pre-shift examination. (Tr. 72, 143, 169). Based on his experience, Edwards knew that the accumulations could not have happened that quickly. (Tr. 72). Beyond high negligence, Edwards believed that the failure to take, or even mark the need for, corrective action was an unwarrantable failure. (Tr. 64, 70-71).

On cross-examination Edwards discussed the fact that there were some notations on the pre-shift record. Entry No. 4 for the pre-shift examination on October 14, 2010 noted 8-15 to 8-36 needed to be swept. (Tr. 151-152). Edwards marked that this condition was not reported in Order No. 8020970 because he believed that this notation was a report of a condition, just not the condition he observed. (Tr. 65, 152). He believed that the fact that the area where he found the heaviest accumulations only stated "needs swept" and listed no corrective action was important. (Tr. 65, 70-71). Edwards believed that if an area needs swept, it does not mean anything beyond float coal dust needs to be swept. (Tr. 144, 168). These accumulations were obvious, extensive and existed for some time. (Tr. 65). Edwards testified that the existence of these accumulations constituted an unwarrantable failure. (Tr. 65).

Edwards conceded that he did not look at any of the other pre-shift examinations beyond October 14, 2010. (Tr. 143-144). At hearing, Edwards reviewed several other pre-shift examinations, including those that stated there were areas that needed to be swept, areas where belt was rubbing the structure, areas with accumulations under the rollers, and broken rollers. (Tr. 147-149). Edwards admitted that he did not talk to the pre-shift examiner, Wilhem, who was not present. (Tr. 145).

In addition to the pre-shift examination evidence Edwards reviewed a MSHA record of the violation history for the Shoemaker during the previous two years. (GX-5, Tr. 67-68). Edwards testified that this history showed Shoemaker had 137 citations for §75.400 over the last two years.[10] (GX-4, 5 p. 61-71; Tr. 69). Edwards had issued a §75.400 violation at Shoemaker in the past. (Tr. 70). When doing so, he spoke with management about corrective actions, the conditions found, and things to improve upon. (Tr. 70). Edwards was not sure as to what mine location the 137 part §75.400 citations were issued or if it was for the same or similar condition cited here. (Tr. 159-160). However, Edwards knew the mine had a significant history of violating §75.400. (Tr. 165-166).

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[9] The evidentiary support for this citation will be discussed below.

[10] Thirty C.F.R. §75.400 is a "Rules to Live By" standard. (Tr. 151). The Rules to Live By identify and informs operators of the standards that result in the most fatalities when violated. (Tr. 69, 150, 151).

Edwards felt Respondent's conduct was aggravated because of Aracoma and the other history of death from fires on belt lines.[11] (Tr. 155). On cross examination, Edwards admitted that this situation was not like Aracoma, but stated that he was trying to prevent such a situation from occurring. (Tr. 156-157). Edwards also believed the conduct was aggravated because of the inadequate pre-shift reports, the inadequate examinations, and the condition was obvious and extensive. (Tr. 158). Edwards thought the pre-shift examiner downplayed the conditions. (Tr. 158). On cross examination, Edwards conceded that things can change in a matter of seconds in a coal mine and he was uncertain about how long the condition was obvious. (Tr. 159). He did not ask anyone how long the condition existed. (Tr. 159).

E. Edwards' Testimony on the Gravity of Order No. 8030970

Edwards testified that the minimal gravity of Order No. 8030970 was lost workdays or restricted duty. (Tr. 58-59). It could have been worse. (Tr. 58-59). He believed that miners could have been exposed to smoke inhalation or burns resulting in permanently disabling or fatal injuries. (Tr. 58). Edwards found that this was reasonably likely to occur because the fire triangle was present. (Tr. 59). Further, he believed the specific hazard created was fire on the belt line or an explosion. (Tr. 59-60).

According to Edwards, the likelihood of the cited danger was increased because there were three equally important ignition sources: belt rubbing the structures, damaged rollers, and accumulations of coal turning in the rollers. (Tr. 133, 164-165). Belt rubbing the structure was an ignition source because friction causes the structure to get hot and the roller to warm. (Tr. 62, 133-134). On cross examination, Edwards admitted that it was possible for a belt to go out of alignment in a matter of seconds. (Tr. 132). He admitted that even if the belt was misaligned, there was a CO system and water sprays on the belt. (Tr. 132). He also testified that there was no methane detected and that the belt was fire resistant. (Tr. 133).

Edwards stated rollers packed and spinning in accumulations were ignition sources because the coal acts as a restriction on the roller turning, causing frictional heat. (Tr. 61). Edwards further testified that broken rollers are an ignition source because uneven rolling can cause frictional heat. (Tr. 61-62). Also, damages rollers can break in two and cut into the metal causing arcing and sparking. (Tr. 61-62, 125-126). Here, Edwards touched the broken bearings and rollers and they were warm. (Tr. 62, 126). He did not see any pizza cutter rollers or sparks but he heard damaged rollers. (Tr. 126).

Edwards noted that one person, the examiner, would be affected by this condition. (Tr. 63-64). Belt lines might have a shoveler though Edwards did not see one here. (Tr. 64).

[11] The Aracoma Alma #1 Mine experienced a mine fire on January 19, 2006 caused by frictional heat generated by a misaligned longwall belt. *See* Report of Investigation Fatal Underground Coal Mine Fire January 19, 2006 Aracoma Alma Mine #1 Aracoma Coal Company, Inc. Stollings, Logan County, West Virginia I.D. No. 46-08801. The fire resulted in the deaths of two miners. *Id*.

Edwards discussed why he found this violation to be S&S. With respect to Order No. 8030970, Edwards testified that Respondent violated §75.400. (Tr. 152). He believed the hazard in this case was the risk of fire on the belt line. (Tr. 152). Although no methane was present, he testified that Shoemaker was a gassy mine on a five-day spot. (Tr. 153, 169). Methane can be liberated from the ribs, roof, the coal on the beltline or the coal in a stockpile at the surface. (Tr. 169). If there was a fire on the belt line, the examiner would be exposed. (Tr. 153-154). Edwards testified that the reasonably likely injury would be smoke inhalation, or burns, resulting in lost workdays, restricted duty, and possibily permanently disabling or fatal injury. (Tr. 153-154). Finally, Edwards believed Respondent exhibited negligence. (Tr. 154). According to Edwards, if all five criteria are met then a violation was S&S. (Tr. 154). This was true even though Edwards never heard of a belt fire at Shoemaker Mine. (Tr. 154-155).

F. Edwards' Testimony Rejecting Possible Mitigating Factors

Edwards conceded that some of the accumulations on the mine bottom were damp to wet. (GX-7, page 19, Tr. 63, 122-123, 134). However, he did not feel this was a mitigating factor because wet coal will dry out under normal mining conditions and become combustible. (Tr. 63, 122-124). The belt will run and the air will dry out the coal. (Tr. 123, 166). The fact that there was a working CO system and water sprays did not change his opinion that this was an S&S violation. (Tr. 166-167). He testified that the CO monitors will only note when there is already a fire, not the danger of a fire. (Tr. 167). He further noted the water sprays were designed to prevent coal dust suspension not to suppress fires. (Tr. 168). He also opined that a fire resistant belt does not mean flammable material was not a hazard. (Tr. 167).

G. Edwards' Testimony Regarding the Photographs

Neither Edwards nor Wilson took photographs; they had no cameras. (Tr. 72-73). Respondent provided pictures that were allegedly taken within sixty minutes of the writing of Order No. 8030790.[12] (Tr. 73). Respondent submitted 19 photographs numbered 12-30 and Edwards discussed each one. (Tr. 74-93). Edwards testified that the photographs showed accumulations of coal dust. (Tr. 75-93). He also observed that most of the photographs did not show the amount of accumulation that was present when he issued Order No. 8030970. (Tr. 75-92). In addition, Edwards noted that one photograph (#23) showed strands of the belt breaking off. (Tr. 86-87). He claimed that this was an indication of belt rubbing structure. (Tr. 86-87). He described how the structure becomes ragged and will slice the belt. (Tr. 87). However, Edwards also noted that the photographs were often dark in the background and overly bright where the flash or photographer's head lamp cast light. (Tr. 75-93).

In reviewing the photographs, Edwards often testified that there was no indication that the areas shown were at Shoemaker mine; however, he had no reason to believe it was a different mine. (Tr. 74-93, 161). Respondent's McElroy and Shoemaker mines look identical. (Tr. 161-

[12] The photographs are contained in Respondent's Exhibit 3, with each given a separate page number. Tr. 73. Respondent's exhibits will hereinafter be referred to as "RX" followed by the number.

162). Edwards was not present when the photos were taken, so he did not know when they were taken or who took them. (Tr. 162).

II. Testimony of James Gropp

A. Qualifications and Work History

Gropp had twenty years of experience before going to MSHA, fourteen years underground, all with Respondent. (Tr. 175-176, 178). He received a Bachelor's degree in Mining Engineering from the University of Pittsburgh in 1987. (Tr. 174). As an employee for Respondent, Gropp acted as an industrial engineer, a section foreman, a project engineer, a shift foreman, a mine engineer, and a track and construction foreman. (Tr. 177). In those capacities, Gropp performed pre-shift examinations of the active workings. (Tr. 178-189). He had been employed by MSHA since April 2007. (Tr. 173). MSHA provided him with specialized training, including on-the-job training with journeymen inspectors and 21 weeks of training at the Academy. (Tr. 174). The 21 weeks in Beckley included classes on law, regulation, policy; citation and order writing; and all the different aspects of Parts 75 and 48. (Tr. 174).

B. Gropp's Testimony about Activities Conducted before the Inspection

Gropp conducted an E01 inspection of Shoemaker on October 26, 2010. (Tr. 180). He was also at Shoemaker to run a noise survey on an MMU section. (Tr. 181). That day he calibrated his instruments, got his inspection gear, drove to the mine, and arrived after 7:00 a.m. (Tr. 181). Upon arrival, he reviewed the pre-shift book, on-shift books, and the weekly permissibility books. (Tr. 182).

C. Gropp's Testimony Regarding the Inspection

Upon entering the mine, Gropp did not immediately begin the survey; instead, he began an imminent danger run on all areas inby the tailpiece. (Tr. 182-183). This was done to ensure that nothing would result in an injury while he was there. (Tr. 183). He testified that this was standard procedure. (Tr. 183). He began around 9:00 a.m. (Tr. 183). The company escort was Gary Rose ("Rose") along with Craig Norton ("Norton"), a foreman trainee, and the union representative was John Miller. (Tr. 183). Upon arriving at the section he stopped at the right-side power center, dropped off his gear, and then went towards the face. (Tr. 184).

Gropp noticed an accumulation of coal just inby the power center. (Tr. 184). Then he traveled up the right side face of the No. 8 entry and saw a second accumulation of coal. (Tr. 184). He then informed Norton this was a violation. (Tr. 184). He ran the faces from 8 to 5 to 4. (Tr. 184). As he went from 4 to 3, he saw more accumulations and he told Norton it was bad. (Tr. 184). Then he examined 2, 1, and 0 entries of the 15D section. (Tr. 184). He found more accumulations and issued Order No. 8033057. (Tr. 184). Upon leaving the faces, Gropp entered the No. 4 entry and saw more accumulations where a piggyback loader was dumping. (Tr. 185). This coal was 60 feet from the intersection of the face outby. (Tr. 185). Gropp added this to the accumulation order. (Tr. 185).

Gropp testified regarding a mine map of Shoemaker. (GX-15, Tr. 187-189). The map included some of the areas Gropp inspected (it did not include the area where one accumulation was found). (Tr. 187-188). Gropp marked the map 1-7 to show the accumulations he found. (Tr. 188, 197). The accumulations here were in the active workings of 8 South. (Tr. 199-200). There were some pieces of equipment on top of the accumulations observed including a bolter by the face of the 15A 0 entry. (Tr. 200). The first accumulation (sixth in the Order) was inby the tailpiece in area 6. (Tr. 190). This accumulation was not on the map; it was outby. (Tr. 190). This was a heavily traveled area and the accumulation was on the right side of the entry. (Tr. 190). Gropp believed this accumulation occurred when a miner cut the rib while trying to maneuver in a tight area with the bits on. (Tr. 190). The accumulation was 30 feet in length, 12 to 24 inches in depth, and two and a half to six feet wide.[13] (Tr. 190). The accumulation was made of coal. (Tr. 191). Gropp testified that he knew this because it was black and he could see where the rib was cut. (Tr. 191). He believed the operator should have scooped coal and put it on the belt. (Tr. 192).

The second accumulation (seventh in Order No. 8033057) was near the face of the No. 8 entry. (Tr. 192). The accumulation spanned 6 plus 28. (Tr. 193). This accumulation resulted from the miner holing through crosscut 7 to 8. (Tr. 193). When a miner goes from a crosscut to an entry, it is called holing through. (Tr. 192). This process causes coal to fall outside of the crosscut. (Tr. 192). Holing through is a normal part of the mining process and result in accumulations of coal and stone. (Tr. 193). There was a fan on top of these accumulations so Respondent could not have loaded them up. (Tr. 192-193). They were as wide as the entry or from to six to 15 and a half feet, 12 to 24 inches in depth. (Tr. 193). The operator should clean accumulations before mining 40 feet and did not do so here. (Tr. 193).

The next coal accumulation (listed fourth in Order No. 8033057) was in the crosscut 4 to 3 and completely covered the crosscut. (Tr. 193-194). The accumulation went from rib to rib and was 140 feet long. (Tr. 194). The coal was 8 to 12 inches in depth and fifteen and a half feet wide. (Tr. 194). Gropp had to walk over the accumulation as would anyone conducting a pre-shift. (Tr. 194). At this location Gropp told Respondent he would issue an order. (Tr. 247-248).

The next accumulation (listed third in Order No. 8033057) was also from holing into an entry from a crosscut at approximately 6 plus 94. (Tr. 194-195). The coal fell inby and outby the crosscut. (Tr. 194). The coal had not been cleaned. (Tr. 194). The accumulation was 15 and a half feet wide, 4 to 18 inches in depth, and 12 feet long on the outby side. (Tr. 195).

The next accumulation (listed second in Order No. 8033057) was in the No. 1 entry 8 south. (Tr. 195). This accumulation was also caused by holing in to an entry. (Tr. 195). It was 15 and a half feet wide, four to nine inches in depth, and 10 feet long. (Tr. 195).

[13] The measurements listed in the Order No. 8030970 that were 15 and a half feet or less were made with the tape measure, the other measurements were walked off with each step being a yard. (Tr. 198). When Gropp took the measurements the Norton and Miller were with him; however, Rose may have left. (Tr. 241).

The next accumulation (listed first in Order No. 8033057) was at the 15 A 0 entry. (Tr. 195-196, 243). The operator had just taken the miner out and never pushed the coal back to the face or loaded it out. (Tr. 196, 243-244). Gropp believed the miner was pulled out on that shift, but it could have been earlier. (Tr. 244-245). Gropp did not know if the scoop was down. (Tr. 244-245). Gropp believed Respondent was cutting without a loader because it was being fixed. (Tr. 196, 245). There was 80 feet of coal from the face outby, the accumulation was four to 15 and a half feet wide and four to 15 inches deep. (Tr. 196, 244). Gropp believed a drag bar made this accumulation. (Tr. 196-197). Occasionally coal will fall onto the bottom when it is being loaded or moved. (Tr. 196-197). Shuttle cars have a drag bar to keep the roads smooth. (Tr. 196-197). On cross examination, Gropp conceded that some of this coal could have been added to after the pre-shift examination. (Tr. 265).

The next accumulation (listed fifth in Order No. 8033057) was outby the face of No. 4 where Respondent had the loader piggybacked. (Tr. 197). The accumulation stretched from 5 plus 20 for 50 feet. (Tr. 197). The accumulation was 14 feet wide and 12 inches deep. (Tr. 197). Gropp believes the drag bar was involved here and that coal was dragged off shuttle cars by cables on the top.[14] (Tr. 197, 254-255). However, it was possible that coal fell when the shuttle car hit a rut. (Tr. 255-256). Gropp did not know what the bottom was made of here. (Tr. 254). If the bottom here were clay, whether it had ruts would depend on the moisture. (Tr. 254). He did not know if the bottom was wet was because he could not see through the coal. (Tr. 254).

At these areas, Gropp saw various kinds of coal accumulations. (Tr. 199). The difference between loose coal, loose fine and ground-up coal, coal dust, and float coal dust is size, and they are all combustible. (Tr. 199). Neither Gropp nor anyone else had a sieve. (Tr. 199-200). However, he knew float coal dust was present because miners produce it. (Tr. 199). Further, coal on the tram road would be pulverized by equipment. (Tr. 199). Black float coal dust means there was fresh coal that has never been rock-dusted. (Tr. 201-202). Rock dust is white and a mix of coal and rock dust is gray. (Tr. 202). Gropp did not take any photographs because he did not have a camera. (Tr. 203). He did not believe anyone else had one. (Tr. 203).

Gropp knew that these accumulations were not the result of sloughage because they spanned the entire entry from rib to rib. (Tr. 202). Sloughage is usually on the side by the rib. (Tr. 202). Accumulations 2, 3, and 7 resulted from holing into the crosscut. (Tr. 250). This was not sloughage. (Tr. 250-25)1. However, the miner often hits the ribs and causes sloughage. (Tr. 251). This was what happened at accumulation No. 6. (Tr. 251). This probably happens more than once in a given shift. (Tr. 251). With respect to accumulation Nos. 3 and 4, Gropp did not see a roof bolting machine correcting sloughage from the roof. (Tr. 251-252). He did not believe the material falling here was slate. (Tr. 252-253). Gropp was familiar with the slate at Shoemaker. (Tr. 252). The slate was usually white to gray in color though he has seen it look black. (Tr. 252). The accumulation was coal with perhaps a little stone. (Tr. 252-253). However, Gropp conceded that he took no samples at any of the areas of accumulation. (Tr. 258). He did not know if anyone took samples. (Tr. 259).

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[14] The miner cable was hanging up at the No. 3 entry across crosccut 3 to 4 and the shuttle cars were passing and likely scraping the coal from the cars. (Tr. 216). This would apply to accumulation Nos. 4 and 5, but mostly 4. (Tr. 216).

Gropp's impression of the working section was that there were about 400 feet of total, obvious, and extensive accumulations. (Tr. 204). The accumulations felt like walking on sand. (Tr. 204). A majority of the accumulations were on the left side, although Citation No. 8033058 was written for both sides. (Tr. 233). Two examiners walked the area without noting anything. (Tr. 233). Gropp never noticed anyone cleaning the accumulations and was not told why Respondent was not doing so. (Tr. 245, 280-281). Gropp did not write the citation for inadequate exam on October 26 because there were two people doing exams and he wrote the Order for both sides. (Tr. 275). During the investigation, Gropp did not observe anyone trying to clean. (Tr. 203). Gropp issued Order No. 8033057 (GX-10) at 10:10 a.m. for violation of §75.400. (Tr. 185, 187).

Respondent terminated the Order using three shuttle cars, two loaders, a scoop and people using shovels. (Tr. 205). Ten people cleaned the area in about four hours. (Tr. 205).

D. Gropp's Testimony on the Length of Time the Condition Existed, the Pre-shift Examinations and Clean-Up Plan

Accumulation No. 1 existed anywhere from one to three shifts. (Tr. 211). Gropp hypothesized the time based of the rate of mining (between 32 and 36 feet per day) and the distance between the accumulations and the face. (Tr. 256-267). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 212).

Accumulation No. 2 existed for one to two days. (Tr. 212-213). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 213).

Accumulation No. 3 occurred before No. 2 and so existed one to three days. (Tr. 213, 264). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 213).

Accumulation No. 4 could have existed one to two shifts. (Tr. 213-214, 264). The coal was there because it was getting drug off the top of the shuttle cars. (Tr. 213-214, 264). Gropp saw shuttles but did not see them in the accumulations because the left side was not producing. (Tr. 264). The spill could not have occurred during the inspection for that reason. (Tr. 214).

Accumulation No. 5 could have existed longer because of the way Respondent set up the miner with the piggyback loader. (Tr. 214). When Respondent ran the shuttle car from the face and dumped the coal on the ground, it covered up the miner cable. (Tr. 214). The accumulations were likely there the whole time Respondent mined the crosscut from 4 to 3 and across the 15A. (Tr. 214). The accumulations could have been there one to three shifts or one to three days. (Tr. 214). The time would depend on whether the accumulations had ever been cleaned. (Tr. 214, 215). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 215). The left side did not have shuttles running at the time. (Tr. 254).

Accumulation No. 6 existed a day. (Tr. 215). Gropp learned this from the dayshift foreman on the right side, Yorty. (Tr. 215).

No. 7 existed for one or two shifts, a day at most. (Tr. 215). Respondent holed crosscut 7 to 8 and turned up at that point. (Tr. 215-216).

Gropp admitted that some of the accumulations may have occurred after the last pre-shift examination and before the inspection, notably 1, 4, and 5. (Tr. 224-225). All of No. 1 could have occurred after the last pre-shift if Respondent had mined the entire area in 3 hours. (Tr. 225). However, Nos. 4 and 5 were too extensive to have been completely deposited in that time. (Tr. 225). Gropp did not believe Nos. 2, 3, 6, and 7 occurred since the last pre-shift. (Tr. 225).

Gropp believed that the examiner would have seen the seven accumulations. (Tr. 225). However, he did not ask anyone how the coal got there as he did not think it was important. (Tr. 256). The exception was accumulation No. 6, where he spoke to the foreman and learned that the bits on a miner had caused the accumulation a day before on dayshift. (Tr. 257-258).

Gropp referred to a pre-shift and on-shift examination report for 8 south left and right for 10-26 on the midnight shift.[15] (GX-14, Tr. 227-228). Nothing in the report stated anything about accumulations on the left side. (Tr. 228-229). Gropp did not talk to the pre-shift examiner, although he had in the past. (Tr. 266). However, on cross examination, Gropp admitted that the on-shift report stated that No. 6 cross 7, cross 8, last open needed dusted. (Tr. 269-270). The report stated that this condition was corrected. (Tr. 269-270). However, Gropp felt this condition was not part of the violation. (Tr. 270). The report just stated the area needed to be dusted, not that there were accumulations. (Tr. 270). Another on-shift report notation dealt wtih four areas (1 was 4 entry, 2 was feeder, 3 was tail, and 4 was 0 entry). (Tr. 271). This was the section Gropp was on. (Tr. 272). Gropp did not look at this on-shift before the hearing. (Tr. 272-273). The report stated there were coal accumulations in all of these areas and that the problem was corrected. (Tr. 272). Gropp testified that if the problems were corrected, they must have occurred again. (Tr. 272). However, even if people had worked on the area, Gropp would not change his evaluation because of the amount of accumulations. (Tr. 278-279).

As a result of the observations above, Gropp also issued Citation No. 8033058 (GX-12), for inadequate pre-shift. (Tr. 226, 231). Gropp referred to the notes that substantiate the citation during his testimony. (GX-13, Tr. 226-227). Citation No. 8033058 was not issued until October 27, 2010, because the area cited was supposed to be examined by two different people. (Tr. 230). Gropp did not feel comfortable issuing a citation on the October 26 as a result of not knowing who did what at the time. (Tr. 230). He changed his mind after talking with his supervisor and realizing that something should have been on the books. (Tr. 227, 230). Two full mining crews and two other people worked on the section following the exam. (Tr. 233). The examiner reviewed these hazardous conditions and did not report them. (Tr. 233). The conditions existed for a period of time, an exam occurred, and the condition was not corrected. (Tr. 275-276).

[15] A pre-shift report is prepared before anyone can go underground for the next shift to let people know about hazardous condition in the area. (Tr. 229). An on-shift exists so an examiner can record air readings, the error, observations, and corrections of violations or hazardous conditions during the shift. (Tr. 229). The on-shift in GX-14 did not occur on the same shift as Gropp's inspection. Tr. 230. Instead, it occurred on the previous midnight shift. Tr. 230.

Gropp also testified that the mine had been cited 139 times for §75.400 in the last two years. (Tr. 223). Gropp learned this number from a computer program before issuance of Order No. 8033057. (Tr. 224). He also recalled from the file review that this violation was common. (Tr. 224). Gropp conceded that these citations were not issued in the same location. (Tr. 266-267). He also conceded that §75.400 is one of the top five violations in the country. (Tr. 277).

Gropp was familiar with the Shoemaker clean-up program. (RX-9; Tr. 216-217, 245). When Gropp worked at Shoemaker the cleanup sequence was as follows: the section was mined for 40 feet and the loader would clean up, then Respondent would apply rock dust, and then this would be repeated for the 300-foot entry. (Tr. 248). Once a face was finished, the miner operator would back the miner up the length of the cut, approximately 30 feet with the pan up in the air, then he would drop the pan and push the coal back up to the face. (Tr. 248-249). Then, it would be loaded out with a loader into shuttle cars. (Tr. 248-249). If the loader was down, he would use the miner because it also has a shovel. (Tr. 248-249). If the miner had already been taken out before the loader went down, the miner would be brought back in. (Tr. 249-250). The miner was a large piece of equipment though Gropp did not believe it was very slow. (Tr. 250).

Respondent did not conform to the clean-up plan with respect to the following sections: No. 1 stated that all coal spills will be cleaned up. (Tr. 217, 221). No. 2 stated, "after dusting, loader needs to be backed up 50 feet and both ribs pushed up to miner." (Tr. 221). Instead of the loader, a miner could be used. (Tr. 221-222). No. 5 stated, "Coal spillage and accumulations near the fan will be cleaned up as mining progresses." (Tr. 217-218, 222). No. 6 stated, "Return entries should be mined 30 feet passed center. The miner will be backed up 30 feet and push coal into the face past the last channel and loaded out." (Tr. 218). No. 9 stated, "areas that cannot be cleaned with scoop or loader will be shoveled out and cleaned up." (Tr. 217, 222). No. 10 stated, "No. 8 south and 8 north mains will be cleaned in the same manner as listed above."[16] (Tr. 217). No. 8 stated, "After holing to crosscut 1 to 2, No. 2 entry will be scooped starting two breaks from the face on both sides. Any cables in the entry need to be hung so they will not be damaged." (Tr. 219). No. 14 stated, "At any time the loader is down and running into shuttle cars mine 40 feet back miner up and clean ribs and coal spilled from the shuttle car then dust before mining continues after the entry or crosscut is finished the entire area is to be scooped then dusted." (Tr. 219). According to Gropp, these failures were a point in determining negligence because the conditions existed in the active workings of the mine and should have gotten attention. (Tr. 234).

Gropp found Order No. 8033057 to be an unwarrantable failure because the examiner would follow the same route as his inspection. (Tr. 210-211). Also, the accumulations were obvious and extensive. (Tr. 210-211, 266). Gropp believed the accumulations existed between one and three days total. (Tr. 211). Gropp believed that Respondent did nothing to correct the problem here. (Tr. 266). He further stated that the number of people in the area affects the unwarrantable failure finding. (Tr. 223). 8 South was well-traveled because it was the future of

[16] "Above" referred to No. 7 which stated, "After holing the middle crosscut, miner will be backed up 30 feet; clean both ribs as well as the coal in the intersection." (Tr. 218-219).

the mine. (Tr. 223). The section foreman, the CM coordinator, the mine foreman, and upper management would all be interested in this spot. (Tr. 223).

E. Gropp's Testimony on the Gravity of Order 8033057 and Citation No. 8033058

Gropp evaluated the gravity of Order No. 8033057 as reasonably likely, lost workdays or restricted duty, S&S and ten persons affected. (Tr. 205). Gropp evaluated Order No. 80332057 as reasonably likely to result in an injury because: combustible material was present; there was an ignition source of electrical cables in and on the coal; there was a bolter on top of the accumulations; and the mine liberated methane and was on a five day spot inspection. (Tr. 206). Gropp testified that the specific hazard created by the condition was an ignition of combustible material or a propagation of an explosion if there was a face ignition or explosion. (Tr. 205). He believed that if an ignition were to occur, at a minimum, there would be smoke inhalation and respiratory damage. (Tr. 205-206, 232). He also felt a miner could suffer crushing internal injuries from explosive forces. (Tr. 206, 232). He believed that these sorts of injuries would at least result in lost workdays or restricted duty. (Tr. 206).

With respect to likelihood Gropp found many ignition sources. Shoemaker has a history of cable violations. (Tr. 207). At the time of issuance, Respondent had five citations in the previous month for openings in cables. (Tr. 207). Gropp was not sure if the cables he saw that day were damaged; he did not check them or issue a citation for them. (Tr. 208, 259). It would not have mattered to him if the cables were not damaged; cables can be damaged and are damaged regularly. (Tr. 208, 259-261, 279). Cables can be damaged by wire mesh, by stones, or by equipment. (Tr. 262). Numerous hazards result from cables sitting in a coal pile, including heat. (Tr. 279). Also, there were other ignition sources. (Tr. 261). Methane was an ignition source when the face was actively being mined and Shoemaker was on a five-day spot. (Tr. 207-208, 279-280). Gropp testified that, given the accumulations here, if there was a methane ignition it could put fine coal dust into the air and propagate an explosion. (Tr. 280). However, he never heard of a face ignition propagating at Shoemaker. (Tr. 281). The shuttle car with a cable on top, the bolter cable on top of the accumulations in 15A, and the fan cable on right side of No. 7 were also ignition sources. (Tr. 261). However, Gropp did not examine or issue any citations with respect to this equipment. (Tr. 261).

Gropp believed ten people would be affected because there were ten people inby the violation where the air would travel. (Tr. 208, 273). Gropp wrote the citation as affecting ten people because there were violations on both air splits. (Tr. 277-278). The miner was operating on the right with an operator, two bolters, a utility man, and a loader operator. (Tr. 208, 273). On the left there were three people hanging curtains and two bolters. (Tr. 208-209, 273).

Gropp testified that Citation No. 8033058 (GX-12) was an S&S violation for the same reasons as Order No. 8033057. (Tr. 231-232). There were accumulations of combustible material; an ignition source from the cables and methane; and, people affected with no action taken to correct the problem. (Tr. 232). Also, an examination was made but the violations were still present, there were accumulations, there were cables, and the mine was on a five day spot. (Tr. 274-275).

III. Gary Rose

A. Rose's Qualifications and Work History

Rose graduated from high school and had no further education. (Tr. 283). He had assistant foreman certifications, MSHA training cards, an EMT certification, and a dust certification. (Tr. 283). He worked at Shoemaker as a Section Foreman. (Tr. 283-284). Before Shoemaker, he worked two years at another mine as a roof bolter, miner operator, and shuttle car operator. (Tr. 284). At the time of the citation, he was a CONSOL safety inspector. (Tr. 284).

B. Rose's Testimony Regarding Order No. 8030970

Rose was familiar with Order No. 8030970. (Tr. 389). He learned that the Order had been issued when he went to work on the afternoon shift. (Tr. 389). He did not know when the Order was issued. (Tr. 390). He was told by The Safety Department to go to No. 8 Belt and take pictures. (Tr. 389-390). He took the photos contained in RX-3. (Tr. 389). Rose did not have a copy of the Order or know where the violations were found, so he tried to take pictures of areas that may have been violations. (Tr. 391, 410). Rose took the photographs between 4:30 and 5:30 on the same day the violation was issued. (Tr. 391-392, 410). Rose testified that the photographs showed that the cited areas were muddy and well rock-dusted. (Tr. 392-409). He testified that the belt was 5,200 feet long and was wet for its whole distance. (Tr. 396-397). In addition, he believed the photographs indicated that there were no significant accumulations of coal dust. (Tr. 392-409). With respect to photograph #23, Rose testified that the two strings hanging down from the belt were normal and not a hazardous condition. (Tr. 403).

No one traveled with Rose when he took the photographs. (Tr. 409). Rose did not take any notes or sample with the photographs. (Tr. 409-410). While he was taking photos Rose never observed anyone working on the belt. (Tr. 402). Rose stated that the belt was running. (Tr. 402).

C. Rose's Testimony Regarding the Accumulations cited in Order No. 8033057

Rose was familiar with Order No. 8033057, as he was with Gropp when it was issued. (Tr. 284-285). The inspection began where the No. 7 was marked on the map. (Tr. 285). They then made their way across the faces and ended up at No. 1. (Tr. 286).

At No. 1, the last place the parties visited, the miner pulled out. (Tr. 286-287). Respondent was done mining and had re-hung the curtain. (Tr. 286-287). Rose did not know when the miner had moved out. (Tr. 287). He conceded that Respondent had not cleaned up 40 feet of accumulation. (Tr. 286-287). When a miner pulls out of an area the proper protocol was for the scoop to clean up. (Tr. 288). The operator should then push everything up to the face and rock dust. (Tr. 288). If the scoop was down, the loader was used, and if the loader was down, the miner must be used. (Tr. 288-289, 304-305). Rose testified that both pieces of equipment were down here. (Tr. 289). As a result, dusting would have been done by hand instead of with a loader. (Tr. 305-306, 315). No one was rock dusting by hand here, but Rose testified that within 40 feet of the face, rock dusting was not required. (Tr. 315). Unlike Gropp,

Rose saw no accumulation 80 feet outby, four to 15 feet wide, and four to 15 inches deep. (Tr. 287). Rose did not measure and did not recall Gropp doing so. (Tr. 287). Rose measured by counting roof straps, which were spaced four feet apart. (Tr. 288). Rose did not know how long it would take to fix the scoop. (Tr. 289). It can take 20-30 minutes to bring the miner back. (Tr. 289, 305). Rose did not recall Gropp asking why the area was not clean. Tr. 290.

No. 2 was at the intersection of 15A number 0 and 8 south 1 at spad 694. (Tr. 290). Rose did not see Gropp or Miller take any measurements here. (Tr. 290-291). The bottom was muddy clay with ruts formed in it. (Tr. 291). Also, there was some sloughage from equipment hitting the rib.[17] (Tr. 291).

No. 3 and 4 dealt with areas being center bolted. (Tr. 292). Mesh was being placed because the top was bad and needed more support as a precaution. (Tr. 292-293, 307-308). At the time of the inspection the equipment was there though Respondent was not putting the mesh up. (Tr. 293, 309). Rose was not aware if the miners were bolting on the same shift as the inspection; it could have been on the last shift. (Tr. 309-310). The falling rocks were black or green and slimy. (Tr. 293). None of the rock was touching the ribs. (Tr. 294). Rose did not agree with Gropp that the accumulations were all the way across the entry. (Tr. 294-295). The accumulation was stone with a little coal mixed in. (Tr. 295, 311). Rose did not recall Gropp taking measurements in No. 3 or No. 4 and he did not take any. (Tr. 297, 311).

No. 5 was at 8 south 4 entry or spad 5 plus 20. (Tr. 297). Rose did not recall an accumulation there. (Tr. 297). Rose was not with Gropp at this location. (Tr. 304).

No. 6 was a muddy tram road with a buggy sitting in the entry. (Tr. 297). There was a very large puddle of water in the area. (Tr. 297). Shuttle cars go through the area to haul coal. (Tr. 296). If a shuttle car hits the ruts, it can hit a rib and knock rock or coal from the rib. (Tr. 296, 312-313). Rose did not see this happen. (Tr. 296, 312-313). Sometimes coal will fall out of the shuttle car if there was a bad operator or from hitting ruts. (Tr. 296-297, 313, 315).

No. 7 was located in 8 south No. 8 entry and was near where the fan was sitting, with mining occurring straight up from the fan. (Tr. 297). Rose stated this was an area that was holed through with a little accumulation next to the rib. (Tr. 297). To clean a hole through, Respondent must use a loader and shovel at the end of every shift. (Tr. 298). Rose testified that this area was going to be cleaned after the shift, when Respondent mined more than 40 feet. (Tr. 313).

Rose did not know why his assessment was so different from Gropp's. (Tr. 298). The only discussion Rose and Gropp was that Gropp said it looked pretty bad and then he issued Order No. 8033057. (Tr. 298). Rose did not take notes or photos on the day of the Order. (Tr. 304). Rose did not accompany the pre-shift examiners (McCauley, Pribila, and Wilhelm) when

[17] Whether or not sloughage from the rib is combustible depends on whether it is coal, whether it is rock dusted, and whether there is methane in the air or another source of ignition. (Tr. 306). However, material is combustible whether or not there is an ignition source. (Tr. 306-307).

they examined this area. (Tr. 312, 314). Rose did not have any first hand knowledge of how or when these accumulations occurred. (Tr. 312). Gropp took no measurements, no dust or air samples, no photographs, and did not check the ventilation to Rose's recollection. (Tr. 302-303). Rose was with Gropp most of the time, although he walked away occasionally because Norton and Miller were there as well. (Tr. 302). He was with him at all the cited areas, except for No. 5. (Tr. 302). Gropp did not discuss any ignition sources or cables. (Tr. 303). Rose did not know the average amount of mining per shift in this area. (Tr. 305).

D. Rose's Testimony Regarding the Clean-up Plan

Shoemaker mine had a clean-up and rock dusting plan. (Tr. 299). In a miner section, after the miner moves out, the coal must be scooped up and rock dusted. (Tr. 299). Dusting must occur every 40 feet, though after every 40 feet Respondent dusted the last 80 feet. (Tr. 299). This was to comply with the new regulations. (Tr. 300).

E. Rose's Testimony Regarding Gropp's Actions After the Investigation

When Gropp said he was going to issue an Order, Rose contacted his supervisor, Hough. (Tr. 301-302). Rose did not help clean the areas covered by Order No. 8033057 nor did he know how many people were involved or how long it took to clean. (Tr. 313).

IV. Testimony of Brian Hough

A. Qualifications and Work History

Hough received a Bachelor's degree and a Master's in Safety Management at West Virginia University. Tr. 317. Hough was trained in the Fundamentals of Supervision, Business Essentials, C.F.R. Training, and Managing Your Body by Consol. Tr. 317. He was a certified Mine Foreman in West Virginia, an MSHA instructor, a Con Ed instruction, a West Virginia EMT miner, and had a MSHA dust certification. Tr. 317. Hough had a total of twelve years of mining experience. Tr. 319. Hough received his assistant mine certification in 2003 and upgraded to a mine foreman a year ago. Tr. 347. He was an assistant mine foreman at the time of these violations. Tr. 348.

B. Hough's Testimony Regarding Gropp's Inspection

Hough was familiar with the Order No. 8033057 and he learned about it from Rose at the time of issuance. (Tr. 319-320). When he learned of Order No. 8033057, Hough examined the pre-shift and on-shift book, made copies, and headed into the mine. (Tr. 320). Hough went underground at approximately 10:40 a.m. (Tr. 351-352). When he got there, he talked to Gropp and then reviewed all of the locations in the Order. (Tr. 321). He did not take notes beyond mental notes and did not take any photos because he did not have a permissible camera. (Tr. 349-350). Hough did not accompany the pre-shift inspector. Tr. 351. He did not measure the accumulations. (Tr. 351). He did not see the accumulations occur and he did not sample them to determine their composition. (Tr. 351).

After looking at the areas Hough told Gropp he did not think the accumulations justified an Order. (Tr. 321). He testified that he informed Gropp that the accumulations were minimal given the size of the area. (Tr. 321-322). The accumulations occurred in an area that was well over 1,000 feet from one side of the section to the other and had two separate MMUs with two separate crews. (Tr. 321-322). However, Hough conceded that it was possible to have a single accumulation so bad as to justify a withdrawal order, though that did not occur here. (Tr. 352).

C. Hough's Testimony regarding the Accumulations cited in Order No. 8033057

In Order No. 8033057, No. 1 was listed as four to 15 inches deep. (Tr. 322-323). Hough testified that this was not possible because the drag rails on the shuttle car prevent accumulations of that depth. (Tr. 322-323). Further, based on roof straps Hough saw only 40 feet of accumulation, not 80. (Tr. 323). Hough believed the last 40 feet do not need to be cleaned. (Tr. 355-356). On cross examination, Hough admitted that the 40-foot requirement was not part of the regulations and only comes from Respondent's clean-up plan. (Tr. 357-358). Hough did not know why the area was not cleaned. (Tr. 324). The delay may have been because the bolter was in the area. (Tr. 324). It would take a long time, up to an hour, to move the miner back in place because the ventilation would have to be moved. (Tr. 324, 359-360). It would be the section supervisor's decision whether to move the miner back in or wait for the loader and scoop to be fixed. (Tr. 325, 356-357). It was also his responsibility to ensure accumulations stay at no more than 40 feet. (Tr. 325, 356-357). Hough spoke with the section supervisor (he cannot recall who that was).[18] (Tr. 325). He told the supervisor to move the miner back in to clean up. (Tr. 325).

No. 2 was located at the intersection of 15A 0 and 8 South No. 1. (Tr. 325). Hough saw material on the ground, some of which had been pushed by the shuttle cars. (Tr. 327). Some of the accumulation was rock material as there was a 12-18 inch stone binder at the lower part of Shoemaker. (Tr. 327). The area was also moist and slippery from seepage. (Tr. 327-328). This can cause stone to fall out of the binder in the rib and accumulate. (Tr. 327-328). This material was not combustible. (Tr. 327-328). He testified that it was mostly rock and mud including clay from the bottom. (Tr. 328, 360). However, Hough did not take any samples. (Tr. 328, 360). Hough did not believe these conditions warranted an order. (Tr. 328). On cross examination, Hough conceded that stone that falls from the rib falls onto the rib lines and if it falls from the roof it falls straight down. (Tr. 360). He also admitted that coal could come out of the shuttle cars because of ruts in the clay. (Tr. 352). Hough described the drag rails suspended from the shuttle cars to prevent ruts deeper than 4-inches. (Tr. 352-353). However, he noted that the rails only prevent the car from bottoming out; they do not eliminate all ruts. (Tr. 352-353). A rut could be a foot deep before the shuttle care bottomed out and the ruts could fill with coal. (Tr. 353-355).

No. 3 was at the intersection of the 8 south and the 2 entry. (Tr. 328). There was material falling from the roof at this location. (Tr. 361). However, it was slate and was being bolted. (Tr. 361). This action was not a hazard because bolts were being added, though the situation may be dangerous if not corrected. (Tr. 361-362). The falling shale was not listed on

[18] Later, he remembered the supervisor on the left was Pribila and the right was Yorty. Tr. 357.

the pre-shift or on-shift report, though examiners sometimes feel this was hazardous. (Tr. 362-364). However, the reports do not mean that mining occurred here, it only means that the power was on. (Tr. 364-365). Coal sloughage from the roof would be combustible. (Tr. 366).

No. 4 and 5 were a combined area for piggybacking. (Tr. 329-331). This was an area where coal from one shuttle car was dropped and then placed on another shuttle car. (Tr. 329-331). Piggybacking occurs when shuttle car cables are not long enough to reach from the loading point to the belt. (Tr. 330, 366). Coal must be placed on the bottom for piggybacking. (Tr. 330). At a certain level, that accumulation is not permissible, maybe 20 tons. (Tr. 366). However, Hough did not believe what he saw on the bottom warranted an order. (Tr. 331). Hough did not know how much energy went through a trailing cable. (Tr. 365).

Hough did not recall No. 6. (Tr. 331).

No. 7 was where the mine fan was sitting and the employees were setting up to mine. (Tr. 331). There were rib sloughage, some coal, some rock, in this area. (Tr. 331).

D. Hough's Testimony Regarding the Clean-Up Plan and Cleaning in General

Hough was familiar with the clean-up and rock dusting plan. (Tr. 334). The clean-up plan goes into effect at the end of each shift; employees clean the tailpiece and their areas at the shift change. (Tr. 334). The plan was not updated on a set schedule. (Tr. 335).

When a miner is holing in and there are accumulations as a result, the loader can turn into the crosscut and attempt to clean up the mess. (Tr. 332). It is very difficult because of the angle of the turn so usually Respondent has to shovel. (Tr. 332). Respondent has to wait until the area is holed through and then roof bolted before the accumulation can be cleaned. (Tr. 332).

E. Hough's Testimony Regarding Examinations cited in Citation No. 8033058

Hough was also familiar with Citation No. 8033058. (Tr. 336). It was true the pre-shift records do not include any information regarding this area. (Tr. 336-337). However, this was because any violations were corrected before the last three hours of the shift and so the on-shift took credit. (Tr. 342-343). Between pages 62 and 79 of the on-shift report, there were many entries that listed cited conditions and noted that the violations had been corrected during the shift. (Tr. 337-342). Hough showed these reports to Gropp so that he would see the attempts to correct violations. (Tr. 342). Gropp said he felt there was not enough effort. (Tr. 342).

Hough testified that the purpose of a pre-shift was to take care of hazardous conditions and to then report those conditions to the record book.[19] (Tr. 344). He testified that pre-shift

[19] Hough opined that all violations are not necessarily hazardous conditions. (Tr. 346). He stated that the accumulations here were not a hazardous condition and would not be unless they were extreme. (Tr. 346). However, Hough did not actually see the conditions. (Tr. 346-347). He reviewed the books and found that the examiner did not believe the conditions were extreme. (Tr. 346-347). Hough did not know if the miners stopped mining to clean them up. (Tr. 347).

hazards must be corrected or dangered off before anyone can go into the section. (Tr. 344, 347). This was different than an on-shift hazard. (Tr. 344-345). In that case, the condition must still be corrected but the whole area does not need to be dangered off. (Tr. 344-345). However, hazardous violations must be dangered off, even when discovered on-shift. (Tr. 345). Hough felt that nothing listed in the on-shift report required dangering off because the conditions were not hazardous, just violations. (Tr. 345).

On cross-examination, Hough discussed why the on-shift did not list all of the accumulations in Order No. 8033057. (Tr. 369). He stated that the on-shift report might have included No. 6 from the Order and indicated the condition was corrected. (Tr. 369-370). He also noted accumulations in the No. 8 entry were cleaned and dusted. (Tr. 370-37)1. On-shifts for 0 Entry and Feeder tail also stated that conditions needed to be cleaned up. (Tr. 371). He also referred to the pre-shift report for the shift where Gropp issued the violations. (Tr. 371). That report stated 0 entry had loose coal accumulations and this was listed as a violation. (Tr. 371). Also, No. 4 entry from 4 to 3 had accumulation and the condition was listed as a violation. (Tr. 371-372).

Hough stated that there was no way to determine how long accumulations existed besides watching their creation. (Tr. 332, 366-367). Even knowing the rate of mining would not be accurate because mining distances can vary daily. (Tr. 333). On a good day, a miner can advance 200 feet. (Tr. 333). Hough did not know the rate of mining per shift at the time of Order No. 8033057. (Tr. 367). However, records existed that Hough could have checked if he wanted to dispute MSHA's estimate of mining rates per shift. (Tr. 367-368). Hough did not know why he and Gropp came to such different conclusions on how long the condition existed. (Tr. 334). According to Hough, at times in the past, even with Gropp, this amount of accumulation would warrant a citation, not an order. (Tr. 334).

V. Testimony of Tom Skrabak

A. Qualifications and Work History

Tom Skrabak ("Skrabak") graduated from high school. (Tr. 373, 374). He was certified as a mine Foreman. (Tr. 374). He had fire and shot papers in Ohio and West Virginia, as well as a training certificate with MSHA. (Tr. 374). He had 41 years of mining experience. (Tr. 376). He worked on miner sections, had done construction underground, and worked as section foreman, shift foreman, and mine foreman. (Tr. 376). Skrabak had been employed by Respondent at Shoemaker and has been for 23 years. (Tr. 374). His position at the time of the hearing was General Mine Foreman; however, on October 14, 2010, he was an Assistant Mine Foreman in charge of the Whittaker Portal. (Tr. 374).

B. Skrabak's Testimony Regarding Order No. 8030970

Skrabak was familiar with Order No. 8030970. (Tr. 376-377). He became familiar when he was called about it on the afternoon of the October 14 by the assistant superintendent at

Golden Ridge. (Tr. 376-377). He stated that he had no knowledge of the Order and that it had not been issued to him. (Tr. 377).

C. Skrabak's Testimony Regarding Edward's Inspection

On the day at issue, Skrabak saw Edwards in the morning and had a non-substantive conversation; however, he did not go underground. (Tr. 378). Instead, he went to a meeting at the Golden Ridge. (Tr. 378). Skrabak's meeting was at the engineering department. (Tr. 383-384). There was a screen showing belt production in that office. (Tr. 384- 385). Skrabak even has one at his home because a down belt means no production. (Tr. 384-385). During the meeting only one alarm summary went off. (Tr. 385). Skrabak was not sure what time the alarm occurred. (Tr. 385). The summary stated "Disconnect, drive disconnect 1, disconnect 2," and was for 8 Belt. (Tr. 385). "Drive disconnect" indicated that the belt was down because the power was disengaged. (Tr. 385- 386). A radio communication showed the belt was down because rollers were being changed. (Tr. 386). Skrabak learned the reason at his meeting and was told by one of the surveyors. (Tr. 386). He did not remember the belts going down at any other time. (Tr. 380). The meeting started at around 10:00 a.m. and ended around 1:00. (Tr. 383-384). He then went to the superintendent's office and discussed other matters before leaving at 2:00. (Tr. 383-384).

When Skrabak saw Edwards coming out of the mine, he asked how the inspection went and Edwards told him he "got you for a few." (Tr. 381). "Got you for a few" indicates to Skrabak that there were a few citations. (Tr. 382). Edwards gave no indication of an order. (Tr. 382). Skrabak did not learn about Order No. 8030970 until the phone call later. (Tr. 382). It was MSHA protocol to inform the mine foreman or assistant mine foreman when an Order was issued. (Tr. 383). Normally, when an order was issued, the section or belt was shut down until the situation was corrected. (Tr. 383, 386-387). As an assistant mine foreman, Skrabak would know if the belt shut off. (Tr. 381).

Skrabak learned about Order No. 8030970 around 4:00. (Tr. 387). After receiving the call, Skrabak went into the foreman's office and obtained a copy of the Order. (Tr. 378-380). Skrabak read the Order and called the assistant superintendent back. (Tr. 380). Skrabak never saw the condition, had no firsthand knowledge of the condition, and did not walk with the inspector. (Tr. 388).

CONTENTIONS OF THE PARTIES

The Secretary contends that Order No. 8030970 was validly issued. (*Secretary's Post-Hearing Brief* at p. 2). He also argues the violation of the standard was reasonably likely to result in lost workday injuries, and would affect 1 person. GX-6. The Secretary claims that the violation was S&S (*Secretary's Post-Hearing Brief* at p. 7). Finally, he argues the violation was the result of high negligence and constituted an unwarrantable failure. (*Id.* at 14). Respondent argues that there were no significant accumulations of combustible material. (*Respondent's Post-Hearing Brief* at p. 30-33). It also contends that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id*. at pp. 37-39). Finally, it argues that it did not exhibit negligence and there was no unwarrantable failure. (*Id*. at pp. 39-40).

The Secretary contends that Order No. 8033057 was validly issued. (*Secretary's Post-Hearing Brief* at p. 18). He also argues the violation of the standard was reasonably likely to result in lost workday injuries, and would affected 10 persons. GX-10. The Secretary claims that the violation was S&S. (*Secretary's Post-Hearing Brief* at p. 26). Finally, he argues the violation was the result of high negligence and constituted an unwarrantable failure. (*Secretary's Post-Hearing Brief* at p. 29). Respondent argues that there were no significant accumulations of combustible material. (*Respondent's Post-Hearing Brief* at pp. 40-47). It also contends that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id*. at pp. 47-49). Finally, it argues that it did not exhibit negligence and there was no unwarrantable failure. (*Id*. at pp. 49-50).

The Secretary contends that Citation No. 8033058 was validly issued. (*Secretary's Post-Hearing Brief* at p. 31). He also argues the violation of the standard was reasonably likely to result in lost workday injuries, and would affect 10 persons. GX-12. The Secretary claims that the violation was S&S. (*Secretary's Post-Hearing Brief* at p. 33). Finally, he argued the violation was the result of high negligence. (*Id*. at p. 34). Respondent argues that the pre-shift examinations were conducted properly. (*Respondent's Post-Hearing Brief* at pp. 50-52). It also contends that that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id*. at pp. 53-54). Finally, it argues that it did not exhibit high negligence. (*Id*. at p. 54).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Order No. 8030970

A. The Secretary has sustained his burden of proof by the preponderance of evidence that §75.400 was violated

With respect to Order No. 8030970, the Secretary presented sufficiently probative evidence of impermissible coal dust accumulations at the subject mine so as to establish a violation of §75.400.

Edwards gave credible testimony regarding coal dust accumulations along the No. 8 Beltline. Edwards observed areas with coal fines, some that had actually accumulated up to the rollers and the roller structure. The rollers were turning in the accumulations. (Tr. 29). Edwards found coal, loose coal, actual coal particles, and coal lumps on the belt line and also ignition sources from 8-46-8-47. (Tr. 29).

Edwards used a tape measure to measure the accumulations, some of which were up to three feet in height and six feet in width. (Tr. 36-38). As to the height of the accumulations, the belt structure was not consistently the same distance from the bottom. Some rollers were as little as one foot from the bottom. (Tr. 38). The accumulations were found to be sometimes coming

into contact with rollers.[20] (Tr. 38). Edwards touched rollers that were packed in accumulations; the rollers were warm to the touch. (Tr. 39).

At hearing Edwards referred to his underground notes (GX-7) which were consistent with his in-court testimony. Respondent cross-examined Edwards regarding the pristine nature of his notes and regarding the actual time and place the Order was written. Although Edwards' testimony was somewhat problematic on these minor points, the ALJ found Edwards' testimony on the whole to be reliable, credible, consistent, and not impeached despite Respondent's vigorous cross-examination. (*see also Secretary's Post-Hearing Brief* at p. 3, Footnote 2).

The ALJ also notes Respondent's hearing cross-examination of Edwards and brief arguments that the Secretary's case was not supported by any photographic, heat measurement, or coal particle testing evidence.[21] (*see inter alia* Tr. at 40, 49, 72, 119, 125 and Respondent's *Post-Hearing Brief* at p. 9 and 33).

The ALJ concurs that, in the best of all evidentiary worlds, MSHA inspectors would carry cameras to photograph all violation scenes, sieves to measure coal dust particles, coal dust meters,[22] specimen bags to collect samples, and heat guns to measure friction temperatures. But, mines are not sterile environments where precise empirical testing can always be conducted. Moreover, placing aside questions of practicality, our current case and statutory law do not require such proof to establish the safety standard violations at issue.

An inspector's testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and, indeed, its S&S nature. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) (holding that the opinion of an investigator that a violation is S&S is entitled to substantial weight); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136 (7th Cir. 1995) (ALJ did not abuse discretion in crediting expert opinion of experienced inspector); and *Cement Division., National Gypsum Co.*, 3 FMSHRC 822, 825-826 (Apr. 1981) (regarding the probative value of inspector's judgment).

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[20] *See also*, Edwards' descriptions of damaged rollers at 8-3 and 8-23 crosscuts that could become frictional heat sources. (Tr. 44-45).

[21] The ALJ notes that Respondent also failed to present any scientific testing evidence. The problematic nature of its proffered photographs shall be discussed *infra*.

[22] MSHA is encouraging underground mine operators themselves to collect and evaluate rock dust/coal samples. Last year, NIOSH verified the effectiveness of the coal dust explosibility meter (CDEM) to evaluate rock dust/coal dust samples to determine whether rock dusting was adequate to prevent explosions. *See* MSHA Program Information Bulletin No. P13-01, "Availability of a Report on the Use of the Coal Dust Explosibility Meter," dated Jan. 25, 2012.

In the case *sub judice*, the ALJ recognizes that Edwards had not been working many years as an inspector for MSHA at the time of the instant inspection.[23] However, the ALJ rejects any argument advanced by the Respondent contending that Edwards' testimony should be accorded little weight due to his short time with MSHA. (*see inter alia Respondent's Post-Hearing Brief* at p. 34). As indicated *supra*, Edward, in fact, had 18 years of underground coal mining experience prior to joining MSHA, including more than 6 years as a certified mine examiner for Respondent in the Shoemaker Mine. (Tr. 19, 21-22).

After careful evaluation of the evidence, the ALJ finds that Edwards was an experienced miner who could readily identify the type of unreported impermissible accumulations cited in his order. The ALJ found Edwards' actual measurement of the accumulations and contemporaneous notes to further corroborate his testimony. As shall be discussed *infra*, Edwards' testimony was essentially unrebutted as to the fact of the violation. Thus, the ALJ accords Edwards' testimony substantial weight.

The ALJ notes Edwards' concession that there were areas of the beltline that were wet, damp, rock dusted, and/or not in violation of 75.400 and notes Respondent's arguments regarding such.[24] However, Edwards credibly testified that there were other significant areas of the beltline that had "major impermissible violations" starting at the 8-36 crosscut and extending to the 8-15 crosscut, a total distance of 2,100 linear feet. (Tr. 36-37). Despite Respondent's vigorous cross-examination, Edwards persuasively opined that given "the conditions of accumulations, the continuous presence of ignition sources and also knowing the oxygen content," the cited area was the "worst beltline" he had ever seen. (Tr. 50, 127). Thus, even accepting there were various areas of the belt line at Shoemaker Mine that were in compliance

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[23] At page 2 of his brief, footnote 1, the Secretary ably summarized Edwards' experience:

> MSHA Coal Mine Inspector David M. Edwards ("CMI Edwards") has been employed by MSHA since January 7, 2007 (Tr. 15). During his tenure with MSHA, CMI Edwards has attended the 21-week coal mine inspector training program and traveled (sic) with certified Coal Mine Inspectors for on-the-job training (Tr. 16). Both the training program and the on-the-job training specifically covered the areas of fire hazards and combustible accumulations (Tr. 16-19). CMI Edwards has earned his certified mine foreman's papers in Ohio and West Virginia and, since joining MSHA, has earned a certified electrician's card for both surface and underground and an MSHA training certificate to train underground examiners to qualify for certification as mine foremen (Tr. 19). CMI Edwards had 18 years of underground coal mine experience prior to joining MSHA, including more than six years as a certified mine examiner for Consol Energy in the Shoemaker Mine (Tr. 19, 21). At Shoemaker, CMI Edwards was a certified mine foreman, conducted pre-shift examinations and received fire-boss training (Tr. 21). CMI Edwards has an Associate's Degree in Electro-Mechanical Engineering (Tr. 20).

[24] The ALJ shall discuss *infra* why such possibly mitigating evidence as general wetness, rock dusting, and intermittent non-violative areas would not necessarily preclude findings of S&S and/or unwarrantable failure.

with §75.400 on October 14, 2010, the ALJ is persuaded that significant lengths of Beltline No. 8 were in violation.

The Secretary's position that §75.400 was violated is not only supported by the case record but also by applicable law. At hearing and in its brief, Respondent indicated that various areas along the belt line were wet, muddy, or rock-dusted. (*See Respondent's Post-Hearing Brief* at p. 11-13). However, such factors do not necessarily mandate against a finding of a §75.400 violation. In *Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990) (*citing Black Diamond Coal Company*, 7 FMSHRC 1117, 1120-21 (Aug. 1985), the Commission held that dampness in coal did not render it incombustible and that wet coal can eventually dry out in a mine fire and ignite. *See also Black Diamond*, 7 FMSHRC at 1121 ("a construction of (§75.400) that excludes loose coal dust that is wet or allows accumulations of loose coal dust mixed with non-combustible materials defeats Congress' intent to remove fuel sources from the mine and permits potentially dangerous conditions to exist.").

It is black letter law that the Secretary bears the burden of proof to establish the fact of violation by the preponderance of evidence. *Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). However, this burden of proof standard only requires that the trier-of-fact conclude the "existence of a fact is more probable than its nonexistence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). As discussed *supra*, Edwards' essentially unrebutted testimony establishes by the preponderance of the evidence that §75.400, as cited in Order No. 8030970, was violated. Moreover, there is also additional inferential evidence in the record supportive of a finding of violation.

Final Order No. 8030971 (GX-9) contains an unwarrantable failure finding that was uncontested by Respondent and reads as follows:

> A record of hazardous conditions for the No. 8 beltline pre-shift was no recorded in the preshift report located on the surface. A hazardous condition which existed from #8-50 to #8-1 crosscut of the No. 8 Beltline was not recorded on the midnight shift of 10/14/2010. The area was preshifted at 5:36 a.m. by an examiner and the condition was obvious and extensive and was not worked on or corrected and not entered into the record book on the surface for that purpose. The condition is described in Order #8030970. This order is written in conjunction with that order. This violation is an unwarrantable failure to comply with a mandatory standard. The mine has received 6 citations of 75.360(f) over the past 2 years. Management engaged in aggravated conduct constituting more than ordinary negligence in that the area was preshifted and a hazardous condition was not reported or corrected.

(GX-9).

As averred under the condition or practice section, this Order finding a pre-shift examination violation was based upon "the condition…described in Order #8030970." In his brief the Secretary properly points out pertinent Commission law indicating that for purposes of the Act, paid penalties that have become final orders pursuant to §105(a) reflect violations of the

Act and the assertion of violation contained in the citation is regarded as true. *See inter alia Old Ben Coal Company*, 7 FMSHRC 205, 209 (Feb. 1985), (*Secretary's Post-Hearing Brief* at p. 4), and (GX-5, page 53 - indicating Respondent had paid a $9,100.00 penalty associated with Order No. 8030971).

The ALJ notes Respondent's argument that the penalty was "inadvertently paid" and that, in any case, Edwards was unaware of the payment when he issued Order No. 8030970. (*Respondent's Post-Hearing Brief* at p. 15 and Tr. 149-150). Respondent's uncontested payment of the penalty at No. 8030971 may not invoke strict rules of *res judicata* or collateral estoppel, or constitute an admission as to violation of §75.400 as cited in Order No. 8030970. However, the ALJ finds that an adverse inference may reasonably be drawn from said uncontested payment, further supporting the Secretary's position.

As noted *supra*, Respondent presented testimony from Gary Rose in an effort to undercut Edward's testimony. Rose's testimony, however, was not persuasive that no violation of §75.400 had taken place. The safety inspector at the Shoemaker Mine when Order No. 8030970 was issued, Rose had not been informed of such until nearly five hours after issuance.[25] (Tr. 389-390). Rose did not see any of the cited accumulations, did not see Order No. 8030970 before or during his photographs of the beltline, and had no actual knowledge of the specific areas that Edwards had cited. (Tr. 389-391, 410). Rose's "random" photographs were taken more than 7 hours after this order was issued. Tr. 390-392.

Although Beltline No. 8 was approximately 5,000 to 6,000 feet long, Respondent only proffered 19 of Rose's photographs for admission into evidence. Rose admitted that he had taken no notes, contemporaneous or otherwise, associated with the photographs and was solely testifying from memory. (Tr. 410). The ALJ gave credence to Rose's testimony only to the extent that there may have been various areas along the belt line that had no impermissible accumulations.[26]

In the final analysis, the ALJ finds Edwards' testimony to be more credible regarding the violative accumulations located along approximately 2,000 feet of the No. 8 Beltline. None of Rose's photographs were clearly established to have depicted the actual beltline areas that Edwards found to be in violation. (*see also Secretary's Post-Hearing Brief* at p. 5-6 regarding such). The ALJ also finds that the testimony of Respondent's witness, Tom Skrabak, was of little probative value. Skrabak had no actual first hand knowledge of the cited accumulations. (*see also Secretary's Post-Hearing Brief* at p. 6 regarding such).

In view of the foregoing the ALJ finds that there was a clear violation of §75.400 as set forth in Order No. 8030970.

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[25] Due to changing conditions associated with mining operations and environment, the ALJ had to consider the possibility that the scenes photographed by Rose may not have been an accurate reflection of the conditions witnessed by Edwards at the actual time of the inspection.

[26] *Inter alia* the ALJ has considered this to be a mitigating factor in denying the Secretary's request for an increased penalty beyond $4,000.00.

B. Respondent's violation of §75.400 was Significant and Substantial in nature

Taking into consideration the record *in toto* and applying pertinent case law, the ALJ finds that Respondent's violation of §75.400 was significant and substantial in nature. The first element of *Mathies* – the underlying violation of a mandatory safety standard – has clearly been 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 – the record again clearly establishes satisfaction of such. Abundant case law has held that combustible accumulations create significant explosion and propagation hazards. *see Old Ben Coal Co*., 1 FMSHRC 1954 (Dec. 1979); *Black Diamond Coal Company*, 7 FMSHRC *supra*; and *Amax Coal Co.*, 19 FMSHRC 846 (May 1997). Furthermore, Commission Judges have long recognized that coal accumulations along conveyor belts and/or longwall shields contribute to the safety hazard of a mine fire or explosion. *Consol Pennsylvania Coal Co.*, 32 FMSHRC 545, 560-561 (May 2010) (ALJ Bulluck); *San Juan Coal Co.*, 28 FMSHRC 35, 39 (Jan. 2006) (ALJ Hodgdon) (reversed and remanded on other grounds); *Mountain Coal Co. LLC*, 26 FMSHRC 853, 868 (Nov. 2004) (ALJ Manning); *Clinchfield Coal Co.*, 21 FMSHRC 231, 241 (Feb. 1999) (ALJ Barbour).

As discussed *supra*, Edwards credibly testified regarding extensive combustible accumulations under and along the No. 8 Beltline. The violative condition at issue, the impermissible accumulations, contributed to the discrete safety hazard of a mine fire or explosion. These accumulations were combustible and could provide the fuel source for a fire or explosion. (Tr. 46, 48-49, 59-60, 94-97). Thus, the Secretary has clearly established that the second prong of *Mathies* was met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is usually the most litigated prong. The Commission has made it clear that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation…will cause injury." *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); s*ee also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not "prove a reasonably likelihood that the violation itself will cause injury…" *Id*. Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id*. (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*,18 FMSHRC 853, 857 (June 1996)).

It is essentially uncontested that the hazard contributed to by the cited accumulation(s) was a fire or explosion, and such a hazard would have a reasonable likelihood of resulting in an injury, including, at the very least, smoke inhalation and burns. (*see* Tr. 58-59; *see also Black Diamond Coal Company*, 7 FMSHRC at 1120 wherein the Commission noted "Congress' recognition that ignitions and explosions are major causes of death and injury to miners…"). At hearing, Edwards described belt rollers turning in accumulations of coal, float coal dust on belt

structures and water lines, the conveyor belt at No. 8 beltline not being properly aligned, and damaged rollers. (*see* GX-6 and Tr. 29, 34-37, 41-47, 50-51, 61-62, 133).

In *Amax Coal Co.*, *supra*, the Commission upheld the ALJ's finding that belt running on packed coal was a potential source of ignition for accumulations of loose, dry coal and float coal dust along the belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found it was immaterial that there was no identifiable hot spot in the accumulation because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional ignition source was present in the form of the misaligned belt rubbing the structure, which could generate frictional heat. Even if the coal near the damaged rollers and misaligned belt had been wet, the Commission has recognized that wet coal can dry out and ignite. *See Black Diamond Mining Co.*, *supra* at 1121. The preceding rulings, including those in *Musser* and *Cumberland Coal*, would all suggest a finding that *Mathies* third element was met in the case *sub judice*.

C. Respondent's argument that there was not a confluence of factors present that would sustain a designation of S&S is specifically rejected.

Citing, *inter alia, U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Mar. 1984), the Respondent argued that the record did not establish "a confluence of factors present that would sustain a designation of significant and substantial." (*See Respondent's Post-Hearing Brief* at p. 37-38). To the extent that Respondent maintains its cited case law and/or interpretations of such stands for the proposition that the hazard contributed to must be reasonably likely to result in an actual accident or untoward event, the ALJ rejects such as being inapposite to the above-cited Commission jurisprudence. However, even if Respondent's proposed analysis of *Mathies'* third element were utilized, the ALJ agrees with the Secretary's arguments that a finding of S&S would still be warranted (*See also Secretary's Post-Hearing Brief* at p. 9-14).

In determining whether a violation is reasonably likely to lead to injury, the likelihood of injury must be considered in the contest of "continued normal mining operations." *See Mid-Continent*, 16 FMSHRC at 1221-1222). Additionally, when evaluating the reasonably likelihood of a fire, ignition, or explosion, the Commission has held that the examination of the confluence of factors must be based upon the particular facts surround the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997) (*quoting Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). "Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area." *Id*. *citing Utah Power & Light Co.*, 12 FMSHRC at 970-971 (1990); *Texasgulf*, 10 FMSHRC at 500-503.

At hearing Edwards discussed the necessary confluence of factors at the subject mine by referring to the existence of a "fire triangle." (Tr. 96). The necessary components of a fire triangle are: (1) an accumulations of combustible materials (fuel); (2) the presence of ignition

sources; and (3) 20.8% oxygen content in the air. All were all found by Edwards during his inspection. (*See inter alia* Tr. 28-31, 34, 45, 50-51, 59, 96). The combustible "fuel" found by Edwards included loose coal, loose fine and ground up coal, and coal dust (including float coal) along the No. 8 Beltline.

As noted *supra*, both at hearing and in its *Post-Hearing Brief*, Respondent has attempted to diminish the combustible nature of the impermissible coal accumulations by emphasizing the dampness/wetness along the belt line and by arguing that the subject was rock dusted.[27] (*see Respondent's Post-Hearing Brief* at p. 8, 11-13, 31-33, 38-39 and Tr. 35, 39, 123, 134, 392-407). However, both in *Utah Power & Light* and *Black Diamond*, the Commission observed that wet coal wet coal will eventually dry out during normal mining operations and that loose coal mixed with non-combustible materials may nonetheless pose a hazard. (*See also* Tr. 35, 63, 122, 123 for Edwards' observation that wet dust will become combustible once dried out.).

Further, the photographic evidence presented by Respondent to prove the accumulations were wet and/or rock dusted was often of problematic probative value. As noted *supra*, Edwards was uncertain as to whether the scenes depicted in Rose's photographs were of the actual sites Edwards had inspected or, indeed, were even taken at Shoemaker. (*see inter alia* Tr. 74-75, 77, 80, 82-84, 86, 88-89, 91-93, 161-162).

It was difficult to ascertain whether the photographed coal dust in some offered exhibits was lighter because of rock dusting or because of photo flashing. (*see also* Tr. 75-76, 78, 81, 83-84, 86, 88-93, 396, 404). Some of the photographed areas were so dark that one was left to speculate whether the area depicted was wet or had a coating of dry black coal dust. In weighing the probative value of the photographs, the ALJ carefully considered Edwards testimony that he had observed many areas where the coal dust was dry, black in color, and/or where the coal dust appeared to lay on top of the rock dust.[28] (Tr. 75-77, 79, 82-83, 85, 88, 91-93). Contrary to Respondent's arguments, the ALJ finds that Edwards' testimony established the existence of combustible materials which would be one of the necessary tri-part elements in the "fire triangle."

Further, at hearing Edwards testified at length regarding the No. 8 Beltline being out of alignment and rubbing the metal belt structure at crosscuts 8-47 to 8-46. (GX-6, 7; Tr. 29-30, 34, 42-43). This rubbing of the belt on the metal structure with the associated friction heat[29] was a potential ignition source for the combustible accumulations – thus constituting the second necessary component of the fire triangle. The ALJ notes Respondent's argument that "warm"

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[27] *Respondent's Post-Hearing Brief* at p. 38 cites Tr. 294-295 for the proposition that the cited area was damp to wet. However those pages contain Rose's testimony on Order No. 8033057 and are not relevant to the immediate discussion on Order No. 8030970.

[28] The black color of the float coal dust would, on visual inspection, indicate little or no non-combustible rock dust component.

[29] *See inter alia* Tr. 43 wherein Edwards testified that when he and Terry Wilson touched the belt it was "actually hot."

rollers are common and do not constitute a hazard. However, according to above cited case law, the ALJ must consider that, with continuing normal mining operations, rollers subject to continued frictional heat may also rise in temperature, posing a hazard for fire and explosion. (*See also Secretary's Post-Hearing Brief* at p. 11-12).

Other potential ignition sources found by Edwards were belt rollers in contact with, turning in, and impacted by the accumulations. (Tr. 29, 35, 37, 39, 50-51, 61, 133). These accumulations coming into contact with the belt rollers were extensive: they measured two to three feet in width and 24 inches in depth and were packing around roller shafts. (GX-6, 7; Tr. 35-38). The bearings of the impacted rollers were also found to be heating up – another potential ignition source for the accumulations. (Tr. 61-62, 133-134). Float coal dust, black in color, was observed directly under the belt rollers on the bottom, approximately 6 feet in width. The dust was also found on the belt structure and water lines. (GX-6, 7; Tr. 41-42). Again, under normal mining conditions pursuant to the above-cited Commission holdings, these conditions could worsen until a fire and/or explosion occurred. (*see also Highland Mining Company, LLC*, 31 FMSHRC__, slip op., KENT 2009-1241 (January 28, 2013) (ALJ Rae); Tr. 61-62, 117; and *Secretary's Post-Hearing Brief* at p. 11 regarding the danger of the belt becoming an ignition source with continued friction).

The ALJ notes that another potential ignition source was methane. The subject mine is a gassy mine.[30] In fact, the Shoemaker mine was on a 5-day spot inspection for high methane levels on the day of the inspection. (Tr. 42, 60). Although not detecting any methane during his inspection, Edwards testified that methane can be liberated at any time to provide an ignition source. (Tr. 169). Further, the Commission has directly held that low levels of methane at a time of violation do no preclude methane from being a factor in the S&S designation. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (holding that whether a violation is S&S designated depends on the circumstances that would have existed if normal mining operations continued[31] after the time the violation was cited, and, finding that methane levels can rise quickly during mining operations). Thus, in addition to the frictional heat associated with the misaligned belt, impacted and damaged rollers, the possibility of a methane release in the subject gassy mine were all part of the confluence of factors justifying an S&S designation.

Further, at hearing Edwards also gave unrebutted testimony that the subject area had a 20.8% oxygen content which was sufficient for creation of the third part of the "fire triangle." In *Highland Mining Company, supra* and *Clinchfield Coal Co.*, *supra*, ALJs Rae and Barbour

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[30] Pursuant to 30 U.S.C. §813(i) a gassy mine liberates more than one million cubic feet of methane.

[31] As noted *infra*, for S&S determinations the evaluations of the reasonable likelihood of an injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC at 1836. Further, the determination of S&S must not be based on the facts existing at the time of the citation issued but also in the context of continued mining operations without any assumptions as to abatement. *Secretary of Labor v. U.S. Steel Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 15 FMSHRC 1982, 1986 (Dec. 1992).

respectively addressed similar fact patterns where accumulations created a reasonably likelihood of fire or explosion so as to satisfy *Mathies'* third element. (*see Highland Mining* at 15-16 and *Clinchfield* at 241-242).

In *Highland Mining*, ALJ Rae found that rollers turning in a quantity of recently spilled coal posed a hazard of fire. Rae rejected the mine operator's position that evidence suggesting that the spill was recent or that the coal was wet vitiated the third element of *Mathies*. (*See Highland Mining* at 14-16).

In *Clinchfield*, ALJ Barbour noted that there were locations where rollers were turning in the accumulations, places where stuck or misaligned rollers caused the belt to rub against the belt structure, portions of the accumulations that ranged from damp to wet, places where the belt was rubbing in the damp to wet accumulations and float coal dust laying on the belt structure. *Id.* ALJ Barbour specifically found that the belt rubbing against the belt structure produced friction, which generates heat, and was a reasonably likely ignition source. *Id*. ALJ Barbour explained:

> Further, while many of the accumulations ranged from damp to wet, there were places where the belt was rubbing in the damp to wet accumulations, which meant that heat was being produced and therefore the accumulations were drying. This too meant that as mining continued, it was reasonably likely that even some of the damp to wet accumulations could have ignited.
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> Finally, there was the highly explosive float coal dust that lay on the belt structure from the portal to the Y… As mining continued, the places where the belt was malfunctioning could have generated heat sufficient to touch off an ignition. As [the MSHA Inspector] noted, "It only takes one frictional source to ignite coal dust" Once there was an ignition, the float coal dust could have propagated an explosion along the beltline.

Id. (*see also Secretary's Post-Hearing Brief* at p. 12-14).

The ALJ has considered the nature and the extent of the accumulations, the oxygen levels, the fact that the subject mine was gassy, and the multiple ignition sources. A conclusion that a belt fire was reasonably likely to occur under continued normal mining operations is persuasively supported by the record. In light of such, the ALJ is further persuaded by the arguments advanced by the Secretary (*see inter alia Secretary's Post-Hearing Brief* at p. 13) that even if he were required to prove that the violation itself was reasonably likely to lead to injury, *Mathies* third element has been established.

D. The record clearly established that the fourth element of *Mathies* is satisfied

Under *Mathies*, the fourth and final element that the Secretary must establish is that there is "a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574. Smoke inhalation and burns sustained in a mine fire or explosion would inarguably be considered serious injuries. (*See* Tr. 58-59). The ALJ agrees that at least one person, as found in the order, would suffer such

injuries. (*See* GX-6 and Tr. 64). Thus, the Secretary has carried his burden as to all of the elements of *Mathies* as to Order No. 8030970.

For reasons set forth within, the ALJ affirms the Order as written as to the gravity found by Edwards.

E. Respondent's violation constituted an unwarrantable failure to comply with §75.400

In a decision issued on February 1, 2013, the Commission recently addressed the specific question of when combustible coal accumulations in violation of 30 C.F.R. §75.400 constituted an unwarrantable failure on the part of the operator to comply with mandatory health and safety standards. (*See Secretary of Labor v. Manalapan Mining Company, Inc.*, 35 FMSHRC__, slip op., (February 2, 2013), 2013 WL 754106).

In *Manalapan*, the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, 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. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Id. at 5.

Considering each of these factors *seriatim*, the ALJ finds that Respondent's conduct constituted an unwarrantable failure to comply with §75.400.

As to the extent of violation factor, as discussed *supra*, Edwards' description of the cited coal accumulations was credible as to the extensive nature of such, being present over 2000 feet of No. 8 Beltline. Given the extent of the accumulations, it was quite apparent to Edwards that the violative condition had existed over a significant length of time. Respondent's own pre-shift examination report, performed hours before Edward's inspection, noted that the area where Edwards found the violations – crosscuts 8-15 to 8-36 – needed swept. (GX-8; Tr. 70-71, 142-144). Such extensive accumulations – taking many miners over 9 hours to shovel – would very likely have taken place over a long period. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001-1004 (Sept. 1999) (extensive accumulations that existed for longer than one shift warranted an unwarrantable failure finding).

As to whether the violations posed a high degree of danger, the ALJ has carefully considered the evidence presented by Respondent that various areas along the No. 8 Beltline were damp, wet, muddy, had been rock dusted, that there was a working CO System present on the belt, that there were water sprays, that the belt was constructed from fire resistant material, and that the methane readings taken during the examination were 0%. (*See inter alia* Tr. 166-169; *see also Respondent Post-Hearing Brief* at p. 9). The ALJ grants that such factors might arguably be considered mitigating so as to diminish the degree of danger posed by the violative conditions. However, as discussed *supra*, just as such factors do not preclude an S&S designation, the ALJ finds that a diminished degree of danger does not vitiate a finding of unwarrantable failure.

As noted *supra*, the ALJ gave only partial credence to the testimony presented by Respondent. Edwards credibly disputed the extent of wetness and/or rock dusting in the areas of the beltline that he actually cited. Further, Edwards persuasively testified that a CO monitor will only alarm when there is already a fire, not where there is a danger of fire. (Tr. 167). In addition, water sprays were primarily designed for dust suspensions, not fire suppression. (Tr. 168). Furthermore, the fact that the belt was made of fire-resistant material did not vitiate the hazard of combustible accumulations. (Tr. 167). Given the above-cited case law holding that the ALJ must assume continuing mining operations and possible drying out of combustible materials, a diminished degree of danger at the time of actual inspection would not necessarily preclude an unwarrantable failure finding.

The ALJ is also mindful of the Commission's admonition in *Manalapan* that while the factor of dangerousness may be so severe that, by itself, it warrants of finding an unwarrantable failure, the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan* at 6. Pursuant to the Commission's holding, the undersigned has "considered the evidence relating to the danger factor, determined whether it was an aggravating or mitigating circumstance, and weighed it against the other relevant factors to determine whether the operator's conduct under the circumstances amounted to an unwarrantable failure." *Id*.

In weighing the other relevant aggravating factors, discussed herein, even if the degree of danger posed by the accumulations had been somewhat diminished, the ALJ finds that Respondent's conduct was nonetheless impermissibly reckless.

As to whether the "violation was obvious," the ALJ again notes Edwards' description of the violative area as "the worst belt line" he had ever seen. (Tr. 50, 127). Even if Edwards had used exaggerated phraseology in describing the violative conditions existent, it is nonetheless clear from his testified to observations that the impermissible accumulations would have been obvious to a reasonably prudent person, familiar with the mining industry and the protective purpose of §75.400. Given the extent of the violative condition and the length of time it must have existed, the ALJ finds that the operator knew or should have known of its existence.

As to Respondent's efforts in abating the violative condition and as to whether Respondent had been placed on notice that greater efforts were necessary for compliance, the ALJ essentially adopts the arguments advanced by the Secretary regarding such. (*See also Secretary's Post-Hearing Brief* at p. 15-16).

Inter alia, Respondent had been issued 137 violations of 30 C.F.R. 75.400 for impermissible accumulation of combustible material at Shoemaker miner in the two years prior to the issuance of this Order. (GX-4, 5 p. 61-71; and Tr. 69). Although not knowing the specific number of §75.400 violations prior to his inspection, Edwards, based upon his review of the mine file, knew that Shoemaker had a significant violation history. (Tr. 165-166) (*see also* case law cited by Secretary holding that repeated similar violations may be relevant to determining unwarrantable failure. Such prior violations serve to put an operator on notice that greater efforts are necessary for compliance with the pertinent safety standard violated. *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007).[32] Further, during his previous quarterly inspection, Edwards specifically discussed with mine management their need to address the problem of impermissible accumulations. (Tr. 70).

In view of the foregoing the ALJ holds that a finding of unwarrantable failure is warranted.

F. The civil penalty of $4,000.00 is affirmed

Section 110(i) of the Mine Act establishes the six criteria to be considered in determining the appropriateness of a civil penalty.[33]

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[32] *See also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) (finding unwarrantable failure indicated when the operator was cited 88 times during the prior two years period for §75.400 violations).

[33] "[T]he Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. §820(i).

Further, the Commission has outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's system for points in Part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id*. Thus, a Commission Judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

After reviewing all of the relevant facts and weighing the 110(i) factors applicable to such, the ALJ finds no reasons to depart upward or downward from the original $4,000.00 amount proposed by the Secretary.

II. Order No. 8033057

A. The Secretary has also sustained his burden of establishing that §75.400 was violated as set forth in Order No. 8033057.

As described *supra*, on October 26, 2010 Inspector James Gropp issued Order No. 8033057 to Respondent for violation of §75.400. (GX-10).

During his EO1 quarterly inspection of Shoemaker (Tr. 180), Gropp[34] – like Edwards on October 14, 2010 – found extensive impermissible accumulations of combustible materials.[35] Gropp measured accumulations of coal created when the mining machine cut into the rib while being maneuvered. (Tr. 190-191). Gropp measured each accumulation up to 25 feet with a tape measure and stepped off larger accumulations, using each of his steps for one yard. (Tr. 191-192, 198). Like Edwards, Gropp documented his observations with contemporaneous notes. (Tr. 186). (Respondent clarified that Gropp recorded his observations underground and filled in his administrative details and summary questions/answers aboveground. Tr. 238-239).

At the time of the inspection, Respondent was actively mining on the right side face and the left side face. Gropp did not observe anyone preparing to clean or actually cleaning accumulations. (Tr. 280- 281).

The first impermissible accumulation that Gropp cited was located just inby the section tail piece. (*see* impermissible accumulation No. 6 on Order No. 8033057, GX-10). The

[34] Gropp was accompanied by UMWA Safety Committee representative, John Miller, Respondent representative, Foreman trainee Craig Norton, and Safety Inspector, Gary Rose. (Tr. 183).

[35] *See* summary of Gropp's testimony *supra* for full description of impermissible accumulations.

accumulation had been created by the miner (machine) gouging into the right rib. (Tr. 190-191). The accumulation measured 30 feet long, 12 to 24 inches deep and 2.5 to 6 feet wide. (Tr. 190).

While such gouging accumulations are not unusual when the miner is being moved into a new entry, these accumulations had not been scooped or loaded into a shuttle car to be put on a belt and removed from the mine. (Tr. 191-192). Gropp testified that the impermissible accumulations had existed for at least one day prior to his investigation. He had been informed by the right side day shift foreman, Mr. Yorty, that the miner had been moved around the corner during the day shift the day before the investigation. (Tr. 215, 257-258).

The next accumulation found by Gropp was the No. 8 entry and cited as No. 7 on the Order and map. (GX-10, 15; Tr. 192-193). This accumulation was on the entire width of the entry – 6 to 15 ½ feet – and measured 12 to 24 inches deep. (Tr. 193). Gropp observed that Respondent had moved a fan on top of the accumulations along with the fan cables. (Tr. 193). A loader could not, given such, be brought in to clean up the accumulations (Tr. 192-193). In order to determine how long the cited accumulations had existed prior to his inspection, Gropp calculated Respondent's rate of mining, using *inter alia*, beeper machine shifts for the 30 shifts prior to his inspection. (Tr. 211-212). Averaging the numbers, Gropp concluded that Respondent mined an average of 36 feet per shift on the left side and 33 feet on the right side. (Tr. 212). Based upon his calculation, Gropp concluded that the impermissible accumulations, as cited at No. 7 on the Order and Map, had existed for at least one to two shifts.[36] (Tr. 215-216).

Gropp next described another §75.400 violation at the crosscut of 4 to 3, No. 4 in the Order: the "whole crosscut was completely accumulated in coal." (Tr. 193-194). Gropp had to walk over the accumulations which measured 140 feet long, 8-12 inches deep, and the entire width of the entry (15 ½ feet wide). (GX-10, 15; Tr. 194). Gropp opined that a miner cable, loader cable, and water line hung from the mine roof, had likely shoved coal from the top of a shuttle car as it had driven underneath. (Tr. 202-203, 216). Gropp determined that this accumulation had also existed for at least one to two shifts prior to his inspection and would not have occurred since the last pre-shift examination. (Tr. 213).

Gropp further testified regarding the impermissible accumulation cited as No. 3 on the Order and map. (GX-10, 15, Tr. 194-195). This accumulation was also extensive, measuring 15 ½ feet in width, four to 18 inches in depth, and 12 feet long. (Tr. 195). Gropp concluded that this accumulation had resulted from holing through, both inby the crosscut, at the face, and outby the crosscut. (Tr. 195).

Gropp indicated that Respondent had also failed to clean up this accumulation and had continued mining. (Tr. 195). Gropp concluded that this accumulation had existed for at least one to three days prior to his inspection. (Tr. 213). Gropp further opined that the accumulation could not have occurred since the last pre-shift accumulation. Respondent had not yet started

[36] *See also Secretary's Post-Hearing Brief* argument regarding Respondent's failure to challenge Gropp's calculations at p. 20-21; *see also* Tr. 215-216.

mining on the left side during the inspection shift. Given Respondent's mining pattern, this accumulation had to occur prior to the No. 2 accumulation found by Gropp. (Tr. 213).

With respect to the violation cited No. 2 on the Order, Gropp measured the accumulations as 15 ½ feet wide, four to nine inches deep, and 10 feet long. This accumulation, which was located near the No. 1 entry of the 8 South Section, was the result of Respondent holing through from a crosscut. (GX-10, 15; Tr. 195). Gropp against determined that the accumulation had existed at least 1 to 2 days prior to his inspection, and , because Respondent had not yet started mining on the left side, could not have occurred since the last pre-shift examination. (Tr. 212-213).

In reference to the cited accumulation, identified as No. 1 on the Order, Gropp determined that Respondent recently finished mining this entry and pulled the miner out without ever having pushed the coal back into the face or loading it out. (GX-10, 15, Tr. 196). The loader that would have moved this accumulation had been switched out for maintenance. (Tr. 196). Gropp measured the accumulation as being four to 15 ½ feet wide, four to 15 inches deep, going from the face where Respondent finished mining outby 80 feet in length. (Tr. 196). Gropp further observed a bolter operating in the face of the 15 AO entry on top of the accumulation at the time of the inspection. (Tr. 200). Gropp determined that this accumulation had also existed for at least one to two shifts prior to his inspection. (Tr. 211).

The final impermissible accumulation cited in the Order, No. 5, was outby the face of No. 4 where Respondent had the loader "piggy-backed" (dumped coal onto the ground to move it from one shuttle car to another because each shuttle has a trailing cable that can only travel 1,000 feet) (GX-10, 15; Tr. 197). This accumulation measured 60 feet long, 14 feet wide and 12 inches deep (Tr. 197). This accumulation was also likely the result of cables shaving coal from the top of a shuttle car (Tr. 216), the coal then being spread out by the drag bar on the bottom of the shuttle car (Tr. 197). Gropp determined that this accumulation could have existed for up to three days (Tr. 214-215). In any event, this accumulation could not in any way have occurred since the last pre-shift examination, because Respondent had not yet started mining on the left side during the inspection shift. (Tr. 214).

At the time of his inspection, Gropp observed that all of the cited accumulations were dry. (Tr. 278). He further testified that each accumulation consisted of loose coal, loose fine and ground up coal, and coal dust including float coal dust (Tr. 199). Gropp conceded that no one present had sieves to measure particle sizes. (Tr. 200). However, regardless of particle sizes, all of the accumulations were combustible and had been left by Respondent. (Tr. 203-205). Gropp further noted that the coal in the cited accumulations was black in color in that the coal was just freshly produced from the mining process and had never been rocked dusted. (Tr. 202). Gropp did not believe the accumulations were sloughage: sloughage is usually on the side of the rib; the cited accumulations were the entire entry width from rib to rib.[37] (Tr. 202).

[37] In any case, Respondent admitted that rib sloughage constituted combustible material. (Tr. 306-307).

Gropp testified that the accumulations in Order No. 8033057 were extensive and obvious: the accumulations were from rib to rib, measuring, in total, 400 feet in length; much of these accumulations were outby the face, an area where they should not have been. (Tr. 204). It would not have been possible for the impermissible accumulations not to have been noticed. (Tr. 204). Respondent had utilized three shuttle cards, 2 loaders, and ten miners using shovels, to abate the violations.

The undersigned found Respondent's attempts at hearing to rebut Grupp's testimony to be less than persuasive. Gary Rose, the safety inspector at Shoemaker mine when Order No. 8033057 was issued, conceded that he had taken no contemporaneous notes during the inspections nor had he taken any of his own measurements of the cited accumulations. He conceded that it was difficult to remember specifics due to the lapse of time. (Tr. 304, 311). Additionally, Rose admitted that he had no firsthand knowledge of how or when many accumulations had been made. (Tr. 312). Further, Rose's explanation for why Respondent had not timely dealt with the accumulations was less than compelling. (*See also Secretary's Post-Hearing Brief* at p. 24-25). For example, when asked why Respondent had not attempted hand dusting accumulations, Rose answered: "I do not have any idea why they were not doing it at that time." (Tr. 306).

Respondent's second witness, Brian Hough, also did not give persuasive evidence to contradict or rebut Gropp's testimony regarding the §75.400 violation. Hough also had taken no contemporaneous notes, measurements, or photographs of the cited violations but was instead relying on "mental notes."[38] (Tr. 349-350). Further, Hough testified that he had not seen any accumulations made nor did he sample any accumulations to determine what they were made of. (Tr. 351). It would be impossible for Hough to determine how long the accumulations had existed. (Tr. 366-367). Hough admitted that, after the Order was issued, he had the miner brought back in to clean up the cited accumulations. (Tr. 325).

The ALJ, hereby, incorporates his rationale *supra*, as to the applicable case law supporting a finding of §75.400 herein without a full recitation thereof.

Gropp, like Edwards, was an experienced miner.[39] While Gropp, like Edwards, had not worked for MSHA for a prolonged period, Gropp had 20 years of experience in mining as well as a B.S. in mining engineering. The ALJ found Gropp to be a credible and reliable historian as to his descriptions of the violative conditions at Shoemaker and accorded substantial weight to Gropp's testimony. The ALJ found Gropp's testimony to be more than sufficient to establish the fact of violation of §75.400.

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[38] The ALJ found the Secretary's argument in his *Brief* at pages 25-26 persuasive as to the limited probative value of Hough's testimony.

[39] *see* summary of Gropp's background *supra* and summary of such in *Secretary's Post-Hearing Brief* at 18, footnote 6.

B. Respondent's violation of §75.400 was Significant and Substantial in nature

The ALJ notes that much of the rationale and case law discussed *supra* as to Order No. 8030970 is equally applicable to the consideration of Order No. 8033057. The ALJ again incorporates said rationale and case law citations without full recitation thereof herein.

The ALJ again finds that all of the *Mathies* elements are met. There was a violation of a mandatory standard. A discrete safety hazard – a mine fire or explosion – was contributed to by the violation. (Tr. 205). Gropp's observation of extensive combustible accumulations at the active 8 South continuous miner section was credibly described. These accumulations, just as the accumulation described by Edwards, would provide a fuel source for fire or explosion. (Tr. 205-206).

Utilizing the *Musser*/*Cumberland* interpretation as to the third element of *Mathies* and applying the rationale used above as to Order No 8030970, there was clearly a reasonable likelihood that the discrete safety hazard contributed to would result in an injury. As testified to by Gropp, a mine fire or explosion would be reasonably likely to result in smoke inhalation, respiratory damage, and crushing internal injures. Such injuries would result in lost workdays or restricted duty to at least the 10 miners Gropp actually observed near the cited accumulations: a miner operator, two bolters, a utility man, and a loader operator on the right side and 2 bolter operators and three miners hanging curtains on the left side. (Tr. 208-209, 273-274). Considering the specific fact pattern established and applicable Commission jurisprudence discussed *infra*, the ALJ finds that the Secretary has again carried his burden of proving *Mathies* third element as to Order No. 8033057.

The ALJ further accepts the argument advanced by the Secretary that, given the extensive combustible accumulations, oxygen level, and ignition sources testified to by Gropp, there was a reasonably likelihood of a fire and/or explosion at the subject mine. (*See Secretary's Post-Hearing Brief* at p. 27-29).

At the time Gropp issued Order No. 8033057, Shoemaker was a "gassy mine" on 5-day spot inspection because of the high concentration of methane liberated and recorded during the previous inspection quarter. (Tr. 206-207). Respondent did not dispute that Shoemaker liberates more than a million cubic feet of methane a day. (Tr. 207). The cited accumulations were located at the active working face; there could have been face ignitions. (Tr. 280). Equipment and electrical cables were in and on the combustible accumulations (Tr. 200, 206-207, 261-263, 274-275). Shoemaker had, within the last month, been issued five citations for electrical cable openings. (Tr. 207, 259-260, 279). Given that cables are regularly damaged during the mining process, the Secretary established a reasonable likelihood of fire or exploration at Shoemaker Mine.[40] (Tr. 208, 262).

The Secretary persuasively cited several ALJ decisions containing similar fact patterns finding that an S&S violation of §75.400 was warranted. (*see Secretary's Post-Hearing Brief* at

[40] Trailing cables, even if intact at the time of the inspection, have been found to be ignition sources for coal accumulations. Utah Power & Light, 12 FMSHRC 965, 971 (1990).

p. 28-29, including holdings in *United States Steel Mining Company, Inc.*, 5 FMSHRC 1873 (Oct. 1983) (ALJ Broderick) and *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330 (Mar. 1986) (ALJ Maurer))

In *United States Steel*, given that the subject mine was gassy and on a 103(i) spot inspection for methane, that face ignitions had occurred in the past, and that mobile mining equipment operated in the cited areas, ALJ Broderick found S&S. 5 FMSHRC at 1875. In *Youghiogheny and Ohio Coal*, considering *inter alia*, evidence of insufficient rock dusting, the fact that the mine was gassy, and on the 103(i) spot inspection for methane, ALJ Maurer concluded that S&S was warranted. 8 FMSHRC at 334.

In light of Gropp's testimony regarding the extensiveness of accumulations, the significant length of time they were allowed to exist, and the multiple ignition sources existent, a conclusion that a fire or explosion was reasonably likely to occur under continued normal mining operations is supported by the record and above-cited case law. Thus, even if the Secretary had to prove the within §75.400 violation was reasonably likely to lead to injury, the third element of *Mathies* for this order has been established.

It is essentially undisputed that the injuries expected to result from the hazard of a fire or explosion would be of a reasonably serious nature. The fourth element of *Mathies* has also been clearly established.

C. Respondent's violation as set forth in Order No. 8033058 constituted an unwarrantable failure

The same rationale and case law utilized by this Court as to Order No. 8030970 is essentially applicable to this Order. The ALJ again incorporates such within without full recitation.

Applying the *Manalapan* factors *seriatim*, the ALJ finds that Gropp credibly described the extensive nature of the violative conditions. The impermissible coal accumulations had existed for a significant length of time. *Inter alia*, the amount of time expended and the number of individuals required to abate the condition is supportive of such.

The ALJ was not persuaded by the arguments advanced by Respondent in its brief that a lesser degree of danger was posed by the cited conditions. (*see Respondent's Post-Hearing Brief* at p. 43-49). However, as noted *supra*, even if the ALJ were to find that Respondent's cited factors diminished the degree of danger presented by the §75.400 violations, such a diminished degree of danger would not, under *Manalapan*, necessarily vitiate a finding of unwarrantable failure.

There are other relevant aggravating circumstances to justify an unwarrantable failure designation, even if the degree of danger was somewhat diminished. Respondent has clearly been placed on notice that greater efforts were necessary to prevent §75.400 violations from occurring. Respondent had been issued 139 violations of §75.400 for impermissible accumulations of combustible materials at the Shoemaker mine in the 2 years prior to the

issuances of this Order. (GX-4, 5, page 61-71, Tr. 267) (This number included unwarrantable failure Order No. 8030970 discussed *infra*).[41]

As to Respondent's efforts to abate the violative condition prior to issuance of the Order, Respondent admitted it was dilatory in such: Respondent essentially conceded that it chose not to clean up accumulations because the scoop and loader were broken and moving the miner or hand dusting would have taken too long. As noted by the Secretary, Respondent's inactions appeared to violate its own clean up plan. (*Secretary's Post-Hearing Brief* at p. 30; Tr. 218, 221-223).

Finally, as properly pointed out by the Secretary, Respondent's conduct in essentially ignoring the impermissible accumulations was especially egregious given the high traffic in the cited areas with numerous individuals walking on and around the combustible materials. (*See Secretary's Post-Hearing Brief* at p. 30; Tr. 223). Therefore, the ALJ is constrained to conclude that the instant violation was the result of Respondent's unwarrantable failure and high negligence.

D. The civil penalty of $14,743.00 is affirmed

After carefully considering all of the criteria for assessing a civil penalty as set forth at 30 U.S.C. §820(i), including, *inter alia*, the fact that Respondent is a larger operator whose ability to stay in business will not be affected by payment of the civil penalty, the ALJ affirms the Secretary's original assessed penalty of $14,743.00.

III. Citation No. 8033058

A. Respondent violated §75.360(b)(3) as set forth in Citation No 8033058

It is black letter Commission case law that pre-shift examinations are of fundamental importance in assuring a safe working environment for miners. (*See Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995); *Enlow Fork Mining Co.*, 19 FMSHRC at 15).

On October 27, 2010 Gropp, after consulting his supervisor, issued Citation No. 8033058, determining that there were inadequate pre-shift examinations conducted on the midnight shift of October 26, 2010 preceding the oncoming day shift on the 8 South continuous miner section, left side MMU 083 and right side MMU 016 (GX-12). Gropp's citation was essentially based on Respondent's pre-shift examiners' failure to note and report the hazardous

[41] The ALJ notes Respondent's argument that the Secretary has failed to present a sufficient "breakdown" of the previous 139 citation that had been issued. (*Respondent's Post-Hearing Brief* at p. 33). Respondent cited no case or statutory law for the proposition that such a failure would preclude an S&S or unwarrantable failure finding. Indeed, our Commission case law indicates that previous violations cited, not just those involving the same facts, constitute an aggravating factor. (*see inter alia San Juan Coal Co.*, 29 FMSHRC at 131 (past violations in a different area of the mine may provide an operator with sufficient awareness of an accumulation problem to be considered for unwarrantable failure).

accumulations described supra and set forth in Order No. 8033057. (GX-12). Despite the obvious and extensive accumulations testified to by Gropp, the pre-shift examiners for the 8 South Right section and 8 South Left section recorded no observations of dangerous or hazardous conditions. (GX-14; Tr. 231).

Even accepting Respondent's argument that Accumulation Nos. 1, 4, and 5 may have occurred between the time the 8 South right pre-shift examinations had occurred and the time of the inspection – the ALJ finds that even lesser accumulations would have constituted a hazardous condition where the pre-shift examinations were conducted. In order to have given proper warning to miners, all 7 hazardous accumulations should have been observed, noted, and recorded on the pre-shift examinations. (Tr. 211-215, 225).

Inter alia, the ALJ notes the following: accumulation No. 6 had existed for at least one day, when Respondent moved the miner to a new entry. (Tr. 215, 257-258); given that no mining had taken place on the left side between the pre-shift examination and the inspection, accumulation Nos. 2, 3, 6, and 7 would have been present on the 8 South Left section at the time of the pre-shift examination. (Tr. 211-215, 225). Moreover, much of Respondent's hearing testimony was not presented to show that the accumulations had not existed but to explain why such had not been timely abated prior to inspection. (*See also Secretary's Post-Hearing Brief* at p. 33).

A review of the testimony and hearing record reveals clear and convincing evidence, unrebutted by Respondent, that there were extensive impermissible accumulation existent at the time of the pre-shift examinations and that such were not reported in violation of §75.360(b)(3).

B. Respondent's violation was Significant and Substantial

The ALJ incorporates his review of the applicable standards under *Mathies* to establish Respondent's violation was significant and substantial. The Secretary has persuasively carried its burden of proving the fact of a §75.360(b)(3) violation and that discrete safety hazard (mine fire or explosion) was contributed to by that violation. (Tr. 232, 274-275).

The third *Mathies* element is met pursuant to the *Musser*/*Cumberland* interpretations. It is readily apparent that the hazard of a mine fire or explosion at the cited areas in Shoemaker mine, where 10 miners were working, would be reasonably likely to result in an injury. For reasons already discussed *supra* the ALJ is persuaded that, even if the Secretary were required to show that the violation was reasonably likely to lead to injury, given the factual situation existent at Shoemaker Mine, the Secretary could carry this even more onerous burden. (*see also Secretary's Post-Hearing Brief* at p. 34).

The fourth prong of *Mathies* has also been established. As discussed *supra*, should there be a fire or explosion, the injuries that would be suffered by miners could be expected to be of a reasonably serious nature. Here, at least 10 miners working the cited area would be exposed to such serious injuries as smoke inhalation with associated respiratory damage and internal injuries from explosion. (Tr. 232, 274-275).

C. Respondent was highly negligent in failing to record and report the impermissible accumulations found by Gropp

§100.3(d) provides that, under the Mine Act, an operator is held to a high standard of care. *Inter alia*, a mine operator is required to be on the alert for conditions and practices that affect the safety of miners and to take steps necessary to prevent hazardous conditions. The pre-shift examiners' failure to report the hazardous conditions existent at Shoemaker Mine was found by Gropp to have constituted a grossly negligent departure from the standard of care imposed by the Mine Act.

Given that the required examinations were "of fundamental importance in assuring a safe work environment" (*See Buck Coal Co.*, *supra*) – the ALJ finds that Respondent's pre-shift examiners were clearly derelict in their duty to report hazardous conditions and agrees with the high degree of negligence found by the inspector.

The Secretary has ably set forth a summary of the facts established at hearing that would support a high negligence assessment. (*see Secretary's Post-Hearing Brief* at p. 35-36). Notwithstanding Respondent's arguments otherwise, the pre-shift examinations were not conducted in a fashion consistent with what a reasonably prudent person, familiar with the mining industry and protective purposes of §75.400 and §75.360(b)(3), would have done. The pre-examination reports failed to fulfill the primary goal of giving fair and adequate notice of potential hazards to miners. The above-cited record compellingly establishes the high degree of negligence found by Gropp. Both of Respondent's examiners traveled the same route as Gropp. (Tr. 233, 275-276). Many of Respondent's managers and employees passed through the cited area. (Tr. 233-234). Respondent violated its own clean up program with regard to the accumulations. (Tr. 234).

Respondent was clearly put on notice that greater efforts were necessary to ensure adequate pre-shifts were being performed: Respondent had received 17 violations of §75.360 in the two years prior to the issuance of the within citation (GX-5 at 55-52). Respondent had been issued an unwarrantable failure order for failing to report hazardous coal accumulations on October 14, 2010 pre-shift examination (GX-9). Respondent had paid the penalty for this order (GX-4). Respondent had been issued 139 violations of 30 C.F.R. §75.400 for impermissible accumulations of combustible material at Shoemaker Mine in the two years prior to the issuance of Order No. 8033057 (GX-5 at 61-71, Tr. 223). Respondent had been issued an unwarrantable failure order on October 14, 2010 (GX-6).

Like the Secretary, the ALJ was troubled by Respondent's seeming policy and practice not to record or correct pre-shift hazards so as to avoid down-time in production. The ALJ essentially adopts the Secretary's rationale regarding such as further grounds for a finding of high negligence. (*see Secretary's Post-Hearing Brief* at p. 36-37).

The ALJ affirms the assessed civil penalty of $6,996.00.

ORDER

It is hereby **ORDERED** that Citation No. 8033058 and Order Nos. 8030970 and 8033057 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of $25,739.00 within 30 days of the date of this decision.[42]

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

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[42] 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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April 11, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2009-1219 A.C. No. 05-04674-190681 Docket No. WEST 2009-1353 A.C. No. 05-04674-193569-02 Docket No. WEST 2011-0084 A.C. No. 05-04674-231645-01
v.	:	
OXBOW MINING LLC, Respondent.	:	Mine: Elk Creek Mine

DECISION

Appearances: Emily B. Hays, Esq., and Natalie E. Lien, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Page H. Jackson, Esq., and Meredith A. Kapushion, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

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

Oxbow operates the Elk Creek Mine ("Elk Creek") near Somerset, Colorado. A total of 13 section 104(a) citations were adjudicated at the hearing. The Secretary proposed a total penalty of $53,256.00 for these citations and orders.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial ("S&S") 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) (2006). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the

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

It is the third element of the S&S criteria that is 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., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination 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) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "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) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (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), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *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 was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L,* 12 FMSHRC 965, 970-71 (May 1990). 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

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).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation Nos. 6688118 and 6688119; WEST 2009-1219

On May 14, 2009, MSHA Inspector Jack William Eberling issued Citation No. 6688118 under section 104(a) of the Mine Act, alleging a violation of section 75.1731(b) of the Secretary's safety standards. The citation states, in part:

> The 48 inch wide belt was rubbing the structure in two places on the operating 2nd North Conveyor. . . . The contact was so hard that the steel hanger was becoming discolored from the apparent heat on the leading contact edge. The hanger was stripping belt fabric in strands that were on the trailing edge of the approximate 8 inch wide hanger. . . .
>
> The second contact was near the tailpiece between the first two sets of trough rollers outby the rail pulley. . . . The friction was so intense that the belt flattened the steel crossbar for a span of 22 inches long by 1 inch wide. . . .

(Ex. G-26). Inspector Eberling determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.1731(b) of the Secretary's regulations requires that "conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components." 30 C.F.R. § 75.1731(b). The Secretary proposed a penalty of $946.00 for this citation.

Also on May 14, 2009, Inspector Eberling issued Citation No. 6688119 under section 104(a) of the Mine Act, alleging a violation of section 75.1731(a) of the Secretary's safety standards. The citation states, in part, "belt was rubbing a locked up return roller so hard, it was stripping rubber and exposing fabric an inch from the edge of the belt[.]" (Ex. G-28). Inspector Eberling determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.1731(a) of the Secretary's regulations requires that "damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced." 30 C.F.R. § 75.1731(a). The Secretary proposed a penalty of $946.00 for this citation.

1. Summary of Testimony

Inspector Jack William Eberling issued Citation No. 6688118 on May 14, 2009, near the #1 entry, #1 crosscut, for a violation of section 75.1731(b). (Tr. 16-17, 45). The inspector issued the citation because a misaligned belt was rubbing against the steel hanger in two places near the head pulley due to a missing roller, causing the belt to strand and fray. (Tr. 18, 42; Ex. G-41).

The contact at one of the friction points was not constant. (Tr. 54). Elk Creek mine is a "gassy mine" that liberates more than one million cubic feet of methane or other explosive gases during a 24-hour period. (Tr. 16-17).

The fire resistant rubber had worn off the return belt, leaving combustible fabric strands hanging off the belt and accumulating below the hanger. (Tr. 19, 26). The hanger itself became so hot that the steel began to discolor. Based upon his observations and experience, Inspector Eberling was concerned that the steel and belt were hot enough to cause a fire. (Tr. 22). The edges of the return belt were frayed and mixed with coal dust, coal fines, and possibly lubricants, which are all combustible. (Tr. 27). Due to the weight of the coal, the top belt was rubbing against a steel cross member and had worn away half an inch of the steel for a length of 22 inches. (Tr. 20, Ex. G-36). Inspector Eberling concluded that the belt had been misaligned for two or three shifts due to the amount of damage it sustained. (Tr. 28).

Inspector Eberling also testified that he issued Citation No. 6688119 on May 14, 2009, for a violation of section 75.1731(a) relating to and in the same vicinity as the misalignment referenced in Citation No. 6688118. (Tr. 29). The misalignment caused the bearing of the belt to seize, damaging both the belt and the roller. (Tr. 30).

The damage to the belt and roller created a fire hazard, testified Inspector Eberling. Contact between the belt and the roller caused "hard friction," which led to the rubber belt rubbing against the end of the hard steel roller and stripping shavings off of the belt. (Tr. 31-32, Ex. G-36 at 3). The belt also pushed against the hanger, grooving the steel and driving the edge of the belt down. (Tr. 30). The shavings from the belt accumulated beneath the belt. (Tr. 32). The belt was worn enough to reveal its combustible inner fabric. (Tr. 33). The inspector worried that the entire belt could split, exposing more combustible material. (Tr. 32).

Inspector Eberling testified that Citation No. 6688119 was S&S. Combustible belt material, belt shavings, coal fines, and coal on the belt were all exposed to the friction between the belt and the hanger. (Tr. 35). This combination of fuel and a heat source produced a reasonable likelihood of fire. *Id*. The inspector also believed that the misaligned belt could produce sparks. (Tr. 36). A fire would likely lead to a lost-time injury due to its production of toxic fumes. (Tr. 37). There were no CO monitors in the area, but there was an atmospheric monitoring system ("AMS") for carbon monoxide detection. (Tr. 37-38, 88).

Inspector Eberling designated that Citation No. 6688119 resulted from moderate negligence on the part of Respondent. (Tr. 38). The inspector estimated that the violative conditions existed prior to the belt move of the previous shift because there "was a long-term accumulation of problems" that he testified occurred over two to three shifts. (Tr. 37). Inspector Eberling easily saw the damage to the belt and he distinctly smelled burning rubber. (Tr. 33). Although the operator's records indicate that the area was inspected, no one recorded the hazards. (Tr. 38). The operator's examiners should have found these conditions. (Tr. 39).

Fred English, a member of the safety division at Elk Creek Mine, testified that after a belt is moved in the mine, belt specialists "train" the belt with coal on it to ensure that it is not misaligned. (Tr. 86). He testified that the AMS has a 180 second delay and that the belt is wet throughout its entire length due to water spray systems used to control dust. (Tr. 92-93). A deluge system also provides fire suppression along the belt at head pulleys, drive motors, belt

banks, and fifty feet past the drive motors. (Tr. 93). English testified that Inspector Eberling designated every citation concerning friction on belts as S&S. (Tr. 99-100). When asked if there was a misalignment of the belt that caused the belt to push against the steel hanger, English admitted that there "was some friction violation, yes." (Tr. 104). With regard to the second point of contact cited in Citation No. 6688118, English agreed with the inspector that the belt was flattening the steel crossbar at a 22 inch-wide point. (Tr. 106). English also agreed with the inspector that the roller in the area cited in Citation No. 6688119 was locked-up and flattened at the point of contact with the belt. (Tr. 107). He testified that the belt cited in Citation No. 6688119 had exposed white fabric that was visible at the point of contact. *Id*. English also testified that there is no difference between belt fines and coal fines. (Tr. 109).

2. Discussion and Analysis

The Secretary argues that both Citation Nos. 6688118 and 6688119 were S&S because the underlying conditions violated safety standards and contributed to the hazard of a belt fire. Hot, dry friction points provided an ignition source and the inner-fibers of the damaged belts mixed with coal fines and fluids are a fuel source that is as combustible as coal fine accumulations. The belt misalignment existed for several shifts and a belt fire would cause smoke inhalation and other injuries to miners. Although the AMS may warn of fire, it will not prevent fire-related injuries.

Respondent argues that neither violation was reasonably likely to lead to an injury and therefore neither is properly designated as S&S. The belts are over 1200 feet long and only intermittently contacted the friction points, which would not produce enough heat to ignite a fire. The belt itself was unlikely to serve as a fuel source. The belt was also equipped with multiple water sprays, CO sensors, and the area around the belt was wet and muddy. The Elk Creek Mine has never had a belt fire and this area had multiple means of egress.

I find that that both Citation Nos. 6688118 and 6688119 were properly designated as S&S. Respondent violated both sections 75.1731(b) and 75.1731(a). Each violation contributed to the safety hazard of a fire, which could easily cause a variety of serious injuries. I credit Inspector Eberling's testimony that waters sprays and an AMS did not remove the S&S nature of these citations.

The question of whether a fire was reasonably likely to cause an injury is, however, the critical one. When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based upon the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). The ignition source here is the friction caused by the contact at several points between the belt and its metal frame. Although this contact was only intermittent, I credit Inspector Eberling's testimony that enough heat was created to be an ignition source, especially when I consider that the contact was hard enough to flatten a portion of the metal and strip away pieces of the belt. I also credit the inspector's testimony that the interior fines from the belt are combustible, testimony that Respondent's own witness confirmed when English said that belt strands were no different than coal fines. Respondent's argument that fibers were not a cause of the Aracoma fire has no

bearing here. The fact that belt fibers had no part in the Aracoma fire does not exclude belt fibers from creating a fire hazard in other situations. The belt fibers in the cited area were mixed with coal fines and combustible lubricants, making them even more likely to ignite. In addition, the Commission has ruled that, when a mine liberates large amounts of methane, that hazard should be taken into consideration in the S&S analysis, even if the methane levels were not dangerous at the time of the citation. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (1987).

I find that Citation Nos. 6688118 and 6688119 were properly designated as the result of Respondent's moderate negligence. A mine fire is highly dangerous to miners. I credit the inspector's testimony that the condition existed for more than one shift. The inspector testified that the conditions were obvious to his sense of sight and smell. Mine management should have known of the conditions, making the moderate negligence designations appropriate. A penalty of $1,000.00 is appropriate for each violation.

B. <u>Citation Nos. 6688120 and 6688121; WEST 2009-1219</u>

On May 20, 2009, Inspector Eberling issued Citation No. 6688120 under section 104(a) of the Mine Act, alleging a violation of section 75.1731(b) of the Secretary's safety standards. The citation states, in part:

> The 52 inch wide belt was making hard friction contact on the first five steel hangers outby the tail piece on the operating 2nd South Conveyor in the 2nd South Longwall section. . . . The contact was so hard that the about one half inch thick belt was turning down at the edge and pushing up a hump in the belt

(Ex. G-30). Inspector Eberling 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 moderate, and that nine persons would be affected. Section 75.1731(b) of the Secretary's regulations requires that "Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components." 30 C.F.R. § 75.1731(b). The Secretary proposed a penalty of $10,437.00 for this citation because the inspector determined that the violation could reasonably be expected to lead to fatal injuries.

On May 27, 2009, Inspector Eberling issued Citation No. 6688121 under section 104(a) of the Mine Act, alleging a violation of section 75.1731(a) of the Secretary's safety standards. The citation states, in part:

> The 52 inch wide belt was making hard frictional contact on a steel pulley support bracket opposite the walkway side of the 3rd South Conveyor in the 1 entry about 30 feet inby 14 crosscut. . . . The contact point was so hard that the belt, which was about .5 inch thick, was bent slightly over the vertically mounted support bracket and the bracket was discovered to have about .25 inch of steel worn away

(Ex. G-32). Inspector Eberling 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 moderate, and that nine persons would be affected. The Secretary also proposed a penalty of $10,437.00 for this citation.

1. Background Summary of Testimony

On May 20, 2009, Inspector Eberling issued Citation No. 6688120 for a violation of section 75.1731(a) located in the 2nd South Longwall section at the 3rd South Conveyor. (Tr. 112-13). The return belt contacted five steel hangers, so that the belt was "turned down" at the edge and "humped up" toward the center. The hangers were stripping the rubber coating off of the belt and exposing the fabric. (Tr. 117-18). The contact caused discoloration and removed the paint of all five hangers. Three of the hangers were grooved from the contact. (Tr. 117). Based upon his experience, Inspector Eberling believed that this friction was giving off heat, but he could not touch the belt safely. (Tr. 117-18). Inspector Eberling testified that the belt had been running for almost an hour at the time he issued the citation and usually coal or coal dust would accumulate on the belt. (Tr. 115, 119). Inspector Eberling's notes did not include any observations pertaining to the sloughage. (Tr. 119-20).

Inspector Eberling testified that Citation No. 6688120 was S&S. The cited conditions were reasonably likely to cause an injury to a miner because the combination of loose fines, loose belt materials, and heat from the friction presented a fire hazard. (Tr. 122). Inspector Eberling testified that he knew the belt materials were combustible based upon personal experience. (Tr. 134-35). The fire hazard was increased by the production of frictional heat from each of the five contact points. *Id*. Elk Creek is also on a five-day spot inspection and the longwall liberates more methane than any other area in the mine. (Tr. 123). The inspector designated this citation as fatal because the cited area would be difficult to escape in the event of a fire due to low visibility. (Tr. 125-26). The fire would be between the miners and both of the escapeways, testified Inspector Eberling, forcing miners to travel 3,000 feet in blinding conditions over uneven terrain to escape. *Id*. Inspector Eberling did not believe that the presence of CO monitors affected the likelihood of injury to miners. (Tr. 130).

Inspector Eberling testified that Citation No. 6688120 resulted from Respondent's moderate negligence. (Tr. 131). Inspector Eberling estimated that the condition existed for about an hour. (Tr. 123). He believed that Respondent should have known of this hazard. (Tr. 133). The inspector believed that nine miners would be affected by this hazard because any smoke from a fire would be carried into the face and through the tailgate, affecting every miner at the face. (Tr. 124, 127).

On May 27, 2009, Inspector Eberling issued Citation No. 6688121 for a violation of section 75.1731(a) that occurred in the same area of the mine as Citation No. 6688120. (Tr. 136, 143). One pulley from a two-pulley assembly had fallen, causing the belt to track over and rub against the hanger that had supported the pulley. (Tr. 137, Ex G-41). The conditions were exacerbated by the complete absence of the outby assembly. (Tr. 140). The contact between the belt and the hanger stripped a "great deal of vulcanized rubber" off of the belt, exposing the internal fabric and leading to accumulations of belt materials on the hanger. (Tr. 138). The contact also wore away 1/4 inch of steel from the hanger. *Id*.

Inspector Eberling testified that Citation No. 6688121 was S&S. The violative conditions exposed miners to the hazard of fire. (Tr. 144-45). He believed that the conditions were reasonably likely to injure a miner. (Tr. 145). The inspector testified that he believed Citation No. 6688121 could lead to the fatalities of all nine miners in the section for the same reasons discussed with respect to Citation No. 6688120. (Tr. 145-46).

Inspector Eberling testified that Citation No. 6688121 resulted from Respondent's moderate negligence. (Tr. 147). He believed that the violative condition existed for two to three shifts based upon the damage to the belt and support as well as the amount of coal fines covering the pulley on the ground. (Tr. 139-40). He also testified that the mine had been cited six times in the same quarter for violations of section 75.1731(a). (Tr. 147).

Blas Villalobos, a longwall foreman at Elk Creek, testified that there was contact between the belt and steel in the area cited in Citation No. 6688120 and that Inspector Eberling's observations concerning the hump and turned down edges of the belt were correct. (Tr. 185). He also testified, however, that there was no likelihood of an injury occurring as a result of the citation because the belt was too wet and the area too well rock-dusted for a fire to start. (Tr. 178). Even if a fire were to ignite, the area has a fire drop, 500 feet of fire hose, a wash-down hose, and the water spray used to lessen coal dust, which would allow miners to extinguish a fire "within a minute." (Tr. 180). If there were a large quantity of smoke, the miners would travel to the "rescue chamber," which is 1000 feet from their gathering place in the eight bay. *Id*.

Allen Christiansen was a shift foreman at Elk Creek in June 2009 when Citation Nos. 6688120 and 6688121 were issued. (Tr. 191). Christiansen testified that Inspector Eberling's drawing in Ex. G-41 accurately depicted the condition cited in Citation No. 6688121. (Tr. 193). He did not, however, know whether the belt was rubbing because he did not see the condition while the belt was still moving. (Tr. 201). He testified that he did not agree with the inspector that the condition was reasonably likely to cause an injury because the wet belt and rock-dusted floor meant that there was "really no fire hazard." (Tr. 195; Ex R-29). Christiansen also disagreed with the fatal designation because miners could escape from the headgate through the intake to Two Entry if there was smoke on the belt line. (Tr. 197). Each miner had his own self-rescuer. *Id*. The tailgate operator can always see the AMS, but it is a ten minute walk from the tailgate to the headgate. (Tr. 201-02).

2. <u>Discussion and Analysis</u>

The Secretary argues that Respondent violated sections 75.1731(a) and 75.1731(b), that those violations were S&S, and that they were the result of Respondent's moderate negligence. The violations contributed to the hazard of a belt fire, which was reasonably likely to lead to a serious injury. The five friction points in Citation No. 6688120 and the friction cited in Citation No. 6688121 created ignition sources and the frayed, exposed interior of the belt combined with coal dust and fines provided fuel for a fire.

Respondent argues that the Secretary failed to meet his burden of proof to show that Citation Nos. 6688120 and 6688121 were S&S. The inspector did not confirm that the friction points produced heat. The wetness of the area would make the heat insufficient to cause combustion and would extinguish any fire if combustion were to occur. If somehow a fire did occur, the AMS would provide early warning and the fire would not block the escape route of the

miners. The Secretary provided no evidence that a serious injury was reasonably likely to occur as a result of the conditions underlying Citation Nos. 6688120 and 6688121.

I find that that both Citation Nos. 6688120 and 6688121 were properly designated as S&S. I find that Respondent violated both sections 75.1731(b) and 75.1731(a). Each violation contributed to the safety hazard of a fire, which is likely to cause a variety of serious injuries.

The analysis of whether a fire was reasonably likely to cause an injury as a result of Citation Nos. 6688120 and 6688121 is similar to the analysis of the same question regarding Citation Nos. 6688118 and 6688119 discussed above. I find that friction points from a belt rubbing on steel provided heat and an ignition source in both situations and exposed belt fibers mixed with some amount of coal fines provided the fuel. I credit Inspector Eberling's testimony concerning these conditions. Although the area cited in Citation Nos. 6688120 and 6688121 is equipped with more firefighting and fire suppression equipment than the area cited in Citation Nos. 6688118 and 6688119, Citation Nos. 6688120 and 6688121 are still S&S. Of the "confluence of factors" considered by the commission in *Texasgulf*, the presence of methane is an important consideration, which the Commission emphasized in *Youghiogheny & Ohio* Coal. 10 FMSHRC 501; 9 FMSHRC 678. Not only is the Elk Creek Mine regulated under 103(i) of the act, but the area cited in Citation Nos. 6688120 and 6688121 is near the long wall section of the mine, which produces the highest amount of methane in the entire mine. The confluence of factors present in the area cited in Citation Nos. 6688120 and 6688121 makes the violations reasonably likely to cause an injury through a fire. A fire would dry any water on the belt in the accumulations. I find that a mine fire, furthermore, is reasonably likely to cause an array of serious injuries, up to and including fatalities.

I find that Citation Nos. 6688120 and 6688121 were properly designated as the result of Respondent's moderate negligence. A mine fire is highly dangerous to miners. I credit the inspector's testimony that the condition existed for more than one shift. The inspector testified that the conditions were obvious to his sense of sight and smell. Mine management should have known of the conditions, making the moderate negligence designations appropriate. A penalty of $10,500.00 is appropriate for each violation.

C. Citation No. 6688131; WEST 2009-1353

On June 16, 2009, Inspector Eberling issued Citation No. 6688131 under section 104(a) of the Mine Act, alleging a violation of section 75.1731(b) of the Secretary's safety standards. The citation states, in part:

> Loaded and operating conveyor belt in the No. 1 Entry, 2nd South Longwall section was misaligned and rubbing against an about 2 and 1/2 – inch diameter horizontal steel pipe cross member under the belt. . . .

(Ex. G-34). Inspector Eberling determined that an injury was unlikely to occur but that an injury could reasonably be expected to be fatal. Further, he determined the operator's negligence was moderate, and that eight persons would be affected. The Secretary proposed a penalty of $1,795.00 for this citation.

1. Summary of Testimony

On June 16, 2009, Inspector Eberling issued Citation No. 6688131 for a violation of section 75.1731 because he observed a top belt loaded with coal rubbing against a cross member. (Tr. 203). The inspector testified that this condition was similar to the conditions he described in reference to Citation No. 6688118, including the fact that the friction between the bar and belt caused a flat spot on the bar. *Id*. Inspector Eberling issued this citation in the same location that he issued Citation Nos. 6688120 and 6688121; the Second South longwall section, just outby the tailpiece. (Tr. 203-04).

Although this area of the belt lacks a fire suppression system, Inspector Eberling designated Citation No. 6688131 as unlikely because the only combustible material present was the coal on the belt, the belt was wet, and the friction was not "hard." (Tr. 204-05). The inspector believed that a fatality was reasonably likely if a fire were to start. (Tr. 205). All eight miners in the section would be affected. (Tr. 205-07).

Inspector Eberling testified that he designated this citation as the result of moderate negligence because the mine examiner should have known about this hazard. (Tr. 206, 214). The inspector believed that this condition existed for two to three shifts. (Tr. 217). He testified that this violation was difficult to detect and that he took into consideration the fact that there was no fuel present and that the condition was adjacent to the water sprays of the tailpiece. (Tr. 206-07). The belt, ground, and coal were all "pretty wet" as long as the water continued to spray. (Tr. 211). The inspector did not observe any damage to the belt due to the friction.

2. Discussion and Analysis

The Secretary argues that the inspector considered the low likelihood of ignition when he designated the violation as non-S&S and unlikely. This violation was the result of Respondent's moderate negligence.

Respondent argues that Citation No. 6688131 was a technical violation of section 75.1731(b) that posed no actual likelihood of injury. As the inspector himself testified, the belt was quite wet and the only fuel present was the coal on the belt. The conditions allowed no likelihood of ignition and therefore no injury as a result of a fire was possible. Respondent argues that the citation should be modified to designate "No Likelihood" of an injury occurring that would result in "No Lost Workdays."

I find that the condition cited in Citation No. 6688131 was a violation of section 75.1731(b). I credit Inspector Eberling's testimony concerning the conditions in the cited area. Due to the wet conditions, the fact that the friction was light, and the lack of fuel, I find that this violation was unlikely to contribute to an injury. In the unlikely circumstance that a mine fire did occur, however, serious injuries or fatalities were likely. I affirm the inspector's negligence and gravity determinations. A penalty of $1,800.00 is appropriate for the violation.

D. Citation No. 8469536; WEST 2011-84

On March 31, 2010, Inspector Eberling issued Citation No. 8469536 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation describes the alleged violation in great detail and then states, in part:

> The chunks that burst from the rib into the mesh broke the rib bolts loose from their anchors for a span of about 30 feet and pushed the mesh over to the walkway. The top half of the mesh filled with coal overhung about 3 feet beyond the lower edge of the mesh. This left several hundred pounds of chunk coal hanging above miners on the walkway.

(Ex. G-37). Inspector Eberling determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to cause lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.202(a) of the Secretary's regulations requires that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of $3,000.00 for this citation.

1. Summary of Testimony

On March 31, 2010, Inspector Eberling issued Citation No. 8469563 at the corner of a walkway in the 10 Crosscut, which was near "the center of activity for the mine[.]" (Tr. 229). Mesh that wrapped around a rib was forced 4 to 5 feet away from the rib and was filled with loose coal and caprock. (Tr. 233; Ex G-43). Inspector Eberling testified that these pieces of rock and coal were large enough to hurt a miner and that one piece was 6 feet long, 30 inches wide and 7 inches thick and hung 12 inches below the roof, or 7 feet from the ground. (Tr. 234-35; Ex G-43). The inspector testified that the rock fell from the rib, landed on the rock pile, and rolled into the walkway after being tapped a few times with a pipe. (Tr. 236; Ex G-45). A rock of similar size had already fallen on its own, according to Inspector Eberling. (Tr. 235). The inspector noticed four roof bolts that had been pushed out of the wall. (Tr. 246).

After continuing around the corner from the conditions pictured in Ex. G-43, Inspector Eberling found accumulated coal and caprock from a rib blow-out pressed against the mesh of the rib and hanging over the walkway. (Tr. 241; Ex. G-44). The walkway was 24 inches wide at this point. (Tr. 245). The mesh was bending and stretching and the rib bolts responsible for holding the mesh in place were missing except for one on each end, according to the inspector. (Tr. 241-42). The inspector testified that another bump could cause the entire mesh, suspended coal, and caprock to fall into the walkway. (Tr. 243). Every miner in the section travels through the cited area. (Tr. 244).

Inspector Eberling testified that the cited conditions were S&S. The inspector believed that the cited conditions violated the safety standard and exposed miners to the hazard of being injured by falling rock and coal. (Tr. 250, 252). He believed that it was reasonably likely that a miner would be injured by this hazard because some of the chunks of coal were 15 to 20 pounds and would fall 7 feet with enough force to break bones. (Tr. 254). Inspector Eberling believed that there was a "100% probability" that the large, 6 foot long rock would fall during the next bump. (Tr. 238). He also believed that both the large rock and the other material in the rib mesh posed a hazard. Although the inspector testified that there was danger tape around the hazard, the rock, when removed, landed outside of the taped-off area. (Tr. 239).

Inspector Eberling testified that the condition had existed since at least the previous shift. (Tr. 255). The foreman from the previous shift should have known about the hazards based upon his examination. (Tr. 256).

Inspector Eberling noted that the cited area included a can, danger tape, and two timbers. (Tr. 271, 277; Ex. G-43). The inspector saw footprints inside of the danger tape. Although he was not sure if the footprints occurred before or after the tape was installed, he testified that miners will often go under the tape. (Tr. 273). He did not believe that the can or timbers would prevent the rocks and coal from falling if the mesh failed. (Tr. 277).

Michael Ricke, a safety engineer at Elk Creek, did not believe that the cited conditions constituted a hazard. (Tr. 286). He testified that the roof support in this area "was overkill, over supported." (Tr. 288). The Elk Creek Mine uses bolts in excess of the minimum requirements in its belt entries. (Tr. 288; Ex. R-37). Ricke admitted that a potential injury could result in lost workdays or restricted duty, but he believed that an injury was unlikely. (Tr. 291).

Brent Christian, a shearer operator on the longwall at Elk Creek, testified that although he easily removed the large rock that concerned Inspector Eberling, it did not fall into the walkway. (Tr. 305). Rather, it fell behind the screen and landed on the sloughage by the rib. *Id*. Christian believed an injury was unlikely if this rock had fallen due to its position on the "backside of the screen" preventing it from falling into an area where it would endanger a miner. (Tr. 307). The timbers supported the mesh well. *Id*. Christian also asserted that neither Ricke nor Inspector Eberling were present when he removed the rock. (Tr. 310).

2. <u>Discussion and Analysis</u>

The Secretary argues that Respondent failed to adequately support the ribs and roof in the 2 North Longwall headgate section. The cited area was an area where miners worked or traveled and was the intersection of two busy walkways. Mesh that bulged with coal and caprock covered a rib in an intersection. Bolts were pushed out and hanging loose or were on the ground. One walkway had a large rock hanging on top of the mesh as well as a large amount of coal and rock filling the mesh. The other walkway was only two feet wide at the floor and mesh filled with rock and coal encroached upon it.

The Secretary also argues that Citation No. 8469536 was S&S. The loaded mesh in both walkways was likely to fall and the pieces of rock and coal were large enough to cause serious injury. One large rock required only a few taps to dislodge and it fell into the walkway; Inspector Eberling believed that the rock would have fallen and was by itself reasonably likely to cause serious injury to a miner. Both of the walkways were heavily traveled and used for storage. The 2 North Longwall was the center of activity for the mine at this time. Although there was hazard tape in the area, miners could still be injured.

The cited conditions were the result of Respondent's moderate negligence, according to the Secretary. The inspector testified that management should have known of the condition. Although Respondent made some effort to support the roof, it did not adequately remove the hazard.

Respondent argues that the cited conditions in Citation No. 8469536 did not violate section 75.202(a) and that the inspector's testimony was inconsistent and not credible.

Respondent's witnesses, Christian and Ricke, have more experience evaluating roof and rib conditions in Elk Creek and provided more reliable testimony than the inspector.

I find that Respondent violated section 75.202(a) by failing to adequately protect miners from falls or bursts of the ribs in the cited area. The requirements of the safety standard, as applied to the ribs, can be broken down into three parts: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls or bursts of rib. In considering whether support is adequate, the Commission has held that "[t]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. *Cannon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). Respondent did not dispute testimony that the cited area was an area where persons work or travel. Although the area was supported or controlled, the support in place was not adequate to protect persons from falls or bursts of the rib. The description of the conditions in the cited area given by the inspector and Respondent's witnesses were essentially the same, but the Respondent's witnesses did not believe that the conditions posed a hazard to miners. I credit Inspector Eberling's testimony that the ribs in the cited area were not adequately supported to protect miners. Although Inspector Eberling was concerned with the large rock that he had pried out of the rib, he testified that the mesh loaded with coal and caprock was also a hazard.

I find that Citation No. 8469536 was S&S. The cited conditions violated section 75.202(a) and contributed to the hazard of miners being injured by falling rock and coal. Due to the size of the rocks and coal in the mesh, injuries including broken bones could lead to lost workdays or restricted duty. The conditions were also reasonably likely to lead to an injury. The mesh was filled with debris in several places and the walkway was only two feet wide in one such area, preventing miners from avoiding the hazard. The area was well-traveled, as the longwall was the center of activity for the mine. Every miner in the section traveled through this area. The large rock that required little effort to remove illustrated the hazard. Regardless of where this large rock landed when it was removed, the various other rocks suspended in the mesh make the hazard posed by these conditions reasonably likely to cause a serious injury. The fact that the area was well-traveled is especially significant. Furthermore, I credit Inspector Eberling's testimony that the cited conditions were reasonably likely to cause a serious injury.

I find that Respondent's moderate negligence caused Citation No. 8469536. The cited conditions were obvious, existed for more than one shift, and Respondent should have known about them. Respondent did, however, make an attempt to danger-off the area and support the roof and ribs. For these reasons, I find that Respondent's negligence was moderate. A penalty of $4,000.00 is appropriate for this violation given the high gravity.

E. Citation No. 6687983; WEST 2009-1353

On June 9, 2009, Inspector Mark C. Brewer[1] issued Citation No. 6687983 under section 104(a) of the Mine Act, alleging a violation of section 72.630(d), which was modified to be a violation of section 72.630(b) of the Secretary's safety standards. The citation states, in part:

> The dust collection system mounted on the Fletcher roof bolting machine unit # 30-13, is not being maintained. . . . In this condition the drill dust is being picked up by the air flow through the exhaust system and emitted in the atmosphere and air ventilation and is coursing back over the bolter operators and helper.

(Ex. G-13). Inspector Brewer 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 moderate, and that three persons would be affected. Section 72.630(b) of the Secretary's regulations mandates, in part, that "Dust collectors shall be maintained in permissible and operating condition." 30 C.F.R. § 72.630(b). The Secretary proposed a penalty of $3,996.00 for this citation.

1. Summary of Testimony

Inspector Brewer issued Citation No. 6687983 on June 9, 2009, for a violation of 72.630(b) in the #3 entry of the 2 North section. (Brewer Dep. at 78). The inspector testified that Respondent was not properly maintaining the dust control system of a Fletcher roof bolting machine. (Brewer Dep. at 80). Visible dust was coming out of the muffler of the system, which would not occur if the system were functioning properly. (Brewer Dep. at 81).

Inspector Brewer testified that Citation No. 6687983 was S&S. The release of this dust, which could be composed of substances including quartz, silica and fine coal, posed the hazard of causing silicosis or pneumoconiosis in miners. (Brewer Dep. at 82). Three miners, including both bolters and the bolter helper, were exposed to this hazard. (Brewer Dep. at 83). Based upon the position of the miners relative to the dust being released and the amount of dust, the inspector believed that the hazard was reasonably likely to cause injury. (Brewer Dep. at 90; Ex. G-23). Inspector Brewer believed that the most likely injury as a result of this hazard would be a fatality as a result of pneumoconiosis or silicosis, but admitted that while pneumoconiosis and silicosis can cause death, they are not certain to do so. (Brewer Dep. at 90, 117-18).

Inspector Brewer believed that this condition resulted from Respondent's moderate negligence. (Brewer Dep. at 96). The inspector testified that the hazard existed for anywhere from multiple hours to multiple shifts, but definitely longer than is permitted; a large amount of dust accumulated despite the filters being in working order. (Brewer Dep. at 91, 105). Although the vent tube removed some of the dust from the air, it was not able to completely stop the miners from inhaling the dust. (Brewer Dep. at 94, 112). The inspector testified that the bolter

[1] Because Inspector Brewer was not going to be available to testify at the hearing, by agreement of the parties and with the consent of the judge, Inspector Brewer's testimony was taken at a deposition.

operators and the section foreman should have known about this condition. (Brewer Dep. at 96). The section foreman, however, would only be in the section during the day and the inspector was not positive how long this condition existed. (Brewer Dep. at 107). Inspector Brewer had never seen dust accumulate in the "clean side" of a filter system before. (Brewer Dep. at 99). The inspector also testified that Elk Creek has a good compliance history with regard to respirable dust. (Brewer Dep. at 114, 117).

Travis Lischke, a bolter operator at Elk Creek, was operating the bolter in the cited area. Lischke agreed that the dust box needed to be emptied, but stated that he did not notice the dust until the inspector pointed it out and he believed that it was being removed by the vent tube. (Tr. 330, 333). He testified that although the helper did move, the three operators were not between the vent and the escaping dust. (Tr. 332; Ex. R-15A). Lischke also stated that there was a fan that "sweeps the face" and moves dust and air into the vent tube. (Tr. 334).

Mike Ricke, who is "certified by MSHA for dust[,]" accompanied the inspector during the issuance of Citation No. 6687983. (Tr. 338). Ricke agreed with Inspector Brewer that there was dust escaping the muffler and that it was the bolter operator's responsibility to find and correct this condition. (Tr. 340). The vent tube was situated between the bolter operators and the muffler and, according to Ricke, it pulls in 25,000 to 27,000 cubic feet per minute. (Tr. 341). He did not observe any dust blowing over the operators, but he also testified that the dust dissipated into the air and disappeared. (Tr. 342, 345, 347). The movement of the air is directed toward the vent tube, which moves air to the exhaust fan. (Tr. 344). Ricke also stated that a fan was set up to move air into the vent tube. (Tr. 345). Terry Hayes testified that the area where the inspector issued Citation No. 6687983 was below the required respirable dust levels. (Tr. 454-55; Ex. R-25).

2. Discussion and Analysis

The Secretary argues that Respondent violated section 72.630(b) by failing to maintain a dust collector in a permissible and operating condition. Inspector Brewer saw dust leaving the muffler, moving over the bolter, beyond the vent, toward the roof bolter helper, and then dissipating into the atmosphere. The vent tube and the collection system were not working properly. The "clean side" of the filter was full of dust and the inspector believed it must have been in this state for several shifts. The material drilled out of the roof includes harmful substances that can cause silicosis and pneumoconiosis.

The Secretary argues that Citation No. 6687983 was S&S. Respondent violated section 72.630(b), exposing miners to dust that could cause fatalities through silicosis and pneumoconiosis. A serious injury was reasonably likely to occur because even short periods of exposure to respirable dust can contribute to an injury or illness and drilling can expose miners to dangerous amounts of dust in a short period of time.

According to the Secretary, Respondent's negligence was moderate. The condition was obvious, the operator should have known of the condition, and there were no mitigating factors.

Respondent argues that there was no violation of section 72.630(d)[2] because the air current was appropriately directed away from the three miners in the cited area. Two miners testified that dust was not passing over them and Brewer did not prove that it was. Consequently, a violation was not established.

I find that the condition cited in Citation No. 6687983 violated section 72.630(b). The escaping dust and the large amount of dust on the "clean side" of the dust filter show that the dust box was not maintained in adequate operating condition. When establishing a violation of the safety standard, the airflow in the cited area is immaterial, as is the position of the dust flow relative to the miners. Section 72.630(b) requires operators to maintain dust collectors in "operating condition." 30 C.F.R. § 72.630(b). If, as in this situation, Respondent did not maintain the dust collector in operating condition, then Respondent violated section 72.630(b). The Commission, furthermore, has held that "we can envision circumstances in which compliance can be determined solely on the basis of an inspector's observations of a dust cloud, and the preamble [of the safety standard] clearly contemplates such cases when it refers to dust controls that are 'obviously visually ineffective.' " Consolidation *Coal Company*, 23 FMSHRC 392, 397 (Apr. 2001) (internal citations omitted). Inspector Brewer and both of Respondent's witnesses testified that they saw dust leaving the dust box and dissipating into the air. A dust collector releasing dust into the atmosphere constitutes a violation of section 72.630(b) on its face, as well as being "obviously visually ineffective."

I also find that Citation No. 6687983 was S&S. Respondent violated section 72.630(b), which contributed to the hazard of miners developing pneumoconiosis or silicosis. The violation in Citation No. 6687983 was reasonably likely to contribute to pneumoconiosis or silicosis and cause a serious injury. The inhalation of relatively low amounts of freshly fractured silica particles from rock drilling may contribute to the development of acute silicosis.[3] Although a single exposure to hazardous respirable dust may not cause pneumoconiosis or silicosis, it is reasonably likely to contribute to one of these diseases. *See Consolidation Coal Co.*, 8 FMSHRC 890, 894-99 (June 1986). I note that the inspector and Respondent's witnesses testified that they viewed dust dissipating into the atmosphere after it escaped from the dust collector, which would allow the miners to inhale the dust without the dust being visible around them. Lischke, furthermore, testified that the bolter helper was "all over the place[,]" increasing the likelihood of his exposure. (Tr. 317). None of the miners wore personal respiratory protection. I credit Inspector Brewer's testimony that the cited violation exposed miners to inhaling hazardous respirable dust, as well as his testimony that the inhalation of this dust was reasonably likely to contribute to pneumoconiosis or silicosis. Considering the facts of this case, I find that it was reasonably likely that the miners' inhalation of respirable dust would contribute

[2] Despite not opposing the motion that occurred during the deposition of Inspector Brewer to modify the citation to a violation of 72.630(b), Respondent's argument in its post-hearing brief addressed a violation of section 72.630(d). (79-80; R. Br. at 62). As the parties presented testimony of the inspector through this deposition and there was no objection, it became a part of the record. I therefore accepted the modification of Citation No. 6687983, treating it as a section 72.630(b) violation.

[3] Preamble to 30 C.F.R. § 72.630, "Air quality Standards for Abrasive Blasting and Drill Dust Control," 59 Fed. Reg. 8318, 8319 (February 18, 1994).

to pneumoconiosis and silicosis, both of which are likely to cause death or other serious injuries. As a result, I find that Citation No. 6687983 was S&S.

Citation No. 6687983 was the result of Respondent's moderate negligence. Exposure to respirable dust is highly dangerous to the health and safety of miners. This condition, furthermore, was obvious; Inspector Brewer noticed the dust escaping the dust collector immediately. Respondent should have known of this condition, which justifies the Secretary's designation of moderate negligence for Citation No. 6687983. A penalty of $4,000.00 is appropriate for this violation.

F. Citation No. 6687977; WEST 2009-1219

On June 2, 2009, Inspector Brewer issued Citation No. 6687977 under section 104(a) of the Mine Act, alleging a violation of section 75.380(d)(1) of the Secretary's safety standards. The citation states, in part:

> The Alternate escapeway out of 2 North Mains is not being maintained. The floor of the escapeway from 3XC to the load point just outby of 4XC in the # 1 entry has bottom irregularities with trip hazards that are covered with muck that is wet[,] sloppy[,] and up to 8 inches deep.

(Ex. G-11). Inspector Brewer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that eight persons would be affected. Section 75.380(d)(1) of the Secretary's regulations requires that each escapeway be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons[.]" 30 C.F.R. § 75.380(d)(1). The Secretary proposed a penalty of $2,678.00 for this citation.

1. Summary of Testimony

Inspector Brewer issued the citation on June 2, 2009, because the alternate escapeway for the 2 North Mains section was not maintained in a safe condition in violation of section 75.380(d)(1). (Brewer Dep. at 26). This escapeway was covered in a deep "muck" that consisted of a mixture of coal dust, loose coal, rock, and rock dust, which formed a sticky, mud-like substance that Inspector Brewer testified nearly pulled his boots off. (Brewer Dep. at 27). The floor underneath the muck was irregular, presenting trip and fall hazards. (Brewer Dep. at 29). The muck was up to 8 inches deep and covered an area 7 feet wide and 180 feet long. (Brewer Dep. at 56). Inspector Brewer believed that the deepest section of the muck would be an area traveled by miners in an emergency. (Brewer Dep. at 69).

Inspector Brewer testified that this citation was S&S. (Brewer Dep. at 32). The hazard caused by these conditions was slipping and tripping due to the muck on the floor. *Id*. The Inspector testified that an injury was reasonably likely to occur as a result of the cited condition due to the depth and "stickiness of some of that mud," as well as the possibility of low visibility or hurried movements probable during an emergency situation. (Brewer Dep. at 34). The muck extended the entire width of the escapeway and the inspector believed that escaping miners could not avoid it. (Brewer Dep. at 34-35). The most likely injury to result from this condition,

according to the inspector, would be sprains or broken bones, which would result in lost work days or restricted duty. (Brewer Dep. at 35).

Inspector Brewer designated this citation as resulting from moderate negligence. (Brewer Dep. at 37). Both the section foreman who moved the belt and the mine examiner should have known of this condition. *Id*. The area became the secondary escapeway after a belt move that occurred several hours prior to the inspection; Inspector Brewer believed that this mitigated Respondent's negligence. (Brewer Dep. at 36). He also acknowledged that there were no fire hazards present. *Id*. Every miner in the working section was affected by this hazard because all eight men would have to escape in the event of an emergency. (Brewer Dep. at 33).

Peter Darland, who is employed in Oxbow's safety department, accompanied the inspector. (Tr. 349, 351). Darland testified that the secondary escapeway had "sloppy mud" but was "not impassable." (Tr. 355-56). He testified that the muddy area was 200 feet long, and 3 or 4 inches deep in most places. (Tr. 356). A section that was about 20 feet long, however, was 8 inches deep. *Id*. Darland had "very little" difficulty moving through the mud, and he claimed the inspector told him his boot got stuck after standing for "two to five minutes, maybe." (Tr. 357). He asserted that the crew is accustomed to working in mud and could hold on to the belt structure or lifeline for support if necessary and therefore he did not believe that an injury was reasonably likely as a result of this condition. (Tr. 358, 363). Darland also believed that lost workdays or restricted duty type injuries were unlikely because "the mud pretty much cushions your fall" in this area. (Tr. 359). Darland affirmed that the company was mining coal when Inspector Brewer issued the citation and that the belt move had been completed that same shift. (Tr. 354, 361).

2. <u>Discussion and Analysis</u>

The Secretary argues that Respondent violated section 75.380(d)(1) by failing to maintain its alternate escapeway in a safe condition. Inspector Brewer testified that a mud-like substance covered the entire width of the escapeway for a distance of about 180 feet, reaching 8 inches in depth in some places. The floor was irregular underneath the mud.

Citation No. 6687977 was S&S, according to the Secretary. The Secretary states that the violation of section 75.380(d)(1) contributed to the hazard of slipping, tripping or falling in the event of an emergency, which could cause sprains or broken bones. The hazard was reasonably likely to cause an injury due to the depth of the mud. In the event of an emergency, miners would be in a hurry and could face reduced visibility.

The Secretary next argues that Respondent's moderate negligence caused the cited conditions. The operator should have known of the condition, but Inspector Brewer found moderate negligence because the condition did not exist for an extended period of time.

Respondent argues that the cited escapeway did not violate the safety standard because it was readily passable; Citation No. 6687977 was also not S&S. It is unlikely that a miner would be injured by the cited conditions, as the miners are accustomed to working in mud. Darland testified that injuries from muddy conditions are rare. Respondent did not violate section 75.380(d)(1) and if it did, Citation No. 6687977 is not S&S.

I find that Respondent violated section 75.380(d)(1) by failing to maintain the alternate escapeway in the 2 North Mains section in a safe condition. I credit the testimony of both Inspector Brewer and Darland that mud from 3 to 4 inches deep covered the entire width of the escapeway for at least 180 feet and that mud that was 8 inches deep covered a distance of 20 feet. With the uneven floor and the thick cover of mud, miners could easily suffer sprains or broken bones. During an emergency, the delay caused by the mud could lead to a variety of injuries including smoke inhalation and injuries as a result of tripping and falling.

I find that Citation No. 6687977 was S&S. The combination of the length of the muddy area, the depth of the mud, and the uneven floor underneath the mud is enough to make this condition reasonably likely to cause an injury as serious as a sprained or broken ankle. I credit Inspector Brewer's testimony that the mud was a hazard that impeded movement and almost removed his boot. If the mud was deep and substantial enough to cushion the fall of a miner, as Darland testified, then it is certainly deep enough to impede movement, conceal hazards on the uneven floor, and create a tripping and falling hazard.

The Commission, furthermore, has held that for "the failure to maintain an escapeway in safe condition . . . the applicable analysis under *Mathies* involves consideration of an emergency." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2366 (Oct. 2011) (Internal citations omitted). Respondent's violation of section 75.380(d)(1) contributed to the hazard of impeding the escape of miners in the event of an emergency. This mud would be difficult to traverse in the best of conditions and could be disastrous in an emergency situation where miners may be carrying other miners, visibility may be poor, and there could be disorientation and panic amongst the escaping miners. I credit Inspector Brewer's testimony that this hazard was reasonably likely to cause serious injuries in the form of sprains or broken bones due to tripping or falling. It could also contribute to injuries that include smoke inhalation during a fire. The condition cited in Citation No. 6687977 was reasonably likely to lead to a serious injury during normal mining conditions or in the event of an emergency; Citation No. 6687977 was S&S.

I find that the Moderate negligence designation for the citation is also appropriate. The condition was obvious and the Respondent should have known of it. The cited condition was extensive. The inspector considered that the condition did not exist for a long period of time, which mitigates Respondent's negligence. A penalty of $3,000.00 is appropriate for this violation.

G. Citation No. 6688271; WEST 2009-1353

On June 9, 2009, Inspector Bradley J. Serazio issued Citation No. 6688271 under section 104(a) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. The citation states, in part:

> Loose coal and dry coal fines were allowed to accumulate in the pump and pump motor compartments and in the cutter head motor compartment on the 27-10 continuous mining machine located in the No. 3 ent[r]y, inby the last open crosscut of the North West Mains Section. The accumulations measured approximately 12 inches deep and were packed around the motors.

(Ex. G-3). Serazio determined that an injury was highly likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that two persons would be affected. Section 75.400 of the Secretary's regulations requires that "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein." 30 C.F.R. § 75.400. The Secretary proposed a penalty of $3,996.00 for this citation.

1. Summary of Testimony

Inspector Serazio[4] issued Citation No. 6688271 on June 9, 2009, because the cover of the cutter head motor of the electric-powered continuous miner was full of accumulations of loose coal and coal fines in violation of section 75.400. (Serazio Dep. at 76, 84). The accumulations were combustible. (Serazio Dep. at 78). The cited piece of equipment was located in the active workings of the North West Mains section at the time. (Serazio Dep. at 76, 83). The accumulations were 12 inches deep and compacted around the motor. (Serazio Dep. at 79). The motor box was roughly 18 inches by 18 inches by 12 inches deep, with 2 inches of clearance around it in the compartment. (Serazio Dep. at 112). The compartment was filled to the top of the motor with solid coal fines and loose coal. Serazio had to dig into the accumulations with a screwdriver in order to use a tape measure to measure the depth of the coal. (Serazio Dep. at 79-80). Although Serazio suggested that four motor compartments had accumulations, he testified that only one compartment had extensive, packed accumulations. (Serazio Dep. at 113-14).

Serazio designated Citation No. 6688271 as S&S. The coal accumulated around the motor, which is a heat source. (Serazio Dep. at 78, 81, 84). Serazio testified that it was highly likely that a miner would be injured due to the heat of the engine or a spark igniting the accumulations, which is a scenario that has caused "many disasters[.]" (Serazio Dep. at 85). He was also worried that coal would enter the engine cover and actually get into the engine itself. (Serazio Dep. at 87). This machine was used on both production crews, increasing the opportunities for a fire to ignite. (Serazio Dep. at 98). A fire would lead to burns or smoke inhalation, which Serazio testified are injuries that cause lost workdays or restricted duty. (Serazio Dep. at 85).

Serazio designated Citation No. 6688271 as the result of Respondent's moderate negligence. Based upon the amount of hard-packed coal, Serazio believed that the hazard existed for more than one shift and he believed that it existed for as long as four shifts. (Serazio Dep. at 86, 90). He stated that it was the responsibility of the continuous miner operator to address these conditions and both the operator and the foreman in the section should have known of these conditions. (Serazio Dep. at 86, 93). Two people, the miner operator and the operator's helper, were exposed to this hazard. (Serazio Dep. at 84).

John Davis, currently a miner operator and formerly a roof bolter at Elk Creek, testified about the cleaning and systems of the continuous miners at Elk Creek. Davis testified that the

[4] Inspector Serazio was unavailable to testify at the hearing and his testimony was taken at a deposition by agreement of the parties with the consent of the judge. He was no longer employed by MSHA at the time of his deposition.

engine compartment could fill with coal of various sizes within the first five or ten minutes of operation. (Tr. 367). He testified that water sprays surrounded the engine area and were active whenever the miner operated. (Tr. 368). There is fire suppression on Oxbow's continuous miner machines. (Tr. 369). Davis had no personal knowledge of the specific conditions underlying the citation. (Tr. 365-66, 370).

Justin Evans, a mine engineer at Elk Creek Mine, testified that he does not believe that a cutter head motor produces enough heat to ignite coal. (Tr. 373). Evans entered the Northwest Mains on June 12, 2009, and took a temperature reading of a cutter head motor and collected a mixture of wet, dry, and moist coal fine samples. (Tr. 373, 384). Using a "meat thermometer" he found that the motor's temperature was 106 degrees Fahrenheit, but several minutes passed between when the motor was turned off and when Evans took his readings. (Tr. 375, 386-87). Evans placed these coal fine samples into a burn chamber, heated them, inserted a thermometer into the fines, and recorded his findings. (Tr. 376-77). Evans testified that 400 degrees Fahrenheit was the lowest temperature where the coal showed evidence of combustion, leading Evans to believe that normal mining operations would not ignite the coal in the cutter head motor. (Tr. 377; Ex. R-14). Evans admitted that he is not an expert in combustion and that he had no first-hand knowledge of the conditions that Serazio cited on June 9. (Tr. 379-80). In his experiment, Evans did not tightly pack the coal fines together into the burn chamber. (Tr. 384).

2. Discussion and Analysis

The Secretary argues that Respondent committed an S&S violation of section 75.400 by allowing coal and coal fines to accumulate in the continuous miner machine's head cutter motor. Coal packed around the hot engine creates a fire or explosion hazard. The heat of the motor is highly likely to start a fire and the continuous miner works at the face where methane is liberated. Serious injuries including burns and smoke inhalation are the most likely outcome of this violation. Regardless of any fire suppression systems in place, this violation is S&S. Respondent did not produce any witnesses with knowledge of the conditions; Evans conducted an unreliable experiment and Davis testified in generalities.[5]

The Secretary believes that Citation No. 6688271 resulted from Respondent's moderate negligence. The section boss should have known of the condition, the condition existed for longer than one shift, and the Inspector testified that he was told by the operator of the continuous miner that the accumulations on Respondent's machines were a known problem.

Respondent argued that Citation No. 6688271 was not correctly designated as "highly likely" or S&S. There is no factual basis to believe that the heat of the engine could ignite the coal fines; Evans' experiment proves this. Citation No. 6688271 should therefore be modified to be "unlikely." Even if a fire could ignite, the fire suppression systems on the continuous miner would make an injury unlikely. Citation No. 6688271 was not S&S and should be modified according to the above arguments.

[5] The Secretary argued with respect to several citations that I should apply the "missing witness rule" because Oxbow did not call the operator of the piece of equipment involved to testify at the hearing. I deny the Secretary's requests that I draw inferences based upon the fact that equipment operators did not testify.

I find that Respondent allowed coal and coal fines to accumulate in the cutter head motor compartment of the cited continuous miner in violation of section 75.400. The combustible coal accumulations contributed to a fire hazard. Fires cause many serious injuries, including burns and smoke inhalation. Although the Secretary did not show that an injury was highly likely to occur as a result of the fire hazard, I credit Serazio's testimony that the conditions were reasonably likely to lead to a serious injury. I do not credit Evans' testimony that the cited condition posed no danger to miners.[6] The motor compartment on the cited piece of equipment is an ignition source because it produces heat and was surrounded by dry, packed coal and coal fines. Citation No. 6688271 was reasonably likely to cause a serious injury and was an S&S violation of section 75.400.

I find that Citation No. 6688271 resulted from Respondent's moderate negligence. The amount of accumulated coal, the tightly packed nature of the accumulations, and Serazio's testimony all suggest that the cited condition existed for longer than one shift. The citation is properly designated as the result of Respondent's moderate negligence because Respondent should have known of the condition. Citation No. 6688271 is **MODIFIED** from "highly likely" to "reasonably likely." A penalty of $4,000.00 is appropriate for this violation.

H. Citation No. 6688284

On June 17, 2009, Inspector Serazio issued Citation No. 6688284 under section 104(a) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. The citation states, in part:

> The Wagner can setter, #24-25, located in E 4 to 3 XC 7 NWM's was found with so many oil leaks that it was tagged out of service and will not be moved until the major leak in the boom cylinder is repaired. The oil was measured to be 3 inches deep, by 8.5 inches long, and 6.5 inches wide.

(Ex. G-9). Serazio determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The Secretary proposed a penalty of $5,961.00 for this citation.

1. Summary of Testimony

Serazio testified that on June 17, 2009, he issued Citation No. 6688284 for a violation of section 75.400 due to hydraulic oil accumulations and leaks relating to Wagner can setter #24-25. (Serazio Dep. at 207-09). Serazio testified that he measured the puddle of oil under the hydraulic tank with his tape measure, finding that it was 8.5 inches long, 6.5 inches wide, and 3 inches deep. (Serazio Dep. at 212). The hydraulic tank was covered with oil. (Serazio Dep. at

[6] The testimony of Evans concerned an experiment that he performed several days after the issuance of the citation. (Ex R-14). Evans had no first-hand knowledge of the cited conditions; there is no way for Evans to know if the conditions of his experiment were the same as the conditions cited by Serazio. The experiment performed by Evans, furthermore, was done in a haphazard and unsophisticated manner and I do not credit the results.

217). The tank looked "as if they filled it up" with oil and "just poured it in and poured it all over the top of the tank." (Serazio Dep. at 207). The condition was located in an active area of the mine. *Id*.

Inspector Serazio testified that Citation No. 6688284 was S&S. (Serazio Dep. at 217-18). The oil produced fire, slipping, and contact hazards. (Serazio Dep. at 222-23). Hydraulic oil is flammable and sticks to coal fines and dust. (Serazio Dep. at 209). Serazio believed that these hazards were reasonably likely to cause an injury "because there is that possibility that it's going to – it could happen." (Serazio Dep. at 221). He also stated that "there's a potential for that to happen, so it's reasonably likely it could happen." (Serazio Dep. at 257). Friction from the two pivot points or contact with a hot surface such as the engine compartment could ignite the oil. (Serazio Dep. at 219, 244). Oil covered the center pivot point, which according to Serazio could cause the point to move smoothly or cause friction. (Serazio Dep. at 215). The motor compartment was about 2 feet from the hydraulic tank, but was above the tank; Serazio testified that the hydraulic oil would have to spray up and onto the engine compartment to make contact with it. (Serazio Dep. at 243-44, 253). He also testified that hydraulic oil that enters the body can cause serious injuries. (2 Serazio Dep. at 23). All these hazards could lead to injuries causing lost workdays or restricted duty. (Serazio Dep. at 224). Serazio testified that he did not know the ignition point of hydraulic oil or how often Respondent used the can setter. (Serazio Dep. at 227, 245).

Serazio testified that Citation No. 6688284 resulted from the operator's high negligence. (Serazio Dep. at 225). Serazio noticed the oil the night before and put an "X" on the equipment to see if the oil would be cleaned up. According to the inspector, the oil was not cleaned up, which convinced him that the condition existed for at least four shifts. *Id*. He further testified that the amount of dust that accumulated in the oil suggested that it had been there for more than one day. (Serazio Dep. at 209). From the initial time that Serazio saw the can setter to when he wrote the citation, the can setter had moved and he testified that the accumulations should have been addressed at that time. (Serazio Dep. at 228). The condition was obvious. (Serazio Dep. at 226). Both the operator of the piece of equipment and his supervisor should have known of the condition, according to Serazio. (Serazio Dep. at 225).

At the time that Serazio issued Citation No. 6688284, John Davis worked on the crew that used the cited can setter. (Tr. 389-90). He testified that the can setter has fire suppression in the "transmission, motor, fuel tank, and hydraulic." (Tr. 393). Davis testified that the can setter would be washed and all accumulations removed before every use and during shifts as necessary. (Tr. 396). Davis asserted that he washed Wagner can setter #24-25 on June 16, 2009. (Tr. 396; Ex. R-21).

James Alfred Blue was the foreman of the crew that was responsible for using the cited can setter when Serazio issued Citation No. 6688284. (Tr. 402). Blue did not believe that the cited condition was reasonably likely to cause an injury because he did not believe that a fire would start. (Tr. 406). The can setter automatically shuts off when it gets too hot. *Id*. He did admit, however, that the can setter creates steel on steel contact while in operation. (Tr. 413). Blue believed that the can setter was washed during the swing shift on June 16, 2009, but had no direct knowledge that it was. (Tr. 414; Ex. R-19,20).

2. Discussion and Analysis

The Secretary argues that Respondent violated section 75.400 by allowing combustible materials to accumulate on a piece of equipment. The hydraulic oil accumulated under the machine, on the machine, and close to the engine. The accumulations existed for more than a day, as Serazio marked the accumulations the day before he issued the citation. The can setter was moved while the accumulations were present.

The Secretary also asserts that Citation No. 6688284 was S&S because the accumulations of hydraulic oil were reasonably likely to cause a serious injury. The accumulations of hydraulic oil created fuel for a fire and friction served as an ignition source, as the metal jaws of the can setter regularly contacts the metal can and the metal mesh on the mine roof. Hot surfaces, such as the engine, can also ignite a fire and served as an ignition source of fires in other mines between 1991 and 1999. A fire is likely to cause serious injuries including smoke inhalation and burns. Hydraulic oil, absent a fire, poses a trip and fall hazard.

Respondent should have known about the cited accumulations, which were the result of Respondent's high negligence, according to the Secretary. The condition was obvious, severe, and extensive. The condition existed for at least four shifts. The shift supervisor and fire boss for each shift should have known of this condition. Witnesses and exhibits for the Respondent were either unknowledgeable or unreliable and should be given no weight.

Respondent argues that Citation No. 6688284 was not S&S because there was no ignition source to ignite the accumulations and the condition was not reasonably likely to cause a serious injury. Serazio did not specify how friction within the boom cylinder would ignite the hydraulic fluid and he had no knowledge of when the cylinder was last lubricated. The diesel motor is protected by fire suppression equipment. The condition did not exist for a significant amount of time; Oxbow offered testimony and maintenance records showing that the can setter is cleaned regularly prior to use. Citation No. 6688284 should be modified to "non-S&S," "no lost workdays," and "low negligence."

I find that the cited hydraulic oil accumulations represent a violation of section 75.400, but Citation No. 6688284 was not S&S. The Secretary established the violation, that the cited condition contributed to a fire hazard, and that the resulting injury would be serious. The Secretary, however, did not meet his burden of showing that an injury was reasonably likely to occur as a result of this hazard. "The Secretary bears the burden of proving that a violation is S&S." *Peabody Coal Co.*, 17 FMSHRC 26, 28 (Jan. 1995). The *Mathies* test does not require the Secretary to prove that a hazard is "more probable than not" to satisfy the third standard. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). He must, however, show that there is a reasonable likelihood and not merely a possibility that an event "could" lead to an injury. *Peabody Coal Co.*, 17 FMSHRC 29. The Secretary identified hypothetical ignition sources, but failed to show that those sources were likely to ignite a fire. Serazio testified that the hydraulic oil would have to "spray" onto the motor compartment, but his description suggested that the accumulations came from the tank overflowing or being overfilled, not spraying. In reference to the pivot points, Serazio stated that the presence of hydraulic oil on the middle pivot point could create friction and therefore ignition, but also testified that it could help the pivot point to move smoothly, which would negate any chance of friction. The steel on steel contact referred to by the Secretary would occur at the front of the can setter, on the opposite end of the vehicle from

the accumulations. Serazio testified that the citation was S&S "because there is that possibility that it's going to – it could happen." And that "there's a potential for that to happen[.]"[7] A mere possibility or the fact that a hazard "could" cause an injury does not equate to a reasonable likelihood. Although Serazio used the words "reasonably likely," his explanations of the term show that the hazard associated with the cited condition was possible, but not reasonably likely to lead to an injury. [8]

I also find that Citation No. 6688284 resulted from Respondent's high negligence. Based upon Serazio's testimony and measurements, it is clear that the condition was obvious and extensive. I credit Serazio's testimony that the condition existed for four shifts and that the shift supervisor and fire boss for each shift should have known of this condition. Respondent's evidence pertaining to the cleaning practices of the mine was generally credible but it failed to convince me that the cited equipment was actually cleaned in this instance. I credit the inspector's testimony on this issue. Citation No. 6688284 is **MODIFIED** from "S&S" to "non-S&S." A penalty of $5,000.00 is appropriate for this violation.

I. Citation No. 6688277; WEST 2009-1353

On June 10, 2009, Inspector Serazio issued Citation No. 6688277 under section 104(a) of the Mine Act, alleging a violation of section 77.1104 of the Secretary's safety standards. The citation states, in part:

> Coal fines and coal dust were allowed to accumulate in both battery boxes on the CAT D10 bulldozer located in the stockpile area. This condition would be reasonably likely to result in a fire during continued normal mining operations due to the accumulations being on an ignition source.

(Ex. G-5). Serazio determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 77.1104 states "[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." 30 CFR § 77.1104. The Secretary proposed a penalty of $946.00 for this citation.

1. Summary of Testimony

Inspector Serazio testified that he issued Citation No. 6688277 on June 10, 2009, because both battery boxes of the Cat D10 bulldozer were full of dry coal fines and coal dust. (Serazio Dep. at 120, 125). Each battery box is 24 inches long, 24 inches wide and 10 inches deep, with about 4 inches of space on each side between the box and the battery itself; this space was filled with coal accumulations. (Serazio Dep. at 123-25). The accumulations were dry and tightly

[7] Regarding other citations in this hearing, Serazio used stronger language to describe what made particular citation "reasonably likely" to cause injury. (Serazio Dep. at 34, 38, 131).

[8] Serazio provided no credible explanation or argument to show that hydraulic oil is reasonably likely to cause an injury based upon contact or slipping.

packed into the box. (Serazio Dep. at 124-25). The bulldozer was located by the stockpile area. (Serazio Dep. at 120).

The inspector concluded that the condition was S&S. The heat of the battery and the possibility that the battery might spark made it an ignition source that created a fire hazard when combined with the coal accumulations. (Serazio Dep. at 125). It is reasonably likely that a miner operating the bulldozer would have been injured. (Serazio Dep. at 130-31). Serazio designated this hazard as reasonably likely to cause an injury resulting in lost work days or restricted duty due to the possibility of a fire causing smoke inhalation, burns, or acid burns. (Serazio Dep. at 132-33). A battery was located on both the right and left sides of the operator. (Serazio Dep. at 130). Serazio testified that the cab where the operator sits would provide some protection from a fire and escape would be possible for the dozer operator unless both batteries caught fire simultaneously. (Serazio Dep. at 143-44).

Serazio testified that the citation resulted from the operator's moderate negligence. (Serazio Dep. at 135). The miner operating the piece of equipment and the surface boss both should have known of the condition. *Id*. The condition existed for longer than one shift. (Serazio Dep. at 127).

Terry Hayes testified that he did not think that a serious injury was likely to occur because the fire suppression system on the bulldozer would shut down the equipment if it became too hot, a miner could easily escape, and the miner operating the equipment was protected by glass and equipped with a self-rescuer. (Tr. 445). He did admit that the accumulations posed a fire hazard. *Id*.

2. Discussion and Analysis

The Secretary argues that Respondent violated section 77.1104. The battery boxes of the Cat D10 bulldozer were full of coal fines and coal dust, which posed a fire hazard when combined with the battery. Respondent's witness, Hayes, admitted that the coal posed a fire hazard.

The Secretary also argues that Respondent's violation of section 77.1104 was S&S. Each battery gives off heat and is an ignition source. Respondent uses the bulldozer every day and the accumulations in both boxes double the chance of ignition. NIOSH studies show that there is a reasonable likelihood that the cited condition could contribute to a fire that would result in injuries including smoke inhalation and burns. (Sec'y Br. 59-60). The presence of fire suppression systems or multiple egress options does not undermine an S&S determination.

According to the Secretary, the cited condition resulted from Respondent's high negligence, although the citation designates Respondent's negligence as moderate. A pre-shift examiner should have found and corrected the condition. Respondent offered no mitigating circumstances. Respondent admitted that it was aware of problems with accumulations on its bulldozers.

Respondent argues that an injury was not reasonably likely and any injury that did occur would not be serious. Fire suppression, fuses that prevented overheating of the batteries, and a cab made of reinforced glass and steel designed to protect the miner operating the equipment made an injury unlikely.

I find that the coal accumulations in the battery boxes of Cat D10 bulldozer created an S&S violation of section 77.1104. The combustible coal accumulations contributed to the hazard of a fire. Fires cause many serious injuries, including burns and smoke inhalation. Both Serazio and Hayes agreed that the accumulations posed a fire hazard, but they disagreed as to whether an injury was likely to occur. I credit Inspector Serazio's testimony that it was reasonably likely to lead to a serious injury. Both batteries on the cited piece of equipment are ignition sources because they produce heat and both batteries were surrounded by dry, packed coal fines and coal dust. The presence of these accumulations prevented air from circulating around the batteries, which increased the potential for overheating. It is reasonably likely that a fire-related injury would occur as the result of a single battery in this condition; two batteries are, therefore, even more likely to cause an injury.

I find that Citation No. 6688277 resulted from the moderate negligence of Respondent because its managers should have known of the cited condition. A penalty of $1,000.00 is appropriate for this violation.

J. Citation No. 6688268; WEST 2009-1219

On June 8, 2009, Serazio issued Citation No. 6688268 under section 104(a) of the Mine Act, alleging a violation of section 77.1104 of the Secretary's safety standards. The citation states:

> Combustible rags, Styrofoam cups, paper towels and clothing articles were allowed to accumulate around the 150 PSI oil lubricated air compressor located in the Lamp Repair room in the Lamp house building. This area also contained significant amounts of coal fines and coal dust on and around the air compressor. Furthermore, two flammable oxygen cylinders were being stored one foot away from the air compressor. This condition was so extensive that it would be obvious to even the most casual observers.

(Ex. G-1). Serazio determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $1,412.00 for this citation.

1. Summary of Testimony

Serazio issued Citation No. 6688268 on June 8, 2009, because a stack of combustible materials in the lamp repair room, including rags, styrofoam, paper towels, and cloth was next to an air compressor. (Serazio Dep. at 23). This pile of materials was about 1.5 feet tall and 2.5 feet wide. (Serazio Dep. at 27). A table in the room, the material pile, and the compressor itself were all covered in a fine layer of coal fines and coal dust. (Serazio Dep. at 28, 30). Two unsecured bottles of oxygen were also in the area. (Serazio Dep. at 24).

Serazio testified that Citation No. 6688268 was S&S. (Serazio Dep. at 34). The cited accumulations presented a fire hazard because all three parts of the fire triangle were present: oxygen, heat from the air compressor, and fuel from the accumulations. *Id*. The air compressor

could ignite the accumulations. (Serazio Dep. at 30-31). In the event of a fire, a miner using the air compressor is reasonably likely to sustain injuries ranging from burns to smoke inhalation because of his likely proximity to the fire. (Serazio Dep. at 38). Serazio believed that burns sustained as a result of the cited conditions could be permanently disabling. (Serazio Dep. at 40). Serazio admitted that he did not know the operating temperature of the air compressor, how often the compressor was used, or the ignition temperatures of any of the accumulations. (Serazio Dep. at 61).

Serazio designated this citation as the result of Respondent's moderate negligence because the operator of the air compressor should have known of the hazard. (Serazio Dep. at 44-45). Based upon the amount of materials stacked in the corner and the accumulations of coal dust and fines, Serazio surmised that the accumulations existed for more than one shift. (Serazio Dep. at 37). Serazio also testified that the accumulations were obvious. (Serazio Dep. at 45).

Terry Hayes testified that he did not believe that an injury was reasonably likely to occur because, even if a fire ignited, a miner could simply walk out of the door that was 5 feet from the desk. (Tr. 433, 435). Hayes testified that the lamp repair room was equipped with a fire extinguisher and that there were fire extinguishers in other parts of the building as well. (Tr. 435). He noted that there was a hose directly outside of the room and another hose within reach of the room. *Id*. He also stated that the lamp repair room had cement floors and that the desk in the room was made of steel. (Tr. 433). Hayes admitted that the air compressor posed a fire hazard. (Tr. 438).

2. <u>Discussion and Analysis</u>

The Secretary argues that Respondent violated section 77.1104 by allowing combustible materials to accumulate in its lamp repair room. Serazio observed rags, Styrofoam cups, paper towels, and clothing articles in a pile that was covered with coal fines and coal dust and was touching the air compressor in the lamp room. The pile was underneath the desk where the lamp repairman worked. Coal fines and coal dust covered the desk and the air compressor itself. The compressor, which is a heat source, was also one foot away from two unsecured oxygen bottles. Respondent did not produce the lamp repairman; therefore, the court should apply the missing witness rule.

The Secretary argues that Respondent's violation of section 77.1104 was S&S. The cited accumulations contribute to the discrete safety hazard of a fire that could obviously cause serious injury to a miner. All three points of the fire triangle existed in a small room and both Respondent and NIOSH studies agree that air compressors can start fires. The oxygen containers could become projectiles in the event of a fire. The lamp repairman works directly next to the accumulations, could be trapped in the room, or could be injured attempting to fight the fire. It is reasonably likely that this fire hazard could have caused a serious injury.

The Secretary contends that the violation was the result of Respondent's moderate negligence. The condition was obvious, the lamp repairman should have known of the condition, and Respondent offered no mitigating factors.

Respondent argues that the Secretary failed to meet his burden of proof to show that Citation No. 6688268 was S&S because a serious injury was not reasonably likely to occur as a

result of the hazard. A fire was unlikely to occur. Serazio testified that he did not know how long or how often the air compressor operated and he did not known the ignition temperature of any of the accumulations. No serious injury would occur because any miner working in the room could simply walk out of the room in the event of a fire. There was also ample fire-fighting equipment available to extinguish the fire quickly.

I find that Citation No. 6688268 was a violation of section 77.1104 and was S&S. The cited accumulations contributed to a fire hazard, which could cause serious injuries including smoke inhalation and burns. Even though a miner in the lamp repair room would have ample means of egress and firefighting in the event of a fire, a fire is still reasonably likely to cause serious injuries to miners fighting the fire. I credit the testimony of both Serazio and Hayes that air compressors can ignite fires. If an air compressor presents a fire hazard, it is reasonably likely that an air compressor would ignite a fire when it was adjacent to and contacting a variety of combustible materials that were covered in coal fines and coal dust. The compressor itself was covered in coal accumulations. Respondent's argument that even if a fire occurred it would not cause serious injury fails. The Mine Act requires fire suppression systems to be in place because of the hazard posed by fires, but their presence does not remove the fact that a fire is reasonably likely to cause serious injury to miners. *See Buck Creek Coal Co.*, 52 f.3d at 136. The argument that a readily available means of egress negates the S&S designation also fails. In this situation, the fire would ignite directly at the feet of the miner. Even if the miner managed to escape the fire initially, Hayes testified that he might return to fight the fire, endangering himself once again. The unsecured oxygen cylinders presented a significant hazard if a fire were to start. The accumulations cited in Citation No. 6688268 were reasonably likely to contribute to a fire that would cause a serious injury.

Citation No. 6688268 resulted from Respondent's moderate negligence. Flammable rags and other combustible materials that are covered in coal dust and piled on a heat source are an obvious hazard, even to a person with no knowledge of mine safety. I also credit Serazio's testimony that the cited accumulations existed for more than one shift, because the pile of accumulations measured 1.5 by 2 feet. An obvious hazard that existed for a significant period of time and posed a fire hazard is certainly enough to support the finding of moderate negligence for Citation No. 6688268. A penalty of $1,400.00 is appropriate for this violation.

K. Citation No. 6688282

On June 16, 2009, Inspector Serazio issued Citation No. 6688282 under section 104(a) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. The citation states, in part:

> Coal fines, rock dust and dirt were allowed to accumulate in the battery box of the Eimco 975 material hauler # 24-19. There were so much accumulations in the battery box that it pushed the battery up against the fire suppression nozzle . . . rendering the fire suppression useless.

(Ex. G-7). Inspector Serazio determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty.

Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The Secretary proposed a penalty of $5,961.00 for this citation.

1. Summary of Testimony

Serazio testified that he issued Citation No. 6688282 as a violation of section 75.400 because an Eimco 975 material hauler that was parked on the surface had accumulations of rock, rock dust, and coal fines in its battery box. (Serazio Dep. at 163). Serazio did not test the mixture for combustibility, but he stated that the top of the battery was covered solely by coal fines and included no other material. (Serazio Dep. at 198, 204). The accumulations forced the battery out of the center of the battery box, pushing the battery against the fire suppression system. (Serazio Dep. at 167). The battery represented a heat source that could ignite a fire. (Serazio Dep. at 173).

Serazio testified that the citation was S&S. (Serazio Dep. at 171-72). The combination of the battery and the coal fines created a fire hazard that could also lead to injuries associated with an explosion from debris and acid. (Serazio Dep. at 165, 172). Serazio testified that the location of the battery would prevent the fire suppression system from activating in the event of a fire. (Serazio Dep. at 167). The proximity of the equipment operator to the battery made it reasonably likely that the operator would sustain an injury as a result of the hazard, according to Serazio. (Serazio Dep. at 172). A fire or explosion would result in lost workday or restricted duty injuries. *Id*.

Serazio believed that the violation was the result of Respondent's high negligence. (Serazio Dep. at 175-76). The hard-packed, dry nature of the accumulations convinced Serazio that the condition existed for longer than one shift and maybe even several days. (Serazio Dep. at 174). Serazio testified that he spoke with mine management about this type of condition in the opening conference. (Serazio Dep. at 175). He also stated that this violation was the result of high negligence while similar violations were the result of moderate negligence because he found the same problem reoccurring over the course of his inspection. (Serazio Dep. at 182). Management should have been looking for this type of violation. (Serazio Dep. at 183).

Terry Hayes testified that batteries in the material haulers at Elk Creek were covered by rubber mats to prevent shorts. (Tr. 446). He testified that he did not believe that the accumulations would stop the 500 PSI water suppression nozzle from activating, but he also had no personal knowledge of the condition cited in Citation No. 6688282. (Tr. 449-50). He mentioned that other fire protection systems on the equipment included a fuse protection system and a manual fuel shutoff. *Id*. Hayes testified that he did not believe the condition was reasonably likely to cause an injury because of the presence of fire suppression systems and the ease with which a miner could flee the equipment. (Tr. 450).

2. Discussion and Analysis

The Secretary argues that Respondent committed an S&S violation of section 75.400 by allowing combustible materials to accumulate in the battery boxes of a material hauler. The battery boxes were full of dry, solidly-packed accumulations that contained dirt, rock dust, and coal fines. The accumulations forced the battery, which is an ignition source, to displace the fire suppression. Respondent presented no direct evidence to contradict Serazio's testimony.

The Secretary believes that the accumulations contribute to a fire hazard, which is reasonably likely to cause a serious injury. Once again, the battery served as an ignition source and the coal fines served as fuel. A fire could cause the battery to explode, releasing debris or acid and seriously injuring the miner operating the equipment. As stated in regard to previous citations, fire suppression does not negate an S&S determination.

According to the Secretary, the cited accumulations resulted from Respondent's high negligence. Serazio addressed accumulation violations as a problem area in the opening conference and cited Respondent for several other accumulation violations in the weeks prior to the issuance of Citation No. 6688282, placing Respondent on notice. Respondent produced no mitigating circumstances. Respondent should have known of these conditions, was on notice, and did not provide any mitigating circumstances, which warranted a high negligence designation for Citation No. 6688282.

Respondent argues that Citation No. 6688282 was not S&S because the equipment had fire suppression and the Secretary failed to show that the accumulations were combustible. Inspector Serazio's testimony and evaluation concerning the cited conditions should be disregarded because he had insufficient knowledge concerning the material hauler to make his testimony credible. The cited machinery has automatic and manual fire protection as well as a rubber mat that covers the battery. The position of the battery against the nozzle would not stop the fire suppression in the battery compartment from activating.

I find that Respondent violated section 75.400; coal dust accumulated in the battery compartment of a diesel powered hauler, which is an S&S violation of the standard. The cited coal accumulations contributed to a fire hazard that was reasonably likely to cause serious injury to miners. As stated above with reference to other citations, Respondent's arguments pertaining to fire suppression does not totally eliminate the hazard of a fire starting and, in this instance, does not affect the S&S designation for this citation. Respondent did not present direct evidence or testimony concerning the cited conditions; testimony regarding the general practices of Elk Creek does not negate the facts underlying the citation. I credit Serazio's testimony concerning both the conditions and his evaluation of those conditions. Although the accumulations included dirt and rock and Serazio did not test the accumulations for combustibility, he testified that the there was a layer of coal on top of the battery that was not mixed with rock or dirt. This layer of coal fines rested directly on top of the battery, which is a heat source that could ignite the coal. Citation No. 6688282 as violation of section 75.400 and was reasonably likely to cause a serious injury.

I credit Inspector Serazio's testimony as to Oxbow's negligence and I affirm his high negligence determination. A penalty of $6,000.00 is appropriate for this violation.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Prior to the hearing, the parties settled Citation No. 6688269 in Docket No. WEST 2009-1219 in the amount shown below. I have considered the Assessed Violation History Reports, which are not disputed by Oxbow. At all pertinent times, Oxbow was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision

will not have an adverse effect on Oxbow's ability to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
WEST 2009-1219		
6688118	75.1731(b)	$1,000.00
6688119	75.1731(a)	1,000.00
6688120	75.1731(b)	10,500.00
6688121	75.1731(b)	10,500.00
6687977	75.380(d)(1)	3,000.00
6688268	77.1104	1,400.00
6688269	75.380(d)(7)(iv)	633.00
WEST 2009-1353		
6688271	75.400	4,000.00
6687983	72.630(b)	4,000.00
6688277	77.1104	1,000.00
6688131	75.1731(b)	1,800.00
6688282	75.400	6,000.00
6688284	75.400	5,000.00
WEST 2011-0084		
8469536	75.202(a)	4,000.00
	TOTAL PENALTY	$53,833.00

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED**, as set forth in this decision. Oxbow Mining LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $53,833.00 within 30 days of the date of this decision.[9]

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

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RWM/bjr

[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

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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April 16, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-1402-M A.C. No. 04-02964-195929
v.	:	
TAFT PRODUCTION COMPANY, Respondent	: :	Mine: Taft Production Company & Mines

DECISION

Appearances: Pamela F. Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Larry R. Evans, Corporate Health and Safety Manager, Oil-Dri Corporation of America, Ochlocknee, Georgia, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA"), against Taft Production Company, ("Taft"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815.[1] The Secretary seeks a total civil penalty in the amount of $9,497.00 for six alleged violations of her mandatory safety standards.[2]

A hearing was held in Los Angeles, California. The following issues are before me: (1) whether Respondent violated the standards; (2) whether the violations were significant and substantial, where alleged, and (3) whether the violations were attributable to Taft's moderate or high negligence, as alleged. The parties' Post-hearing Briefs are of record.

[1] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[2] This docket contains ten citations, four of which the parties settled prior to hearing.

For the reasons set forth below, I **AFFIRM** the citations, as modified, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Respondent Taft Production Company, to be known as Taft, is engaged in mining at a surface metal/nonmetal mine. The mine identification number is 04-02964. The mine is near Taft, California.

2. Taft's operations at the mine affect interstate commerce.

3. Taft is an operator as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the mine where the citations at issue in this proceeding were issued.

4. Operations of Taft at the mine at which the citations were issued in this proceeding are subject to the jurisdiction of the Mine Act.

5. The administrative law judge has jurisdiction in this matter pursuant to section 105 of the Mine Act.

6. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity as an authorized representative of the Secretary of Labor when the citations were issued.

7. True copies of the citations at issue in this proceeding were served on Taft as required by the Mine Act.

8. The total proposed penalties for the citations in this proceeding will not affect Taft's ability to continue in business.

9. The Secretary stipulates that Taft exercised good faith in terminating the citations in a timely manner.

10. The Secretary and Taft are free to argue that evidence admitted in the context of a particular citation is relevant to the court's determination of other citations. Further, if the court accepts the party's argument, the court may consider that evidence in reaching her decision concerning those other citations.

Tr. 7-9.

II. Factual Background

Taft Production Company operates a clay surface mine and production facility near Taft, California. Resp't Br. at 2. The mine manufactures kitty litter and other products. Tr. 17. On July 28, 2009, MSHA Inspector James Maddox was accompanied by MSHA field supervisor Bart Wrobel on a regular inspection of Taft. Tr. 10, 17. At the time of inspection, Maddox had been an inspector for approximately four months, and Wrobel had been an inspector for approximately eight years. Tr. 17, 253.

Maddox and Wrobel started their inspection in the maintenance shop. Tr. 22. Maddox observed and photographed a water cooler and several All-Threads in front of the activation paddle for the emergency eye-wash station.[3] Tr. 42-44; Ex. P-1. He issued a citation for Taft's failure to provide readily accessible water or neutralizing agents on the maintenance shop floor. Tr. 24; Ex. P-2.

The inspection team then traveled to Mill Building No. 2 which contained several crushing and screening devices. Tr. 72. Maddox observed a vibratory feeder being suspended at the corners by turnbuckles, and that the load bearing clevis pins provided by the manufacturer had been replaced with grade 5 bolts.[4] Tr. 77, 88-89. He issued a citation to Taft for using the bolt in one of the turnbuckles beyond its design capacity. Tr. 73; Ex. P-5.

Maddox and Wrobel then moved to Level 3 of Mill Building No. 2 where three screening devices are located. Tr. 92. Maddox observed that the flexible metal conduit on screen No. 104 had been partially severed, exposing the wires to damage where they enter the motor's junction box. Tr. 92-93; Ex. P-6, P-7. Consequently, he issued a citation for Taft's failure to protect the electrical conductors inside the conduit from mechanical damage. Tr. 95; Ex. P-7.

Maddox and Wrobel returned to Taft on July 29 to continue their inspection. Tr. 112. They traveled to Warehouse No. 3 where they observed two sets of metal shelves being used to store materials. Tr. 112-13. Maddox observed that one set of shelves was not secured to the floor and its center support leg was bent inwards. Tr. 115; Ex. P-9. Several heavy pallets were stacked on the middle and top shelves, and a bag of material extended over the edge of the top

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[3] All-Threads are metal rods of various sizes. Tr. 44.

[4] A vibratory feeder is an electronic feeding device which moves material towards a conveyance system or a crushing device. Tr. 75.

A turnbuckle is a metal coupling device consisting of an oblong piece internally threaded at both ends into which the corresponding sections of two threaded rods are screwed in order to form a unit that can be adjusted for tension or length. *The American Heritage Dictionary* 1859 (4th ed. 2009).

shelf.[5] Tr. 115-17; Ex. P-9. Maddox also observed that the other set of shelves was leaning to the left and was not secured to the floor. Tr. 122-23; Ex. P-10. Two or three pallets were stacked on the top shelf, and a box was on the middle shelf. Tr. 122. Maddox issued a citation to Taft for stacking heavy materials on unstable shelves in such a way that created a fall-of-material hazard. Tr. 135; Ex. P-11.

After inspecting the warehouse, the inspectors traveled to the quarry to inspect the crusher. Tr. 134-35. They took a look at the feeder and the conveyance system. Tr. 135-36. Maddox observed that the cover on the electrical switch gear box for the B5 conveyor belt was open and the box was energized. Tr. 138; Ex. P-13. To close the box, Taft de-energized the system. Tr. 138-39. Maddox issued a citation to Taft for its failure to keep the box cover closed while the system was energized. Tr. 137; Ex. P-14.

Maddox and Wrobel returned to Taft on July 30 to complete their inspection. Tr. 161. They traveled to Mill No. 1 and inspected the walkways along the conveyor belt in the surge tunnel. Tr. 162-63. Maddox observed that the tail pulley guard on the C1 conveyor belt was not secured in place. Tr. 165. A gap existed between the guard and the framework of the pulley. Tr. 166; Ex. P-16. Therefore, he issued a citation to Taft for failing to secure the tail pulley guard in place while the belt was being operated. Tr. 164-65; Ex. P-17.

III. Findings of Fact and Conclusions of Law

A. Citation No. 6481833

Inspector Maddox issued 104(a) Citation No. 6481833 alleging a "significant and substantial" violation of section 56.15001 that was "reasonably likely" to result in an injury that could reasonably be expected to be "permanently disabling," and was caused by Taft's "high" negligence.[6]

The "Condition or Practice" is described as follows:

> The emergency eye wash station located in the Machine Shop was inaccessible due to shop materials blocking the area. Eye injuries

[5] A pallet is a portable platform that is used for storing or moving cargo or freight. *The American Heritage Dictionary* 1266 (4th ed. 2009).

[6] 30 C.F.R. § 56.15001 provides that, "Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used."

> are possible due to flying material and the shops [*sic*] use of chemicals requiring the emergency eye wash station if a miner were to be exposed. A miner could suffer permanently disabling injuries by not being able to reach the eye wash station. The Mine Operator stated that it was a problem.

Ex. P-2.[7] The citation was terminated after the area was cleared of obstructions to the emergency eye-wash station.

1. Fact of Violation

In order to establish a violation of one of her mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.,* 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Maddox referenced cleaning solvents that are often packaged with first aid instructions calling for immediate eye flushing in the event of eye contamination. Tr. 37-38. Taft conceded that there were chemicals in the maintenance shop which would be harmful to miners' eyes. Tr. 40. Maddox testified that when standing to the left of the water cooler, he could barely see the activation paddle for the eye-wash station through all of the obstructions in front of it. Tr. 42-43; Ex. P-1. In his opinion, a miner attempting to reach the activation paddle would be impeded by the water cooler and the All-Threads. Tr. 43-44. He believed that the obstructions would prevent a miner from fully depressing the paddle, and that the eye-wash station was necessary, given the nature of the work and the chemical substances used in the shop. Tr. 26-27, 49. He stated that, in the event of an emergency, a miner would need to flush his eyes within seconds, in order to have the best chance of avoiding serious eye injuries. Tr. 49, 52.

Wrobel gave a similar account of the area by testifying that the eye-wash station was blocked by several pieces of equipment and that, as the station was being inspected, Nancy Tidwell, human resources and safety manager, stated that the condition "looks pretty bad." Tr. 255, 257.

Tidwell testified that she trains Taft's supervisors on safety procedures and that, in her opinion, the eye-wash station was accessible because a miner could reach the paddle when approaching the station from the front left side. Tr. 293-94. She also pointed out that a bathroom, approximately five steps around the corner from the eye-wash station, provided another source of water and a first aid kit with eye-wash solution and cups. Tr. 294.

[7] The Citation refers to the maintenance shop as the "Machine Shop."

I am not persuaded by Tidwell's argument. A miner in the throes of an emergency should not be required to grope around the corner to locate the bathroom, then find the faucet or the first aid kit and its contents, in order to get some relief. That is exactly why the eye-wash station is situated in the body of the shop. The word "available," as used in the standard, means "present and ready for use." *The American Heritage Dictionary* 123 (4th ed. 2009). A miner in need of immediate first aid would be delayed by having to negotiate the water cooler and All-Threads. This would prove especially difficult were the miner fully, even partially, blinded or in extreme pain. Moreover, the obstructions posed a trip-and-fall hazard for a miner suffering impaired vision. Based on Taft's failure to provide immediate access to the eye-wash station, I conclude that the Secretary has proven that Taft violated section 56.15001. In doing so, I interpret the word "available" in a manner consistent with the protective purposes of the Act. *See Rock of Ages Corp. v. SOL*, 170 F.3d 148, 155 (2nd Cir. 1999).

Maddox believed that the condition was obvious because miners were continually walking through this area. Tr. 65. He opined that the condition may have existed for a significant period of time because the water cooler was plugged in and cups were provided on top of it. Tr. 65-67; Ex. P-1. He also observed an appreciable amount of dirt or dust under and around the water cooler and All-Threads as Taft was cleaning to terminate the citation. Tr. 67; Ex. P-1. The evidence as a whole makes it likely that the operator had deliberately situated the water cooler in front of the eye-wash station as a convenient place to provide drinking water. Therefore, I find that Taft was highly negligent in violating the standard.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been established and miners, already in distress, would be subjected to possibly more serious eye injuries because of obstructed access to first aid. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

The Commission has held that, to satisfy the third element of the *Mathies* test, the Secretary must prove that the hazard contributed to by the violation will be reasonably likely to cause a serious injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury. *Musser Eng'g and PBS Coals, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010). I find that obstructing access to the emergency aid apparatus provided in the event of chemical exposure to the eyes is reasonably likely to result in eye injuries ranging from temporary irritation to total vision loss, as well as cuts, contusions and musculoskeletal injuries from tripping and falling. Therefore, I conclude that the violation was S&S.

B. Citation No. 6481835

Inspector Maddox issued 104(a) Citation No. 6481835 alleging a violation of section 56.14205 that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Taft's "high" negligence.[8] The "Condition or Practice" is described as follows:

> The ½ inch x 8 inches turnbuckle securing the elevated corner of the "Syntron" vibratory feeder located in the Mill Building #2 was held in place with a grade 5 bolt, rather than the required Clevis Pin for the turnbuckle. By not using parts designed for the turnbuckle, the condition exposed miners to broken bones, cuts, and bruising if the bolt being used were to fail. The condition was obvious.

Ex. P-5.

1. Fact of Violation

Although all four turnbuckles had been fitted with grade 5 bolts rather than clevis pins, Maddox testified that one of the bolts was significantly worn. Tr. 79, 88-89. He stated that it was not extending through the other side of the turnbuckle, and that there was a significant dip in the middle from which a dish-shaped fragment had broken off. Tr. 82; Ex. P-4. He explained that a clevis pin, which has a shaft made of stronger material than a bolt, is designed to secure side loads in turnbuckles. Tr. 81. A bolt, on the other hand, is intended to hold two pieces of metal together and resist longitudinal tension, but is not designed to withstand side pressure or support a side load. Tr. 81. According to him, when Taft installed bolts in the turnbuckles to suspend the vibratory feeder, it was, indeed, using them to support side loads. Tr. 81-82. The use of the cited

[8] 30 C.F.R. § 56.14205 provides that, "Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons."

bolt in the turnbuckle created the hazard of the bolt breaking, causing the corner of the feeder to fly out. Tr. 84, 89. If the projecting turnbuckle, itself, were to hit a miner in the foot, knee, or arm, it is probable that an injury resulting in lost workdays or restricted duty would result. Tr. 84, 90.

Wrobel testified that he had worked as a machinist for 12 or 13 years prior to working for MSHA. Tr. 259. He opined that the grade 5 bolt was being used beyond its design capacity. Tr. 258. He explained that the turnbuckle comes from the manufacturer with the clevis pin as part of a set, and that a clevis pin can be substituted by a shoulder bolt, which is specially hardened to withstand side pressures. Tr. 259-60. Notwithstanding the design limitations of grade 5 bolts, Tidwell countered that there was a barrier between the travelway and the vibratory feeders, and that Taft's policy is that the machines be shut down before employees enter the area. Tr. 296.

Maddox and Wrobel both testified credibly that the grade 5 bolts used in the turnbuckles, unlike clevis pins, are not designed to support side loads, and Taft offered no credible rebuttal. The heavily worn condition of the cited bolt clearly demonstrates that it was being used beyond its design capacity. The bolt breaking, and the turnbuckle failing and acting as a projectile, could result in an injury, even if the probability of no miners being in the immediate area makes it unlikely. Therefore, I conclude that Taft's use of the grade 5 bolt in the cited turnbuckle violated section 56.14205.

The severely worn condition of the cited bolt establishes the probability that it had been utilized for a significant period of time. Additionally, although Maddox elected to cite only one turnbuckle, all four had been outfitted with grade 5 bolts. I credit the inspectors' unrebutted testimony that this condition was obvious, not only because the vibratory feeder was adjacent to a walkway, but also because it is common industry knowledge that bolts are not designed or intended to support side loads. Tr. 90-91, 259. I, therefore, find that Taft was highly negligent in violating the standard.

C. Citation No. 6481836

Inspector Maddox issued 104(a) Citation No. 6481836 alleging a "significant and substantial" violation of section 56.12004 that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by Taft's "high" negligence.[9] The "Condition or Practice" is described as follows:

[9] 30 C.F.R. § 56.12004 provides that, "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected."

> The flexible metal conduit, housing the 480 volt power wires had been damaged. The conduit was damaged exposing the wires where they entered the junction box of the Screen #104 motor. Employees working in and around this area are exposed to the possibility of an electrocution, shock or burn hazard. The operator was unaware of the electrical defect as it was missed on the work place exam and the condition was obvious.

Ex. P-7. The citation was terminated after the flexible conduit was replaced.

1. Fact of Violation

Taft has conceded that the violation of section 56.12004 occurred, but contests the S&S designation and negligence finding alleged by the Secretary. Tr. 28.

2. Significant and Substantial

Maddox testified that the screening process involves screens violently vibrating back and forth. Tr. 97. He explained that in the course of normal mining operations, it was reasonably likely that the metal coil lining the conduit would cut into the insulation of the inner conductors, exposing miners in the immediate area to contacting the bare conductors. Tr. 107. Maddox opined that a miner would be in close proximity to the broken conduit when conducting a workplace examination or performing routine maintenance. Tr. 103. He testified that he was told by someone at Taft that a miner would be in the vicinity of the broken conduit once or twice per shift. Tr. 103-04. He also testified that, at another mine, a miner who contacted a bare conductor on a 480-volt conduit was electrocuted. Tr. 98-99. Wrobel concurred with Maddox, and added that if the ground wire in the conduit were cut before any of the three power lines, the overload circuit protection would be disabled, and a person coming into contact with a bare wire would be electrocuted. Tr. 317-18. On the other hand, Tidwell pointed out that there is a guardrail between the travelway and the electrical conduit, and that Taft has a policy prohibiting persons from entering the work area unless the screen is shut down. Tr. 297.

The fact of violation has been established, and miners were subjected to burns or electrocution were they to contact bare conductors. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Maddox and Wrobel both testified credibly that grounding can be defeated, and that contact with a bare conductor can result in serious injury, including electrocution. There is no evidence in the record that a person contacting a bare conductor creates an electrical fault which would de-energize the system. While Taft had erected a handrail system around the conduits, the handrails would not prevent a miner who was adjusting or cleaning the belts from contacting the conduit located adjacent to the travelway. I find that the broken conduit exposed the conductors

to damage from the movement of the metal coil. In the course of continued normal mining operations, the coil would eventually cut into the insulation, exposing miners to contact with the bare conductors, resulting in shocks, burns or electrocution. Therefore, I conclude that the violation was S&S.

3. Negligence

Maddox testified that the break in the conduit was obvious, and should have been observed and corrected since it was adjacent to a regularly traveled walkway. Tr. 109. He also opined that the amount of dirt accumulated in the conduit indicated that this condition had existed for a significant period of time. Tr. 109. Given that the conduit was located next to a heavily traveled walkway, and that the break in the conduit was obvious, Taft should have recognized and corrected the hazard. I find that this condition existed for a significant amount of time, and I am unpersuaded that lack of inclusion of the hazard in the pre-shift examination book establishes that the condition was not obvious, as Taft contends, but rather, that it simply may have been overlooked. Accordingly, I find that Taft was highly negligent in violating the standard.

D. Citation No. 6481838

Inspector Maddox issued 104(a) Citation No. 6481838 alleging a "significant and substantial" violation of section 56.16001 that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by Taft's "high" negligence.[10] The "Condition or Practice" is described as follows:

> Two sets of shelves, having 3 levels each, located in the #3 warehouse building, measuring 10' high x 16' long x 45" deep were found to be damaged. Both shelves had heavy pallets of materials stacked across the entire top shelf with the lower two shelves partially loaded. Two forklifts were parked adjacent and in front of each shelf set. The shelves adjacent to the first forklift measured 29" from the access point of the operators station. The center upright leg was bent inward approximately 6" and could topple over due to the shelves not being secured to the floor exposing persons to fatal crushing injuries. The condition had existed for an unknown amount of time and was very obvious.

[10] 30 C.F.R. § 56.16001 provides that, "Supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards."

Ex. P-11. The citation was terminated after the shelves were unloaded, taken out of service, and the forklift operator was directed to discontinue stacking materials on them.

1. Fact of Violation

Taft has conceded that the violation of section 56.16001 occurred, but contests the S&S designation and negligence finding alleged by the Secretary. Tr. 28.

2. Significant and Substantial

Maddox testified that the forklift operator was exposed to the danger of receiving crushing injuries from falling pallets when operating in close proximity to the metal shelves. Tr. 130-31. In his opinion, the forklift operator would be only partially protected from falling objects while driving the forklift, and would be totally exposed to falling pallets when walking between the shelves and the forklift. Tr. 131. Wrobel noted that if a forklift operator were loading pallets onto or wrapping pallets at the shrink wrapping station, pallets holding 1,900 pounds or more could fall from the shelves and crush the miner. Tr. 267, 268, 269, 271-72. Tidwell testified, however, that the forklifts operating next to the shelves were equipped with canopies, known in the industry as falling object protection systems ("FOPS"). Tr. 299.

The fact of violation has been established, and miners were exposed to the hazard of large pallets, holding approximately a ton each, falling on them from a distance as high as 10 feet. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Despite the fact that the forklifts were equipped with FOPS, the evidence makes clear that a pallet could fall from the unstable units and crush a miner walking to a nearby forklift or performing a routine task such as shrink wrapping. I find that the hazard of pallets, weighing a ton and falling from overhead heights, is reasonably likely to result in severe crushing injuries to a miner walking or working adjacent to the sets of shelves. Therefore, I conclude that the violation was S&S.

3. Negligence

Maddox testified that the bend in the center leg of one set of shelves, and the generally poor condition of both sets, was obvious. Tr. 131-32; Ex. P-9. He recalled someone at Taft telling him that the shelves had been in that condition for a long period of time and, in his opinion, the rust on the bent leg substantiates that allegation. Tr. 132-33.

The obviousness of the bent, rusting leg should have been recognized by Taft management and employees operating forklifts or shrink wrapping pallets and, given the weight of the materials which the shelves housed, Taft should have corrected the defects long before the rusting occurred. Therefore, I find that Taft was highly negligent in violating the standard.

E. Citation No. 6481839

Inspector Maddox issued 104(a) Citation No. 6481839 alleging a "significant and substantial" violation of section 56.12032 that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by Taft's "high" negligence.[11] The "Condition or Practice" is described as follows:

> The cover on the energized 480 volt switch gear box for the B-5 Conveyor Belt was not closed and secured against contact. Foot prints were noted within 48" and an access ladder for the head pulley area of the B-4 conveyor measured 51" from the energized box. The condition exposed Miners who could contact the energized conductors to a 480 volt electrocution. The Mill operator cleans in the area once per shift or as needed.

Ex. P-14. The citation was terminated after the B-5 conveyor belt was shut down, locked and tagged-out, and the de-energized box was closed and secured.

1. Fact of Violation

Taft has conceded the violation of section 56.12032, but contests the S&S designation and negligence finding alleged by the Secretary. Tr. 28.

2. Significant and Substantial

Maddox testified that if a miner were to contact any of the six lugs underneath the cover plate, he could be burned or electrocuted.[12] Tr. 147, 149. He opined that a crusher operator, mechanic, or electrician could access the box to check fuses or amperage of the legs, or to perform maintenance on the motor. Tr. 152-53. Wrobel added that a miner may have intentionally disabled the latch mechanism in order to quickly access the box or perform amperage tests. Tr. 275-76. Arguing that an injury was unlikely to occur, Tidwell testified that Taft's policy permits only electricians and maintenance technicians to access the electrical boxes. Tr. 300-01.

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[11] 30 C.F.R. § 56.12032 provides that, "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

[12] A lug is a copper or brass fitting to which electrical wires can be soldered or otherwise connected. *The American Heritage Dictionary* 1039 (4th ed. 2009). Maddox testified that the lugs are screwed onto bare conductors to keep them in place. Tr. 147.

The fact of violation has been conceded, and it has been established that miners were exposed to burns or electrocution by contacting the energized lugs. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., the reasonable likelihood of injury and its seriousness. The record establishes that electricians and maintenance technicians have access to the box and that if the lugs were contacted in performance of their duties, they would be reasonably likely to be seriously burned or electrocuted. Therefore, I conclude that the violation was S&S.

3. Negligence

Maddox testified that the open box cover was highly visible since it was only 48 inches away from the access ladder, and was located in a recently traveled walkway. Tr. 159. He opined that the condition had existed for a number of days due to the amount of dirt in the bottom of the box. Tr. 160. He stated that he was told by someone from Taft that the condition had existed for three days. Tr. 160. Maddox also opined that someone may have intentionally defeated the latch mechanism, designed to ensure that power is off when the box cover is open, in order to measure the number of amps that each leg was pulling. Tr. 142-43, 152-53. As mentioned earlier, Wrobel was of the same opinion.

The purpose of the built-in latch mechanism is to prevent a miner from contacting the energized lugs inside of the box when it is energized, and being severely burned or electrocuted. Maddox observed that the lever was in the "up" position, indicating that the box was energized but, contrary to its intended design, the box cover was open rather than closed. I credit Maddox's and Wrobel's testimony that the only way that the box cover could have been open with the lever in the "up" position was for someone to have intentionally tampered with the latch mechanism in order to keep the power on. Considering the obviousness of this condition and the evidence that it had existed for several shifts, I find that Taft was highly negligent in violating the standard.

F. Citation No. 6481842

Inspector Maddox issued 104(a) Citation No. 6481842 alleging a "significant and substantial" violation of section 56.14112(b) that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by Taft's "high" negligence.[13]

The "Condition or Practice" is described as follows:

> The tail pulley guard on the C-1 conveyor was not securely in place.

[13] 30 C.F.R. § 56.14112(b) provides that, "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

> The opening was approximately 8-10" and measured 20" to the rotating self cleaning tail pulley. There were hand tools laying on top of an adjacent guard approximately 15" to the opening exposing miners to a fatal entanglement hazard. The mine operator stated that someone probably had been working on it and didn't secure it back in position.

Ex. P-17. The citation was terminated after the guard was repositioned and secured in place.

1. Fact of Violation

Taft has conceded the violation, but contests the S&S designation and negligence finding alleged by the Secretary. Tr. 28. Addressing negligence, it is plausible, based on the sighting of hand tools on the adjacent guard, that the guard had been recently removed for maintenance performed on the tail pulley. Moreover, Tidwell testified credibly that the tail pulley was in an area which would not be frequented regularly by management. Tr. 301. Accordingly, I find that the violation was a result of Taft's moderate, rather than high negligence.[14]

2. Significant and Substantial

Maddox testified that were a miner to actually fall into the tail pulley, his hands or arms could be severed by pinch points. Tr. 179-80. However, he was also of the opinion that, were a miner to fall onto the guard, it is unlikely that the guard would move out of place and expose him to contact with the tail pulley. Tr. 177. I credit Maddox's testimony and make a gravity finding that the violation was unlikely to result in a permanently disabling injury, rather than a fatality. Therefore, I conclude that the violation was non-S&S.

IV. Penalties

While the Secretary has proposed a total civil penalty of $9,497.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Taft is a medium-size operator, with no history of similar violations and an overall record that is not an aggravating factor in assessing appropriate penalties. As stipulated, the proposed total civil penalty will not affect Taft's ability to continue

[14] Maddox testified that he disagreed with the original gravity and negligence designations. Tr. 179-82. Indeed, the Secretary has changed her position, and argues that the citation should be modified to "unlikely" to result in a "permanently disabling" injury as a result of Taft's "moderate" negligence. Sec'y Br. at 25-26.

in business. Stip. 8. I find that Taft demonstrated good faith in achieving rapid compliance after notice of the violations. The remaining criteria involve consideration of the gravity of the violations and Taft's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 6481833

It has been established that this S&S violation of section 56.15001 was reasonably likely to result in an injury that could reasonably be expected to be permanently disabling, that Taft was highly negligent, and that it was timely abated. Therefore, I find that a penalty of $946.00, as proposed by the Secretary, is appropriate.

B. Citation No. 6481835

It has been established that this violation of section 56.14205 was unlikely to result in an injury that could reasonably be expected to result in lost workdays or restricted duty, that Taft was highly negligent, and that it was timely abated. The Secretary originally proposed a penalty of $127.00. Because my finding of high negligence included Taft's improper use of grade 5 bolts in all four turnbuckles, I find that a penalty of $600.00 is appropriate.

C. Citation No. 6481836

It has been established that this S&S violation of section 56.12004 was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Taft was highly negligent, and that it was timely abated. Therefore, I find that a penalty of $2,106.00, as proposed by the Secretary, is appropriate.

D. Citation No. 6481838

It has been established that this S&S violation of section 56.16001 was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Taft was highly negligent, and that it was timely abated. Therefore, I find that a penalty of $2,106.00, as proposed by the Secretary, is appropriate.

E. Citation No. 6481839

It has been established that this S&S violation of section 56.12032 was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Taft was highly negligent, and that it was timely abated. Therefore, I find that a penalty of $2,106.00, as proposed by the Secretary, is appropriate.

F. Citation No. 6481842

It has been established that this violation of section 56.14112(b) was unlikely to result in an injury that could reasonably be expected to be permanently disabling, that Taft was moderately negligent, and that it was timely abated. While the Secretary has proposed a penalty of $2,106.00, consistent with my findings of lower gravity and negligence, I find that a penalty of $300.00 is appropriate.

ORDER

ACCORDINGLY, Citation Nos. 6481833, 6481835, 6481836, 6481838 and 6481839 are **AFFIRMED**, as issued; and it is **ORDERED** that the Secretary **MODIFY** Citation No. 6481842 to reduce the level of gravity to "unlikely," "permanently disabling," and "non-significant and substantial," and reduce the degree of negligence to "moderate;" and that Taft Production Company **PAY** a civil penalty of $8,164.00 within 30 days of the date of this Decision.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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April 17, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of Dustin Rodriguez,	:	Docket No. WEST 2013-618-DM
Complainant	:	MSHA Case No.: WE-MD 13-15
	:	
	:	
v.	:	
	:	
C.R. MEYER AND SONS COMPANY,	:	Mine: Pass Mine & Mill
Respondent	:	Mine ID: 04-02542 1ZU

DECISION AND ORDER
REINSTATING DUSTIN RODRIGUEZ
(with corrections)

Appearances: Natalie Nardecchia, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, CA, representing the Secretary of Labor (MSHA) on behalf of Dustin Rodriguez.

Erik K. Eisenmann, Esq., Whyte, Hirschboeck, Dudek, S.C., representing C.R. Meyer and Sons Company.

Before: Judge Steele

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.,* and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on March 25, 2013, filed an Application for Temporary Reinstatement of miner Dustin Rodriguez ("Rodriguez" or "Complainant") to his former position with C.R. Meyer and Sons Company, ("C.R. Meyer" or "Respondent") at the Pass Mine & Mill pending final hearing and disposition of the case.

On February 25, 2013, Rodriguez filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.[1] In his application, the Secretary represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Rodriguez to his former position as a pipefitter foreman.

Respondent filed a request for hearing on April 3, 2013. A hearing was held in Henderson, Nevada on April 10, 2013. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witness and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Rodriguez.

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).

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.[2] *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 at 744.

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[1] Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See 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).

[2] "Substantive 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 Rodriguez 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. Respondent is an operator as defined under Section 3(d) of the Mine Act. (Transcript at 7).[3]

2. The Mountain Pass Mine and Mill is a mine as defined under Sections 3(b), 3(h), and 4 of the Mine Act. (Tr. 7).

3. Rodriguez is a miner within the meaning of the Mine Act. (Tr. 7).

Contentions of the Parties

On February 18, 2013, Rodriguez executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint on February 25, 2013. In this statement he alleged, "I was laid off for having a safety concern."

Submitted with the application was the March 18, 2013 Declaration of Jason Leno, a Special Investigator employed by the Mine Safety and Health Administration. Leno stated that he investigated Rodriguez's discrimination claim against Respondent. He determined the following:

a. On January 24, 2013, the affected miner, Dustin Rodriguez, engaged in protected activity by notifying C.R. Meyer and Sons Company of unsafe conditions at the mine, refusing to work in unsafe conditions, and requesting information about health hazards.

b. Mr. Rodriguez's employment at C.R. Meyer and Sons Company was terminated on January 25, 2013.

Application at Exhibit B, p. 2.

Respondent disputes Rodriguez's claim that he was laid off for voicing safety concerns. Instead it claims that he was laid off for loafing. Respondent also contends that the alleged safety concerns arose after the decision was made to lay-off Rodriguez. Furthermore, Respondent claims that Rodriguez would have been laid off on January 25, 2013 because of economic conditions regardless of the alleged loafing or alleged safety concerns.

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

Exhibits

The Secretary submitted one exhibit, the Discrimination Complaint filed by Rodriguez on February 25, 2013 (Hereinafter "GX-1") into the record at the hearing and it was duly admitted into evidence. (Tr. 17).

Respondent proffered three exhibits. Respondent Exhibit E ("RX-E") a chart showing the pipefitters working for Respondent since the project began. RX-F is a workforce chart for all trades. RX-G is a chronology demonstrating when employees were hired. Following a motion *in limine*, I ruled that this hearing would focus on the issue of whether Rodriguez claim was frivolously brought and limited evidence related to possible tolling of the re-instatement. As a result, Respondent's exhibits were not included in the record.

Summary of Testimony

Direct Examination of Dustin Rodriguez:

Rodriguez was a union journeyman pipefitter and had been a pipefitter since August of 2004. (Tr. 11). His work history was mostly heavy industrial maintenance. (Tr. 12). In his career, Rodriguez worked around chemicals. (Tr. 12). He received training about hazards presented by working around different chemicals and MSHA safety training. (Tr. 12). Rodriguez was a member of the San Bernardino and Riverside County Plumbers & Pipefitters Local 364. (Tr. 12). He was a journeyman. (Tr. 12). He also worked as a supervisor pipefitter. (Tr. 12).

Rodriguez was employed by Respondent from December 5, 2012 until January 25, 2013. (Tr. 12-13). He learned about the job from Local 364's manpower hotline. (Tr. 13). He had never worked for Respondent before. (Tr. 13). Around 12 other union members were also hired. (Tr. 13). His title was journeyman pipefitter. (Tr. 13). Training lasted a week or a week and a half. (Tr. 14).

As soon as he completed training with Respondent, Rodriguez became a foreman. (Tr. 14). Rodriguez learned he was going to be foreman from Mark Cartwright ("Cartwright") and the union steward, Todd Schaeffer ("Schaeffer"). (Tr. 14). Rodriguez expressed interest in being a foreman to Cartwright. (Tr. 15). He told Cartwright that he wanted to be considered as a foreman and that he had just a left a foreman's position and felt confident that he could do a good job as foreman for him. (Tr. 15). Being a foreman increased his pay rate and it did not go back down. (Tr. 15). Cartwright did not tell him why he as being made foreman. (Tr. 14). Rodriguez considered it a promotion. (Tr. 14).

His duties were to instruct men on the jobs, tasks, and hazards that could occur during the job. (Tr. 14). He also got safety equipment and material for the men. (Tr. 14). He performed lay out and blueprint interpretation with the other contractors. (Tr. 14). The other contractors were Kelly Brown & Root ("KBR"). (Tr. 14). Other duties included signing paperwork; making

sure everyone was following safety, company procedure, and mine procedure; and evaluating workers' production and work ethic. (Tr. 15).

Rodriguez worked on different projects for Respondent including the Phoenix project run by KBR. (Tr. 15-16). He was foreman the whole length of that project, about a month. (Tr. 16). After that he changed project to work on maintenance. (Tr. 16).

When he worked on the KBR project he observed conditions that raised safety concerns. (Tr. 16-17). Specifically, he was instructed to tell the employees he supervised to pull a 20-foot length of two-inch pipe up by rope while standing 20 feet high on an I-beam. (Tr. 17). He deemed this unsafe. (Tr. 17). Rodriguez informed Cartwright and Ed Berube ("Berube"), a foreman, and they told him that he did a good job keeping his men safe. (Tr. 17, 24). They told him to keep doing what he was doing. (Tr. 17). He raised other safety concerns with Respondent on the KBR project almost daily. (Tr. 17).

On January 24 Rodriguez went to work and Cartwright told him there were going to walk down to a new job that had just been awarded that was supposed to last a month. (Tr. 20). Rodriguez and Cartwright walked alone to the new job. (Tr. 20). Cartwright told him what the point of connection and termination would be for the job, what type of piping it would be, what type of task training they would need to have, where the material was stationed, and who Rodriguez was going to direct for the job. (Tr. 20-21). He gave instruction on how to instruct other miners. (Tr. 21). The walk-through lasted about an hour or an hour and a half. (Tr. 21). After the walkthrough Cartwright told Rodriguez to get the men who would be working with him on the new project and show them what they would be doing. (Tr. 21). Cartwright said he would be back to train them on the equipment and machinery that would be used. (Tr. 21-22). There were four miners. (Tr. 22). Cartwright returned to train them at about 10:30. (Tr. 22). After task training, Cartwright left. (Tr. 22). Rodriguez began working on the project, even informing Cartwright of a mistake that had been made in planning. (Tr. 22-24)

While they were working, miners told Rodriguez that Cartwright wanted to see him in the office about another job. (Tr. 23-24). He went to the office and Cartwright told him to meet with Jon Way ("Way"), an apprentice pipefitter, and Berube to learn about the other project. (Tr. 24).

Rodriguez went outside and found Berube and Way getting personal protective equipment ("PPE") for the job they were going to do. (Tr. 24-25). He asked why the PPE was required. (Tr. 25). Berube told them they would be working at a part of the mine used for sodium carbonate (also known as "soda ash") storage. (Tr. 25). Rodriguez had never worked around it and did not know how it was used in the mining process. (Tr. 25). Berube said they would need rubber gloves, a rain suit, and a face shield. (Tr. 25). Rodriguez asked if they needed leather boots because in his experience if leather gloves were not effective then leather boots would not hold up either. (Tr. 26). Berube told him it was up to his discretion. (Tr. 26). Rodriguez asked about Berube's experience with sodium carbonate and what to do in case of

exposure. (Tr. 26). Berube said that he was not experienced and that it was just baking soda that could wash off with water. (Tr. 26).

Rodriguez, Berube, and Way then went to the job site. (Tr. 26-27). As they walked Berube told Rodriguez what they would be doing. (Tr. 27). Specifically, they would be unclogging a sodium carbonate line that came directly off the sodium carbonate tank. (Tr. 27). When they arrived in the job site where the tank was located Rodriguez noticed a placard on the tank with a "2" in the blue area meaning there was a health hazard. (Tr. 27). As a result, he asked for to see the job safety analysis ("JSA"). (Tr. 27). A JSA is a pre-task analysis that identifies job hazards and how to eliminate them. (Tr. 27). He had not reviewed the JSA before he arrived. (Tr. 27-28).

Way retrieved the JSA and it had already been signed by Berube and Way. (Tr. 28). The JSA said to review the Material Data Safety Sheet ("MSDS') to eliminate any hazards. (Tr. 28). Neither Berube nor Way had reviewed the MSDS. (Tr. 28). Rodriguez asked for a copy of the MSDS before he started working. (Tr. 28). Berube said, "Are you serious? You want an MSDS?" (Tr. 28). His tone was disbelieving; he said it was just baking soda. (Tr. 28-29). Rodriguez knew that it was his right to obtain an MSDS. (Tr. 29). After Berube made his comment, Rodriguez continued to tell him that he wanted the MSDS. (Tr. 29). He told Berube that he did not believe he was knowledgeable about the PPEs because of his comments regarding the boots. (Tr. 29). Also, Berube did not know what to do in case over over-exposure. (Tr. 29). As they were unclogging a 20-30 foot four-inch line of sodium carbonate, there was a chance of getting a large amount of the sodium carbonate on his body. (Tr. 29-30). Neither Berube nor Way knew what to do in the event of an overexposure. (Tr. 30). Rodriguez said he did not want to wait until after an exposure to get the MSDS. (Tr. 29).

Rodriguez reiterated that he wanted the MSDS and Berube said he would get it. (Tr. 30). Rodriguez explained to Way his reasoning behind requesting the MSDS. (Tr. 30). He did not want to get exposure to their eyes and then have to search for the MSDS after they had already been exposed. (Tr. 30). They wanted to know what to do before it happened. (Tr. 30). Way agreed. (Tr. 30). Rodriguez told Way not to do a task until it was clear what to do in case of exposure and what PPE was needed. (Tr. 30).

Berube did not obtain an MSDS and left the area. (Tr. 30-31). Rodriguez eventually obtained an MSDS for sodium carbonate. (Tr. 31-32). Forty-five minutes after his request to Berube he called Eichleay safety group, a group that conducted the safety training on site, and asked the safety administrator for an over-the-phone MSDS. (Tr. 32). He requested the PPE, the way to treat over exposures, the risks working with it, both acute and long term, and whether they should wear leather boots with the rubber gloves. (Tr. 32).

Rodriguez and Way began to get their tools and materials in place where they would need it. (Tr. 31). A scaffold was built in front of the sodium carbonate tank and it was freestanding. (Tr. 33). Their task would require standing on the scaffolding. (Tr. 33). Rodriguez observed a yellow tag on the scaffold. (Tr. 31). That means that there must be a 100

percent tie-off. (Tr. 31). There was a tag system on scaffolding. (Tr. 33). A green tag means it is safe to be on the scaffold without fall protection. (Tr. 33). A yellow tag means that there is some danger on the scaffold creating a chance for a fall so people must be 100% tied off. (Tr. 33-34). Tie off means fall protection to present falling off the scaffold, the best method is overhead tie-off. (Tr. 34).

On the scaffold at issue there was no way to tie off. (Tr. 34). The scaffold itself was not tied off, it was not anchored to the structure. (Tr. 34). Therefore, it was not possible to tie off to the scaffold itself. (Tr. 34). There was nothing above them to tie off on. (Tr. 34). Vertical scaffold poles must have what is called a rosette to tie off on. (Tr. 34). It is a fixed anchorage point to tie a lanyard to. (Tr. 34).

When Rodriguez saw there was no tie-off point he contacted Molycorp and asked if there was a reason why they could not make it a green scaffold. (Tr. 35). He observed that there was no danger from the scaffold, the rails were in place and the holes were covered. (Tr. 35). Maycorp called the scaffold company and told Rodriguez it would remain yellow. (Tr. 35).

Rodriguez told Respondent, specifically by contacting Berube over the phone, about his concerns with the tie-off. (Tr. 35-36). He told Berube that they had an issue with the scaffolding tie-off, specifically a yellow scaffold with no tie-off point. (Tr. 36). Berbue told him to tie of on the scaffold poles, the railing of the scaffold. (Tr. 36). Rodriguez told him that he needed to come down and look at the area. (Tr. 36). Berube did so. (Tr. 36). Rodriguez showed him the yellow tag and that there was no fixed anchor point for a tie-off. (Tr. 36). He said they needed the scaffold builders to come out and correct the scaffolding, either by making it green or adding a tie-off point. (Tr. 36).

Berube said it was okay to tie off on the scaffold poles and that they needed to get the job done that day. (Tr. 37). Rodriguez told him that it was not okay to tie off on the scaffold poles and that he would not do so. (Tr. 37). He said it was against everything they had been taught in their safety and MSHA training. (Tr. 37). Rodriguez said that he and Way would be the ones fined if MSHA saw them, not Berube. (Tr. 37). Berube said it was "okay for this job only." (Tr. 37). Rodriguez said he contacted MSHA and MSHA said it was definitely not okay to tie off on the scaffold. (Tr. 37). Berube told him that they had to get the job done that day. (Tr. 37). Rodriguez said that they could get it done in a day if the safety was in place but they would not do it if it was not safe. (Tr. 37-38).

Berube then instructed Way to work on the scaffold, who did so. (Tr. 38). Rodriguez said that Way did not have an approved tie off, instead he was tying off on the rigging choker. (Tr. 38). MSHA does not allow miners to tie off on rigging, tie offs must be on something specifically designed for fall protection. (Tr. 38). Rodriguez told this to Berube and Way. (Tr. 38). Way then climbed up the scaffold and tied off to a horizontal scaffold rail. (Tr. 38). Rodriguez instructed him to tie off on a vertical rail because it would be safer. (Tr. 38). Rodriguez believed that it was wrong, but he felt it was safer that way. (Tr. 38). He also got up on the scaffold and helped because he was not going to let the apprentice get hurt. (Tr. 38-39).

Rodriguez worked on the task assigned. (Tr. 39). It started at 2:00 p.m. and took about an hour. (Tr. 39). Then Berube called Rodriguez and told him that he could leave at the end of the shift. (Tr. 39). Rodriguez said he would not leave Way by himself and Berube agreed to relieve him. (Tr. 39). Rodriguez waited for Berube to get there. (Tr. 39). In Rodriguez's experience as a pipefitter, it is not normal for one foreman to finish another foreman's task. (Tr. 39).

Rodriquez would describe Berube's attitude as a blatant disregard for his safety concerns. (Tr. 40). Berube almost seemed in disbelief that he would ask for an MSDS or a tie off for a scaffold. (Tr. 40). While he worked for Respondent he heard of Berube acting similarly with respect to other miners' safety concerns. (Tr. 40). Specifically, another miner hired at the same time as Rodriguez was instructed to go underneath a trailer that was skirted to the ground. (Tr. 40-41). There was only one way in or out. (Tr. 41). The miner asked for an oxygen monitor to see if there was an oxygen deficiency because it was a confined space and chemicals in the ground could have seeped up. (Tr. 41). He was told it was not a confined space and told to proceed with his job. (Tr. 41). The miner argued that it was not meant for permanent occupancy, the criteria to determine a confined space. (Tr. 41). Berube said it was not a confined space and told him to go. (Tr. 41).

On January 25 he arrived at work at 5:00 a.m. (Tr. 20). That morning everyone went to the superintendent's trailer to get their job assignments for the day. (Tr. 20). Everyone except for Rodriguez and one other miner got assignments. (Tr. 20). That miner was the other miner who had complained about safety. (Tr. 41). Rodriguez asked Cartwright and Berube if they had a job for them and they said they were looking. (Tr. 41-42). Then Rodriguez and the other miner were left standing there. (Tr. 42). After they left, Rodriguez and the other miner cleaned the area for about and hour and a half. (Tr. 42). The other miner said he thought they were going to get laid off. (Tr. 43). Rodriguez said he did not think so because they had been telling him the plans for the mine. (Tr. 43). The other miner thought he was getting laid off because of the confined space issue. (Tr. 43).

After that time, Cartwright and Berube arrived and Rodriguez asked if they had any work because they were out of things to do in the storage area. (Tr. 42). Cartwright said he was looking for something and went into the office. (Tr. 42). Rodriguez followed Cartwright into the office and asked if he was being punished for bringing up safety concerns the day before. (Tr. 42-43). Cartwright and Berube made short, evading comments. (Tr. 43). Cartwright said they were not being punished, he said he was glad they brought up safety concerns. (Tr. 43). Rodriguez said he felt like he was being punished. (Tr. 43-44). No one would talk with them or acknowledge they were there. (Tr. 44). They just stood there while everyone went about there work, which was abnormal. (Tr. 44). Things had changed after the 24th. (Tr. 44).

Then Cartwright said that Rodriguez was being laid off. (Tr. 44). Rodriguez asked why and Cartwright said he had been caught standing around on two projects. (Tr. 44). Rodriguez asked which projects. (Tr. 44). He noted that he participated in completing tasks by drawing

blueprints for the projects to have the pre-fab built and that he lined everyone up to perform the tasks needed in a safe and productive manner. (Tr. 44-45).

Cartwright said that Molycorp had complained about his performance on a steam job the week before and the job they had walked down the morning before. (Tr. 45). Rodriguez told Cartwright that they both knew that was not the reason for the lay-off. (Tr. 45). Cartwright did not respond. (Tr. 45). Rodriguez testified that they had praised and complimented his work before the 24th and only after that day was the issue of standing around raised. (Tr. 45). Cartwright would not tell him who at Molycorp had brought the complaint. (Tr. 45).

Rodriguez went outside and called his union steward. (Tr. 45-46). He asked if the steward was aware that he was going to be laid off. (Tr. 46). The steward was not aware and he said he would go down there immediately and find out what was going on. (Tr. 46). In Rodriguez's experience as a union pipefitter, a union steward is usually involved before someone is let go. (Tr. 46). The steward will contest the termination if it is not legitimate. (Tr. 46). The steward was not involved before Cartwright told him he would be let go on the 25th. (Tr. 46).

The union steward arrived. (Tr. 46). He told the steward that he knew it was not the reason and the steward had worked under him on the projects where he was accused of standing around. (Tr. 46-47). He told the steward it was because of his safety complaints. (Tr. 47). The steward went into the office and came out and confirmed the lay-off. (Tr. 47). Further he said it would be a bad lay-off so they would have to stand outside of the property to get their checks. (Tr. 47). A bad lay-off does not involve a reduction in force, it has to do with performance or attendance. (Tr. 47). There were negative comments about his performance on the lay-off. (Tr. 47). Respondent provided Rodriguez with his last check on the 25th. (Tr. 48). It was at the foreman's pay rate. (Tr. 48). Cartwright did not give Rodriguez any paperwork in his office. (Tr. 48).

Afterwards, he and the other miners drove to the union hall. (Tr. 48). On the way he called MSHA and asked about filing a complaint because he felt he was wrongfully terminated for bringing up safety over production. (Tr. 48). Rodriguez believed he was let go because he called MSHA regarding the scaffold tie-off. (Tr.48-49). He believed that Berube thought he was questioning his authority. (Tr. 49). Rodriguez identified the discrimination complaint that MSHA mailed to him to file (GX-1). (Tr. 18-19).

The entire time he worked for Respondent Rodriguez received no verbal or written disciplinary actions or warnings. (Tr. 49). No one told him that his performance was deficient, that he was unwilling to work, that he stood around on the job, that he was unhelpful, or that he had a bad attitude. (Tr. 49). Before he was terminated, no one from his union, including the steward, ever said his work was deficient. (Tr. 49-50). Both Cartwright and Berube told him that his performance was good. (Tr. 50). When they worked on the KBR project Berube said he did not know how Rodriguez dealt with the KBR management. (Tr. 50). Cartwright told him that he was doing a good job. (Tr. 50). He told Cartwright he would be more than happy to work in that area because he lived in Las Vegas. (Tr. 50-51).

Another person, whose name Rodriguez could not recall, a superintendent on the maintenance side, heard about what was going with KBR. (Tr. 51). That man said that he wanted to retire in nine years and turn the work over to "you guys." (Tr. 51). The workers under him also praised him for keeping his cool and standing up to protect them. (Tr. 51-52). They appreciated the way that he kept up morale and would address their concerns. (Tr. 52). On the whole he got along with the other miners. (Tr. 52). Before he was terminated he had no reason to believe that Respondent was dissatisfied. (Tr. 52).

Cross Examination of Rodriguez:

When Rodriguez was hired, he was hired to work on a maintenance project. (Tr. 53). However, he did not work on that maintenance project initially. (Tr. 53). Instead he worked on the KBR construction project. (Tr. 53). The duration of the project was not given. (Tr. 53). Rodriguez believed he would be working on the maintenance project because the call for the union job line said there were 12 long-term maintenance positions for people living in Las Vegas. (Tr. 54). People were required to be from Las Vegas as it was about two hours closer than San Bernardino or Riverside. (Tr. 54).

Rodriguez started on the KBR project as a foreman. (Tr. 55). He got the position because he asked Cartwright to consider him for it. (Tr. 56). He had been a foreman in the past. (Tr. 56). Cartwright said he would consider it. (Tr. 56). He was hired as journeyman but after training was made a foreman. (Tr. 56-57). He was paid as a journeyman for the duration of training and then compensated as a foreman. (Tr. 57).

Rodriguez noted several safety issues on the KBR project including the pipe and I-beam issue. (Tr. 57). He advised Cartwright about this issue. (Tr. 57). Cartwright said he appreciated Rodriguez raising the issue. (Tr. 58). He also reported KBR employees using conduit as a means to tie off for fall protection above where Rodriguez's men were working. (Tr. 58). He contacted KBR's safety department. (Tr. 58). If the KBR workers fell they would have fallen on Rodriquez's men. (Tr. 58). When Rodriguez reported this, Cartwright thanked him and said he was doing a good job and they did not want KBR employees to hurt anyone. (Tr. 58-59). While working on the KBR project, he never felt discriminated against for raising safety concerns. (Tr. 59).

Respondent's role in the KBR project ended on January 15, 2013, a month and a half after it started. (Tr. 59). Everyone who worked for Respondent on that project except for Rodriguez and two others were laid off when the KBR project ended. (Tr. 59-60). Rodriguez was not laid off because Cartwright said that he wanted one pipefitter and one welder to stay. (Tr. 60). The other workers agreed that because of the work he had done and how he had stood up to KBR he should be the one to stay. (Tr. 60). Two other workers ended up staying. (Tr. 60). Respondent kept Rodriguez on after the KBR project and after he raised safety concerns. (Tr. 61). He raised those concerns to both Respondent and KBR. (Tr. 61).

After the KBR job ended, his duties included lining up the men to do the tasks assigned by Cartwright. (Tr. 61). That was his role as a foreman. (Tr. 61). He was still a foreman on the maintenance project after the KBR project ended. (Tr. 62). The other foreman was Berube. (Tr. 62). It was normal on a project this small, with 12 employees, to have more than one foreman. (Tr. 62).

Cartwright told him that he would have to bump his pay down temporarily on the maintenance project while they secured more work. (Tr. 62). However, he said it would be better in the long run because Rodriguez would be running the maintenance for Respondent. (Tr. 62). Cartwright said he would try to keep him at foreman pay so he could stay a foreman but he did not know if he could. (Tr. 63). However, if they lowered the pay, it would only be while they looked for more work. (Tr. 63). Rodriguez said that it was fine and would not mind going back and working as a journeyman instead of a foreman. (Tr. 63-64). Foremen generally tell other people what to do, they do not work directly. (Tr. 64). Cartwright did not say that his pay would be lowered; he said that it might be. (Tr. 64). Cartwright would fight to keep him a foreman. (Tr. 64). Rodriguez knew that if his pay went down he would no longer be a foreman, he would be a journeyman. (Tr. 65). It is against union rules to do work without getting paid so lowering pay would automatically mean not being a foreman. (Tr. 65).

Rodriguez was on the maintenance project for a little more than two weeks after the KBR project ended. (Tr. 65). During that time Rodriguez was performing both journeyman work and "working foreman" work because that is allowed with a small crew. (Tr. 65). However, his compensation was never lowered. (Tr. 65).

Rodriguez did not recall having a conversation with Cartwright in a pick-up truck owned by Respondent about his job performance. (Tr. 65-66). He did not recall Cartwright telling him that he needed people who could work. (Tr. 66).

Rodriguez learned about the MSDS information from a verbal description given by Eichleay safety. (Tr. 66). He asked Berube for a copy and Berube said he was going to go get one. (Tr. 66-67). However, Berube never gave him one. (Tr. 67). He did eventually learn the information about soda ash. (Tr. 67).

Respondent did not build the scaffold; it was built by a contractor. (Tr. 67). It was between 25 and 40 feet tall. (Tr. 67-68). The portion of the scaffold he was working on was four feet tall and had proper rails and foot boards. (Tr. 68). He did not see any safety hazards with the scaffold. (Tr. 68). He saw that it had a yellow tag so that is why he wanted more information. (Tr. 68). After the conversation with Berube both Rodriguez and Way performed work on the scaffold and tied off to a vertical piece of scaffold. (Tr. 68).

Rodriguez was terminated on January 25, 2013. (Tr. 68). Cartwright told him he was laid off for standing around on different projects. (Tr. 68-69). Cartwright told Rodriguez at an earlier date that when he had to terminate people he did not give good lay-offs because it had "come back to bite him in the butt" in the past. (Tr. 69). Rodriguez did not know if Cartwright

gave other kinds of lay-offs. (Tr. 69-70). Rodriguez believed that his lay-off was different than that given to others. (Tr. 70). The other lay-offs were "bad" because there was just cause. (Tr. 70). Rodriguez did not believe there was just cause in his situation. (Tr. 70).

Rodriguez did not receive a written termination slip. (Tr. 70-71). There might have been writing on his check. (Tr. 71). There was a box marked that said unacceptable work habit or work ethic. (Tr. 71). It was not a reduction in force lay-off, not a clean lay-off. (Tr. 71). Since the lay-off Rodriguez has stayed in contact with other employees on the maintenance project. (Tr. 71). None of those employees are still employed on the project. (Tr. 71). Some quit and some were laid off. (Tr. 72).

Court's Examination of Rodriguez:

Rodriguez learned from the telephone call that sodium carbonate came in a powder form and they would need to wear a respirator. (Tr. 73). It was water soluble and if it got on their skin they needed to wash for 15 minutes. (Tr. 73). If it got in their eyes they needed to flush for 15 minutes and seek medical attention. (Tr. 73). He believed that the PPE was face shield, gloves, respirator (if in powder form); boots, and protective equipment to cover the clothes. (Tr. 73-74).

Re-Direct Examination of Rodriguez:

Rodriguez considered this to be an unfair lay-off because he felt it was punishment for standing up to Berube on January 24. (Tr. 74).

Direct Examination of Mark Cartwright:

Cartwright was a piping supervisor. (Tr. 75). He distributed work and made sure it was done safely. (Tr. 75). He had worked for Respondent for six years. (Tr. 75). As a piping supervisor he was involved in hiring and staffing projects. (Tr. 76). He requested men when they were needed and laid off or fired employees as needed. (Tr. 76). The requests were sent to the local union hall. (Tr. 76). Cartwright is from Michigan and Respondent has an office there. (Tr. 76).

Cartwright first became involved at Molycorp Mine when he went out to the site in August 2012. (Tr. 76-77). He went there to perform maintenance on the combined heating and power plant. (Tr. 77). This maintenance work would include changing water piping, valves, pumps, agitators, and doing work on the scrubber system. (Tr. 77). The people performing the work would be pipefitters and millers. (Tr. 77). "Dennis" from Molycorp provided Cartwright with the specifications for people to hire. (Tr. 77-78). Dennis was a top manger at Molycorp. (Tr. 78). Dennis and Cartwright discussed how many men would be needed and what work they would be doing. (Tr.78). Dennis liked the employees from Michigan and was impressed with their work. (Tr. 78).

Cartwright was involved in hiring Rodriguez on or about December 13, 2012. (Tr. 79-80). Rodriguez and the other local union employees were hired to work on a KBR project under Respondent. (Tr. 80). Cartwright does not know why Rodriguez believed he would be working maintenance. (Tr. 80). The KBR project entailed working on the salt recovery unit. (Tr. 80). Respondent's role was to install piping and supports for KBR. (Tr. 80-81). Cartwright made the call to the union hall to hire Rodriguez and the other union workers. (Tr. 81). There was no conversation about what role Rodriguez would have until he arrived at the project. (Tr. 81).

When he arrived Rodriguez asked if Cartwright needed a foreman and asked to be considered. (Tr. 81). Cartwright asked around to other employees about him, including the steward, but no one really knew him. (Tr. 81-82). Cartwright decided to "take a chance" and hire Rodriguez as a foreman. (Tr. 82).

Cartwright thought Rodriguez did a good job on the KBR project keeping the men safe and dealing with KBR management. (Tr. 82). KBR management was difficult to deal with. (Tr. 82). They screamed and hollered and wanted projection where they could not supply the pipe supports. (Tr. 82). Cartwright did not work closely with Rodriguez but he seemed to stand up under the pressure. (Tr. 82). Cartwright did not witness Rodriguez loafing or not doing work on that project. (Tr. 82-83). However, a general foreman named Paul Langford ("Langford") was not impressed with Rodriguez's work. (Tr. 83). Langford said that he found ways of not completing his work rather than finding ways to complete it and that he never turned in paperwork. (Tr. 83). However, that conversation was two weeks before the hearing, not while the project was ongoing. (Tr. 83).

The KBR project eventually ended. (Tr. 83-84). Cartwright did not know why it ended, KBR just told Respondent it no longer needed its services. (Tr. 84). Cartwright laid off the employees and kept a welder and fitter. (Tr. 84). Cartwright was going to keep Tony Van Tassel and Schaeffer, but Schaeffer left. (Tr. 84). As a result, Cartwright let Rodriguez come over from the KBR project. (Tr. 84). Cartwright told him that he would get the rest of the week on foreman's pay but then get cut back to pipefitter's wages. (Tr. 84-85). He told Rodriguez he would be supervising people for three days on a steam line and getting foreman's wages during that time. (Tr. 85). Cartwright told Rodriguez that in the future, when there were 20 or 30 guys, they would need a foreman and that his pay might go back up. (Tr. 85-86). Cartwright said he would see what he could do, that you never know what the work would be from week to week, but that he could not justify foreman's wages after the first week. (Tr. 86). He told him that on Friday, January 18, 2013. (Tr. 86).

Rodriguez seemed okay with the decrease in wages. (Tr. 87). However, on the following Monday he got complaints from people working with him that he was not helping out. (Tr. 87). Cartwright also saw him on Tuesday, January 22, standing around while two employees were putting relief valves on a boiler. (Tr. 87-88). There was another one to be installed and Rodriguez was qualified to install it. (Tr. 87). Cartwright did not witness anything else personally but four people working with him said he was not doing his work. (Tr. 88). He spoke with Mark Lenards, Jenna Skradski, and Tony Van Tassel. (Tr. 89). When he terminated

Rodriguez he spoke with Schaeffer. (Tr. 89). Schaeffer said he noticed the change in Rodriguez as well. (Tr. 89).

Cartwright decided to terminate Rodriguez on the morning of Thursday, January 24. (Tr. 89). They were on the other job and Cartwright saw three guys sitting in a van not working. (Tr. 89). On Tuesday, he spoke with Rodriguez to say that they needed people to work not just supervise. (Tr. 89). The decision to terminate was made before Rodriguez asked for the MSDS sheet. (Tr. 89-90). Cartwright knew that he had to lay-off two people that week because the steam project was done and he selected Rodriguez. (Tr. 90). Cartwright was not aware that Rodriguez had made a MSDS request. (Tr. 90). He was also not aware of the complaints Rodriguez made about the scaffolding. (Tr. 90). He learned about the MSDS issue from Berube on Thursday night. (Tr. 90). He did not hear about the scaffolding. (Tr. 91).

Cartwright conceded that Respondent had obtained an additional week and a half of work. (Tr. 91). Long-term work would not be on-line until May or June, although that was pushed back until August by the time of the hearing. (Tr. 91).

On January 25 Cartwright told Rodriguez that he was going to lay him off. (Tr. 91). Rodriguez asked if he was being punished for bringing up safety issue and Cartwright said "of course not." (Tr. 91-92). Cartwright told Rodriguez that he was being laid off that day for standing around, not participating, and because of complaints from other workers. (Tr. 92). Cartwright told him it would be checked off for poor work habits; he does not give good lay-offs if there is reason. (Tr. 92). He puts the reason for the lay-off. (Tr. 92). He used to just give a reduction in force but he no longer does that. (Tr. 92). Rodriguez's lay-off was no different that anyone else's in terms of giving a reason. (Tr. 92). Respondent would not allow Cartwright to work for the company if he laid people off for bringing up safety issues. (Tr. 92-93). The other employee laid off was Troy Johnson. (Tr. 93). He was terminated for poor work habits. (Tr. 93). Cartwright was not aware of any safety complaints made by Johnson. (Tr. 93).

Cross Examination of Cartwright:

Cartwright did not notice any qualities that made Rodriguez stand out to hire him as a foreman. (Tr. 94). However, Cartwright would not make just any miner a foreman. (Tr. 94). Rodriguez was local and Cartwright liked to make local people foremen. (Tr. 94).

It was Cartwright's decision to terminate Rodriguez. (Tr. 94). The decision was made on January 24. (Tr. 94). By that evening he knew about the MSDS concern. (Tr. 94). He decided to terminate Rodriguez the next day. (Tr. 95).

Rodriguez had no written disciplinary action or write-ups in his personnel file. (Tr. 95).

Langford's comments about Rodriguez did not play a role in the decision to terminate Rodriguez. (Tr. 95). Cartwright did not ask Langford for proof or for anything he knew that would lead him to think that Rodriguez was unimpressive. (Tr. 95).

When the KBR project ended Cartwright laid off all the people from Local 364. (Tr. 95-96). He also laid off the miners from Michigan but they were not even gone yet when he had to keep them because of other work. (Tr. 96). There were seven or eight miners from Michigan. (Tr. 96). He laid off two. (Tr. 96).

Cartwright had two conversations with Rodriguez regarding foreman's pay. (Tr. 96). During those conversations he never discussed Rodriguez's work performance. (Tr. 96). The second conversation regarding pay was on Monday and he started to get complaints on Tuesday or Wednesday regarding Rodriguez. (Tr. 97-97). He did not document any of these complaints. (Tr. 97).

On January 24 Rodriguez was assigned to work for Berube. (Tr. 97). Cartwright supervised Berube. (Tr. 97). On that day Berube assigned Rodriguez to work on the sodium carbonate tank. (Tr. 97-98). Cartwright does not know if Rodriguez refused to work on the tank until he got an MSDS for the sodium carbonate. (Tr. 98). Miners have the right to demand an MSDS. (Tr. 98).

Cartwright was aware that the scaffolding required a 100 percent tie-off. (Tr. 98). He learned about it when the MSHA special investigator told him about it. (Tr. 98). When Cartwright went over and looked at the scaffolding it looked like it was secured to prevent tip-over. (Tr. 98-99). However, he did not do any tests. (Tr. 99). It is not acceptable to tie off to horizontal bars. (Tr. 99). It was not Cartwright's understanding that Rodriguez was told to tie off on a horizontal bar. (Tr. 99).

Rodriguez's safety concerns did not delay production on the 24th because the line was already frozen and it did not matter if it was finished that day. (Tr. 99-100).

Rodriguez worked for a little bit of time on January 25. (Tr. 97).

Part of the reason Rodriguez was fired was for lack of production. (Tr. 100). However, Cartwright did not tell anyone Rodriguez was fired for lack of production. (Tr. 100). Rodriguez never said that Cartwright knew that Cartwright's reasons for the termination were just pretext. (Tr. 100).

Court's Examination of Cartwright:

The normal pay day is Wednesday. (Tr. 101). Rodriguez was caught up to date on the 25th. (Tr. 101). The last pay check was supposed to be on the foreman's scale. (Tr. 101). Cartwright went back and checked the timesheets and it said he was a pipefitter journeyman. (Tr. 101). He sent in the hours and was e-mailed a check. (Tr. 101). His last check was to be on

the pipefitter journeyman's scale. (Tr. 101-102). It was only journeyman, not a combination of foreman and journeyman's wages. (Tr. 102).[4]

Re-Direct Examination of Cartwright:

Cartwright knew that Rodriguez should get journeyman's pay because they kept time sheets at the job site that reflected he should receive those wages. (Tr. 102).

Cartwright decided to terminate Cartwright on the 24th but waited until the 25th so that he could finish Friday and get a full week's pay. (Tr. 103).

Direct Testimony of Berube:

Berube was employed by Respondent at Molycorp Mine as a journeyman pipefitter for maintenance. (Tr. 104). He had been there since August 13, 2012. (Tr. 104). He was involved in the KBR construction project as foreman. (Tr. 104). Rodriguez and Berube were foreman of their own crews on that project. (Tr. 104). Berube did not have an opportunity to observe Rodriguez's work on that project. (Tr. 104-105).

When the KBR project ended Berube continued to work on the maintenance project. (Tr. 105). He still did not work closely with Rodriguez on that job as they had different projects. (Tr. 105).

Berube recalled working with Rodriguez on a soda ash project on January 24, 2013. (Tr. 105). Rodriguez requested an MSDS for soda ash and so he went to Mike Kinzer's office to get one and when he returned Rodriguez had already obtained one. (Tr. 106). He had an MSDS he was going to give Rodriguez. (Tr. 106). He did not tell Rodriguez he had an MSDS but it was in his hand and visible. (Tr. 106). Berube did not know if Rodriguez was kidding when he first asked for an MSDS so he asked if he was serious. (Tr. 106). There is a different demeanor on the job site so he asked if he was serious and when he was Berube went and got one. (Tr. 106-107). He was gone 20-25 minutes. (Tr. 107).

With respect to the scaffolding project, when he came back with tools Way and Rodriguez were already tied off on the scaffolding performing work. (Tr. 107). They did not have a conversation about the safety of the scaffolding until they were already up. (Tr. 107). When they were on top of the scaffolding Rodriguez said he did not know if it was legal for them to tie off to the vertical staffs. (Tr. 107-108). Berube did not know and he went and got more tools. (Tr. 108). Berube never told them to get up there because they needed to get the job done. (Tr. 108). A tie-off was required because of the tag. (Tr. 108). Berube never told Rodriguez to tie off to a horizontal bar. (Tr. 108).

[4] Initially Cartwright stated that Rodriguez's last payment was to be on the foreman's scale. However, he corrected himself and said that it was on the journeyman's scale.

With respect to Johnson's complaint, Johnson never told Berube about the confined space; Berube's father told him about it. (Tr. 108). They pulled off a portion of the wood skirting on the double wide trailer. (Tr. 108-109). Neither Johnson nor anyone else asked about the confined-space issue. (Tr. 109). He never ordered anyone to go under the trailer. (Tr. 109). Once a new manhole is opened it is no longer a confined space because there are two ways to enter. (Tr. 109).

Berube discussed the MSDS issue with Cartwright on the night of the 24th. (Tr. 109). He does not recall if he ever told Cartwright about the scaffolding issue. (Tr. 109-110). Berube was not involved in the decision to terminate Cartwright. (Tr. 110).

Cross Examination of Berube:

In addition to the MSDS, Rodriguez asked what PPE was required for the task at the sodium carbonate tank. (Tr. 110). In addition he asked if Berube had reviewed the JSA. (Tr. 110). Rodriguez also expressed concern about what to do in the event of exposure. (Tr. 110). Berube had spoken with the operators and they did not believe there were any serious safety concerns. (Tr. 110-111). However, because Rodriguez wanted an MSDS, Berube got one. (Tr. 111). He had never worked with sodium carbonate before that date. (Tr. 111). He did not know what to do in the event of overexposure. (Tr. 111). Berube thought that Rodriguez may have been joking about the MSDS because his demeanor did not appear serious. (Tr. 111). He was not laughing when he asked. (Tr. 111-112). Berube did not give the workers any task training for unclogging the pipe. (Tr. 112). To Berube's knowledge neither Way nor Rodriguez had ever worked with soda ash before. (Tr. 112). Berube did not review the MSDS prior to that day. (Tr. 112).

Rodriguez was already tied off to the vertical staff when Berube arrived. (Tr. 112). Rodriguez told Berube he did not want to leave Way alone because he was an apprentice. (Tr. 113). Rodriguez was not wrong to point out the safety issue posed by the scaffolding tie-off. (Tr. 113). Berube did not think Rodriguez was overly cautious about safety concerns. (Tr. 113).

Findings and conclusions

Protected activity

The Mine Act contains safeguards for miners engaged in protected activity. Specifically, §105(c)(1) states, in relevant part:

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

30 USC § 815(c)(1). As shown previously, to support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action. The initial issue is whether Rodriguez engaged in activity that triggered those protections.

On January 24, 2013 Rodriguez testified that he spoke out regarding two separate safety issues. First, he refused to work on a sodium carbonate tank until he was provided with an MSDS. (Tr. 28). Rodriguez testified that he requested the MSDS to know what to do in the event of overexposure. (Tr. 29). Also, Rodriguez wanted to know the proper PPE to use when handling sodium bicarbonate and questioned whether his supervisor, Berube, was knowledgeable about the chemical. (Tr. 28-29). In his testimony, Berube conceded that Rodriguez requested an MSDS. (Tr. 106). Therefore it is uncontested that Rodriguez requested an MSDS because of safety concerns.[5] Further, there is no evidence to suggest that requesting an MSDS is not protected activity. Requesting safety material concerning a chemical exposure falls squarely within the protection of §105(c)(1). In light of the testimony, Rodriquez's claim that he was engaged in protected activity with respect to the soda ash project is not frivolous.

Rodriguez's also claimed that he engaged in protected activity by refusing to tie off on a vertical scaffolding pole rather than on a designated tie-off point, as required by MSHA. (Tr. 37). Berube testified that Rodriguez was already on the scaffolding and tied off to the vertical pole when he arrived at the site. (Tr. 107-108, 112). However, Berube conceded that Rodriguez raised concerns about the safety of the scaffolding once he was on it. (Tr. 112). Here there is a conflict in the evidence. Rodriguez claims that he engaged in protected activity before climbing the scaffolding and after being ordered to climb while Berube claims that Rodriguez only raised the safety concerns after climbing the scaffolding. However, this conflict in the testimony is immaterial. It does not matter when Rodriguez engaged in protected activity, only that he did so. It is uncontested that Rodriguez engaged in protected activity at some point with respect to the scaffolding. Therefore, Rodriguez's claim that he was engaged in protected activity with respect to the scaffolding project is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Rodriguez engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the January 25, 2012 termination. The Commission recognizes 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)

[5] The only other witness at the hearing, Cartwright, was not present for either instance of alleged protected activity and did not provide testimony regarding whether or not protected activity occurred. (Tr. 90-91).

disparate treatment of the complainant. *See*, *e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). In *Secretary of Labor on behalf of Turner v. National Cement Company of California*, the Commission discussed some actions that could be considered animus or hostility toward protected activity. 33 FMSHRC 1059 (May 2011). Specifically, the Commission remanded the case because, among other reasons, the ALJ failed to consider Respondent's animus in ignoring or denigrating an employee's safety suggestions. *Id*. at 1069.

In this case, the Secretary presented evidence that Berube, an agent of Respondent, denigrated and ignored Rodriguez's safety concerns. Rodriguez testified that Berube denigrated his safety concerns with respect to the soda ash. When Rodriguez asked for an MSDS Berube responded "are you serious?" and seemed in disbelief over the request. (Tr. 28). In fact, Berube conceded at hearing that he asked if Rodriguez was serious. (Tr. 106-107, 111-112). Further, Rodriguez testified that after his request Berube left and never obtained an MSDS. (Tr. 30-31). Rodriguez also testified that Berube ignored his safety concerns with respect to the scaffolding. Specifically, Rodriguez informed Berube that it was against MSHA regulation to tie off on the scaffolding pole but Berube told him that it was okay for this job and that he needed to finish quickly. (Tr. 37). When Rodriguez continued to refuse the unsafe order, Berube ordered Way to climb onto the scaffolding. (Tr. 38). Rodriguez also testified to another incident in which Berube ordered another miner to enter a confined space despite that miner's safety concerns. (Tr. 40-41)

Respondent presented evidence that conflicted with Rodriguez's testimony. First, Berube testified that as soon as he realized Rodriguez was serious about the MSDS request that he went and retrieved one. (Tr. 106-107). He also testified that when he arrived at the scaffolding Rodriguez was already on it and that he was attentive to Rodriguez's safety concerns. (Tr. 107-108). Finally, he testified that he was not involved in the incident with the other miner concerning the confined area. (Tr. 108). However, it is not a judge's role to weigh conflicting evidence in a temporary reinstatement hearing. *CAM Mining, LLC,* 31 FMSHRC at 1085. In this case, I find that Rodriguez's testimony supports an inference as to Respondent's animus towards protected activity.

Knowledge of the protected activity

According the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there

is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. Rodriguez testified that he spoke out about both of his safety concerns in front of a member of management, Berube. (Tr. 28-29, 37). At hearing, Berube acknowledged that Rodriguez expressed concerns about both issues. (Tr. 106, 112). Furthermore, Cartwright (the firing official) acknowledged that he learned about Rodriguez's request for an MSDS for soda ash from Berube on the night of January 24th. (Tr. 90). Therefore, it is uncontested that Respondent had at least some knowledge of the protected activity before the termination occurred.

However, Respondent argued that the decision to lay-off Rodriguez was made on the morning of January 24, before either of Rodriguez's protected actions. (Tr. 89). Cartwright testified that he made the decision but allowed Rodriguez to finish the week before telling him. (Tr. 103). In essence, Respondent argues that it chose to terminate Rodriguez before it could possibly have knowledge as to his protected activity. However, Rodriguez testified that he believed the decision to terminate was made after he raised safety issues with respect to the scaffolding. (Tr. 48-49). Perhaps more importantly, he testified that on the morning of the 24th, Cartwright explained to him a new project that would last about a month and gave him instructions about what his role would be on that project. (Tr. 20-24). It is not possible to reconcile Cartwright's testimony that the decision was made to terminate Rodriguez on the morning of the 24th with Rodriguez's testimony that Cartwright gave him a role in a new month-long project at the same time.[6] Moreover, that role included the continuation of Rodriguez as foreman and continuing training activities. As such, I believe that Rodriguez has raised a non-frivolous issue as to whether Cartwright made the decision to terminate only after learning of the protected activity.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

[6] Cartwright conceded that Respondent had a new project, although he stated it would have only lasted a week and a half. (Tr. 91). However, the amount of time is immaterial. The fact that a new project was available and Rodriguez was trained for a role in it is significant. It tends to undercut the claim that a decision had already been made regarding discharge on Thursday morning.

In the present matter, the time between the protected activity and the termination was less than 24-hours. Rodriguez did not testify as to what time he requested the MSDS. However it was sometime after he was task trained on the new project around 10:30 a.m. (Tr. 22). He also testified that he began work on the scaffolding at around 2:00 p.m. (Tr.39). According to his testimony, he climbed the scaffolding only after making his safety concerns known. (Tr. 37-38). Therefore both of his safety concerns occurred between 10:30 a.m. and 2:00 p.m. on January 24, 2013. Rodriguez arrived the next day for work at 5:00 a.m. (Tr. 20). He worked for around an hour and a half and then, shortly thereafter, he was laid off. (Tr. 43-44). This easily meets the Commission's requirements. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). In this case, Rodriguez was punished for allegedly loafing and refusing to work. There is no evidence on record of any other employees punished less severely for the same or similar alleged misconduct. Therefore there is no evidence of disparate treatment. However, the Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id*. at 2510-2513.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between Rodriguez's protected activity and the Respondent's subsequent adverse action.

Tolling the Reinstatement

Respondent argued that, because all of the "local" employees hired on December 13, 2013 were laid off by January 25, 2013, any requirement to reinstate Rodriguez is tolled because no jobs were available after that date. (Tr. 116-117). As previously stated, following a motion *in limine* filed by the Secretary, I limited evidence concerning the issue of tolling. I rested that determination on the Commission decision in *Cobra Natural Resources*, wherein the Commission held that it was within the Judge's discretion to consider the issue of tolling. 35 FMSHRC__, slip op. at *3, (February 28, 2013), 2013 WL 865606.

However, in reviewing Respondent's proffer on this point, I have determined that Respondent is not actually making an argument about tolling. Instead, it is offering an alternative explanation for the decision to terminate Rodriguez on January 25, 2013. The first argument, the one already discussed, is that Rodriguez was terminated on January 25, 2013 for cause; loafing and refusing to work. However, in its tolling argument, Respondent contends that

on January 25, 2013 there was no longer any work available for Rodriguez and so no reinstatement is necessary. Essentially, it argues that it has two reasons to discharge Rodriguez on January 25th: it had just cause for a termination and it had economic reasons for a termination.

This is not an argument for tolling; it is a second affirmative defense to the discrimination claim. The very issue at the heart of this case is whether there is reason to believe that Rodriguez's termination on January 25, 2013 was the result this protected activity. As already shown above, I have found that the issue is not frivolous. It does not matter if Respondent argues under either theory - whether because he was a loafer or because there was no work - I have determined that there is a non-frivolous issue as to the discriminatory intent of the discharge that day.

The essence of a tolling argument is that while a reason for the discharge may have been discriminatory, there was another intervening event that would have caused a discharge anyway. *See Chadrick Casebolt*, 6 FMSHRC 485, 499 (Feb. 1984) ("if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.") When the alleged discriminatory discharge and the alleged legitimate economic lay-off occur on the same day, it is impossible (in a temporary re-instatement case where conflicts cannot be resolved) to determine which motive resulted in the lay-off or for what period the alleged discriminatee is entitled to payment.

I recognize that I did not allow Respondent to present evidence regarding the alleged economic reasons for a January 25th discharge. However, I find that even if I allowed Respondent to present all of its evidence at best it would present a conflict of evidence. Respondent would assert that the January 25th discharge was either for cause or for economic reasons and Rodriguez and the Secretary would assert that it was for the protected activity already discussed at length above. That would not change my determination here.

As a result, I find that tolling in this case is inappropriate. That is not to say that there might not have been legitimate economic reasons for the lay-off. It means that the appropriate forum for that discussion is in a discrimination proceeding.

Pay Rate

With respect to pay rate, "Any remedial relief due…must be determined…on the basis of whatever non-discriminatory status he would have occupied…had he not been disciplined." *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1420 (June 1984). There is a conflict in testimony as to whether Rodriguez would have been in the position of a journeyman pipefitter or a foreman. Rodriguez testified that his last paycheck was paid at a foreman's rate. (Tr. 48). Cartwright testified that Rodriguez's last paycheck was paid at a journeyman pipefitter's rate. (Tr. 101-102). However, Rodriguez admitted that Cartwright had told him that his pay might decrease in the future. (Tr. 62-64). As a result, I find that Rodriguez was aware that continuing in employment with Respondent meant there was a possibility of working at a journeyman

pipefitter's rate. Therefore, I find that it is appropriate for Rodriguez to be reinstated at that position and at that rate.

Conclusion

In concluding that Rodriguez's complaint herein was not frivolously brought, I give weight to the evidence of record that he expressed concern about the soda ash project and the scaffolding project. I also conclude that there were non-frivolous issues as to whether Respondent was aware of Rodriguez actions, that Respondent showed animus toward Rodriguez's alleged protected activities, and that there was a close connection in time between his alleged protected activity and his January 25, 2013 discharge.

Respondent asserts that its discharge of Respondent was based on his unprotected activities, most notably for loafing. I find that Respondent's evidence on this record is not sufficient to demonstrate that Rodriguez's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

ORDER

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

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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April 18, 2013

NORTHSHORE MINING CO., Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2010-666-RM
	:	Order No. 6493367;04/14/2010
v.	:	
	:	Docket No. LAKE 2010-668-RM
	:	Citation No. 6493359;04/06/2010
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Mine: Northshore Mine
ADMINISTRATION, (MSHA),	:	Mine ID: 21-00209
Respondent	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2010-964-M
Petitioner,	:	A.C. No. 21-00209-229431
v.	:	
	:	
NORTHSHORE MINING CO.,	:	Mine: Northshore Mining Company
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2012-6-M
Petitioner,	:	A.C. No. 21-00209-267117 A
v.	:	
	:	
ROBBBIE M. WILLS, employed by,	:	
NORTHSHORE MINING CO.,	:	Mine: Northshore Mining Company
Respondent	:	

DECISION

Appearances: Travis Gosselin, U.S. Department of Labor, Chicago, Illinois, on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Northshore Mining Company and Robbie M. Wills.

Before: Judge Zielinski

These cases are before me upon Notices of Contest and Petitions for Assessment of Penalty filed by the Secretary of Labor 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). The petition in LAKE 2010-964-M alleges that Northshore Mining Company is liable for two violations of the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines, and proposes the imposition of penalties in the amount of $29,500.00. The petition in LAKE 2012-06-M alleges that Robbie M. Wills, an agent of Northshore Mining, is personally liable for one violation of the standards, and proposes the imposition of a penalty in the amount of $2,700.00. A hearing was held in Duluth, Minnesota and the parties filed post-hearing briefs. For the reasons that follow, I find that Northshore committed the violations and impose civil penalties in the total amount of $7,000.00. I find that Wills is not liable under section 110(c) and dismiss the petition filed against him.

Findings of Fact - Conclusions of Law

Citation No. 6493359

Citation No. 6493359 was issued by John Koivisto[1] at 2:33 p.m. on April 6, 2010, pursuant to section 104(d)(1) of the Mine Act. It alleges a violation of 30 CFR § 56.11001 which requires that "[s]afe means of access shall be provided and maintained to all working places." The violation was described in the "Condition and Practice" section of the citation as follows:

> Crusher Ground Floor Repair Bay: Safe access was not provided to the upper elevated work platform on the east side of the "Evapco" oil cooler. Personnel were reportedly walking [a]... 6.5 inch wide steel beam on the south side of the cooler for a distance of about 12 feet to access a vertical ladder. The beam was about 3 feet above the steel platform deck. There were numerous trip hazards along the beam including piping, angle iron, and a fall hazard to the lower floor near the ladder. Footprints were observed on a wooden box and on the beam. Reportedly[,] personnel access the upper platform monthly via this route. Crusher Coordinator Rob Wills engaged in aggravated conduct constituting more than ordinary negligence in that he was aware personnel were using this means of unsafe access. The violation is an un-warrantable failure to comply with a mandatory standard.

Ex. S-1.

[1] Koivisto has been a mine inspector with MSHA for 7.5 years, performing about 200 inspections each year, and was trained to perform special investigations pursuant to sections 110(c) and 105. Tr. 22, 26-27, 28. He received a bachelors degree from the University of Minnesota-Duluth and an occupational proficiency degree in safety and health administration. Tr. 22. After college, Koivisto worked for Hibbing Taconite Company for approximately 27 years where he was a senior safety engineer and representative. Tr. 23, 26-27.

Koivisto determined that the violation was reasonably likely to cause a fatal injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was high.[2] He also determined that the operator's negligence rose to the level of unwarrantable failure.[3] A civil penalty in the amount of $24,600.00 was specially assessed for the violation.

The Violation

On April 6, 2010, Koivisto was at the Northshore Mine and conducted an inspection of the crusher area. Tr. 25, 84-85. He was accompanied by Dean DeBeltz,[4] a Northshore safety representative. As Koivisto climbed a stairway to an Evapco cooler, he noticed a wooden box, and upon further investigation, discovered a steel beam near the box, both with footprints, indicating that miners were using the beam to reach a ladder that led to an upper platform on the cooler. Tr. 35-36; Ex. S-5. Robbie Wills, the foreman of the section, told Koivisto that approximately once a month, employees would step onto the box to reach the beam and walk across the beam to a ladder that led to the upper platform in order to do preventative

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[2] It should be noted that the Cleveland-Cliffs Iron Company, the owner of Northshore, was the managing agent/part-owner of Hibbing Taconite Company when Koivisto was employed there and later laid off as part of a workforce reduction. Koivisto filed a discrimination complaint pursuant to section 105(c) of the Act, claiming he was terminated because he engaged in protected activity. Tr. 24. The Secretary chose not to pursue the case on behalf of Koivisto, and Koivisto filed a section 105(c)(3) complaint with the Commission that ultimately settled. Tr 81. Hibbing never admitted to discriminating against Koivisto in the settlement. *Id.* Koivisto stated in his field notes that previous issues with Cleveland-Cliffs were absolutely not a factor in issuing the citation. Tr. 25; Ex. S-3 at 5. MSHA usually institutes a 5 year restriction on inspectors inspecting mines of previous employers, but Koivisto's restriction was lifted after 2 years. Tr. 106, 109.

Koivisto was clearly concerned about the appearance of bias. He explained to Dean DeBeltz, the Northshore safety representative, that his previous relationship with Cleveland-Cliffs had no bearing on the citation he was issuing. Tr. 26. Overall, I found Koivisto's testimony to be credible and unbiased, and I do not believe that his past experience influenced his decisions to issue the citation and order. If anything, his concern appeared to make him more cautious in his determinations.

[3] A citation may be issued pursuant to section 104(d)(1) of the Act for more serious violations if the Secretary finds that there has been a violation of a mandatory health or safety standard, that the violation could significantly and substantially contribute to a safety or health hazard, and that the violation was caused by an unwarrantable failure. 30 U.S.C. § 814(d)(1).

[4] DeBeltz had worked at the Northshore Mine for 12 years. Tr. 165. At the time the citation was issued, he was a mine safety representative whose duties included general oversight of safety for operations and inspections, and conducting hazard recognition inspections. Tr. 166.

maintenance work. Tr. 37, 128-29. This route was established because access to the ladder from a lower platform was eliminated when the cooler was installed.

The beam is depicted in a photograph and a drawing made by Koivisto. Ex. S-4, S-5C. It was flat, smooth, approximately 6 ½ inches wide, and ran along the south side of, and 10-14 inches away from, the cooler. Tr. 34, 42. Miners using the route would step onto the box at the southwest corner of the cooler, step onto the beam, and walk approximately 12 feet to a ladder that was mounted vertically on the southeast corner of the cooler. Ex. S-4. The passageway was 22 inches wide, measured from the wall of the cooler on the left to two pipes on the right that were 3-4 inches in diameter and mounted, one above the other, from 30 to 46 inches above the beam. Tr. 44, 127; Ex. S-5C. A steel deck was located 3 feet below the beam. Ex. S-1. The rails of the ladder touched the edge of the beam. Consequently, the distance between the ladder rails and the pipes on the right was approximately 8-10 inches. Ex. S-5C. Just before reaching the ladder, a small 1-inch diameter pipe crossed over the beam at a height of approximately 1 foot. Tr. 46-47, 87-89; Ex. S-5C. Approximately 10-12 inches beyond the ladder, another pipe, the top handrail of the cooler's lower work platform, crossed the beam, at a height of approximately 4 inches. Tr. 47; Ex. S-5D. There was also a piece of angle iron in that area, but it is unclear whether it extended over the beam. The lower work platform did not extend beyond that railing, and at that point the distance to the floor below was 15-17 feet. Tr. 47; Ex. S-5G. Once he reached the ladder, a miner would step over the small pipe, turn to face the ladder and the cooler, sliding into the 8-10 inch gap between the ladder and the pipes, and climb up three rungs to the upper work platform.

While men who used the access route told Koivisto that they did not think the route was unsafe, he believed that it was unsafe because there were unprotected openings, no handrails, and either a 3 foot or a 15-17 foot fall if a miner tripped on a pipe or mis-stepped as he walked along the beam. Tr. 35. In addition, employees confirmed that not everyone who used the access route wore fall protection. Tr. 38. Koivisto posited that these factors could have led to serious injuries of the knees, back, or arms, if a miner mis-stepped while walking the beam, or a fatal injury if he fell through the gap between the ladder and the pipes to the floor below.

Respondents argue that the access route did not violate the standard because it was safe and there was "no realistic likelihood of falling." Resp. Br. at 5. They maintain that the wall of the cooler and the pipes provided protection to a miner walking on the beam by, in essence, providing handrails. Tr. 87; Resp. Br. at 5. Further, they point to a policy letter issued by MSHA, entitled "Safety Belts and Lines," that states, in essence, that fall protection is not required where there is a danger of falling less than 6 feet. Resp. Br. at 6; Program Policy Letter P12-IV-01.

The program policy letter states, "[i]n many cases, compliance with OSHA's fall protection standard will satisfy the requirements of MSHA's 30 C.F.R. §§ 56/57.15005 standard." Program Policy Letter P12-IV-01. However, Respondent was not cited for violating section 56.15005 and nowhere in the letter is section 56.11001 addressed. Under the policy letter, fall protection may not have been required in the circumstances at issue, but that does not mean that the access route was otherwise safe.

The question to be resolved is whether the access route along the beam posed a danger to miners who had to traverse it in order to reach the upper work platform of the cooler. *See Western Industrial, Inc.*, 25 FMSHRC 449, 452 (Aug. 2003). While the miners were trained to have three points of contact while traveling down the beam, the beam was relatively narrow, there was a trip hazard, and there were openings on either side of the beam. A misstep while traversing the beam, attempting to step over the small pipe, or attempting to step onto the beam while descending the ladder, could have resulted in a number of injuries, as described by Koivisto.

The fairness of applying a broadly worded standard, like section 56.11001, to particular factual situations is judged by application of the "reasonable person test," i.e., what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard would have provided in order to meet the protection intended by the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). Here, Wills, the newly assigned foreman, had identified a problem with the route and had initiated steps to address it. While his assessment that the route did not pose a high degree of danger was not unreasonable, it clearly did pose a danger, and a reasonable person would have concluded that it did not meet the safe access protection intended by the standard.

I find that safe access was not provided, and that the standard was violated.

Significant and Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[5] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), 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*, 6 FMSHRC 1, 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.

[5] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

. . . .
. . . .

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. It contributed to a discrete hazard, a miner mis-stepping or tripping and falling. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

Koivisto determined that an injury was reasonably likely to occur, and he thought that miners would have continued to use the beam in order to access the cooler. Tr. 73-74. In addition, several miners stated that they did not wear fall protection, which Wills explained would not have prevented a fall of 3 feet to the deck below. Tr. 38, 161. Koivisto posited that a miner could have hurt his back, fractured a knee, or broken an arm or his tail bone from trying to catch himself from a mis-step, tripping, or falling from the beam. Tr. 42-43. He also anticipated that a miner could have fractured his leg, hurt his knee, or suffered a broken ankle as a result of slipping off the beam where piping and small openings were located. Tr 44. Furthermore, he stated that if a miner went beyond the ladder and tripped over the handrail pipe or angle iron, or tripped and fell between the ladder and the pipes on the right, he could fall to the concrete floor below, and suffer a fatal injury. Tr. 47, 56-57.

Koivisto agreed that miners could have touched the cooler to the left and the pipes to the right of the beam in order to steady themselves as they walked 12 feet on the beam to reach the ladder, stepping over the small pipe. Tr. 87. Miners were trained to use three points of contact when climbing a ladder to prevent falls. Tr. 90, 132. They did

not carry tools up the ladder. If tools were needed, they would be set on the upper platform, which was easily reachable from the lower platform, prior to climbing to the upper platform. Tr. 129. Crusher technicians that Koivisto interviewed stated that they did not think that access to the cooler was unsafe. Tr. 96, 173-174; Ex. R-5. Even so, Wills was in the process of developing solutions to improve access to the upper work platform.

The cooler and the access route had been in place for approximately 10 years and even though Wills had identified the condition as awkward and developed possible solutions for alternate access, he did not move forward with plans to remedy it because he was addressing other issues. Tr. 85, 125-26. This indicates that the condition would have continued to exist for a considerable period of time, making injury reasonably likely. A miner would have no reason to proceed to the east beyond the ladder, and it is highly unlikely that a miner would fall through the relatively narrow opening between the ladder and the pipes. Consequently, there was no realistic possibility of the condition resulting in a fatal injury.[6] However, a fall from a mis-step or tripping could reasonably have been expected to result in lost workdays or restricted duty from a miner fracturing or otherwise injuring his knee, ankle, or back. I find that these injuries would have been reasonably serious in nature, and therefore, that the violative condition was significant and substantial.

Unwarrantable Failure- Negligence

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

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

[6] A miner would have stepped over the small pipe when he reached the ladder. After turning to face the cooler, and sliding into the 8-10 inch wide space between the pipes and the ladder rails, he would climb the ladder. The other trip hazards described by Koivisto were to the east, beyond the ladder, and there was no reason that a miner would have proceeded past the ladder. Climbing of the ladder was not identified as being unsafe. There was no realistic possibility that a miner would fall through the 8-10 inch gap, or that he would encounter or trip over the angle iron and pipe.

> 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 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 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary asserted that the violation was the result of Northshore's unwarrantable failure because Wills knew employees were using the beam as a means of access and he did not stop the practice, barricade the area, contact the safety department, or submit a work order. Tr. 72-73; Sec'y Br. at 20-21. The Secretary also maintained that the condition posed a high degree of danger. Sec'y Br. at 20-21. Koivisto believed that the violation was an unwarrantable failure because Wills exemplified "aggravated conduct beyond ordinary negligence . . . . " Tr. 74.

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

Wills was aware of the access route to the cooler and stated that the means of access had always been the same. Tr. 60; Ex. S-2 at 2. He had also used the beam once himself to investigate a safety chain issue that was found during a January 2010 inspection. Tr. 61, 62, 69; Ex. S-2 at 2. Wills told Koivisto that when he looked at the platform, he realized there was an access problem and discussed how to resolve it with the crusher group. Tr. 67, 138; Ex. S-3 at 12.

Wills did not think that the access route was unsafe, only that it was awkward and not the best design. Tr. 133, 138; Ex. R-4. In addition, the men who used the access route did not think it was unsafe. Nonetheless, Wills put the access route on his list of issues to address, but had not moved forward with possible solutions. Wills stated that after telling Koivisto this, he responded by saying that if they had understood each other better, he might not have written a "d" order, i.e. charged Northshore with unwarrantable failure. Tr. 136. However, after conducting some research, Koivisto maintained that the "d" order was proper. He discovered that Wills never submitted a work order and continued to send miners up to the platform to perform maintenance because he did not have time to address the issue. Tr. 68.

The violative condition was obvious and I find that Northshore had knowledge of the existence of the violation.

Length of Time

The Evapco cooler was installed in 2001 and the access route conditions had not changed through the issuance of the order in 2010. Tr. 85. In addition, absent the citation, the condition would have continued for the foreseeable future.

Operator Placed on Notice that Greater Efforts at Compliance were Necessary

The Secretary did not present any evidence that Northshore was placed on notice that greater efforts at compliance were necessary.

Extent of the Violation

The extensiveness factor involves consideration of the scope or magnitude of a violation, not an additional consideration of dangerousness or obviousness. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010).

Preventative maintenance was done on the cooler approximately once a month by one miner. Tr. 128-29. There was no indication from either party that it was accessed for any other reason or more frequently. Therefore, the scope and magnitude of the violation being small, I find that the violation was not extensive.

Degree of Danger

As stated above, access to the cooler had not changed in approximately 9 years, and the Secretary did not present any evidence of injuries that occurred as a result of walking the beam. While there were no handrails, the pipes to the right of the beam and the cooler to the left provided a reasonably secure passageway that allowed for three points of contact when a miner was walking the beam. In addition, the miners who worked in the area, including Wills, did not think the access route was unsafe. If, on the off chance, a miner did mis-step or trip while walking the beam, the most serious expected injuries may have resulted in lost workdays or restricted duty.

I find that the violative condition did not pose a high degree of danger to miners.

Operator's Efforts in Abating the Violation

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of the violation, generally a measure of an operator's response to violative conditions that were known or should have been known to it. While the parties stipulated that Northshore exhibited good faith in abating the violation, post-citation efforts are not relevant to the

determination of whether the operator engaged in aggravated conduct in allowing a violative condition to occur. *Enlow Fork Mining Co.*, 19FMSHRC 5, 17 (Jan. 1997).

When Wills became foreman of the crusher section, he sat down with employees about once a month and discussed their concerns. Tr. 124. Wills also developed a list of projects to undertake, one of them being improving access to the top of the cooler. Tr. 125-26. In January 2010, Koivisto identified a safety chain issue on an elevated platform. Tr. 124. As a result, there was a campaign to repair or install handrail chains in other locations. *Id.* When Wills used the access route to investigate the safety chain issue on the upper work platform of the cooler in February 2010, he added it to the list of projects. Tr. 124-25. Wills talked to the crusher planner about creating a different access route. Tr. 149. They developed several designs but never narrowed the choices. Tr. 150-51. Wills testified that he could have submitted a work order before deciding on a plan, but he would likely have had to go back and change it. Tr. 160. In addition, he would have needed to speak with the supervisor to confirm the chosen plan before sending the proposal to an engineering company, tasks that are not done via submission of a work order. Tr. 162. Koivisto maintained that Wills could have taken other steps to address the problem such as barricading the area or requiring miners to wear fall protection.

Northshore was in the process of addressing the issue, however, it had not continued to move forward by deciding on a particular plan. The citation was terminated by simply moving the ladder to a different point, which demonstrated that there was a relatively easy and quick solution. Ex. S-5A. Additionally, while fall protection may not have prevented a fall to the deck below, barricading the access route would have insured that no miner was put at risk of injury.

I find that Northshore made no effort to abate the violation.

Conclusion

Northshore had knowledge of the violative condition, and did not actively attempt to correct it. The violative condition was obvious and existed for a long period of time. The condition was not extensive, the operator was not placed on notice that greater efforts at compliance were necessary, and it did not present a high degree of danger to miners.

In addition to the elements above, I agree with my colleague that, "lack of previous enforcement must be considered when analyzing the negligence of the operator." *Sierra Rock Products, Inc.*, 35 FMSHRC ___, slip op. at 8, No. WEST 10-1589 (Jan. 8, 2013) (ALJ) (review granted Feb. 13, 2013); *Tide Creek Rock, Inc.*, 24 FMSHRC 201, 123 (Feb. 2002) (ALJ). Miners had been using the same access route to the cooler's upper platform since it was installed in 2001. There had been two complete inspections conducted by MSHA each year since that time. Tr. 85. Not one inspector identified the condition as unsafe, including Koivisto, who had performed an inspection of the same area in January 2010. Tr. 84, 85, 124. Koivisto maintained that the location of the beam was somewhat hidden and that the ladder was not located in a position where it could have been easily seen. Tr. 112. However, there was only one ladder to the upper platform, and, as depicted in a photograph taken by Koivisto, the ladder was clearly visible from the floor of the crusher area. Tr. 114, 116; Ex. S-5G.

Upon consideration of all the factors, I find that the violation was not the result of Northshore's unwarrantable failure to comply with the standard, but that based on the facts above, its level of negligence was properly marked as high.

Individual Liability

Section 110(c) of the Mine Act states: "Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c).

> The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 36264 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).
>
> A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'" *Id.* (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Ernest Matney, 34 FMSHRC 777, 783 (Apr. 2012).

Wills started as a foreman for the crusher area less than one year before the citation was issued. Tr. 122-23. The operator had just come back from a shut down and there was a large turnover in management. Tr. 123. Because Wills was the only salaried coordinator, he had to train his replacement in the bull gang, a new employee in the truck shop, and a new employee in the electrical shop during the first few months of his new job. Tr. 123.

As discussed above in detail, Wills addressed general safety concerns with employees, identified the access issue, and added it to his list of projects to undertake. While he thought that the route was awkward, he did not pursue his effort to find a permanent solution.

On the other hand, the condition had existed for almost 10 years, and had never been identified as an unsafe access route in any of the approximately 20 MSHA inspections conducted

during that time. Wills reasonably believed that the access route did not pose a serious hazard, and that it had been at least implicitly approved by prior managers and inspectors. While he should have had knowledge of the violation, his conduct cannot be characterized as indifference or a serious lack of reasonable care that constituted more than ordinary negligence. I find that he is not subject to liability under section 110(c) of the Act.

Order No. 6493367

Order No. 6493367 was issued by Koivisto at 10:54 a.m. on April 14, 2010, pursuant to section 104(d)(1) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.14100(b) which states, "[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 violation was described in the "Condition and Practice" section of the order as follows:

> Company #103 (P&H model 2800) Cable/Rope Shovel: A defect on the shovel was not corrected in a timely manner. The mirror mounted on the left side of the shovel was not present. The shovel was in use at the time and reportedly the mirror had been missing and not replaced since at least March 1, 2010. This condition exposed personnel to mobile equipment hazards. Mine Maintenance Coordinator Randy Lislegard stated he was awaiting a warranty ticket resolution by the manufacturer since about September, 2009. Coordinator Lislegard engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the condition and allowed the machine to remain in operation without a left side mirror. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-6.

Koivisto determined that the violation was unlikely to cause an injury, that the injury could reasonably have been expected to be fatal, that one person was affected, and that the operator's negligence was high. He also determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of $4,900.00 was specially assessed for the violation.

The Violation - Gravity

During an inspection on April 14, 2010, Koivisto found that the left-side mirror of the No. 103 P&H 2800 shovel was missing. Tr. 186, 188. Generally, there is no requirement that mirrors be installed on a shovel. Tr. 217. However, the manufacturer delivered the machine with two mirrors, and if the absence of the mirror constituted a defect affecting safety, the standard required that it be corrected in a timely manner. Tr. 217. The mirror on the right was close to the operator's cab, and provided a reasonable view to the rear along the right side of the shovel. In contrast, the left-side mirror, the same size as the right-side mirror, was located 30 feet away from the cab, on the left front corner of the shovel, approximately 20-30 feet above the ground, and the operator's view of the mirror was partially obstructed by a boom and cables.

The P&H 2800 shovel is an extremely large piece of equipment – described as the size of a house – that is used to dig surface material, rock or taconite, and load trucks that haul the material away. Tr. 189. The operator sits in a cab, three sides of which have windows, located on the top right front corner of the machine. Tr. 189, 243. The upper part of the shovel, called the house, rotates on a large center pin. The boom and related cables that support the shovel's bucket, are mounted in the center of the rotating part of the shovel. Tr. 199-200; Ex. S-10. In addition to the mirrors, the shovel is equipped with two cameras: one is positioned on the boom, facing down towards the shovel bucket, and the other is located on the rear, facing a trailing cable. Tr. 191, 193, 239-40; Ex. S-8 at 17, S-10. The rear camera remains in one spot and does not pivot with the house. Tr. 278. A monitor located in the operator's cab could display the view of either camera. Tr. 239.

Koivisto stated that because the shovel is so large, there is very limited visibility to the sides and rear of the machine and because the cab where the operator sits is on the right side of the shovel, the left side is a blind spot. Tr. 194, 234. He maintained that the operator needed mirrors to look for personnel or other equipment nearby. Tr. 194. Based on tire tracks he observed on the left side, Koivisto asserted that rotating the bucket to the left, without the left side mirror, created a crushing hazard to mobile equipment and personnel that might be located on the left side for reasons such as loading, maintenance, or clean-up. Tr. 195-96, 216, 226; Ex. S-8 at 18, S-10. Another potential crushing hazard was presented when the bucket was rotated to the right, because the rear of the house would then swing out into what had been the left side of the shovel. Tr. 252. However, the house would have passed over any miner on foot, and any mobile equipment that might be struck would have to have been in very close proximity to the shovel.

Northshore maintains that the missing mirror was not a defect affecting safety because it provided virtually no view of the left side of the shovel and was not used by shovel operators. The left-side mirror was located some 30 feet from the operator's cab, and the view of the mirror was partially or totally obstructed by the boom and cables, depending on the position of the bucket. Tr. 265-67, 285. Koivisto confirmed that the view could be obstructed at times. Tr. 233. Several witnesses testified that the left-side mirror provided virtually no view of the left side of the shovel, or the ground on the left side of the shovel. Tr. 265-67, 289. Koivisto confirmed that the left-side mirror provided a "significantly lesser" view of the left side of the shovel than the right-side mirror did of the right side, and was unable to state whether it could display the ground on the left side of the shovel. Tr. 227-28. DeBeltz interviewed a number of shovel operators the day after the order was issued, and none indicated that they used the left-side mirror. Tr. 249.

Operators interviewed by Koivisto told him the same thing, apparently with one exception. Tr. 219. The mirror was convex, distorting images, and it was not apparent from photographs introduced into evidence exactly what could be seen in the mirror, or whether the ground was visible. Tr. 235, 236, 294; Ex. S-10.

Northshore also maintains that the missing mirror presented no safety hazard during maintenance, cleanup, locomotion, or loading. Randy Lislegard,[7] Northshore's maintenance coordinator, maintained that the left side mirror was not used to perform any of these functions. Tr. 269. Positive contact with the shovel operator, by radio or sight, is required before any approach to the shovel. For maintenance or repair work, which Koivisto explained could prompt a "convention" of vehicles and personnel around and on the shovel, positive radio contact would be made. The operator would then set the bucket on the ground and apply the brakes, which locked the house. He would then leave the cab to lower a ladder on the right side of the shovel to the ground. Tr. 244, 251. When the ladder is down, there is an interlock that prevents the shovel from energizing. Tr. 270. A similar process, including positive contact with the operator, was followed for clean-up around the shovel, and clean-up was done only at the request of the shovel operator. Tr. 253.

When in operation, the power cable on the rear of the shovel is connected to a stationary power source. When the shovel must be moved to a different location, a portable device called a generator set is used to supply power to the shovel as it moves. During this process, the house and operator are facing forward and the generator set follows behind the shovel which moves slowly and in a straight line. Tr. 223, 271-72. The generator supplies only enough power to provide locomotion. The bucket and all other power driven mechanisms are locked out, and the house cannot rotate.

DeBeltz explained that to load material in a truck from either side of the shovel, the truck driver would contact the operator of the shovel or vice versa, usually by radio. Tr. 243-44. Then, the operator would move the bucket to where it would be positioned for loading. The truck would then be backed in, and the shovel operator would sound the horn when the truck was in the proper position. Tr. 242-43. The operator would then rotate the shovel back and forth to load the truck. Tr. 269. The operator must see the truck in order to load it and DeBeltz asserted that the top of the truck would have been visible. Tr. 243, 257.

At the time the order was issued, the shovel was positioned in such a way that its power cable paralleled the material bank and created a narrow passageway that would not have allowed traffic to pass from the right side over to the left side in back of the shovel. Tr. 247. DeBeltz asserted that it would have been against company procedure and difficult to drive over the cable because it was raised slightly above the ground and carried 7200 volts. Tr. 248. The cable and

[7] Randy Lislegard has been at Northshore approximately 13 years and has held positions as a maintenance technician for the crusher, a bull gang member, and a reliability inspector. Tr. 260. During the time that the order was issued, he was the maintenance coordinator and filled maintenance work orders. Tr. 259-60.

the location of the bank made crossing in front of the shovel the only possible route to the left side.

The shovel was delivered, and accepted by Respondent, with both left and right side mirrors, which had to be maintained under section 56.14100(b) if safety was affected. Mirrors are installed on mobile equipment as safety devices. While the view that the left-side mirror displayed may have been distorted and did not show the ground on the left side of the shovel, it provided some view of areas on the left side of the shovel, enough to provide some warning of the presence of mobile equipment or personnel, which at least marginally increased the general safety level with which the machine could be operated. As Koivisto explained, at times the mirror would not provide much of a view, but at other times it could be critical. Tr. 235. Also telling, was Lislegard's statement that Northshore at first wanted to remove the left-side mirror, but was told that it couldn't. Tr. 272. The statement was not further explained, but it is possible, if not likely, that the reason that removal of the mirror was barred was because it was considered safety equipment.

I find that the absence of the left-side mirror was a defect affecting safety. As discussed more fully, *infra*, Northshore knew that the mirror had been missing for at least six weeks, and chose to pursue a warranty claim against the manufacturer rather than continue to replace the mirror, which failed frequently. It did not correct the defect in a timely manner. Accordingly, I find that failure to timely replace the missing left-side mirror violated section 56.14100(b).

Koivisto determined that a fatal crushing injury was reasonably expected to occur based on the size of the shovel and the possibility that the bucket could be swung around at a low level, such that it or material falling from it might strike persons or other mobile equipment. Tr. 216. He also asserted that injury was unlikely because of the procedures requiring radio contact before approaching the shovel, though, he was aware of accidents where radio communication failed with large mobile equipment, but not specifically power shovels. Tr. 216, 230.

DeBeltz asserted that there were procedures in place requiring radio contact before approaching the shovel, left-side loading was uncommon, and the shovel was locked out when maintenance was performed. Tr. 219, 223-24. Further, he maintained that the house rotated approximately 20 feet off the ground and would have passed over any unseen person standing on the ground. Tr. 232. Whether it would have passed over mobile equipment would have depended on the size and location of the equipment. Tr. 232. As for the possibility that the bucket would strike a vehicle, there was nothing to obstruct the operator's view of the bucket as it swung, and it was swung more slowly to the left because of the limited visibility. Tr. 254-56.

I find that an injury was correctly marked as unlikely. If the bucket was swung and hit a piece of mobile equipment as a result of the missing mirror, a fatal injury could be expected because of the sheer size of the machine. Material falling from the bucket could also cause a fatality, and the rear of the shovel could fatally injure the operator of a piece of mobile equipment located close to the shovel.

Unwarrantable Failure - Negligence

The Secretary argued that the violation was the result of Northshore's unwarrantable failure because it knew that the mirror was missing and had the means to install a new mirror, but chose to rely on the manufacturer instead, letting the condition continue for a long period of time. Sec'y Br. at 29-30.

Obviousness and Length of Time

Shovel operators perform an inspection of the shovel before beginning to operate it, and record the results on cards. At least eight pre-operation inspection cards, dated between March 1 and April 12, 2010, stated that the left mirror was missing. Tr. 205; Ex. S-12. Even though some cards did not mention a missing mirror, the number of cards that did led Koivisto to believe that the mirror had been missing since at least March 1, 2010, and that it had not been replaced between then and April 12, 2010. Tr. 206. This belief was confirmed by Lislegard who told Koivisto that he did not believe the mirror was replaced during the month of March. Tr. 208; Ex. S-7 at 5.

Respondent had a computer system, referred to as "Ellipse," that tracked work orders. The system showed that the mirror had not been replaced since September 1, 2010 and no work orders were placed subsequent to March 1, 2010. Tr. 275-77. However, as far as Wills was aware, the mirror had been replaced between September and March. Tr. 293.

The violative condition was obvious, and at the very least, existed for a period of approximately 6 weeks.

Operator's Knowledge of the Existence of the Violation

In addition to the numerous pre-operation inspection cards given to the control room operator that stated that the left-side mirror was missing, there was also a warranty ticket from September 2010 that remained open at the time the order was issued. Tr. 209-11, 260-61; Ex. S-7, S-11. Lislegard was in the process of trying to resolve the issue with P&H. Tr. 209-11. It is clear that Respondent knew about the violation.

Operator Placed on Notice that Greater Efforts at Compliance was Necessary

There was no evidence presented by the Secretary that Respondent was placed on notice that greater efforts were required to comply with the standard.

Extent of the Violation

The violative condition involved the failure to replace a left-side mirror that slightly enhanced the safety of the shovel's operations. It did not have a significant impact because, with one exception, none of the operators used the mirror while performing tasks such as loading,

clean-up, and maintenance. In addition, the view that the mirror displayed, when visible from the operator's cab, was distorted and extremely limited.

I find that the violative condition was not extensive.

Degree of Danger

Debeltz testified to the communication and safety procedures that were used when the shovel was in operation. For loading purposes, any truck driver that wanted to approach the shovel had to make positive contact with the operator, usually by radio, and wait for the operator to spot the truck. Likewise, advance radio communication was required for clean-up and maintenance tasks, and the operator would shut off power and lock out the machine before any maintenance personnel approached. Loading rarely took place on the left side. The operators, almost uniformly, did not use the left-side mirror because of its obstructed and distorted view, and the fact that it provided an extremely limited view of the left side of the shovel.

I find that the violative condition did not pose a high degree of danger.

Operator's Efforts in Abating the Violation

Respondent had three 2800 P&H shovels in 2010 and all of them had issues with the mirrors popping out of the plastic holder, cracking, or the plastic holders cracking. Tr. 262-63. Prior to the issuance of the order, Respondent tried to use regular mirrors and mirrors with metal backs but the mirrors were breaking before being installed on the shovels. Tr. 263. Mirror issues were occasionally discussed at monthly meetings with P&H. Tr. 264, 281. Respondent wrote a warranty ticket in response to its claim on September 8, 2010, but it was still open at the time the order was issued. Tr. 214; Ex. S-11.

In addition to the warranty ticket, there were seven pre-operation inspection cards with notes about a missing left mirror. The cards would go to the control room operator who would then look in the Ellipse system to see if the same issue had already been tagged, and if it had not, a work order would be created. Tr. 260-61. There were three work orders in the Ellipse system that were dated prior to the warranty ticket. Tr. 261-62. There were no work orders placed between March 1, 2010, and the time that the order was issued, which indicates that a work order was in the Ellipse system for 6 weeks and it was not filled.

While Respondent had, in the past, tried to develop ways to keep the mirrors secure, and replaced them periodically, it had chosen to pursue the manufacturer's warranty claim and had not replaced the mirror for at least 6 weeks. I find that Northshore made virtually no effort to abate the violation.

Conclusion

Northshore had knowledge of the violative condition and did not attempt to address it for a lengthy period of time. However, I do not consider the knowledge or abatement factors to be particularly aggravating under these circumstances because Respondent had a legitimate, and reasonable belief that the missing mirror did not pose a significant safety hazard. The violative condition was obvious but it was not extensive, the operator was not placed on notice that greater efforts at compliance were necessary, and the condition did not present a high degree of danger to miners.

Upon consideration of all the factors, I find that the violation was not the result of Northshore's unwarrantable failure to comply with the standard. However, based on the facts above, I find that the negligence level was properly marked as high.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> > the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).
>
> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp*., 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must

also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that Northshore demonstrated good faith in abating the violations. Ex. J-1. It was also stipulated that paying the proposed penalties would not affect Northshore's ability to remain in business. *Id.* The parties did not stipulate to the size of Northshore as an operator. However, the MSHA Data Retrieval System, coupled with Table I of 30 C.F.R. § 100.3, indicates that Northshore is a medium-sized operator, and I so find.

History of Violations

Northshore's history of violations is reflected in reports from MSHA's database, typically referred to as "R-17s." Ex. S-13. One of the reports lists violations issued at Northshore Mine and reflects that 21 violations became final between April 2008 and April 2010. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Qualitative violations' history information can often be found on the form reflecting calculations of the proposed assessments, which are usually filed with the petition. However, the assessment form for the two litigated violations did not reflect information on overall or repeat violation history because the penalties were specially assessed. Other citations, issued in the same time frame for violations of the same standards, reflect an assessment of 8-10 points for overall violation history and no points for repeat violations.

I find that Northshore's overall history of violations, as relevant to these violations, was low to moderate, and should not be considered an aggravating factor in the penalty assessment process.

Docket No. LAKE 2010-964M

Citation No. 6493359 is affirmed as an S&S violation. However, it was not an unwarrantable failure to comply with the safety standard, and the injury that would have been reasonably expected to occur was lost workdays or restricted duty. It will be modified to a citation issued pursuant to section 104(a) of the Act. A specially assessed civil penalty in the amount of $24,600.00 was proposed for this violation. Considering that the violation would not have resulted in a fatality, that it was not an unwarrantable failure, and that the level of negligence remains high, a regular assessment would have resulted in a penalty in the range of $1,500.00. Considering the factors itemized in section 110(i) of the Act, and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of $4,500.00 for this violation.

Order No. 6493367 is affirmed as a violation. However, it was not an unwarrantable failure to comply with the safety standard and therefore, the order will be modified to a section 104(a) citation. A specially assessed civil penalty in the amount of $4,900.00 was proposed for this violation. A regular assessment would have resulted in a penalty in the range of $1,200.00. Considering the factors itemized in section 110(i) of the Act, and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of $2,500.00 for this violation.

The penalties imposed above, which total $7,000.00, are lower than the $29,500.00 in penalties assessed for the violations for which Northshore was found liable. The reductions are the result of findings of lesser gravity, that the violations were not the result of Northshore's unwarrantable failures, and the diminished likelihood that special assessments would have been deemed appropriate.[8]

ORDER

Based on the foregoing, it is **ORDERED** that Citation No. 6493359 and Order No. 6493367 are amended to citations issued pursuant to section 104(a) of the Act, and are **AFFIRMED, as amended;**

It is **FURTHER ORDERED** that the petition, in Docket No. LAKE 2012-06-M, lodged against Robbie M. Wills, in his individual capacity, is hereby **DISMISSED**; and

[8] Explaining deviations from penalties assessed pursuant to the Part 100 formula can be a relatively simple task, because the formula establishes qualitative weightings for each of the penalty factors. Where findings differ from those upon which the penalty assessment was calculated, reference to the tables can provide useful guidance on whether and/or how much the penalty imposed should differ from that assessed. Of course, consideration of other factors may justify imposition of a penalty that diverges significantly from any such suggested adjustment. As the Commission explained in *Cantera Green*, "a finding that . . . negligence and gravity were as great or even greater than the Secretary originally alleged does not preclude the judge from assessing lower penalties based on consideration of other statutory criteria and the evidence adduced during the adjudicative process." 22 FMSHRC at 622.

Where proposed penalties are specially assessed, explanations for divergences become more difficult. The Secretary's regulations do not set forth any criteria that MSHA is to apply in determining whether to specially assess a violation, and the narrative notification of a special assessment, when available, typically sheds little light on the rationale for specially assessing the violation, simply referring to the same factors that are taken into account in the regular assessment process. The situation is compounded by the fact that the Secretary typically asserts a claim of privilege and declines to disclose the reasons for special assessment recommendations or why a violation was specially assessed.

It is **FURTHER ORDERED** that Respondent, Northshore Mining Company, pay civil penalties in the amount of $7,000.00 within 45 days of this order.[9]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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[9] 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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April 19, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. KENT 2011-1156
Petitioner	:	A.C. No. 15-19447-254050-01
	:	
v.	:	Docket No. KENT 2011-1157
	:	A.C. No. 15-19447-254050-02
ICG Knott County, LLC,	:	
	:	
Respondent.	:	Mine: Kathleen
	:	

DECISION

Appearances: Elizabeth L. Friary, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
John M. Williams, Esq., Rajkovich, Williams, Kilpatrick, & True, Lexington, Kentucky, for the Respondent

Before: Judge Moran

Introduction

Five citations remain at issue in these dockets.[1] From Docket No. KENT 2011-1156, Respondent, ICG Knott County ("ICG"), disputes the validity of the order in Citation No. 8233876, issued under Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), for an

[1] Ten citations were issued in total at the Kathleen Mine in Knott County, KY on February 28, 2011. Citation Nos. 8233869 (failure to record results of previous pre-shift belt examination), 8233870 (accumulations of combustible materials along No. 3 belt line at No. 1A belt drive), 8233871 (improperly plastered brattice at the 1A headway of the No. 3 belt), 8233874 (insecure guardrail at No. 4 tail pulley), and 8233878 (insecure guardrail at No. 3 tail pulley) were not at issue during this June 1, 2012 hearing. Exh. S-6 includes the Inspector's notes on all violations.

inadequate on-shift examination on February 26, 2011.[2] If upheld, issues remain as to whether that violation was significant and substantial ("S&S"), of high negligence and an unwarrantable failure. From Docket No. KENT 2011-1157, ICG contests the validity of Citation No. 8233872, for alleged accumulations of combustible materials along the Kathleen Mine's No. 4 conveyor belt line and the S&S designation too. For Citation Nos. 8233873, 8233875, and 8233877, Respondent concedes those violations, but challenges the significant and substantial findings which were made for each of them.

For the reasons which follow, the Court finds that each of the violations was established along with all respective associated special findings. Further, although each matter cited stands on its own in these findings, there is an additional consideration that the relatively close proximity of these violations and their interrelated nature buttresses these conclusions.

Findings of Fact

Events preceding the discovery of the alleged violations which raised concerns for the MSHA Inspector

On February 28, 2011, MSHA Inspector Berl Hurt[3] conducted an examination of the Kathleen Mine, an underground coal mine operated by ICG Knott County in Knott County, Kentucky.[4] He had previously inspected the No. 1 and 2 belts, and intended to next inspect the No. 3 and 4 belts on this visit. Tr. 16, 21.[5]

[2] Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

[3] Berl Hurt currently works at MSHA's field office in Hindman, KY. Tr. 12. Inspector Hurt has been involved in the mining industry since 1994 and had five years of mining experience before he began working with MSHA in 2007. Tr. 13, 14. At MSHA, he first worked as a coal mining inspector (CMI) before becoming a health inspector in 2011. Tr. 14.

[4] The Kathleen Mine closed in May 2012 due to economic hardship. Tr. 198-99.

[5] At hearing, the Secretary presented a cross-sectional map of the Kathleen Mine (Joint Exh. 1 (JE1)) to assist the witnesses in explaining the layout of the Kathleen Mine. The No. 3 head drive was located in a southeast area of the mine, and the No. 3 belt extended from the No. 3 head drive about 1800 feet northwest until it adjoined the No. 4 head drive. The No. 4 belt then extended slightly southwest, perpendicular to the No. 3 belt line, for another 700 feet (about ten or eleven breaks). Tr. 36.

Inspector Hurt arrived at the Kathleen Mine around 8 a.m., at which time he met with mine superintendent Randy Pack to examine books before going underground.[6] Shortly thereafter, mine foreman Steve Hoskins escorted the Inspector underground around 8:30 a.m. Tr. 39. Hoskins brought Inspector Hurt to the No. 3 head drive, where he then met with Perry Holbrook,[7] the mine's day shift belt foreman, and began the inspection. Hoskins left the Inspector with Mr. Holbrook at the No. 3 head drive, the starting point for the inspection of the No. 3 belt. Tr. 21.

Mr. Holbrook accompanied Inspector Hurt during his examination of the belts.[8] They crossed over the No. 3 belt and began walking on the offside of the belt up toward the No. 4 head drive. Tr. 22, 24.[9] They then walked to the No. 4 head drive and continued from that point to walk the narrow side of the No. 4 belt, along the coal ribs. Tr. 24. At approximately 9:45 a.m., Hurt and Holbrook arrived at the No. 4 head drive and prepared to walk up the belt line. Tr. 40. At this point Holbrook asked Inspector Hurt if he wanted to go outside. Tr. 24. The Inspector testified that Holbrook mentioned "several times" that he would take Hurt "back outside once [he] got to the [No. 4] drive." *Id.* Hurt had traveled with Holbrook on previous inspections, and believed Holbrook was acting *differently* on this day. Tr. 132. Holbrook's statements sparked Hurt's suspicions and made him decide to inspect the No. 4 belt as well, "because there's something obvious [Holbrook]'s wanting not to check." Tr. 24. As a normal workday for Inspector Hurt would end around 3:30 p.m., interrupting it before 10 a.m. was odd, to say the least.[10] Tr. 40.

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[6] Inspector Hurt issued Citation No. 8233869 before entering the mine for the operator's failure to record the results of the pre-shift examinations that had been conducted on February 27, 2011. Tr. 19.

[7] Perry Holbrook has worked in the mining industry since 1986. He received his foreman papers in 2006, and started working at the Kathleen Mine in 2010, where he soon took the position as the Mine's belt examiner. Tr. 154-56.

[8] The mine was approximately four feet high in this area. Tr. 161; Exh. JEI.

[9] The pair walked up the No. 3 belt line and arrived at the 1A head drive, where the 1 section belt dumps into the 3 section belt. Here, Mr. Hurt noticed accumulations that were black in color for approximately two breaks and issued a Section 75.400 violation (Citation No. 8233870) for accumulation of combustible material. Tr. 23, S-6, p. 9-10. As they proceeded up the No. 3 belt toward the No. 4 head drive, Mr. Hurt saw a brattice that was not plastered entirely of non-combustible material at the 1A headway of the No. 3 belt and issued Citation No. 8233871. Tr. 23, S-6, p. 9, 11. Citation Nos. 8233870 and 8233871 are not disputed in this case.

[10] Although the Inspector agreed on cross-examination that it is not unusual to have a ride underground ready for the inspector to leave the mine at any time, and further agreed that such an arrangement is common practice in a mine, Mr. Holbrook was not asked by Respondent's Counsel about offering Mr. Hurt these rides. Tr. 129. The Court considered Respondent's arguments but, as noted, does not subscribe to its take on the issue. *See,* R's Post-Hearing Response Brief at 5-6.

Citation No. 8233873

The belt alignment citation

As Inspector Hurt and Mr. Holbrook started along the No. 4 belt, the Inspector observed the belt rubbing the bottom stands within the first few breaks in the No. 4 belt. Tr. 24-25.[11] He then issued Citation No. 8233873 for violating 30 C.F.R § 75.1731(b), which provides:

> Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.

The citation alleged a violation of this standard, that it was caused by moderate negligence and was reasonably likely to cause lost work days or restricted duty arising from such injuries as smoke inhalation. Exh. S-2; Tr. 37. It was also marked significant and substantial. Hurt marked the hazard as moderate negligence because the rubbing "was on the off-side, so [miners] could examine the belt from the wide side which they should be able to see." Tr. 37.

The Inspector explained that a belt needs to be properly aligned to prevent rubbing against the belt's structure or components; otherwise, this rubbing creates a potential fire hazard, as the belt rubbing the structure could heat up and create friction that would cause smoke or a fire to catch on the belt itself or on nearby coal accumulations. Thus, if normal mining conditions continued, friction from the belt rubbing would heat the belt and result in a fire. Tr. 33-34.

Significantly, Inspector Hurt saw this rubbing occur at seven different locations at the No. 1, 2, and 3 breaks. Tr. 29, 47. He could tell the stand was rubbing in seven locations because the rubbing was "easily seen" upon walking up to it, as the belt was "rubbing up against and cutting some of the stands." Tr. 30. The paint on the stand had rubbed off and the stands were "grooved" at the points where the belt had rubbed the stand, which led the Inspector to believe that the condition had existed for several shifts. Tr. 32, 39, 116. Neither Inspector Hurt nor Mr. Holbrook touched the misaligned portion; Hurt based his assessment on the obviousness of the misalignment and that heat would naturally be generated from such a misalignment. Tr. 34. Hurt stated that he could have touched it to check the heat, but did not because it would have been dangerous to do that. Tr. 33.

Inspector Hurt showed this misalignment to Holbrook, who then "took a hammer and…hit the thing…and straightened the belt right up." Tr. 164. Holbrook, for his part, elaborated that the belt "wouldn't rub all the time, but a crooked piece of belt would come through and it would rub hard, you know, for a little bit and then it would clear up. You know, it wasn't no problem to fix it." Tr. 165. In contrast to the Inspector's testimony, Mr. Holbrook did not see any places where

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[11] A break is the same length as a crosscut, which is a 70 ft. x 70 ft. block of coal. Tr. 23. Mr. Hurt marked Point "A" on the map (Exh. JE1) where he saw the belt rubbing. Tr. 26. Hurt testified based on where he marked on the map that the rubbing was occurring due to misalignment around "the first three breaks inby the No. 4 head drive." Tr. 27, 30.

the belt was cutting notches or grooves into the belt stand. *Id.* However, on cross-examination, he said that he did notice that paint had rubbed off the belt from the misalignment. Tr. 181.

Citation No. 8233872

Accumulations Citation

Inspector Hurt and Mr. Holbrook continued walking along the off-side of the No. 4 belt when they found accumulations of combustible material in the form of loose coal and dust in that area. Tr. 42-43. The Inspector measured the accumulations, which ranged in size from a thin layer to 14 inches in height. Tr. 43. The bottom of the belt and the bottom belt rollers were approximately eight to ten inches off of the ground. Tr. 44. The accumulations spanned for a distance of a break and a half, or approximately 100 feet, and were built up on both sides of the belt. Tr. 43-44. There were approximately three breaks, or 200 feet, a relatively close distance in the Court's view, between the accumulations cited here and the misaligned belt the Inspector found, per Citation No. 8233873, just discussed *supra*. Tr. 46-47.

Inspector Hurt then issued Citation No. 8233872 for a violation of 30 C.F.R. § 75.400, which 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.

This citation noted that the violation created a heat source that, in the Inspector's view, was S&S, caused by moderate negligence, and was reasonably likely to cause lost work days or restricted duty. Exh. S-1. Hurt expressed that the rubbing belt, continuing in such a fashion, and so close to dry coal accumulations, could cause a fire. Tr. 52. He believed this hazard would have injured one person, namely, either the belt examiner or the belt shoveler. Tr. 54. Although he marked the condition as moderate negligence, based on the amount of time that he believed had elapsed to create the size of the accumulations, upon reflection, he believed that he "should have marked it high [negligence]. I really think I should." Tr. 54.

Inspector Hurt issued this citation because the combustible material that had spilled off of the conveyor belt created a smoke and fire hazard. Tr. 45.[12] He could tell by looking at the accumulations along the No. 4 belt that they were black and dry. Tr. 47. He did not "feel" whether the coal was wet, but explained that determining whether coal is wet or dry is similar to determining a wet rock from a dry rock in that "it's real shiny when it's wet and then kind of dull looking when it's dry." Tr. 48. The dryness of the coal was therefore obvious to the Inspector, and he noted that the accumulations extended for a break and a half (about 110 feet). *Id*.

[12] Hurt estimated the No. 4 belt at about 700 feet, or approximately ten breaks. There were approximately three breaks, or 210 feet, between the misalignment along the No. 1, 2, and 3 breaks of the No. 4 head drive and the start of the coal dust accumulations along the No. 4 belt. Tr. 47.

He stated that although the belt rollers were not rubbing the accumulations, he did notice that the coal accumulations were piled above the rollers and that "someone had cleared out from underneath the roller to keep it from turning in the accumulations." Tr. 49. It was the Inspector's view that the accumulations were at such a level that, given the misaligned belt, another spill could have had the rollers turning in the coal "within just a few minutes." Tr. 50.

One belt shoveler was already shoveling the accumulations on the wide side of the No. 4 belt at the time Hurt and Holbrook entered the area. Tr. 50. It should be recalled that ICG Knott had tried to divert the Inspector from this area. Accordingly, Hurt believed that the miner was there in an effort to clean up the accumulations before he reached the area. *Id.* The relatively close proximity of two violations, the rubbing belt and the coal accumulations, created an even greater concern of a fire hazard in the Inspector's estimation. Tr. 51.[13]

Mr. Holbrook testified that he did not know about the accumulations until he arrived at the No. 4 belt with the Inspector. He asserted that the accumulations causing the violation were "fresh" and that the shoveler who was already down there was working on a spill in another area of the No. 4 belt. Tr. 178. On cross-examination, Holbrook admitted that he considered a break and a half of accumulations to be a big spill. Tr. 181. He did not touch the accumulations to check if they were wet, but he admitted that that area with the deepest spill was neither muddy nor wet. *Id.*

Hurt issued a Section 104(d)(1) order later during the inspection,[14] at which time Holbrook shut down the No. 4 belt and brought in five or six other miners to shovel the accumulations and rock dust around the belt, all in order to abate the citation. Tr. 56-57.

Citation No. 8233875

The fire-fighting equipment citation

Following the issuance of the two citations along the No. 4 belt, Inspector Hurt and Mr. Holbrook traveled down to the end of the 700-foot-long No. 4 belt to the point at which this belt adjoined the No. 5 belt head drive. Hurt observed that there was no fire-fighting stand, nor any nozzle attached to the fire-fighting hose at the No. 5 head drive. Tr. 58-59.[15] Hurt also saw a fire-fighting valve lying on the ground, detached from the No. 4 tailpiece, and further noticed

[13] Hurt explained that when he issues citations, he writes down the violation in the moment when he sees them while underground in the mine. Tr. 55. At the time he wrote out the citations for the misalignment and accumulations, right after noticing them and telling Holbrook that he was going to issue them, Holbrook did not object or dispute the citation. Tr. 55-56.

[14] The Section 104(d)(1) order was entered in Citation No. 8233876, discussed *infra*.

[15] At this point the pair had traveled 700 feet up the No. 4 belt and had gone under the No. 5 head drive.

that fire hose outlets were not placed at 300-foot intervals along the No. 4 belt. Tr. 59, 61.[16] Hurt therefore issued the third contested citation, No. 8233875, for violating 30 C.F.R. §75.1100-(2)(b). That standard provides:

> In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with fire hose outlets with valves at 300-foot intervals along each conveyor and at tailpieces. At least 500 feet of fire hose with fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

This citation was marked significant and substantial, caused by moderate negligence, and reasonably likely to cause lost work days or restricted duty. Exh. S-3. Inspector Hurt believed it would be too hard to fight a fire in those conditions without all the fire-fighting equipment (hose, nozzle, outlets, and valves) readily available at their proper locations. Tr. 77.

The detached fire valve[17] lying on the ground next to the water line, indicated to Inspector Hurt that someone had prior knowledge of this violation. This conclusion was equally clear to the Court. The Inspector explained that in order to remove a fire valve from a water line, the water line outby must first be shut off. Tr. 62. Once the water line has been turned off, the valve can be physically removed from the water line, and then the hose line can be reconnected. *Id*.[18] Mining has to halt when the water supply stops, because water is constantly needed in each section for ventilation purposes to keep dust down, as the continuous miner cuts coal. Tr. 63. The valve's location on the ground therefore quite reasonably indicated to Inspector Hurt that someone had been previously aware of the detached valve, because it could not have found its way onto the ground without someone first turning off the water and consequently shutting down production to physically remove it. Hurt was doubtful that the valve's detachment had occurred in the previous four hours that had elapsed since the shift started, and estimated that the fire valve had been lying on the ground for at least one shift. Tr. 71-72. On this record, the Court agrees with that conclusion as well.

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[16] At no point in the record did the witnesses expressly discuss the proximity of the No. 4 tailpiece to the No. 5 head drive. At times, however, the parties use these terms interchangeably to indicate the area at the end of the No. 4 belt. On the map of the Kathleen Mine, the Inspector designated Point "D" as the location of the detached fire valve at the No. 4 tailpiece, while he marked Point "E" as the location of the missing fire nozzle at the No. 5 head drive. (Exh. JE1). Points "D" and "E" are adjacent to each other on this map.

[17] Fire valves, referred to as "fire hose outlets" in 30 C.F.R. §75.1100(2)(b), are the same as fire hydrants. Tr. 61. In an underground mine, the water line runs beside the conveyor belt, and such hydrants are supposed to be situated every 300 feet along the belt.

[18] There is enough slack in the water line, especially at the head drive, to pull the ends together. Tr. 62, 69-70. Lock-in clamps, made for the water line, are on each side of the line and couple together. Tr. 70.

Although Inspector Hurt marked this violation as displaying moderate negligence, as with Citation No. 8233872, upon reflection, he testified that he "should have marked high [negligence for this violation too]…because it was obvious that someone knew about it. They had to physically remove it and left the other one [lying] beside it…When you remove a valve, several people in the mine from the outside to the section know about it because you have to physically…shut the water off." Tr. 78-79. Hurt believed that the valve was broken; therefore someone had removed it, but rather than shutting down production further, they had failed to replace it. Tr. 62. He recalled that Holbrook said something to the effect that someone had forgotten to replace the broken valve. Tr. 68. Hurt's hunch that the valve was broken was confirmed when Holbrook shut off the water and installed the valve that had been lying nearby on the ground, which valve then started leaking. Tr. 61, 71.[19] Holbrook then contacted Randy Pack on the surface to bring a new fire valve down. Tr. 71. Two valves and a nozzle were then delivered and installed to abate the citation. *Id*.

Respondent's Perry Holbrook agreed that the fire valve was not attached to the water line, and that a valve was lying nearby on the ground. Tr. 172. When Hurt told Holbrook that he was going to issue a citation for the broken valve, Holbrook told him, "I can fix that. Right here lays one." Tr. 172. However, as noted, when he tried to install it, he found out that the valve was defective, and therefore he had to order that another one be installed. Holbrook did not know when the fire valve broke, who removed it, or when it was removed. Tr. 173. He testified that the first time he ever noticed the broken valve was during the February 28 examination with Inspector Hurt:

> The day that we walked in on [the valve], it was gone. It's like another shift before me, something happened, and they took it out…It was probably there before, but now, the day [Hurt and I] got there—and keep this in mind. I hadn't been there prior to this that day, so I hadn't been there since Saturday noon. Because, I mean, we [were] usually out of there by 1:30, 2:00 on Saturdays. Tr. 179.

Mr. Holbrook did not challenge Inspector Hurt's issuance of this citation for the broken valve, missing nozzle, or improperly placed valve during the inspection. Tr. 68.

Unlike the valve, which was, albeit defective, lying on the ground, the nozzle, which was supposed to be attached to the fire hose outlet at the No. 5 head drive, was missing.[20] Inspector Hurt testified that Mr. Holbrook told him "something had happened to it and they had failed to replace it." Tr. 64. Nozzles are normally stored along with their fire-fighting hose, and without a

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[19] The belts were running at the time Inspector Hurt issued the Citation No. 8233875 for the valve and nozzle. At that point in time, the belts were turned off, with the Inspector issuing his 104(d)(1) order on the No. 3 and No. 4 belts. Tr. 72.

[20] In an arrangement similar to a home garden hose and spray nozzle, the mine's nozzle screws on to the end of the water line and allows water to be sprayed in the needed direction, in the event of a fire. Tr. 64.

nozzle, a fire hose is rendered useless. Tr. 64-65.[21] Holbrook had no memory of seeing a nozzle at its required location during the inspection and he did not know how it went missing or who took it from its proper location. Tr. 172.

In addition to the broken valve and missing nozzle, Inspector Hurt also observed that the next nearest fire-fighting valve to the No. 5 head drive was 420 feet away, located back along the No. 4 belt. Tr. 63.[22] At hearing, Hurt marked the location of this fire valve as Point "C" on the map of the Kathleen Mine. Exh. JE1. Fire-fighting valves are required at 300-foot intervals and at the belt's tailpiece, but here there was neither a valve installed at the tailpiece, nor was another valve present for 420 feet. Tr. 63. A fire hose was located near the No. 5 head drive, but Hurt asserted that it could not have been used in this area because neither an outlet nor a nozzle was available at that point. Tr. 72. Furthermore, while the automatic fire suppression system was present at the No. 5 head drive, there was no such system along the No. 4 belt. Tr. 72-73.

With no valve at the required 300-foot interval, but rather some 420 feet away, Hurt stated that if a fire started at the No. 5 head drive, a miner would not have the equipment available to immediately start fighting it. Tr. 73. Instead, a miner would first have to travel 700 feet down to the No. 4 head drive to retrieve the nearest nozzle, then head back down the No. 4 belt to the hydrant located at the 420-foot mark to hook it up. Tr. 73-74. There was a fire hose located at the No. 5 head drive, but the only way to fight a fire under such conditions would be to get the nozzle and hose from the No. 4 head drive and hook the equipment up at the 420-foot mark. Tr. 75. Although, at 500-feet long, the hose could have reached the entire belt and watered it, the key point was that to hook up the hose to fight a fire in that region would have taken a longer period of time. Tr. 76. Obviously, time is critical if a fire occurs in a mine.

Although the Inspector did not check whether there was a fire stand located 300-feet inby the No. 5 belt from the No. 5 head drive, he asserted that a fire stand at that location would not have lessened the fire hazard. Tr. 78. Fire stands, he explained, are specifically required at tail pulleys because "there's so much fire hazard involved with a head drive. You've got electrical, mechanical bearings that could heat up and create fires, and that's why they are required." *Id.*

[21] The Court asked whether a person could place his thumb over a nozzle to get the outgoing water to spray in an intended direction, and Hurt responded that this would be impossible because it was an "inch and a half hose," meaning a miner would have to put his entire hand over it (because the circumference would be too wide for a thumb to cover the entire circumference). Tr. 65.

[22] Hurt measured this 420 foot distance himself by counting the breaks town to the next fire valve, which totaled six breaks (six crosscuts), each of which have 70 foot centers. Tr. 66.

Citation No. 8233877

The damaged rollers citation

Following the citations just discussed, Inspector Hurt also issued Citation No. 8233877 for stuck rollers along the No. 4 belt (Ex. S4).[23] 30 C.F.R. § 75.1731(a) provides:

> Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced.

Inspector Hurt found eleven (11) stuck rollers situated throughout the length of the No. 4 belt, which were located on its top portion, on both the travel-way and narrow side. Tr. 81, 83-84. He issued this citation in conjunction with the citations for the coal accumulations and seven misaligned belt areas, also along the same No. 4 belt (Nos. 8233872 and 8233873), for creating a fire hazard. Exh. S-4; Tr. 82. Unlike normal rollers, which are free turning, the metal of a stuck roller will rub against the rubber of the belt, which causes friction and creates a fire hazard. Tr. 83. Hurt explained he that did not touch the rollers because he could visually see that they were not turning. Tr. 84.

Holbrook also saw the stuck rollers. Inspector Hurt explained that Mr. Holbrook and "three or four other men" who were brought in from the section "took a hammer to some of them and actually physically removed the entire structure, the three rollers from that area" to abate the violation. Tr. 84-85. Inspector Hurt stayed with Holbrook and the other miners as they made these repairs, which was at the same point that he issued the 104(d)(1) order. Tr. 85.

The Inspector considered the stuck rollers as significant and substantial, caused by moderate negligence, and reasonably likely of causing lost workdays or restricted duty. Exh. S-4. He determined that this condition was reasonably likely to cause injury "because a confluence of factors was involved…the accumulations, the belt rubbing, plus the stuck rollers and no fire-fighting equipment in the area." Tr. 89. The Court agrees with this cumulative assessment. Here again, the Inspector believed that he should have marked the violation as high negligence, rather than moderate, because a belt examiner should have seen the stuck rollers and because they looked like they had been stuck for several shifts. Tr. 90.

Inspector Hurt explained that rollers act like scrapers and scrape accumulations off of the belt as the belt travels across the rollers. That action can create "accumulative [gob]" on both sides of the rollers, and in turn can cause the rollers to freeze up. Tr. 80. Hurt elaborated about the condition of the stuck rollers along the No. 4 belt: "Some of them [were] worn shiny where the belt had rubbed against them, and all of them had accumulations…that's how obvious you

[23] Citation No. 8233876, involving Inspector' Hurt's issuance of a Section 104(d)(1) order, follows Citation No. 8233875 chronologically. However, since this 104(d)(1) order encompasses all other violations at issue in this case, the Court will first address Citation No. 8233877.

could see it." Tr. 80. When a belt rubs metal for an extended period of time, the paint will wear off of the rollers and they appear shiny. Tr. 90-91.

Citation No. 8233876

The inadequate on shift examination citation

After Inspector Hurt issued the citation for the broken valve (No. 8233875), he issued a Section 104(d)(1) order, Citation No. 8233876, which resulted in the No. 3 and No. 4 conveyor belts being turned off. This, in turn, caused a shutdown of Section 2 from producing coal. Tr. 105. Respondent disputes that this order was validly issued. The order was based upon 30 C.F.R. § 75.362(b), which provides:

> During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway, where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the shift examination is conducted within three hours before the oncoming shift.

The cited provision requires that an on-shift examiner inspect the entire belt line for hazards while coal is being produced.[24] Hurt's examination took place on a Monday morning; therefore, the most recent on-shift examination to precede his inspection occurred on Saturday, February 26, 2011, since the mine did not produce coal on Sundays. Inspector Hurt explained that the purpose of an on-shift examination is to "know what's actually going on and correct it," and also "to see if you have a trend. If you keep reporting that it needs cleaning, needs dusting or stuck rollers, it shows over a period of time that this what's going on…[with the] # 4 belt or # 3 belt." Tr. 101.

Inspector Hurt found these conditions to be both S&S and an unwarrantable failure. He also marked it as high negligence due to the readily recognizable conditions, which included obviously visible hazards, such as the pile of coal accumulations, the stuck rollers while the belt was operating, and the fact that someone had to physically remove the fire valve at the No. 5 head drive. Tr. 107. Hurt found no mitigating factors and designated the order as arising under 104(d)(1) because the conditions had existed for several shifts, some for longer than others, and

[24] Inspector Hurt explained some differences between on-shift and pre-shift examinations. An on-shift examination requires the belts to be running while an examiner designated by the operator checks the condition of the belt, whereas in a pre-shift examination the belt does not have to be running and the examiner will check on methane and air quality, among other things, but attention to the belts is less than that made during an on-shift examination. Tr. 94. The reason is plain; the belt will not usually be running during a pre-shift examination. A hazard found during a pre-shift examination requires an examiner to report the hazard, while an on-shift examination requires the condition to be corrected, posted, or reported. Tr. 96. These requirements are outlined in 30 C.F.R. § 75.360 & 362.

because two on-shift examiners had conducted on-shift examinations on Saturday. *Id.* Yet the obvious conditions evaded their reports.

As just noted, none of the conditions Inspector Hurt found were recorded in recent pre-shift or on-shift examination reports, but he believed that the day-shift examiner and the second-shift examiner on February 26 should have noticed these conditions. Tr. 92, 108. According to the belt books from the day shift on February 26, no hazards were observed. Tr. 98-99.[25] As explained earlier, the examiners should have either corrected the hazards or posted the area and recorded the hazards. Tr. 98.

Two on-shift examinations were conducted on Saturday, February 26.[26] Perry Holbrook examined the No. 4 belt during the first shift, and testified that he did not see the coal spillage found that following Monday, nor did he notice the eleven stuck rollers, the belt rubbing against the structure, the broken valve at the No. 5 head drive, or the missing fire nozzle. Tr. 174. He did concede, however, that the fire valve located at the Point "C" 420-foot mark was in the same place that Saturday as it was the following Monday. Tr. 175.

Lawrence Kendrick[27] performed the second on-shift examination on February 26 and testified that "the only thing I found on my on-shift when I examined [the No. 4 belt] was a couple of rollers that weren't turning. They had a little mud in them and stuff and I corrected them." Tr. 190-191. He corrected the stuck rollers during the on-shift examination by hitting them with a block hammer. The mud would then fall out and the rollers would start turning. Tr. 191. Mr. Kendrick testified that he did not see the belt rubbing the structure or coal accumulations along the belt on February 26. Tr. 191. He also did not see a nozzle missing at the head drive. Tr. 193. Kendrick did not record his examination in the books, adding that he did not consider stuck rollers, small accumulations, or a belt rubbing a structure to be safety hazards. Tr. 191, 195.

Dennis Ratliff, section foreman in Section 2 of the Kathleen Mine where the No. 3 and 4 belts were located, worked the shift that started at 11 p.m. and ended around 8:20 am on Monday, February 28. Tr. 199, 201. As part of his duties, Ratliff performed the pre-shift examination for the first shift while the belt was not producing coal. Tr. 200. At around 5:30

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[25] No recordings of accumulations, bad rollers, removal of fire hose outlet or valve, distance of fire hose outlet from No. 5 head drive, belt rubbing were included in the February 26 on-shift examination immediately preceding Hurt's inspection on February 28. Tr. 100-101.

[26] The mine did not produce coal during its third shift, therefore the second shift on Saturday, February 26, 2011 would have been the most recent on-shift examination time while coal was being produced prior to Hurt's inspection on the morning of Monday, February 28, 2011. Tr. 94.

[27] Mr. Kendrick worked in coal mining for 38 years at the time of the hearing. Tr. 187. He received his foreman papers in 1981 and has worked as a foreman in an underground mine for 15 years. *Id.* He worked at the Kathleen Mine for 3 years as a section foreman and then belt examiner. Tr. 188.

a.m., he traveled the entire length of the No. 4 belt. He testified that he did not see coal accumulations along the No. 4 belt at this time. Tr. 201.

A number of miners were brought into the area to abate each of the violations. Three or four men were called in to help Holbrook remove the stuck rollers; five or six additional men helped shovel away the coal accumulations; and another group of men came and installed another fire valve between the No. 5 head drive and the 420-foot marker on the No. 4 belt. Tr. 85-86. Superintendent Randy Pack came down to the scene when Hurt's issuance of the 104(d)(1) order caused production to stop. Steve Hoskins, who had escorted Mr. Hurt into the mine, was also present with "guys from the section" who assisted with the abatement. Tr. 86.

Legal Standards

The issues before the Court involve safety standards required on and in the areas surrounding conveyor belts. To place these standards in context, the legislative history of the Mine Act details Congress' concern with the hazards associated with such belts, noting that "many fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, and examination of belt conveyors is necessary." S. Rep. No. 91-411, at 57 (1967), *reprinted in* Senate Subcomm. On Labor, Comm. On Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975).

Gravity ("Seriousness")

The gravity penalty criterion under Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n.1 (Sept. 1987).

Significant and Substantial

A violation is properly designated significant and substantial 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained that:

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

In *U.S. Steel Mining Co.*, Inc., 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."… We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1129 (internal citations omitted) (emphasis in original).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC.* 195F.3d42 (D.C. Cir. 1999).

S&S Determinations Involving Fire Hazards

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the determination hinges on whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). Some factors relevant to this determination include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light*, 12 FMSHRC 965, 970-71 (May 1990).

With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L,* 12 FMSHRC 965, 970-971 (May 1990). The dampness of nearby coal and coal dust deposits are not dispositive of a non-S&S finding. *Williams Brothers Coal Co.*, 22 FMSHRC 57, 63-65 (Jan. 2000). The Commission has further held that a violative "accumulation" exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present. *Old Ben Coal Co*., 2 FMSHRC 2806, 2808 (Oct. 1980) ("Old Ben II").

Negligence and Unwarrantable Failure

Negligence is defined as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d) (2011). Under the Mine Act, "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent previous hazardous conditions or practices." *Id.* Moderate negligence exists when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances," while high negligence is when "the operator knew or should have known of the violative condition or practice, but there are *no* mitigating factors" *Id.* (emphasis added).

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. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (March 2000). In *Emery Mining Corp*., the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). It is "conduct that is not justifiable and inexcusable [and] is the result of more than inadvertence, thoughtlessness, or inattention" and is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001, 2003-04. The Commission has also defined unwarrantable failure as "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." *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. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) ("Consol"); *Cyprus Emerald Res*. Corp., 20 FMSHRC 790, 813 (Aug. 1998*), rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material*, 19 FMSHRC at 34; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); Peabody Coal Co., 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992*); Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The abatement measures taken in order to terminate the Order are a relevant consideration when determining whether the violation was extensive. *Pine Ridge Coal Co.*, 33 FMSHRC 987 (April 2011); *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (explaining that extensiveness can be shown by conditions that require significant abatement measures).

An operator's supervisors are held to a high standard of care, and a foreman's failure to recognize the violation and take reasonable precautionary measures is a factor supporting an unwarrantable failure finding. *Pine Ridge Coal Co.*, 33 FMSHRC at 1023. The Commission has affirmed ALJ unwarrantability determinations based on an ALJ's inference that the operator did not view the condition as hazardous. *Maple Creek Mining, Inc.*, 27 FMSHRC 555 (Aug. 2005).

Credibility of Inspector's Testimony

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).

DISCUSSION

Citation Nos. 8233872, 8233873, & 8233877

As noted above, Inspector Berl Hurt marked the violations for Citation Nos. 8233872, 8233873, and 8233877 as S&S, caused by moderate negligence, and reasonably likely to cause injury. The Court affirms those findings on all three citations. Inspector Hurt's notes related that these violations were issued in conjunction with one another for creating a heat source. Exh. S-1, S-2, S-4. Given the interrelatedness of these three violations in their physical proximity to each other and their respective extensiveness, the Court will analyze these violations jointly.

Citation No. 8233872. Alleged violation of 30 C.F.R. 75.400 for coal and dust accumulations.

As noted, *supra*, the standard in issue, 30 CFR § 75.400, entitled "Accumulation of combustible materials," 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."

Accumulation violations under 30 C.F.R. 75.400.

The Commission has spoken to this standard and circumstances which support an S&S determination. In *Mid-Continent Resources*, 16 FMSHRC 1218, (June 1994), the Commission reversed the judge's determination that accumulations along a conveyor belt were not S&S in light of the fact that he found "potential ignition sources such as frictional contact between the belt rollers and the accumulations, the belt rubbing against the frame, electrical cables for the shark pump, the electrical devices for the longwall and one area in the longwall that was not being maintained." Others factors were noted by the Commission, including the judge's failure to take into account continued normal mining operations. It also specifically rejected the proposition that spontaneous combustibility of coal is required for an S&S finding. *Id.* at 1222. Acknowledging that this mine's coal was low in combustibility, the Commission then noted that "coal is, by its nature, combustible."

Thereafter, in May 1997, the Commission addressed the same issues in *Amax Coal*, 19 FMSHRC 846. As with *Mid-Continent Resources*, at issue were accumulations along a belt. *Amax* asserted that the judge essentially made a 75.400 violation, *per se* S&S. The Commission did not see it that way, rejecting the claim that a "more probable than not" test must be applied to support an S&S finding and finding that there was substantial evidence to support the determination that "there was a reasonable likelihood of an injury-producing event." Noting that the judge determined that there was a reasonable likelihood of an injury-producing event and that there was substantial evidence to support that determination, the Commission stated that a "15 foot section of the mother belt running on packed dry coal and in loose coal was a potential source of an ignition." Even where such coal is wet, the Commission offered, "accumulations of damp or wet coal can dry out and ignite." *Id.* at 849.

Citation No. 8233872—Coal and Dust Accumulations.

a. Secretary's Contentions

In support of Inspector Hurt's findings that this violation was significant and substantial, caused by moderate negligence, and reasonably likely to cause injury in the form of lost workdays or restricted duty, the Secretary argues that the Kathleen Mine had three identifiable sources of ignition in the area: (1) a misaligned belt, (2) stuck rollers, and (3) battery powered buggies. Each created a heat source which could contribute to a fire hazard. Sec. Br. 22.[28]

The Secretary points to testimony that the coal and loose dust accumulations were extensive, as they extended over 100 feet on both sides of the No. 4 belt and reached up to 14 inches in height. It notes that Perry Holbrook's testimony that the area with the deepest spill was fresh and dark was at odds with Inspector Hurt's assertions that the accumulations were dry and appeared to have been there for an extended period of time. Given the potential sources of ignition in that area of the mine, the Secretary contends that there was a reasonable likelihood that the extensive accumulations, combined with the ignition sources, could have resulted in a fire, causing serious injuries. Additionally, the area beneath the rollers had been previously shoveled, while the rest of the accumulations remained. This was indicative that someone was aware of this accumulation, at a time prior to Mr. Hurt's examination.

[28] Buggies are rubber-tired, battery-powered, four-wheeled vehicles that miners use travel in the mine. Tr. 202.

The Secretary argues that batteries on the buggies can fail at any time, creating sparks which can ignite the accumulations. Perry Holbrook usually conducted his inspections while traveling on a buggy and Dennis Ratliff was traveling on a buggy when he passed by the No. 4 belt on the morning of February 28. Tr. 180, 202. Inspector Hurt, however, did not list the buggies as a potential ignition source either during his examination or at hearing. The Court does not consider the buggy as a factor in its analysis. The Court's findings control the identification of ignition sources. *See,* R's post-hearing reply brief at 1-2.

b. Respondent's Contentions

Respondent disputes whether the standard was violated for coal accumulations along the No. 4 belt. Even if this standard had been violated, Respondent further contends that the Secretary has failed to meet his burden of proving that this was an S&S violation. Mere spillage of coal is not enough to warrant a violation; rather the Commission has explained that "it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Secretary v. Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980). Such spillage must show that "it likely could cause or propagate a fire or explosion if an ignition source were present" *Id.* Section Foreman Dennis Ratliff's testimony asserts that the spillage was not present at 5:30 a.m. and it is likely that the spillage was caused by misalignment of the belt. Also, a miner was already cleaning the belt when Hurt arrived. Although the rollers were admittedly stuck, they were not rubbing, thus the stuck rollers were not an ignition source. Resp. Br. 13. There was no heat produced according to Holbrook, and Inspector Hurt never felt for the heat.

Respondent also argues that the Secretary cannot prove the existence of any ignition source; therefore, even if a violation is established, it cannot be S&S. The only two ignition sources, according to the Respondent, were the rubbing belt and the stuck rollers. Resp. Br. 13. When asked on cross-examination whether the belt rubbing a stand would cause an ignition of the accumulations, Inspector Hurt responded that it was probably not likely to cause an ignition. Tr. 114. Furthermore, the stuck rollers were not an ignition source because Hurt could not place the rollers in relation to the accumulations and he did not touch the rollers to feel for a heat source. Resp. Br. 13.

Citation No. 8233873—misaligned belt rubbing against structure

a. Secretary's Contentions

The Secretary argues that the misaligned belt that rubbed against the metal structure created a fire hazard that warranted Inspector Hurt's S&S and moderate negligence designations. Mr. Hurt located seven different misaligned stands that served as frictional heat sources. The Secretary asserts that the frictional heating caused by the belt rubbing the metal structure created a reasonable likelihood of a risk of fire, which could result in serious injuries to miners. Sec. Br. 19.

Inspector Hurt testified that heat is generated when a belt rubs against a metal stand. Tr. 33. When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission looks to whether a "confluence of factors" were present, based on the facts surrounding the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). According to the Inspector, the confluence of factors here included the built-up coal accumulations, along the 700-foot No. 4 belt, and which accumulations were dry, and the heat generated from the rubbing, which could travel toward the accumulations, creating an ignition source. Sec. Br. 19-20. Although the cited accumulations were three breaks inby the misaligned belt, ignition was possible because the portion of the belt that was rubbing the structure and generating heat was traveling toward the accumulations. *Id*. Furthermore, regarding the moderate negligence

designation, the Secretary argues that the hazardous conditions were obvious, existed more than one shift, and should have been observed by any prudent examiner.

b. Respondent's Contentions

Respondent does not dispute that the standard was violated for the misaligned belt; rather, it contests the S&S designation, asserting that there was not a reasonable likelihood of serious injury. This contention is based upon Inspector Hurt's testimony that the condition was "probably not" likely to cause a fire. Tr. 114. Furthermore, Hurt testified that he did not touch the rollers to determine if they were hot. Tr. 84. Respondent also points out that Mr. Hurt's notes contained no reference to the stands being cut or forming "grooves" where the belt was cutting the stand, and that this undermines his credibility. Tr. 32, 116; Resp. Br. 15. Further, the Inspector did not ask anyone whether the belt was rubbing the structure, nor had he ever seen a belt ignite under such circumstances, and he did not know how long it would take the belt to start smoking from the friction. Tr. 118-119.

Citation No. 8233877—stuck rollers

a. Secretary's Contentions

Inspector Hurt's report designated the eleven stuck rollers along the No. 4 belt as S&S, caused by moderate negligence, and reasonably likely to result in injury. He testified that the poor condition of the rollers was obvious, as some were shiny and had been worn flat due to friction. During the inspection, three rollers were replaced, and the others were unstuck by a hammer. Tr. 164. The Secretary agrees that the gravity of the violation should remain S&S because there was a reasonable likelihood that stuck rollers would contribute to a fire, resulting in injury. The friction of the belt passing over stuck rollers could generate enough heat to ignite the belt or the accumulations beside the belt.

Noting that there is a dispute in testimony between Inspector Hurt and Mr. Holbrook over which areas of the mine floor, if any, were wet, the Secretary argues that regardless of this inconsistency, and even if areas around the belt were wet, the belt was elevated and the portion of the belt that would catch fire was not in water. Tr. 212-14; Sec. Br. 27. The potential wetness of the coal therefore would not prevent an ignition by the stuck rollers. It observes that ALJs have affirmed S&S designations for stuck rollers even when the coal deposits around the rollers were wet, citing *Williams Brothers Coal Co.*, 22 FMSHRC 63-65 (Jan. 2000) (ALJ finding that 30 stuck rollers on a conveyor belt constituted an S&S violation despite damp coal and coal dust deposited around the rollers).

b. Respondent's Contentions

Respondent concedes this violation, but challenges whether the condition created a reasonable likelihood of a serious accident occurring. Inspector Hurt's testimony, it maintains, essentially asks the Court to presume S&S, but that finding cannot be presumed; rather, it must be proven. Inspector Hurt established that stuck rollers were located at various points along the No. 4 belt, but he could not place any of these rollers in close proximity to the accumulations.

Resp. Br. 15-16. If the rollers had been stuck for many work shifts, as the Inspector alleges, they would have been hot. He did not check for heat, and offered no testimony of similar circumstances that had caused a mine fire. Resp. Br. 16.

The Court's Conclusions regarding Citation Nos. 8233872, 8233873, and 8233877

The Court concludes that these violations were S&S and that the negligence in each was moderate. These three violations were issued in conjunction with one another for creating a heat source, and the Court finds they each contributed to a fire hazard along the No. 4 conveyor belt. The prolonged state of each condition, the proximity of these ignition and heat sources to one another, and their pervasiveness throughout the No. 4 belt are commonalities that inform this Court's S&S and negligence determinations. The Court will therefore analyze the "confluence of factors" among these violations that contributed to the fire hazard.

First, the Court finds that Citation No. 8233872, issued for coal accumulations along the No. 4 belt, was established, and it also upholds the violation's S&S designation. Inspector Hurt's recorded measurements and testimony establish that the coal accumulations along the No. 4 belt were more than the "mere spillage" that ICG argues in its brief. Not only did the Inspector measure the accumulations at 14 inches deep in some areas, but the condition required at least five miners to shovel away all the accumulations. Tr. 57-58. The highest point of these accumulations exceeded the height of the bottom rollers on the belt, which were about eight to ten inches off the ground. The accumulations therefore reached or exceeded the height of the bottom belt and bottom rollers, which conditions were also cause for significant concern in creating an ignition source. The Secretary therefore established the first two prongs of the *Mathies* test, as these accumulations violated the mandatory safety standard codified in 30 C.F.R. § 75.400, and presented a discrete safety hazard, the risk of a fire.

Although Inspector Hurt and Mr. Holbrook disputed the consistency of the coal, the Court credits the Inspector's testimony that the coal was dry, particularly since the accumulations were of a considerable size, which suggests that these deposits were not "fresh," as Perry Holbrook testified. Holbrook also conceded on cross-examination that the area with the deepest spill was not muddy or wet. Tr. 181. To put the height of deepest spill area into perspective, Mr. Holbrook testified that the mining height was about four feet in the area along the No. 4 belt. Some of these accumulations therefore reached to more than a quarter of the height of the area and also exceeded the height of the bottom belt. The Court cannot credit the claim that this amount of buildup had accumulated between the final on-shift examination on Saturday, February 26 and Mr. Hurt's examination that following Monday morning.

The Court takes note of and credits Inspector Hurt's testimony that someone appeared to have shoveled the accumulations from underneath the belt to prevent the coal from contacting the belt. That a clearance was created demonstrates awareness about the prolonged presence of the accumulations. That the mine was unable to fully abate this condition prior to the MSHA inspection also speaks to both the extent of the accumulations and the mine's awareness of it. The one miner, who was shoveling nearby at the time the Inspector and Mr. Holbrook arrived for the examination, was unable to single-handedly remedy the hazard created by these accumulations. Rather, at least five men were needed, after Inspector Hurt issued the Section

104(d)(1) order, to clean up the accumulations surrounding the No. 4 belt. Had one or two miners been able to clean up these accumulations, Inspector Hurt's S&S designation may have been an overreach, but the need for five or six miners to complete the work typically assigned to one miner illustrates the extensiveness of these accumulations. The extensiveness of the accumulations and the fact that the mine employed a stop-gap measure to deal with it, by shoveling only a clearance under the belt, show that a confluence of factors existed.

The heat source created by the coal accumulations was not located in some isolated area, far removed from an ignition source. ICG Knott County argues that Inspector Hurt could not establish with certainty how close the accumulations were to the misaligned areas of the No. 4 belt. Resp. Br. 15-16. The Court disagrees with this assertion, for Inspector Hurt's testimony detailed the proximity of these conditions to each other. The Inspector estimated that the No. 4 belt ran for about 700 feet, or approximately ten breaks. Three breaks, (about 200 feet), separated the misalignments, along the No. 1, 2, and 3 breaks, near the No. 4 head drive, from the start of the coal dust accumulations along the No. 4 belt. Tr. 47. From this point, the coal accumulations spanned a distance of a break and a half, or approximately 100 feet, and were built up on both sides of the belt. Tr. 43-44. Holbrook admitted on cross-examination that he considered this break and a half of accumulations to be a big spill. Tr. 181. Furthermore, Inspector Hurt found eleven different stuck rollers located at various points throughout the No. 4 belt which, at a length of 700 feet, he noted, was not very long. Tr. 82. The Court is not persuaded that the distance between the highest accumulations and the misalignment is sufficient to remove Inspector Hurt's S&S findings. The pervasiveness of these violations throughout a relatively short belt length, if anything, adds to the confluence of factors that existed in this area.

As noted, Respondent has conceded the misaligned belt and stuck roller violations (Citation Nos. 8233873 and 8233877). The Court finds that Inspector Hurt's S&S findings for these violations were established, especially given their proximity to the heat source created by the coal accumulations in Citation No. 8233872. Regarding the misalignment of the No. 4 belt, the Court credits Inspector Hurt's testimony that the belt was shiny in the areas where the rubbing was occurring, indicating that the rubbing and misalignment had existed for an extended period of time. Although Inspector Hurt's notes did not mention the "grooved" nature of the belt due to the misalignment, nor did he measure or test whether those conditions were producing heat, those absences do not undercut the existence and seriousness of the misalignment, nor the stuck rollers. As Mr. Holbrook admitted, regarding the state of the stuck rollers:

> I had some stuck rollers. And what was happening, the belt was getting out of line and spilling and the dirt and the lumps and the garbage [were] falling down and clogging the rollers up so they wouldn't turn. But, now don't get me wrong, I did have two rollers that I had to—I had to turn the belt off and take two of them out because they—these ones, I took a hammer and hit them and knocked them loose. But there [were] a couple that were stuck, just I don't know if they just—I don't know. I guess just old and locked up. Tr. 166.

Furthermore, whether the belt was producing heat at the time of the examination is not the entirety of this S&S inquiry. The Court is not focused exclusively upon whether the belt or the rollers were producing heat at the precise moment of the examination, but rather, whether the

conditions could reasonably result in an injury-producing event. The stuck rollers were encrusted in accumulated gob that created friction between the metal rollers and belt, while the rubbing belt was shiny from constant contact against the structure. The obviousness of both violations to both Inspector Hurt and Mr. Holbrook during the examination indicates a prolonged failure on the part of ICG to address these conditions. Had Inspector Hurt not examined the No. 4 belt on February 28, it is unknown how long these conditions would have continued. Further, Inspector Hurt thought it would have taken several shifts, or about a week, for the belt to rub a metal belt stand and actually cut the metal, as it did here. Tr. 117.

The Court finds that both the rubbing belt and stuck rollers were potential ignition sources, and the close proximity of these unattended friction sources to the significant accumulations of coal, created a confluence of factors, resulting in a reasonable likelihood of an injury-producing event. In summary, a number of conditions contributed to the confluence of factors, which support the S&S designation for these citations: (1) the dry and extensive coal accumulations that were located close to the belt, reaching as high as the bottom rollers in some areas, and spanning at least 100 feet of the No. 4 belt; (2) the misaligned belt, which was shiny from prolonged periods of contact against the structure; (3) the portion of the belt that was rubbing the structure, generating friction, while traveling towards the accumulations; (4) eleven stuck rollers, which Mr. Holbrook admitted were old, were encrusted in accumulative gob and located along the belt; and (5) the visible state of each condition indicating that they had gone untreated for an extended period of time. Because the citations must not be evaluated in a vacuum, when taken in conjunction with each other, they warrant Inspector Hurt's S&S designation, and they also support his finding of moderate negligence, especially when considering the number of conditions of which Respondent should have been aware. Further, the inadequacy of the fire-fighting equipment along the No. 4 belt and at the No. 5 head drive (discussed below), added to this confluence of factors that warrant the S&S designations in these three citations.

Citation No. 8233875—fire-fighting hazards – the missing nozzle, the broken valve, and the requirement of fire hose outlets with valves at 300-foot intervals along each conveyor and at tailpieces

Inspector Hurt noted that the fire hose outlets had failed to be installed at 300-foot intervals on the No. 4 belt. Instead, the distance to first fire valve from the No. 5 head drive, and down the No. 4 belt line, was 420 feet. Additionally, a fire nozzle was missing from the No. 5 head drive area, and a fire valve was removed from the No. 4 tailpiece.[29] The Inspector marked the hazards in this Citation as S&S and caused by moderate negligence.

a. Secretary's Contentions

The Secretary asserts that Inspector Hurt's S&S designation was warranted due to ICG's failure to place fire valves at 300-foot intervals along the No. 4 belt conveyor, and because the fire valve at the No. 4 tailpiece was removed and no nozzle was available in the area around the

[29] As noted earlier, the No. 4 tailpiece and the No. 5 head drive were adjacent to each other. Exh. JE1.

No. 5 head drive. Based on the conditions Inspector Hurt observed, the discrete safety hazard was the miner's inability to quickly fight a fire, which resulted in an increased risk of injuries because of the delay in getting water to a fire. ICG Knott County's failure to provide the required firefighting equipment significantly increased the likelihood that a miner would suffer lost workday or restricted duty-type injuries. Sec. Br. 24. Thus, given the location of the fire valves, the inoperative fire valve at the No. 4 tailpiece would have impeded the mine's ability to fight a fire around the No. 5 head drive. Sec. Br. 25. A miner would have to travel 700 feet down the No. 4 belt to retrieve the hose and nozzle at the No. 4 head drive and bring it back up the belt to the fire valve that was 420 feet away from the No. 4 tailpiece before water would be available to fight a fire. *Id.* Alternatively, a miner would need to carry the fire hose 420 feet from the No. 5 head drive to the nearest fire valve, and retrieve a nozzle at the No. 4 head drive, another 280 feet away, before traveling back up to fight the fire. *Id.* Either way, the additional time necessary to fight the fire therefore would increase the likelihood that an injury would result. *Id.*

Upon reflection, Inspector Hurt expressed that he should have marked the violation as "high negligence," because it was obvious that someone had physically removed the broken valve at the No. 4 tailpiece and reattached the waterline without replacing it. Sec. Br. 25-26. A prudent examiner also should have noticed that the nearest valve was more than 300 feet outby the No. 4 tailpiece. Sec. Br. 26.

b. Respondent's Contentions

ICG Knott County agrees that the valves on the No. 4 belt were not placed at 300-foot intervals, as required by the standard, and that the valve at the No. 4 tailpiece was not in place, but it disputes the S&S designation for this violation. Resp. Br. 16.[30] It notes that Inspector Hurt agreed on cross-examination that the entire belt line still had coverage in the event of a fire, because the 500-foot fire hose could be attached at point "C" and would still reach the entire belt

[30] The Respondent would have it that Inspector Hurt conceded the violation was not S&S. The Court does not agree with the Respondent's construction of the Inspector's testimony. The transcript reads:

> Q: Wouldn't you agree with me, sir, that under those circumstances this could not be designated as a significant and substantial violation if you could fight a fire on the entire belt line?
> A: Right.
> Q: You agree that it should not have been designated as S&S?
> A: No, no I don't. I didn't understand the question. Tr. 124.

By this testimony, the Court finds that the Inspector did not recant his S&S determination.

line.[31] Given that water could reach all points on the belt, it contends that no serious accident was likely to occur. Resp. Br. 18; Tr. 125-26.

The Court's Conclusions regarding Citation No. 8233875

Neither the No. 5 head drive, nor the 420-foot mark (Point "C") along the No. 4 belt had the required and/or operable proper equipment to fight a fire. The valve was detached and the nozzle was missing around the No. 5 head drive, while the fire stand, located at Point "C," lacked both a fire hose and a nozzle. Tr. 73-74.[32] The No. 4 head drive was therefore the closest location where a miner could gather all the proper fire-fighting equipment in an emergency, which was as much as 700 feet away. The standard requires both fire hose outlets with valves at 300 foot intervals along each belt conveyor *and* such outlets, with valves, must also be at tailpieces.

As noted, the Court does not subscribe to Inspector Hurt's putative "admission," which Respondent claims occurred during the cross-examination. The record indicates and the Court concludes that he did not fully grasp the question asked of him when he responded on cross-examination that this violation was probably not S&S. While the Court instructed Mr. Hurt, "If you don't understand a question, don't give an answer," the rest of Mr. Hurt's testimony establishes that he strongly believed that the cited violation was S&S and that, upon reflection, he expressed that it also should have been marked as high negligence. Tr. 125. Given the conditions along the No. 4 belt, which included dry coal accumulations, the rubbing belt, and the stuck rollers, Hurt believed it would be too hard to fight a fire without hoses, nozzles, and outlets in their proper locations. Tr. 77. He also emphasized the particular necessity of required fire-fighting equipment at tail pulleys, since head drives contain electrical bearings that are susceptible to heating up and creating fires. Tr. 78.[33]

Respondent's argument that the 500-foot-long hose located at Point "C" would reach all fires along the No. 4 belt, while true, overlooks the time constraints created by these conditions. Fires spread quickly, especially in a mine with extensive accumulations of dry coal, as were the conditions in the Kathleen Mine on February 28, 2011. The Secretary's brief illustrates the possible scenarios for a miner if a fire were to ignite at the No. 5 head drive, which included

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[31] Inspector Hurt marked Point "C" on the map of the Kathleen Mine (Exh. JE1) at the 420-foot mark outby the
No. 5 head drive on the No. 4 belt.

[32] Inspector Hurt explained that the inch-and-a-half circumference of the fire hose foreclosed the ability to spray water by covering the opening with a thumb. Thus a fire nozzle was required to properly spray the water. Tr. 65.

[33] Inspector Hurt's markings on the Kathleen Mine map (Exh. JE1) indicate that the tail pulley located at the No. 4 tailpiece (also the location of the detached fire valve marked as Point "D") and the No. 5 head drive (also the location of the missing nozzle marked as Point "E") were adjacent to one another.

retrieving equipment from up to 700 feet away and then attaching the equipment at Point "C" along the No. 4 belt. Even if a miner were eventually able to attach a 500-foot-long hose at Point "C" that could reach a fire at the No. 5 head drive, the response time to such a fire would necessarily lag, and this lapse in time could mean the difference between successful abatement and a serious injury resulting, such as smoke inhalation or burns. Thus, the time required to gather and attach necessary firefighting equipment would increase the amount of time before the hose could provide water at the No. 5 head drive. This, in turn, would increase the likelihood of injury due to a fire in this area. The S&S allocation is therefore at least partially attributable to the reduced fire-fighting capability at the mine.

The Court also credits Inspector Hurt's testimony regarding Respondent's awareness of the state of the fire-fighting equipment. As he stated on direct examination regarding the detached fire valve: "[I]t was obvious that someone knew about it. They had to physically remove it and left the other one laying beside it. And, you know, several people . . . in the mine from the outside to the section know about it because you have to physically . . . shut the water off." Tr. 78-79. No testimony contradicted the Inspector on this. The Court finds this testimony particularly persuasive, because the valve's placement on the ground necessarily indicated intentional conduct, which at the very least constitutes moderate negligence.

The prior manual removal of the fire valve from the No. 4 tailpiece, the missing nozzle at the No. 4 fire stand, Mr. Holbrook's acknowledgment that someone had forgotten to replace these items, and the improper placement of fire outlets along the No. 4 belt, jointly establish that there was a confluence of factors that warrants an S&S finding, as well as the awareness factor that supports the moderate negligence designation. As determined above, the ignition sources at both the belt misalignments and stuck rollers, coupled with the extensive and dry accumulations along the belt, caused a confluence of factors that created a reasonable likelihood of an injury-producing event, for which there would be a reasonable likelihood of a reasonably serious injury. Therefore, the third and fourth *Mathies* elements were met.[34]

Citation No. 8233876 – 104(d)(1) order for failure to conduct an adequate on-shift examination

Inspector Hurt's notes reflect that the last recorded on-shift examination had taken place on February 26, 2011, yet no records of the non-compliant conditions were logged at this time, and no corrections were made that addressed these conditions during that examination. Hurt therefore marked the deficiencies from this on-shift examination as S&S, high negligence, and unwarrantable failure. Per the discussion which follows and upon consideration of all the evidence, the Court affirms the Inspector's findings.

a. Secretary's Contentions

The Secretary asserts that the Inspector's observations from the February 28 inspection regarding the deficiencies of the preceding inspection on February 26 should be credited. It

[34] Speaking to the first two *Mathies* elements, the violations were either conceded or upheld by the Court, and the discrete safety hazards for each citation have been identified.

notes that, in cases such as *Big Ridge Inc.*, 2012 WL 362190, 23 (Jan. 2012), a court may credit the inspector's observations, including the obviousness of the conditions, which contribute to the gravity analysis. For all the reasons stated in its preceding arguments, these hazards, including the stuck rollers, misaligned belt, accumulations, and inadequate firefighting equipment, presented a dangerous risk of fire that warrants an S&S finding.

Regarding the high negligence designation, the Secretary also urges that the Inspector's observations and his finding that it was an unwarrantable failure should also be sustained as the conditions existed for an extended period of time and thus rose to a higher level than ordinary negligence. The conditions were extensive, as evidenced by the fact that the belts were turned off and five miners were brought in from the section to shovel the accumulations, several rollers had to be removed, two new fire valves were brought in from the outside, and an adequate on-shift examination had to be conducted before the Order was abated. Sec. Br. 32. In addition to the extensiveness of the action required to abate the problem, the obviousness of the conditions indicates that they existed for at least one shift, and second shift belt foreman Lawrence Kendrick was indifferent to several serious conditions that he did not believe to be hazards. Sec. Br 33-34.

Furthermore, even assuming an absence of the operator's actual knowledge, the Secretary asserts that there is sufficient evidence that agents of ICG Knott County reasonably should have known of the violative conditions on the No. 3 and 4 belts. An operator's supervisors are held to a high standard of care, and a foreman's failure to recognize the violation and take reasonable precautionary measures is a factor supporting an unwarrantable failure. *Pine Ridge Coal Co.*, 33 FMSHRC at 1023. Mr. Kendrick was an agent of the operator who demonstrated indifference to serious hazards, including stuck rollers, "small accumulations," and a misaligned belt—conditions which were not lessened by his view that they were not hazards and therefore did not merit being recorded in his examination report. Sec. Br. 35. Perry Holbrook also admitted that he was aware that the fire valve was 420 feet from the No. 4 tailpiece and that this condition had lasted for at least two days. Sec. Br. 36.

b. Respondent's Contentions

Respondent first argues that Inspector Hurt cited wrong standard in his order. The standard cited in the order, 30 C.F.R. § 75.362(b), only requires that an examination be conducted, and as such an exam in fact occurred on February 26, it asserts that this citation must be vacated. Resp. Br. 19. Further, Respondent contends that even if the government relies upon 30 C.F.R. § 75.363(b), with its requirement for recording and/or correcting hazards during an on-shift examination, no violation was established. Respondent contends that this provision only requires

the reporting of hazards, as distinct from the reporting of technical violations.[35] Since there was no risk of serious injury to any miner, the conditions Inspector Hurt cited were not hazardous. Resp. Br. 20. Respondent concedes only that one valve was at a 420-foot interval along the belt line instead of 300-feet; however, this violation alone did not compromise the firefighting ability on the No. 4 belt. Resp. Br. 21.

Respondent further argues that even if this citation is not vacated, it must be modified to a Section 104(a) violation, because it was not S&S, nor was it caused by an unwarrantable failure. Resp. Br. 20. In support of this, it asserts that the Secretary did not prove how long the accumulations were present before February 28. The Secretary cannot prove how long the valve was broken, or when the nozzle went missing, and Lawrence Kendrick testified that there were no stuck rollers or misaligned belts on February 26. Resp. Br. 21. Inspector Hurt's view therefore amounts to speculation, not proof, that the belt was misaligned and that accumulations were present on February 26. *Id*.

Respondent also contends that the Secretary does not satisfy the requirements for unwarrantable failure, because only one misplaced valve existed prior to February 28 and the Secretary offered no proof that ICG Knott County was on notice of the need for greater compliance. There is no proof of aggravated circumstances that would justify a finding of unwarrantable failure. Resp. Br. 22.

The Court's Conclusions regarding Citation No. 8233876

a. The issue of whether the Standard cited was Incorrect.

The Inspector cited 30 CFR § 75.362(b). That standard, entitled, "**On-shift examination**," provides at subsection (b) "During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift."

By contrast, 30 C.F.R. § 75.363, entitled, "**Hazardous conditions; posting, correcting and recording,"** provides at subsection (a) that: "Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas

[35] Respondent points to an amendment to the regulation, effective August 6, 2012, which reflects the difference between hazards and technical violations: "During each shift coal is produced, a certified person shall examine for hazardous conditions and *violations of the mandatory health or safety standards*…along each belt conveyor haulageway where a belt conveyor is operated." 30 C.F.R. § 75.362(b) (emphasis added). Resp. Br. 20. The Court does not consider the violations to be "technical," nor does it read the Amendment as Respondent interprets it. Further, the Amendment was made after the violations cited here.

would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area." Subsection (b) then adds: "A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements."[36]

Respondent asserts that Citation No. 8233876 should be vacated because the provision cited in the order is incorrect. The standard cited, 30 C.F.R. § 75.362(b), requires that an on-shift examination be conducted, whereas the standard in 30 C.F.R. § 75.363(b) governs the recording and/or correcting of hazards during an on-shift examination. Respondent argues that since Mr. Holbrook and Mr. Kendrick both conducted on-shift examinations on February 26, it did not violate the provision cited in the order. The Secretary has not moved to amend this citation and did not address Respondent's contention in its post-hearing brief.

The Court rejects ICG's contention on two, independent, bases. First, it concludes that a citation based on 30 C.F.R. § 75.362(b) inherently carries with it the obligation to do more than to simply go through the motions. To assert that, where an on-shift exam has been made, such an exam insulates the mine from being cited for a violation of that provision, makes no sense when the exam misses obvious "hazardous conditions and violations of the mandatory health or safety standards." Thus, there has not been compliance with the provision by merely asserting that an on-shift exam was made when the evidence establishes that one (or in this case several) hazards were overlooked. To rule otherwise would run against common sense and the remedial intent behind the requirement.

Other judges have reached the same conclusion about this standard. As noted by Judge Barbour in *Twentymile Coal*, 2012 WL 7761935, (Aug. 2012), section 75.362(b) "carries with it the obligation that the examination be sufficient to detect hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. *Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.*" *Id.* at *26 (emphasis added).

[36] The reader is advised that the text of both section 75.362 and 75.363 have been amended. The language employed in the body of this decision applied at the time the citations were issued.

Apart from a focus on whether there was a recording in the examination book of hazards, in *Big Ridge, Inc*., Judge Manning upheld an Order invoking 75.362(b) on the basis that the exam was clearly inadequate. Finding the conditions were "obvious and should have been discovered by the on-shift examiner," the judge found that the workplace exam was therefore not adequate. 34 FMSHRC 63, 2012 WL 362190, at ** 18. (Jan. 2012).

Accordingly, the Court concludes that 30 C.F.R. § 75.362(b) applies here.[37]

b. Discussion on the Merits

For the reasons discussed above, affirming Inspector Hurt's S&S findings in Citation Nos. 8233872, 8233873, 8233875, and 8233877, the Court also affirms Citation No. 8233876 and its S&S designation. Respondent asserts that it violated no standard because the conditions at issue were technical violations, not hazards, and thus did not require reporting during the February 26 on-shift examination. The Court disagrees and finds that each violation at issue did in fact constitute a hazard. Although the term "hazard" is not defined in the standard, the Commission has held that, in the context of the S&S analysis, "hazard" denotes a measure of danger to safety or health. *National Gypsum*, 3 FMSHRC at 827. The Secretary has established that each violation discussed above contributed to a fire hazard.

The Court also credits Inspector Hurt's opinion in assessing the gravity associated with this violation. Inspector Hurt offered concrete testimony of the observations that led him to each S&S determination at issue before the Court. He produced detailed descriptions of the dry and extensive coal accumulations along the No. 4 belt, the shininess from rubbing, where the conveyor belt was misaligned, and the caked-on coal that surrounded the stuck rollers. He also offered a detailed explanation of the time constraints created by the deficient firefighting equipment, which increased the reasonable likelihood that the hazard contributed could result in an injury. Inspector Hurt's testimony further established that each violation had not developed overnight, but had existed for at least one shift prior to the February 28 examination. These violations created a confluence of factors that warranted each S&S finding. Hurt rightfully issued a Section 104(d)(1) order, given the fire hazards in this area and the need to abate the violations. These violations each contributed to a fire hazard that was reasonably likely to result in a serious injury, such as smoke inhalation to miners in the section.

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[37] Alternatively, the Court concludes that liability was also established under 30 C.F.R. § 75.363. The Respondent can hardly claim any disadvantage or prejudice to invoking this standard. Indeed, ICG's argument made at the hearing was that *this was* the correct standard for the Secretary to rely upon. Thus, although the Secretary has not moved to amend the violation to cite 75.363, the issue was tried by implied consent. *See, for e.g., Black Beauty Coal*, 34 FMSHRC 436, 2012 WL 894516 (Feb. 2012) and *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Because of that consent, the failure to amend does not prohibit the determination of the applicability of the provision. Instead, apparently advocating that this provision applies, ICG's argument is that the conditions cited by the Inspector were not in fact hazardous. The Court has found otherwise.

The Court also affirms Inspector Hurt's high negligence and unwarrantable failure designations in this citation. The testimony of Inspector Hurt, Mr. Holbrook, and Mr. Kendrick establish that Respondent either knew or should have known of these hazards during the February 26 on-shift examinations and there were no mitigating factors. The extensiveness of these violations, their obviousness, and the degree of danger they posed to miners are aggravating factors that ICG should have recognized and contribute to the unwarrantable failure finding. The magnitude of the abatement measures taken following Mr. Hurt's issuance of the 104(d) order underscores this finding.

A number of aggravating factors indicate the presence of these hazards and Respondent's awareness of them prior to Inspector Hurt's examination: (1) a clearance had been shoveled to separate the dry coal accumulations from the moving conveyor belt; (2) Perry Holbrook's behavior in asking Mr. Hurt multiple times at the beginning of the examination whether he was ready to exit the mine;[38] (3) the detached fire valve had been manually removed, which also required turning off the water supply to the section and thus shutting down production in the section; and (4) Mr. Holbrook's own testimony that the stuck rollers appeared old and worn out during Hurt's inspection when the standard requires that they be removed *immediately*. The extensive abatement measures required in the Kathleen Mine on February 28 further indicate that these violations had existed for an extended period of time. At least three men assisted Holbrook in removing the stuck rollers; five or six additional men helped shovel away the coal accumulations; and another group of men brought in two fire valves and installed them between the No. 5 head drive and the 420-foot marker on the No. 4 belt. Tr. 85-86.

The Court finds both Perry Holbrook and Lawrence Kendrick were agents of ICG Knott County who demonstrated carelessness, or indifference, to the fire hazards along the No. 4 belt. Their conduct significantly deviated from the standard of care expected of an operator's supervisors. As a belt examiner who inspected the No. 4 belt daily, Mr. Holbrook should have noticed and attended to these hazards. Mr. Kendrick's testimony was similarly illustrative of the indifference with which these violations were treated prior to Inspector Hurt's examination. The Court recognizes that underground coal mines are not pristine environments, and the machinery used to extract coal is subject to continuous wear and tear. It therefore realizes that some coal accumulations and slight rubbing along conveyor belts are inevitable effects of the coal extraction process. Nonetheless, fire hazards are another reality in this environment, which requires ongoing diligence from a mine's supervisors to reduce their likelihood. Fire hazards like the stuck rollers should have been replaced immediately, but instead Mr. Holbrook admitted they were old and worn out on the day of Hurt's examination. The detached fire valve at the No. 4 tailpiece also should have been replaced immediately, given the known fire hazards that conveyor belt head drives pose. The extensiveness of each violation, discussed at length in the

[38] Respondent argues that it is common practice to have a buggy ready to escort an MSHA examiner from a mine at any point during an inspection. Tr. 128. The implicit availability of this ride, however, and repeatedly mentioning the availability of this ride during an examination, are two distinct scenarios. Like Inspector Hurt, the Court finds that Mr. Holbrook's behavior in this regard was unusual and indicative of some prior knowledge about the state of the Kathleen Mine at the time of this inspection.

sections above, contributed to a risk of serious injury from a fire hazard that constituted an unwarrantable failure on the part of the Kathleen Mine operators. The Court therefore affirms Inspector Hurt's finding of unwarrantable failure.

Civil Penalty Assessments

The foregoing discussion of the citations addresses the fact of violations, where challenged, the special findings, and the gravity and negligence associated with each matter. Exhibit 7 is the mine's violation history. The violations were abated in good faith. Imposition of the proposed penalties will not affect ICG Knott's ability to remain in business.

Citation No. 8233872 is upheld as a violation and it was S&S, with the associated negligence being moderate. The Court adopts the Secretary's proposed penalty of $946.00.

Citation No. 8233873, an admitted violation, was S&S and the associated negligence was moderate. The Court adopts the Secretary's proposed penalty of $499.00.

Citation No. 8233875, an admitted violation, was S&S and the associated negligence was moderate. The Court adopts the Secretary's proposed penalty of $499.00.

Citation No. 8233877, an admitted violation, was S&S and the associated negligence was moderate. The Court adopts the Secretary's proposed penalty of $499.00.

Citation No. 8233876, is upheld as a violation and it was S&S, an unwarrantable failure, and the associated negligence was high. The Court adopts the Secretary's proposed penalty of $2,000.

For the reasons set forth above, the Citations are affirmed and ICG KNOTT COUNTY, LLC, Respondent, is **ORDERED TO PAY** the Secretary of Labor the sum of $4,443.00 within 30 days of this decision.[39]

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

[39] 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

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April 19, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2011-151
Petitioner,	:	A.C. No. 40-03318-237796
	:	
v.	:	
	:	
TRIPLE H COAL, LLC,	:	
Respondent.	:	Mine: Area #2

DECISION

Appearances: Hansford Hatmaker, Triple H. Coal, Jacksboro, TN for Respondent

Kanisha R. LaRoche, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA for the Secretary

Before: Judge Andrews

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000) (the "Mine Act" or "Act"). This matter concerns Citation Nos. 8404221, 8404222, 8404223, 8404224, and 8404225. All five citations were issued under §104(a) of the Act. The citations were served on Triple H Coal, LLC ("Triple H" or "Respondent") during an EO1 inspection of Area #2 Mine on September 17, 2010. The Secretary assessed a total penalty of $500.00 in this matter, $100.00 for each alleged violation. A hearing was held in Knoxville, Tennessee on January 15, 2013.

JURISDICTION

Respondent's activities in mining coal at the mine subject it to the jurisdiction of the Act as a "coal or other mine" as defined by section 3(h) of the Act, 30 U.S.C. §802(h). Further, Respondent meets the definition of an "operator" as defined by section 3(d) of the Act, 30 U.S.C. §802(d). Hence, this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judge (ALJ) pursuant to sections 105 and 113 of the Act, 30 U.S.C. §§805, 813.

CITATION NO. 8404221

On September 17, 2010 at 9:35 a.m., Inspector Edward F. Taylor ("Taylor") issued Respondent Citation No. 8404221 for an alleged violation of 30 C.F.R. §77.404(a).[1] That standard states, "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." In this citation, Taylor observed the following condition or practice:

> When checked the black Mack service truck serial no. R6885T being used in the pit was not being maintained in a safe operative manner. The following conditions were observed when checked.
> 1. Excessive movement was present in the pitman joint.
> 2. Excessive movement was present in the off side tie rod joint.
> 3. The windshield wiper were (sic) not being maintained in operative condition. This equipment is used in climate (sic) weather and on and off the road. In the event one of theses (sic) joint were to fail the operator could lose control with possible serious injuries occurring to his self (sic) or other. Along with vision being limited in climate (sic) weather. The operator has removed the equipment from service until repaired.

(Government Exhibit 1).[2]

Taylor found that the violation was reasonably likely to lead to an injury and that such injury could reasonably be expected to result in lost workdays or restricted duty. *Id*. He determined the violation to be S&S and affecting one person. *Id*. Taylor found Respondent exhibited moderate negligence. *Id*.

Summary of Testimony

Taylor issued Citation No. 8404221 during a general inspection.[3] (Tr. 21). The inspection started around 7:00 a.m. (Tr. 22). Respondent's employee, a mechanic, accompanied Taylor. (Tr. 22).

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[1] Taylor testified at the hearing. His testimony included a brief outline of his work experience: At the time of the inspection at issue, Taylor had worked for MSHA for around 12 years. (Transcript 17-18) (Hereinafter the transcript will be cited as "Tr." followed by the page number). He had over 38 years of experience as a supervisor on underground and surface equipment. (Tr. 18-19). He was a service specialist for three years and a dust and noise specialist for two. (Tr. 19). His duties included inspecting service and underground mining equipment. (Tr. 19). Taylor has completed around 500 inspections on equipment. (Tr. 30).

[2] Hereinafter citations to the Government's Exhibits will be cited as "GX."

[3] A general inspection involves examination of all the equipment, the property, the records, and all items required under the code of federal regulations to be obtained. (Tr. 21-22).

Taylor issued this Citation because there was excessive movement in the pitman joint and in a tie rod joint on the black Mack service truck.[4] (Tr. 24). The pitman joint ties the steering system together. (Tr. 25). Taylor checked for movement by letting the mechanic move the steering wheel and watching the joint for movement greater than 1/8 of an inch. (Tr. 25). This is the standard method. (Tr. 25-26). This truck showed approximately 2 inches of movement in the tie rod and 1.5 inches in the pitman joint. (Tr. 25). Taylor testified that if the joints failed, the hazards would include the loss of steering resulting in a vehicle overturn or meeting oncoming traffic. (Tr. 27). The truck has public and private tags, and drives on steep grades, both on and off road. (Tr. 27, 72). In addition to the issues with the tie rod and pitman joint, Taylor observed that the windshield wipers were not operative. (Tr. 24, 26). The mechanic also observed all of these conditions. (Tr. 29-30). Taylor testified that these conditions could and should have been noticed by the examiner. (Tr. 26).

Taylor noted that the truck was not locked out or tagged out. (Tr. 30-31). The truck was accessible by miners, on the job site, and 500-600 yards from the pit. (Tr. 31). MSHA's policy requires equipment to be rendered inoperative to be classified as locked out or tagged out. (Tr. 31). This could be done by removing a tire or the battery terminals. (Tr. 31). Here, neither the tire nor the battery was removed and there was no tag on the vehicle. (Tr. 32). Taylor testified that the area where the truck was parked was not "marked off." (Tr. 64).

Taylor testified that his notes (GX-10, p. 13) indicated that the condition existed at least a few days. (Tr. 26-27). He believed it existed for that amount of time because such excessive movement would take a while to occur. (Tr. 27). Taylor believed this citation was reasonably likely to result in an injury and also that it was S&S because excessive movement could have caused the joint to fall off, resulting in a loss of steering control. (Tr. 28). He testified that there was a reasonable likelihood that an injury of a reasonably serious nature would occur. (Tr. 28). Taylor believed those injuries would most likely be "Lost-Workday" injuries. (Tr. 28). The injuries could be fatal, but this was less likely because Taylor did not believe the joints would fall off. (Tr. 28). Because of the terrain and location where the cited truck was found, Taylor believed only one person, the operator, would be affected by this condition. (Tr. 29). Taylor marked this citation for "Moderate" negligence to be fair because the equipment was recently purchased and Respondent may not have been aware of the condition. (Tr. 28-29). The condition was abated by replacing the joints and having a fuse installed in the wipers. (Tr. 32).

Hansford Hatmaker ("Hatmaker") testified for Respondent.[5] He explained that Respondent maintained a designated area where it placed all tagged out equipment. (Tr. 77). He

[4] The black Mack service truck was used for maintenance and hauling diesel and lubricants to equipment at the job site. (Tr. 24, 64, 71). It was taken back and forth from the shop. (Tr. 71). The shop was 12-14 miles from this location, off of mine property. (Tr. 71-72).

[5] Hatmaker's testimony included a brief outline of his work experience: He is a certified inspector. (Tr. 76). He attended the same school as Taylor and received state and federal certification. (Tr. 76). He taught safety classes for seven years. (Tr. 76). These classes discuss safe working areas and accident prevention. (Tr. 76-77).

noted that it is not necessary to disable the equipment. (Tr. 77). Taking a tire off would cause a repair of an air horn to take three days. (Tr. 77). Tagging out allows equipment to be fixed and returned to service with less work. (Tr. 77). The Mack truck here was tagged out and placed in the correct area. (Tr. 77-78). With respect to service areas, Hatmaker testified that the main shop was 12 miles away but there was a working area on the premises, only 1.5-2 miles away. (Tr. 78).

Discussion & Analysis

According to well-settled Commission precedent, 30 C.F.R. §77.404(a) imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. *Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979); *see also U.S. Steel Mining Company*, LLC, 27 FMSHRC 435, 438 (May 2005). "Derogation of either duty violates the regulation." *Peabody Coal Company*, 1 FMSHRC at 1495. With respect to the first duty, equipment is maintained in an unsafe operating condition "when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1557 (Sept. 1996). With respect to the second duty, the Commission has held that equipment is still in use if it "is located in a normal work area, fully capable of being operated." *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 845 (April 1981) *see also Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990) (equipment was in use when it was "parked in the mine in turn-key condition and had not been removed from service.") The Commission found that allowing equipment to stay "parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Ideal Basic Industries*, 3 FMSHRC at 845.

With regards to Citation No. 8404221, Taylor testified credibly that the condition of the Mack truck was a hazard warranting corrective action. Taylor testified that the truck showed approximately 2 inches of movement in the tie rod and 1.5 inches of movement in the pitman joint. (Tr. 25). He observed that this condition could cause loss of steering resulting in a vehicle overturning or colliding with oncoming traffic. (Tr. 27). In addition, Taylor testified that the windshield wipers were not operative. (Tr. 24, 26). Clearly, loss of control, a head-on collision, and lack of visibility in a vehicle are hazardous conditions. Respondent presented no evidence to refute Taylor's testimony. Respondent provided no exhibits and the testimony it offered dealt exclusively with the issue of removal from service. Therefore, the undersigned finds the truck was not maintained in safe operating condition. Under *Peabody Coal Company*, Respondent failed the first duty imposed by §77.404(a) and therefore violated the standard.

However, even if the Secretary were also required to prove Respondent failed the second duty, the evidence shows the truck was not removed from service. Taylor noted that the truck was neither locked out nor tagged out. (Tr. 30-31). The truck was sitting in an area only 500-600 yards from the pit and in turn-key condition. (Tr. 30-31). Hatmaker testified for Respondent that the truck was placed in a designated area for tagged out equipment. (Tr. 77). However, Taylor testified that this area was not marked. (Tr. 64). A miner, seeing the truck

parked in turn-key condition just a few hundred yards from the active pit would have no way of knowing that this truck was not available for use.[6] Therefore, the undersigned holds that the truck was not removed from service, and therefore Respondent violated the second duty of §77.404(a).

Respondent's violation cited in Citation No. 8404221 was allegedly significant and substantial ("S&S"). In order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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). As already shown, Respondent violated §77.404(a). As discussed, that violation contributed to the hazards of loss of control and lack of visibility in the vehicle. The Commission has recently clarified the third element of *Mathies*, stating the test "is whether there is a reasonable likelihood that the hazard contributed to by the violation…will cause injury." *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); s*ee also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not "prove a reasonable likelihood that the violation itself will cause injury…" *Id*. There is no question a truck driver could experience injury if his truck lost control and overturned or was involved in, for example, a head-on collision. Finally, it is reasonably likely that the injuries resulting from such an accident would be reasonably serious, perhaps even fatal. As a result, this violation was S&S.

The undersigned finds that the evidence established that this violation was, at least, reasonably likely to result in a lost workday injury for one person. (Tr. 28). Also, the undersigned finds that Respondent exhibited moderate negligence. While Respondent knew, or should have known, of the violative practice, there were mitigating circumstances. *See* 30 C.F.R. § 100.3(d). Those mitigating factors included the fact that equipment was new, and Respondent may not have closely inspected the equipment or been aware of its condition. (Tr. 28-29).

In light of the above findings, I **AFFIRM** Citation No. 8404221 as written by Taylor and find that the proposed penalty of $100.00 is appropriate for this violation.

[6] Commission cases have differed on whether "tagging out" equipment is sufficient to remove it from service. *See e.g. Eastern Associated Coal Corp.*, 1 FMSHRC 1473, 1474 (Oct. 1979) ("We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment.") and *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001) (holding that a standard applied "as long as the cited equipment is not tagged out of operation and parked for repairs."). However, the undersigned finds that the truck here was not tagged. Further, it might be true that the area where the truck was sitting was used by Respondent for repair work. However, there was no marker to indicate this was a repair area and that equipment there was unavailable for use. Therefore, the *area* was not "tagged" either.

CITATION NO. 8404222

At 9:50 a.m. on the same day, Taylor issued Respondent Citation No. 840422, for an alleged violation of 30 C.F.R. §77.1605(b). That standard states, in pertinent part, "(b) Mobile equipment shall be equipped with adequate brakes..." In this citation, Taylor observed the following condition or practice:

> The black Mack service truck serial no. R6885T being used in the pit and on the roads was not being maintained with adequate brakes. When checked an excessive air leak was present in the front rear tandem on the operators side. All of the other five wheel brakes was (sic) working with the low air indicator also working.

(GX-2).

Taylor found that this violation was unlikely to result in injury and that such injury could reasonably be expected to result in no lost workdays. *Id*. He anticipated the condition would affect one person. *Id*. Taylor found Respondent exhibited moderate negligence. *Id*.

Summary of the Testimony

Taylor referred to Citation No. 8404222 (GX-2) for his testimony. (Tr. 32). He issued this citation because there was an excessive air leak in the canister on the front rear tandem of the truck, and braking systems in tandem trucks are solely maintained by air pressure. (Tr. 33). The air must be maintained to ensure the brakes work. (Tr. 33). Here, when the brake pedal was applied, air exited from the adjusting rod on top of the canister. (Tr. 33). This created an unsafe condition that could prevent one braking system from being applied. (Tr. 35). The mechanic observed the condition. (Tr. 34). The truck was not locked out or tagged out. (Tr. 36-37).

On cross examination, Taylor conceded that a truck will not move if the air leak prevents the maxi brake from getting 60 pounds of pressure. (Tr. 65, 72). It does not "kick off" until there is 120 pounds of pressure. (Tr. 65). However, he testified that the small leak here would not have prevented the truck from running. (Tr. 73). With one small leak, it can be possible to build up pressure to the release point and allow the brake to disengage. (Tr. 72-73). It would take excessive air leakage to prevent the pressure from building up to the release point. (Tr. 73).

Taylor noted the gravity of Citation No. 8404222 was "Unlikely," "Not S&S," and "No Lost Workdays" because the truck had six independent braking systems and five were working. (Tr. 35-36). Also, there was a low indicator light to give warnings to the operator. (Tr. 35-36). Taylor testified that the hazard could be fatal, but that was unlikely. (Tr. 34-35). Only the operator would be affected. (Tr. 36). He also testified that this violation showed "Moderate" negligence because a hazard could occur when the vehicle was on an incline even if the other five systems were working. (Tr. 36). The condition was abated with the replacement of the canister and the elimination of the leak. (Tr. 37).

Hatmaker testified for Respondent. He explained that unless there was 60 pounds of pressure, the brakes will not release. (Tr. 78). If the air leak was bad enough, the truck could not move. (Tr. 79). This is because of the emergency or maxi-brake. (Tr. 78). Further, the truck was in a tagged out area where they were going to work on it for the other issues. (Tr. 79).

Discussion & Analysis

The Secretary's evidence established there was an air leak in the black Mack truck's braking system. (Tr. 33). This condition could have prevented the braking system from being applied, especially on an incline. (Tr. 35-36). Obviously, brakes are only "adequate" when they can be applied. A condition that could prevent the effective use of the brakes on this truck would violate 30 C.F.R. §77.1605(b). Respondent argued that unless the brake was able to reach 60 pounds of pressure, the truck would not be able to move. (Tr. 78). This is apparently a fail safe measure to prevent the truck from starting when the brake pressure is low. Taylor agreed with that assessment. (Tr. 65, 72). In essence, the parties agreed that the brakes can be adequate when the proper amount of pressure is present or still be effective to prevent movement if they contain 60 pounds of pressure or less. At a pressure level greater 60 pounds but less than the proper level, the truck may be able to start but lack the ability to provide adequate braking. Taylor credibly testified that that the small leak found here would not have prevented the truck from starting. (Tr. 72-73). Essentially, he established that the cited brake had a hazardous middle amount of air pressure. Respondent presented no evidence to counter Taylor's credible explanation regarding the size of the leak. Respondent did not even assert that the pressure here was less than 60 pounds or at the proper level. Therefore, the undersigned finds that the truck was not provided with adequate brakes in violation of 30 C.F.R. §77.1605(b).

The undersigned finds that it was possible, but unlikely, that this condition could result in a runaway truck that could cause a no lost workday injury to one person (Tr. 35-36). Also, the undersigned finds that Respondent exhibited moderate negligence. (Tr. 36). While Respondent knew, or should have known, of the violative practice, there were mitigating factors including the fact that five of the six brakes were in good working condition and the truck was equipped with a low pressure indicator light. (Tr. 35-36).

In light of the above findings, I **AFFIRM** Citation No. 8404222 as written by Taylor and find that the proposed penalty of $100.00 is appropriate for this violation.

CITATION NO. 8404223

One hour later on the 17th at 10:50 a.m., Taylor issued Respondent Citation No. 8404223, also for an alleged violation of 30 C.F.R. §77.404(a). In this citation, Taylor observed the following condition or practice:

> When checked the operators side Bucket safety latch for the Komatsu HM 400 rock truck company no 203 being used in the pit was not being in a safe usable condition. When checked the safety bracket has been hit closing the holes preventing the safety pin from entering. Theses (sic) pins are used to hold up the

extremely heavy bucket when work is needed and preformed (sic) in this area.
The off side safety latch was in working order.

(GX-3).

Taylor found that this violation was unlikely to result in injury and that such injury could reasonably be expected to result in no lost workdays. *Id*. He anticipated the condition would affect one person. *Id*. Taylor found Respondent exhibited moderate negligence. *Id*.

Summary of the Testimony

Taylor issued Citation No. 4044223 (GX-3) because the safety pin on the bucket of the Komatsu 400 truck had been dislocated such that the safety latch would not couple.[7] (Tr. 37). In this condition, the bucket would not be maintained solidly and would not be safe for a person underneath. (Tr. 37). The safety latch and pin allow the bucket to be kept in a raised position so a mechanic can work underneath. (Tr. 38-39). The safety latch, or bracket, consists of two mechanisms that line up so a pin can be run through them to prevent the bucket from lowering. (Tr. 39). There are two safety latches on a bucket because of the weight. (Tr. 41).

Taylor referred to his notes (GX-8, p. 8) to describe the condition. (Tr. 39). The first paragraph of page 8 stated "When I checked, the entrance holes had been mashed together with a torch taken to them to allow the bed to raise." (Tr. 39-40). This meant that the two brackets on the outer side had been pinched together and the torch had been used to relocate the bracket in an operable position. (Tr. 40). This is not the proper way to fix the safety latch, but it allowed it to be raised and lowered. (Tr. 40-41). Taylor pointed out this condition to the mechanic but he did not know why they had torched the pieces rather than replacing the safety pin. (Tr. 42-43).

It is possible to use wood blocks when repairing the safety latch, but Taylor did not see any. (Tr. 41, 44, 74). If Respondent used blocks, they would have been close to the end pin on the back of the bucket. (Tr. 41). Blocks would function in the same way as the safety latch. (Tr. 41). However, even if blocks had been used, he still would have issued the citation, because the equipment was not being maintained safely. (Tr. 41-42). Taylor conceded that eight-by-eight blocks would be sufficient because they catch both sides rather than one. (Tr. 66). It is possible that at the time of the citation he discussed blocks with Hatmaker, but he did not recall. (Tr. 74).

Taylor also testified that at the time of the citation, the equipment was on the side of the road and available for use. (Tr. 42). It was not tagged out or locked out. (Tr. 42).

The safety hazard associated with this condition is that the remaining pin on the bucket could give way causing injury. (Tr. 43). Taylor marked the event as "Unlikely" and "No Lost

[7] Occasionally in the testimony the "bucket" of the Komatsu 400 truck is referred to as a "bed." At the hearing, Hatmaker stated, "We are calling this a bucket. It is actually just a bed for a 400 Komatsu that raises up and dumps and so forth." (Tr. 66). The parties use the terms interchangeably and "bucket" and "bed" should be understood to mean the same thing.

Workdays" because one pin may have held the bucket up and Respondent may have been using wood. (Tr. 43). Only a mechanic under the bucket would be affected. (Tr. 44). Taylor believed Respondent exhibited "Moderate" negligence because one latch was functional and Respondent may have been using blocks. (Tr. 44). The condition was abated when a new latch was installed. (Tr. 44).

Hatmaker testified for Respondent. He asserted he had 50 years of experience in mining working in the pit area and that he was knowledgeable with respect to trucks and equipment. (Tr. 79). He believed the eight-by-eight block was safer than the pins because it catches both sides of the bed, rather than just one. (Tr. 79-80).

Discussion & Analysis

Citation No. 8404223 was issued for a violation of 30 C.F.R. §77.404(a), the same standard discussed above with respect to Citation No. 8404221. The case law cited in that discussion is directly applicable here. Taylor testified credibly that the condition of the Komatsu HM 400 rock truck was a hazard warranting corrective action. His testimony established that a safety latch assembly on the bucket of the machine was broken. (Tr. 37). He testified that rather than replacing the missing safety pin, Respondent had improperly "mashed" the holes in the bracket together with a torch. (Tr. 39-40, 43). His testimony also established that this condition would present a hazard to a person working under the bucket. (Tr. 37). Hatmaker testified that an eight-by-eight wooden block was used to support the bucket. (Tr. 79). However, Hatmaker presented no evidence beyond testimony to establish that the blocks were present. The undersigned credits Taylor's testimony that no such blocks were present. More importantly, Taylor testified that even if wooden blocks were used a citation would have been warranted. (Tr. 41-42). Therefore, regardless of whether there were blocks, the undersigned holds that the truck was not maintained in a safe condition. Respondent failed the first duty imposed by §77.404(a) and therefore is in violation of the standard. Furthermore, the evidence established that the truck was not removed from service. (Tr. 42). Thus, Respondent also violated the second duty of §77.404(a).

The undersigned finds that it was possible, but unlikely, the bucket could fall causing an injury to one person. (Tr. 43). Also, the undersigned finds that Respondent exhibited moderate negligence. While Respondent knew, or should have known, of the violative practice, there were mitigating factors including the fact that Respondent may have been using blocks and been unaware that doing so was a violation. (Tr. 44).

In light of the above findings, I **AFFIRM** Citation No. 8404223 as written by Taylor and find that the proposed penalty of $100.00 is appropriate for this violation.

CITATION NO. 8404224

Next on the morning of September 17, 2010, Taylor issued Respondent Citation No. 8404224, for an alleged violation of 30 C.F.R. §77.404(a). In this citation, Taylor observed the following condition or practice:

> The Caterpillar 330 C1 excavator being observed used in the open pit was not being maintained with working window shield wipers. When checked the wipers failed to perform.

(GX-4).

Taylor found that this violation was unlikely to result in injury and that such injury could reasonably be expected to result in no lost workdays. *Id*. He anticipated the condition would affect one person. *Id*. Taylor found Respondent exhibited moderate negligence. *Id*.

Summary of Testimony

Taylor issued Citation No. 8404224 (GX-4) because a 330 Cl-excavator's windshield wipers did not function. (Tr. 45, 67). Respondent's mechanic agreed that the wipers were not working. (Tr. 46). If this equipment was used in inclement weather and on a steep incline the lack of working wipers could result in a hazard: the truck overturning. (Tr. 45-46). The excavator was not locked out or tagged out and was available for use; although not in use at the time, an operator was nearby moving equipment around. (Tr. 47).

Taylor noted the gravity Citation No. 8404224 was "Unlikely," "Not S&S," and "No Lost Workdays" because the weather that day was clear. (Tr. 46). He believed only the operator would be affected. (Tr. 46-47). Taylor marked this citation as "Low" negligence because the fuse had blown and that could have happened at any time. (Tr. 47). The citation was terminated when a new fuse was installed by the mechanic. (Tr. 47, 67-68).

Hatmaker again testified for the Respondent. He noted that the condition was corrected by replacing a fuse in the windshield wiper. (Tr. 80). He opined that it is difficult to keep the various moving pieces working, but that Respondent tries to comply. (Tr. 80). Hatmaker believes that the goal of inspection is to be helpful and fix problems, not just about money. (Tr. 80).

Discussion & Analysis

Citation No. 8404224 was issued for a violation 30 C.F.R. §77.404(a), the same standard discussed above with respect to Citation No. 8404221. The case law cited in that discussion is again directly applicable here. Taylor testified credibly that the 330 Cl-excavator's windshield wipers did not function and, as a result, were a hazard warranting corrective action. (Tr. 45, 67). Specifically, if used in inclement weather the faulty windshield wipers could cause the driver to lose visibility in the cab and the truck could overturn. (Tr. 45-46). Respondent did not present evidence that in any way refuted Taylor's testimony. Instead, Hatmaker simply testified that the condition was quickly abated. (Tr. 79). As that argument is immaterial with respect to the violation occurred, the undersigned finds that Respondent failed the first duty imposed by §77.404(a). Furthermore, the evidence established that the truck was not removed from service. (Tr. 47). Therefore, Respondent violated the second duty imposed by §77.404(a).

The undersigned finds that it is possible, but unlikely, this violation could cause a no lost workday injury to one person as a result of lost visibility. (Tr. 46-47). Similarly, the undersigned finds Respondent exhibited low negligence. While Respondent knew, or should have known, of the violative practice, there were considerable mitigating factors including the fact that the defective wiper was caused by a blown fuse and could have occurred at any time. (Tr. 47).

In light of the above findings, I **AFFIRM** Citation No. 8404224 as written by Taylor and find that the proposed penalty of $100.00 is appropriate for this violation.

CITATION NO. 8404225

At 7:50 p.m. on September 17th, Taylor issued Respondent Citation No. 8404225 for an alleged violation of 30 C.F.R. §62.130(a). That standard states:

> The mine operator must assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level. If during any work shift a miner's noise exposure exceeds the permissible exposure level, the mine operator must use all feasible engineering and administrative controls to reduce the miner's noise exposure to the permissible exposure level, and enroll the miner in a hearing conservation program that complies with §62.150 of this part. When a mine operator uses administrative controls to reduce a miner's exposure, the mine operator must post the procedures for such controls on the mine bulletin board and provide a copy to the affected miner.

In this citation, Taylor observed the following condition or practice:

> Based upon the results of an MSHA full shift survey taken on 9/17/2010, the permissible exposure level of 132 percent has been exceed on the caterpillar D9H dozer serial no. 90B5838, operator, (368) in the 001-0 working pit. The results obtained from a personal noise dosimeter showed a PEL dose of 152 percent. This miner is enrolled in a hearing conservation plan and was wearing hearing protection (ear plugs). Management will implement all feasible administrative and engineering control to reduce the noise exposure and protect the health of the miner.

(GX-5).

Taylor found that this violation was unlikely to result in injury and that such injury could reasonably be expected to result in no lost workdays. *Id*. He anticipated the condition would affect one person. *Id*. Taylor found Respondent exhibited moderate negligence. *Id*.

Summary of Testimony

Taylor issued Citation No. 8404225 (GX-5) because a full noise survey revealed one piece of machinery exceeded the permissible exposure level ("PEL") dose. (Tr. 48, 52). The

limit is 132% and this piece of equipment exceeded 152%. (Tr. 48, 52). The equipment is tested by installing a dosimeter on an employee or in his compartment within 36 inches of his area.[8] (Tr. 52). The microphone here was placed on the operator's lapel.[9] (Tr. 52, 53, 70). The equipment is supposed to stay with the miner at all times. (Tr. 53). The miner may move the dosimeter; the test is still accurate. (Tr. 53-54). Taylor did not know whether the operator was using the truck during the entire survey. (Tr. 57). He was not required to monitor the equipment for the entire duration of the survey. (Tr. 57). He was only required to check the device twice a shift to be sure it was operating properly. (Tr. 57). He did so and both times the equipment was being operated and the dosimeter was working. (Tr. 57-58, 74-75). At no time was the equipment locked down and tagged out, it was operating. (Tr. 57).

The hazard associated with this violation would be inner eardrum damage; however, Taylor considered 152% to be a low percentage. (Tr. 56). Further, the operator of the equipment was provided with ear plugs and/or ear protection and as a result, Taylor cited this violation as "Unlikely" and "Not S&S." (Tr. 56). This citation was marked "No Lost Workdays" because the operator had the opportunity to wear ear plugs and he was not enrolled in a hearing protection plan. (Tr. 56). The only person affected was the operator. (Tr. 56-57). Taylor found Respondent exhibited "Moderate" negligence because of the low PEL and the fact that the operator was wearing ear plugs. (Tr. 57). The citation was abated when a later noise survey was found compliant. (Tr. 58).

Hatmaker testified for the Respondent. The maximum decibel level is 85. (Tr. 81). A gun blast is about 125 decimal points while regular traffic is around 85. (Tr. 81). Respondent checked the noise level every day. (Tr. 81). Hatmaker had never seen a piece of equipment get up to 132%. (Tr. 81-82). He believed that the meter was mis-calibrated or was misread because the dosimeter was set on the console. (Tr. 82). This was not the inspectors fault, but he should have checked to see if something was wrong. (Tr. 82). Hatmaker placed a microphone on the employee after the citation and did not have any problems with the noise level. (Tr. 82).

Discussion & Analysis

The evidence found credible reveals that Respondent's equipment exceeded the permissible noise limit. (Tr. 48, 52). Taylor tested Respondent's equipment and found that the caterpillar dozer had a PEL dose of 152% when the limit is 132%. (Tr. 48, 52). Hatmaker testified that he believed that the dosimeter was mis-calibrated or read incorrectly because it sat on the console. (Tr. 82). However, he presented no evidence to support this theory. He just asserted that the survey was incorrect for some reason. Taylor credibly testified that the dosimeters were properly calibrated and that he checked them twice during the survey, as is

[8] MSHA calibrated the dosimeters to the dBA standards before they were installed. (Tr. 49). To calibrate the equipment, a noise meter microphone was placed in a calibrator and it set to the standard. (Tr. 50). Calibration occurs before and after each use and a factory calibration occurs once a year. (Tr. 51). The calibration showed they were working properly. (Tr. 50-51).

[9] Hatmaker was not present when Taylor put the microphone on the operator's lapel. (Tr. 56).

required, to ensure they were working properly. (Tr. Tr. 49-51, 57-58, 74-75). Hatmaker also testified that he re-tested the employee after Taylor's survey and found that the equipment did not exceed permissible limits. (Tr. 82). Leaving aside the fact that Hatmaker did not testify as to whether his equipment was properly calibrated, it is entirely possible that his follow-up test showed a lower PEL dose. However, that does not change the results of MSHA's official noise survey; the equipment was found to exceed the PEL dose on the full-shift test. Therefore, the undersigned finds that the caterpillar dozer exceeded the permissible PEL dose and, as a result, Respondent violated 30 C.F.R. §62.130(a).

The undersigned finds that it is possible, but unlikely, that this condition could result in inner ear drum damage causing a no lost workdays injury to one person. (Tr. 56-57). The likelihood was lessened because the employee was wearing earplugs. (Tr. 56). Also, the undersigned finds that Respondent exhibited moderate negligence. While Respondent should have known of the violative practice, there were mitigating factors including the fact that the operator was wearing earplugs and the equipment only marginally exceeded the permissible limits. (Tr. 57).

In light of the above findings, I **AFFIRM** Citation No. 8404225 as written by Taylor and find that the proposed penalty of $100.00 is appropriate for this violation.

ORDER

Respondent is **ORDERED** to pay civil penalties in the total amount of $500.00 within 30 days of the date of this decision.[10]

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

Distribution:

Hansford Hatmaker, Triple H Coal, LLC, 100 Memorial Drive, Jacksboro, TN 37757

Kanisha R. LaRoche, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forysth Street, SW, Room 7T10, Atlanta, GA 30303

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

April 19, 2013

RESOLUTION COPPER MINING LLC, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2013-319-RM
v.	:	Citation No. 8596049; 11/28/2012
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Resolution Mine Mine ID No. 02-00152
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-299-M A.C. No. 02-00152-309931
v.	:	
RESOLUTION COPPER MINING LLC, Respondent	:	Resolution Mine

DECISION

Appearances: Jason Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary;
Laura E. Beverage, Esq., Jackson Kelly PLLC, Denver, Colorado for Resolution Copper Mining.

Before: Judge Manning

These cases are before me upon a notice of contest filed by Resolution Copper Mining LLC ("Resolution") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") 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 Resolution Mine (the "Mine") is an underground copper mine in Superior, Arizona. Resolution expects the mine to become the deepest and most productive mine of its type in the world. Upon completion, the Mine is projected to have six active mine shafts at a depth of approximately 7,000 feet each. These cases arose out of events during the developmental stage of the mine, which involved sinking and constructing the number 10 shaft.

BACKGROUND

On April 12, 2011, Resolution Copper filed a petition under 30 C.F.R. Part 44 for modification of 30 C.F.R. § 57.19076[1], arguing that its conveyance used for lowering miners into the shaft was not a bucket and therefore could permissibly travel faster than 500 feet per minute ("fpm"). (Ex. P-5). Resolution also asserted that, if its personnel conveyance is deemed to be a bucket, the company's safety procedures were as safe for miners as the requirements of the standard. Resolution wished to increase the speed of the man conveyance to 1200 fpm, but only where the shaft was unobstructed and the conveyance was distant from any attachments on the shaft walls. (Ex. P-5 at 1). A consulting firm determined that the 1200 fpm speed proposed by Resolution was safe for miners during both travel and deceleration. (Ex. P-6, 7, 11).

MSHA denied Resolution's petition for modification in a proposed decision and order dated November 4, 2011. (Ex. P-14). Resolution appealed the denial to the Office of Administrative Law Judges of the Department of Labor, as set forth in 30 C.F.R. §§ 44.14 & 44.15. The case was assigned to Administrative Law Judge Richard M. Clark. In the case before Judge Clark, both parties agreed that the judge needed to resolve two issues: (1) whether the conveyance in question was a bucket as that term is used in section 57.19076 and, if so, (2) whether the petition for modification should be granted because Resolution Copper's method was as safe as the safety standard. Both parties agreed that Judge Clark had jurisdiction to determine whether the safety standard applied to the conveyance.

Judge Clark held an evidentiary hearing on May 23 and 24, 2012. On November 7, 2012, in a 22-page decision, Judge Clark determined that the conveyance was not a bucket. (Ex. J-1)[2]. As a consequence, he held that the 500 fpm speed limit does not apply to the conveyance and he did not reach the second issue. (Ex. J-1 at 22). MSHA appealed Judge Clark's decision to the Assistant Secretary for Mine Safety and Health, as set forth in 30 C.F.R. § 44.33.

On November 28, 2012, MSHA, for the first time, issued a citation to Resolution for its failure to comply with section 57.19076 in the No. 10 shaft. Citation No. 8596049 states that the shaft hoist logs indicated that the operator had been hoisting persons in the shaft at speeds up to 1200 fpm, which exceeds the maximum allowable speed of 500 fpm when hoisting persons in a bucket. Resolution, without objection, sought an expedited proceeding before me based upon the record developed by Judge Clark in the Department of Labor administrative hearing. Both parties agreed upon this procedure to avoid having to try the same issues a second time. I also agreed to this procedure so long as I determined that it was not necessary for me to observe the demeanor of witnesses to resolve any factual issues. After reviewing the transcript and exhibits developed before Judge Clark, I find that I can resolve the issues raised in these cases without

[1] Section 57.19076 requires that "[w]hen persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station." 30 C.F.R. § 57.19076.

[2] Judge Clark's decision is labeled as exhibit J-1 in this case. I reference the exhibit numbers used in Judge Clark's case in this decision.

observing the witnesses in open court. The record developed before Judge Clark was comprehensive.

SUMMARY OF TESTIMONY

Thomas Goodell, the general manager of underground development for Resolution, testified that the cited piece of machinery and personnel conveyance is a type of elevator, not a bucket. Four wind ropes hold the Galloway[3] and two of those ropes guide the conveyance down the shaft, preventing it from moving laterally. (Tr. 44; Ex P-2 at :18). The personnel conveyance is not a modified muck bucket, concrete bucket, or any other type of bucket and it is a different size. (Tr. 110-11). It was designed from scratch by a group of experts from Resolution, outside consultants, and Cementation Canada[4] for the express purpose of transporting people in a safer manner than would be available in a bucket. (Tr. 110). A personnel conveyance cannot perform most of the tasks required of a muck bucket including hauling muck and bailing water because the walls are too thin, the hatch at the top is too narrow, it cannot tip upside down, and the door used to enter the conveyance from the side has holes in it for air flow. (Tr. 112-115). The personnel conveyance and the muck bucket move through the same shaft, but are not the same size. (Tr. 111). The top of the conveyance is not open. (Tr. 123). The personnel conveyance also has a steel door along one side that slides open and closed for miners to enter and exit the conveyance. (Tr. 108). Goodell testified that he does not believe that the personnel conveyance fits the definition of "bucket" in the *The Dictionary of Mining, Mineral and Related Terms* (2d ed. 1997) ("*DMMRT*"). (Tr. 123).

Goodell also testified about the safety of using the personnel conveyance to transport people. The conveyance slows down automatically when approaching stations and busy areas and can stop automatically if there are potential problems. (Tr. 59, 75). The speed of the personnel conveyance is based upon its location in the shaft, not the controller's decision. (Tr. 70). The personnel conveyance cannot enter the Galloway unless it is signaled by a human being and once in the Galloway it moves at 60 fpm. (Tr. 60; Ex. P-1). Several sets of steel doors provide an airlock and, when any conveyance travels through one of the several steel doors in any part of the shaft, Resolution limits its speed to 200 fpm. (Tr. 45-47, 54; Ex. P-2 at :50,

[3] The Galloway is a work stage that can move up and down the shaft at 12 fpm by being pulled by four large cables that connect it to the surface. It is 60 feet high and has five active decks as well as the ability to accommodate a sixth deck. Buckets and conveyances move through the Galloway. (Tr. 40-41).

[4] Cementation Canada ("Cementation") has expertise in shaft-sinking projects and works at the Number 10 shaft as a contractor for Resolution. Cementation employees operate and maintain the hoist system in the Number 10 shaft. (Tr. 193). Cementation also designed the entire obstruction control system for the number 10 shaft, which monitors and controls the movement of personnel conveyances and buckets through the shaft using two Programmable Logic Controllers ("PLCs"). These PLCs control numerous functions of the conveyances and buckets including applying automatic brakes and monitoring the location of conveyances and buckets. (Tr. 180; Ex. P-17). Cementation designed the personnel conveyance and developed software that runs the conveyance, although it did not physically build the conveyance. (Tr. 192).

2:52). The busiest section of the shaft, before the Never Sweat level, is monitored by video cameras, but Resolution does not want the conveyance to travel at more than 500 fpm through this section. (Tr. 54). Below the busy section of the shaft, the conveyance no longer passes through doors and the conveyance increases its speed to 1200 fpm. (Tr. 55-56; Ex. P-2 at 2:56). Conveyances in the shaft can travel through two separate tracks, which are 5.5 feet apart; permanent obstructions in the shaft are 18 inches from the conveyances.[5] (Tr. 57-58). He considered 18 inches to be a safe distance. (Tr. 128). Through monitors, the hoist operator views a plethora of information, warning signals, and video coverage of the conveyances. (Tr. 71; Ex. P-1 at 3-7). Both the hoist and the conveyance itself track the location of the conveyance; if their information does not match, the hoist shuts down and stops the conveyance. (Tr. 80). The conveyance has both radio and bell communication systems. (Tr. 116). Based upon 39 years of experience, Goodell believes that speed does not affect the likelihood of a collision involving the personnel conveyance. (Tr. 135). Although aerodynamics could lead to a collision due to the swinging of a conveyance, Goodell testified that Resolution has not experienced the personnel conveyance or any of its buckets swinging. (Tr. 133, 135). Increased speeds would not cause the conveyances to swing. (Tr. 135). Goodell also testified that increased kinetic energy does not increase the risk of a collision. (140).[6]

Hector Denogean, the shaft superintendent of the 10 shaft project, examines the shaft several times each day. (Tr. 155). He believes that entering and exiting the personnel conveyance as opposed to a bucket eliminates trip and fall hazards to miners, especially those with knee problems, because the miners can simply walk through the door as with an elevator. (Tr. 163). Experiencing an emergency stop when a bucket moves 1,200 fpm feels the same to Denogean as an emergency stop that occurs at any other speed. (Tr. 168).

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[5] There are two sides to the Number 10 shaft, Side No. 1 and Side No. 2, where either one bucket or one personnel conveyance can travel. Each side has only one bucket or conveyance at a time, but both No. 1 and No. 2 can have some form of bucket or conveyance simultaneously. When both sides are occupied, one side moves its contents up while the other moves its contents down at the same speed because both sides are controlled by the same hoist. When the buckets or conveyances pass each other, they are near the vertical center of the shaft. The sides are in a "mechanical balance." (Tr. 55-56; 3:10). When muck buckets are in "muck mode," personnel conveyances are never in use, but buckets not in "muck mode" can move at the same time as a personnel conveyance but on the other side of the shaft. (Tr. 49-50).

[6] Goodell stated that in October 2011 a concrete bucket struck a loose brad on the Galloway level, knocking it off of the shaft and causing it to fall onto and injure a miner. (Tr. 138). Increased speed of a bucket or conveyance and increased potential kinetic energy does not make it more likely to collide with something. (Tr. 140). Speed was not a contributing factor in the accident; the maximum speed in the area where the accident occurred is 500 fpm, and the concrete bucket was moving less than 60 fpm at the time of the accident. (Tr. 142). The personnel conveyance made evacuation of the victim of this accident easier. (Tr. 144). Goodell testified that an obstruction attached to the bucket was the cause of the accident. (Tr. 147).

Ryan Gough, an engineer who manages project services at Cementation, testified as a shaft sinking design and operations expert. (Tr. 188). Although it may be possible for the personnel conveyor to swing, Gough testified that it does not do so. The entire system does, however, sometimes rotate in a counter-clock wise motion, but usually only during muck mode when the personnel conveyance is not in use. (Tr. 199-200). There is "very little" movement of the personnel conveyance. (Tr. 201). He believes that the conveyance is superior to buckets for personnel transportation even if the buckets were to transport miners at 500 fpm while the conveyances did so at 1200 fpm. (Tr. 232). Gough testified that it was not a "reasonable risk" that the personnel conveyance would collide with anything. (231). Cementation documents often refer to the personnel conveyance as a bucket. (Tr. 236; Ex. R-4).

Thomas Barkand, the expert on hoists for the Secretary, testified that the personnel conveyance is a bucket and is similar to the other buckets at the Mine. (Tr. 249; Ex. R-1,R-2,R-3). Neither the presence of a door nor the enclosed top mean that the conveyance is not a bucket, testified Barkand. (Tr. 249). In addition to similar shapes and dimensions, all three buckets used at the Mine are suspended by hanging from the crosshead, which is "the real quantifying issue." (Tr. 250). The personnel bucket is capable of acting like a bail although it is not used in such a manner while transporting personnel. *Id*. Fixed guided conveyances are permitted to move at 2500 fpm, but the personnel conveyance is not a fixed guided conveyance according to Barkand. (Tr. 252). Barkand testified that MSHA regulations do not define what qualifies as a bucket. (Tr. 258). If the personnel conveyance used at the mine moved faster, its potential kinetic energy would increase. (Tr. 253). Barkand agreed that the personnel conveyance was not designed to carry muck or to be dumped and did not fit the definition of "bucket" in the *DMMRT*. (Tr. 260). Barkand also acknowledged that the *DMMRT* was a source for defining mining terms and he could not name another source to support his position. (Tr. 259).

DISCUSSION AND ANALYSIS

The Secretary argues that the personnel conveyance is a bucket and therefore section 57.19076 and its maximum speed limitation of 500 fpm apply. The conveyance looks like a bucket. It is attached to a crosshead and guided in the same manner as the other buckets at the mine. Resolution and its consulting companies all have documents that refer to the conveyance as a bucket. MSHA's expert Tom Barkand, furthermore, testified that the conveyance is a bucket despite the presence of a covered top and a side door. The Secretary contends that the court should defer to his interpretation that the conveyance is a bucket under section 57.19076. Interestingly, the Secretary argues that Judge Clark did not have the authority to determine that the personnel conveyance was a not bucket because only the Commission has the authority to review the Secretary's interpretation of MSHA's safety standards.

Resolution argues that Citation No. 8596049 should be vacated because the personnel conveyance is not a bucket under section 57.19076. The appearance, design, use, and manner of function of the personnel conveyance are different from standard mucking or concrete buckets. In addition, the conveyance does not conform to the definition of "bucket" in *DMMRT*. Indeed, MSHA's decision and order denying the petition for modification admits that the personnel conveyance is not a bucket. (Ex. 14 at 1).

Resolution also argues that the Secretary's interpretation of section 57.19076 only deserves *Mead* or *Skidmore* deference and the Secretary's interpretation is unpersuasive. It maintains that section 57.19061,[7] which applies to conveyances other than buckets, applies to its conveyance. The citation should be vacated because section 57.19076 does not apply. Resolution also argues that the citation should also be vacated upon the ground of *res judicata*.

Resolution's argument that the current proceedings are barred by *res judicata* is rejected, because the claims involved in the current proceeding and the modification hearing before the Department of Labor judge are not identical and Resolution did not prove all the elements necessary to establish *res judicata*. *See Faith Coal Co.*, 19 FMSHRC 1357, 1365 (Aug. 1997). Judge Clark's decision is not binding on the Commission.

Subpart R of section 57, "Personnel Hoisting," provides detailed requirements for the use of equipment to hoist personnel. At issue here is the speed with which a person may be hoisted; the Secretary argues that Resolution cannot hoist a person at speeds in excess of 500 fpm in its personnel conveyance, while Resolution would like its conveyances to move up to 1200 fpm when carrying personnel. Section 57.19076, cited in the violation, only applies to buckets carrying miners and requires movement speed to be no greater than 500 fpm. Section 57.19061 applies to conveyances other than buckets and it provides that movement speed be no greater than 2,500 fpm. The dispute between the parties before me is whether the conveyance used to carry miners into Shaft 10 at the Mine is a "bucket" under section 57.19076.

When considering an agency's interpretation of a regulation the "starting point" is the language of the regulation itself. *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057, 1062 (Sept. 2000). Where a regulatory provision is clear and unambiguous, the provision must be enforced as written without regard for the interpretation of the agency. *Wolf Run Mining Company*, 32 FMSHRC 1669, 1678 (Dec. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997); *Peabody Coal Co.,* 18 FMSHRC 686, 690 (May 1996); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC at 1062. If the regulation is ambiguous, however, the agency's interpretation is given controlling deference unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Basically, deference is given to the agency's interpretation if it is "not unreasonable[.]" *Udall v. Tallman*, 380 U.S. 1, 18 (1965).

An agency's interpretation that does not carry the force of law may still be worthy of receiving another form of persuasive deference or "respect." *Christensen v. Harris County*, 529 U.S. 587; *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (U.S. 1944); *U.S. v. Mead Corp*., 533 U.S. 218, 221 (2001). The persuasive powers, or level of deference, given to "an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position[.]" *Mead Corp*., 533 U.S. at 227-228 (internal

[7] Section 57.19061 mandates that "[t]he safe speed for hoisting persons shall be determined for each shaft, and this speed shall not be exceeded. Persons shall not be hoisted at a speed faster than 2,500 feet per minute, except in an emergency." 30 C.F.R. § 57.19061.

citations omitted). Internal agency guidelines not subject to the APA only receive "some deference." *Reno v. Koray,* 515 U.S. 50, 61 (1995). Persuasive deference may be given to an agency's interpretation of an ambiguous regulation it administers when that interpretation is expressed in the form of a litigation position that "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. at 462; *accord Akzo Nobel Salt, Inc.,* 212 F.3d 1301, 1304 (D.C. Cir. 2000); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC at 1062.

I find that the language of section 57.19076 is not entirely clear on its face. The term "bucket" could be limited to the type of open bucket pictured in Ex. P-9 or it could be interpreted in a broader manner. Neither the Mine Act nor the act's legislative history provides any guidance as to the meaning of the term "bucket" in the context of the safety standard. The regulatory history also does not provide any guidance as to the scope of the safety standard. Thus, the persuasiveness and consistency of the Secretary's interpretation must be evaluated to determine how much deference should be accorded, if any.

I find that the Secretary's interpretation is erroneous and unpersuasive. His position on the meaning of the term "bucket" has also not been consistent. I find that Resolution's personnel conveyance is not a bucket.[8] The conveyance in question does not fit the ordinary definition of a bucket and was not designed to function as a bucket. Resolution's personnel conveyance does not fit the definition of bucket in the *DMMRT*. The Commission recognizes that the technical usage of a term is relevant to providing the meaning of that term and *DMMRT* is a recognized authority to determine technical usage. *Wolf Run Mining Co.*, 32 FMSHRC at 1685; *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *The American Coal Company*, 35 FMSHRC __, slip op. at 2 (Feb. 2013). The pertinent definition of bucket from the *DMMRT* is "[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening." *DMMRT* at 71. Although the personnel conveyance could theoretically be used to transport supplies and Resolution and Cementation often referred to the conveyance as a bucket, it does not match the definition of bucket. Resolution's personnel conveyance has a closed top, and is not used to hoist broken rock or water. The conveyance was specifically designed to only hoist miners and whatever equipment is on the persons of those miners. The conveyance also has a door, which in addition to making it look unlike a bucket, would also be an unnecessary addition to a bucket and make it difficult to use for any function other than transporting miners.

The Secretary's argument that the definition of bucket in *DMMRT* should not be relied upon is unconvincing. The dictionary definition of a term should not be relied upon when a different dictionary provides "different or uncertain outcomes." *The American Coal Company*, 35 FMSHRC __, slip op. at 2 (quoting *Alarm Indus. Communication Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997). The Secretary, however, did not provide any alternate definition of bucket at the hearing or in its brief. Barkand, furthermore, admitted that the dictionary was an acceptable source of industry terminology. The Secretary's argument that the conveyance qualifies as a bucket primarily because it was suspended from a crosshead fails, as he does not show how the suspension of the bucket relates to what is considered a bucket in the safety

[8] I reach this conclusion for essentially the same reasons as Judge Clark.

standard. If the Secretary wanted any personnel conveyance suspended from a wire rope without the use of a fixed guide to be subject to the 500 fpm speed limit, he could have easily said so in the safety standard. The way the standard is written, the 500 fpm speed limit is limited to buckets used to transport people.

MSHA also interpreted section 57.19076 in a different manner when Neal H. Merrifield, Administrator for Metal and Nonmetal Mine Safety and Health, denied the petition for modification in his decision and order. The decision and order states:

> Section 30 C.F.R. § 57.19076 requires persons hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station. The personnel conveyance that this petition is submitted upon *is not a "bucket," but rather is an enclosed capsule designed for the transport of personnel.* Notwithstanding, MSHA has asserted that the regulation is applicable and this petition distinguishes this means of transport and operational conditions to assure the agency that the same level of safety as intended by the standard is met.

(Ex. P-14 at 1) (emphasis added). Thus, it is clear that in November 2011 the agency recognized that the personnel conveyance was not a bucket but that MSHA intended to apply section 57.19076 to the conveyance despite that fact. This action exceeds the Secretary of Labor's authority and I find that the Secretary's interpretation of the standard to apply to the personnel conveyance in use at Resolution is not entitled to deference.

One of MSHA's concerns appears to be the possibility that miners would be injured in the event the conveyance is forced to stop quickly in an emergency. MSHA's decision denying the petition for modification provides:

> Actual deceleration rates experienced by miners riding in the bucket can be greater than the drum decelerations due to the elasticity of the suspension ropes. The stretching and subsequent rebound of the suspension rope is an inherent characteristic of the rope which can introduce accelerations and decelerations to the conveyance which exceed the drum deceleration and cause injury to miners.

(Ex. P-14 at 2). The Secretary relates this hazard to the speed of the conveyance. Resolution produced a report, expert testimony, and various opinions of consulting firms showing that the personnel conveyance is as safe moving at 1200 fpm as it is moving at 500 fpm. Resolution's operating plan for the conveyance also includes numerous safety features such as sophisticated electronics, extensive clearance between the conveyance and obstacles, and required speeds below 500 fpm in sections of the shaft that present risk. Gough testified that the deceleration rates and "cage bounce" are as safe at speeds of 1200 fpm as they are at 500 fpm in the personnel conveyance. (Tr. 220-221, 233; Ex. P-11 at 3). I do not reach these issues because I have determined that the conveyance is not a bucket. I note that section 57.19061, which applies to

the conveyance in question, provides that "[t]he safe speed for hoisting persons shall be determined for each shaft, and this speed shall not be exceeded." MSHA did not cite Resolution under that safety standard.

ORDER

I find that Resolution's personnel conveyance is not a bucket and therefore Resolution did not violate 30 C.F.R. § 57.19076. For the reasons set forth above, Citation No. 8596049 is **VACATED** and these proceedings are **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of Brad Houston,	:	Docket No. KENT 2013-643-D
Complainant	:	MSHA Case No.: MADI-CD 2013-11
	:	
v.	:	
	:	
HIGHLAND MINING CO., LLC,	:	Mine: Highland #9 Mine
Respondent	:	Mine ID: 15-02709

DECISION AND ORDER REINSTATING BRAD HOUSTON

Appearances: Schean G. Belton, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, representing the Secretary of Labor (MSHA) on behalf of Brad Houston

Jeffrey Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky, representing Highland Mining Co.

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 801, *et. seq.,* and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on April 10, 2013, filed an Application for Temporary Reinstatement of miner Brad Houston ("Houston" or "Complainant") to his former position with Highland Mining Co., ("Highland Mining" or "Respondent") at the Highland No. 9 Mine pending final hearing and disposition of the case.

On February 14, 2013, Houston filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.[1] In the Secretary's application, he represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Houston to his former position as a face support worker at the Highland No. 9 Mine.

Respondent filed a request for hearing on April 16, 2013. An expedited hearing was held in Henderson, Kentucky on April 22, 2013. The Secretary presented the testimony of the complainant, and the Respondent had the opportunity to cross-examine the Secretary's witness, and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).[2]

For the reasons set forth below, I grant the application and order the temporary reinstatement of Houston.

Temporary Reinstatement

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).

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

[1] Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See 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).

[2] Exhibits of Respondent were admitted, but found largely irrelevant to the proceeding. Four of the documents, photocopied from the personnel files of two other employees and released to the court without documented authorization, were placed under seal to prevent any further disclosure of private information. Respondent's Exhibits I, J, K, and L.

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).

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."[3] *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. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999. 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." *Jim Walter Resources,* 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).

In order to establish a *prima facie* case of discrimination *in a full discrimination proceeding* 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, Houston 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, a similar analytical framework is considered 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,

[3] "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)).

1089 (Oct. 2009). 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). 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 evidence

On February 14, 2013, Houston filed a Discrimination Complaint, which included a brief Discrimination Report. In his Complaint, he reported that he was terminated from his job as a face support worker at the Highland No. 9 Mine on February 9, 2013. Exhibit B, Application for Temporary Reinstatement.

Following the filing of the complaint, the Secretary performed an investigation and determined that the Complaint was not frivolously filed. On April 10, 2013, the Secretary filed an Application for Temporary Reinstatement of Brad Houston.

Submitted with the Application for Temporary reinstatement was the April 3, 2013 Declaration of Special Investigator Freddie Fugate. The Declaration, in pertinent part, is as follows:

1. I am a Special Investigator employed by the Mine Safety and Health Administration, United States Department of Labor, and I am assigned to the District 7 Office in Barbourville, Kentucky. During the period of this investigation however, I was on detail at the District 10 Office in Madisonville, Kentucky.
2. As part of my responsibilities, I investigate claims of discrimination filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Brad Houston. My findings as a result of this investigation disclosed the following:
    a. Brad Houston was employed by Highland Mining Company, LLC as a face support worker building brattices for the No.9 Mine sometime in September 2010.
    b. In February 2013, Houston was working first shift on the Number 5 Unit. The roadway to the section was known to be muddy, filled with potholes, and was frequently the cause for delays in getting to the mine surface. At the end of his shift on February 6, 2013, Houston and 11 other crew members loaded onto a mantrip and headed to the surface. Casey Kennedy in a hurry to get to the surface, began to drive the mantrip recklessly and at a fast pace over the bumpy mine road. At some point during the four mile bumpy drive to the mine surface, Houston believes that he hit his head causing him to lose his hard hat and cap light. He stated that he was dazed and did not realize that he had lost the items until someone told him. Kennedy stopped the mantrip and Houston got off and found his hard hat in the roadway. He, however, was

unable to find his cap light. As Houston headed back toward the mantrip, Kennedy took off and left him behind in the dark roadway without a light.

c. Eventually, Houston located a mine phone that was several breaks away and called the mine foreman's office. He told mine foreman Mickey Morris that he had hit his head due to the mantrip being driven recklessly and that he had been left underground without a cap light. Morris told Houston that a second mantrip should pass by and that he should ride to the surface on that one.

d. About 20 minutes later the second mantrip drove by and picked Houston up. Houston retold the miners on the second mantrip what happened to him and how he ended up alone in the dark roadway. Jeremy Hendrickson, a production supervisor, was one of the miners on the second mantrip.

e. Once on the surface, Houston reported the incident to Morris who was still in the mine foreman's office. He told Morris that he was left alone underground without a cap light, that he thought he might have suffered an injury as a result of hitting his head, and that the mantrip was being driven in a manner that could hurt someone. Morris offered Houston a new cap light but made no comments regarding Houston's other statements.

f. On February 8, 2013, Houston called the mine office complaining that his head hurt from the day before. He was told to bring in a doctors excuse when he returned to work. Houston was also scheduled to work Saturday, February 9, 2013, but he also called in on that day. On the same day union representative Larry Baker called Houston at home. Baker told Houston that he should make sure that he brought in a note from the doctor because the company was putting him on a "5 day" with the intent to terminate.

g. On Monday, February 11, 2013, Houston reported to work and gave the doctor's excuse to Faye Henshaw, the company secretary and timekeeper. Houston stated that he then spoke with Terry Miller, President of the UMWA. Miller told him that the union would attempt to put him on a program to save his job. A company official told Houston to come back to the mine the next day at 10:00 a.m.

h. Houston returned to the mine the next day at 10:00 a.m. and by 11:00 a.m. he was terminated. Mine Superintendent Ezra French told Houston to sign a "quit sheet." French told him that if he signed the "quit sheet" he would not give him a bad reference; otherwise, Houston would not be able to get a job with any Peabody or Arch mine in Kentucky. Houston reluctantly signed the "quit sheet."

i. Houston believes that he was discharged because he notified mine foreman Mickey Morris and production foreman Jeremy Hendrickson that he was left in the mine without a cap light and because he complained about the mantrip being driven in a reckless manner.

3. Based upon my investigation of this matter, Houston engaged in a protected activity when he reported his concerns about the recklessly driven mantrip and of being left underground without a cap light. I conclude that his complaint was not frivolously brought.

Exhibit A, Application for Temporary Reinstatement.

Brad Houston began working in the mining industry in 2008, and at Highland Mining on September 7, 2010. Tr. 11-12. He began at Highland Mining as a roof bolter, but has since worked a variety of other jobs at the mine. Tr. 12-13. Houston worked full time on rotating 10-hour shifts, meaning that every two weeks Houston would rotate into a different shift. Tr. 13-14.

On Wednesday, February 6, 2013, Houston was working the morning shift from 7 am to 5 pm. Tr. 15. He started the day working on the unit and then got pulled off to do belt work. Tr. 14-15. After performing belt work, Houston and his co-workers headed back to the unit and started running coal. Tr. 15. Toward the end of their shift, when they were done with their work, everyone boarded the mantrip to leave. Tr. 15-16. The unit they were working on was approximately 5 miles from the slope, and usually takes approximately 40-45 minutes to travel by mantrip. Tr. 24.

The mantrip has rubber tires, fits 14 miners, has a canopy over it, and has no doors on its sides. Tr. 24-25, 48-49. One of Houston's coworkers, Casey Kennedy, was driving the mantrip, and Houston was sitting in the far back because the mantrip was full. Tr. 16, 50. Kennedy was driving erratically, causing at least one person to lose his hard hat. Tr. 16. Houston said that it may have been Kennedy who lost his hat, because he remembers him stopping and getting out of the mantrip to retrieve a hard hat. Tr. 58-59. People were yelling for Kennedy to slow down and stop. Tr. 17. The mantrip and belt were not making so much noise that the driver would have been unable to hear passengers yelling to him. Tr. 61-62.

Houston was getting jarred around in the back and he hit his head on the canopy top approximately a fourth of the way into the trip to the slope. Tr. 17, 24, 25. This caused Houston to get knocked out for one to several minutes. Tr. 17, 28. Houston's head hitting the canopy also caused him to lose his hard hat. Tr. 17. Houston and others yelled for Kennedy to stop the mantrip so that Houston could find his hard hat. Tr. 17-18. Houston rolled out of the mantrip and, with the help of Kennedy shining a light, he looked for his hard hat 6-8 crosscuts behind him. Tr. 18, 62. When Houston finally found his hard hat, there was no cap light on it. Tr. 18. As he began looking for his cap light, Houston saw the mantrip leaving him. Tr. 18. He yelled for the mantrip to wait, but it still left without him. Tr. 19.

Houston was left alone and in the dark, with no cap light. Tr. 20. He could see light from a header, so he walked 6-8 crosscuts to the header and found a phone. Tr. 19-20. He called up to the mine surface and reached Mickey Morris, the mine superintendent.[4] Tr. 21. Houston introduced himself and told Morris that he had hit his head, lost his hard hat, and was down in

[4] Houston was not certain if Morris was a mine superintendent or foreman. Tr. 21. Either position would place him as Houston's supervisor, so his precise title does not affect the findings and conclusions herein.

the mine without a cap light. Tr. 21. Morris told Houston to wait for the next mantrip, which picked Houston up after approximately a half an hour. Tr. 22. This mantrip was driven by a roof bolter named Rick Bishop, and a face boss named Jeremy Hendrickson was on board. Tr. 23. Houston told Bishop and Hendrickson about what happened with the previous mantrip. Tr. 23.

After the second mantrip arrived at the bottom, Houston went back to the first mantrip to get his lunch bucket and tool bag. Tr. 25. While looking around the first mantrip, Houston found his cap light on the floorboard. Tr. 25. Houston then took the hoist up to the surface and went to the locker room to clock out. Tr. 26-27. Miners who were on the first mantrip told Houston that what Kennedy did to him was "wrong" and that he should "get that stopped." Tr. 27. Houston responded, "I'm getting ready to go in here and let them know what happened." Tr. 27.

Houston then went to Morris, Hendrickson, and a face boss named Steve Buckhorn. Tr. 28. Houston told Morris again, with the others listening, about Kennedy's erratic driving, how he hit his head and lost his hard hat, and how he was knocked out. Tr. 28, 29. When Houston told them that he had lost his cap light, Morris responded that he would get him a new cap light. Tr. 28. Houston described himself as being in shock. Tr. 65. None of the supervisors present responded in any other way to Houston's complaint of reckless driving and injury. Tr. 28-29.

On a previous occasion, Houston complained to his face boss about Kennedy for a variety of safety incidents. Tr. 81-82. Houston testified:

> I have reported [Kennedy], you know, ramming the back of my ram car when I'm driving it, you know, underground with – you know, hauling coal and – and, you know, you pulling up under the miner and you got a miner man out here, you know. And he's wanting to come and, whatever, play derby with the cars. I have reported unsafe acts.
>
> I have reported to Brad Peyton, my face boss. I reported unsafe acts that his guy's done, and they don't do nothing about it. I mean, they don't say nothing to him.

Tr. 82.

Houston then went back to the locker room, put his belongings away, showered, and left for the day. Tr. 29. He had no gashes on his head, but had a bump that formed on the back of his head. Tr. 29. He was also experiencing popping in his ear on the side where his head was hit, and a great deal of soreness and pain in his shoulders, back, and hips. Tr. 29-30.

When Houston awoke the next day, he was woozy, his head was in a great deal of pain, and his body was stiff. Tr. 30. He described sitting on the side of his bed, "just trying to get myself together." Tr. 30. He felt that something was wrong, so he called into the call-in line at work and said that he was going to the doctor. Tr. 30-31. He tried calling again at 8 am, when people from the safety department would be arriving at work, but he could not reach anyone. Tr. 31. Houston testified that he kept trying, and on the third or fourth time he reached someone

from human resources, likely the human resources manager, Tonya McCullough.[5] Tr. 31, 106-107. Houston told her what happened, and she told him to go to the doctor. Tr. 31-32.

Houston went to the MOMs clinic in Henderson and saw a doctor. Tr. 32. The doctor examined Houston and prescribed him some medication, which Houston could not recall. Tr. 33, 57. Houston went home and called Highland again. Tr. 33. He couldn't reach anyone, so he left a message on the voicemail of mine superintendent Aaron Farmer. Tr. 33.

On Saturday, February 9, Houston received a call from a union representative named Larry Baker. Tr. 33. Baker asked Houston if he knew that the company had him on a 5-day suspension with intent to discharge. Tr. 33. Houston responded that he was not aware of that, and Baker told Houston to remember to bring the doctor's excuse on Monday. Tr. 34.

When Houston arrived for work on Monday morning, miners began approaching him telling him that they had heard that he was fired. Tr. 34. The union president, Aaron Miller, took Houston to go see Farmer. Tr. 34-35. Houston turned the doctor's excuse in to the secretary while waiting to speak with Farmer. Tr. 36. After waiting for a while, Houston entered Farmer's office, to speak with Farmer, Baker, and Miller. Tr. 35.

According to human resource manager, Tonya McCullough, the decision makers for discharge are her, Ezra French from human resources, and Farmer. Tr. 102-103. Farmer told Houston that because of call-in issues he was putting Houston on a 5-day suspension with intent to discharge. Tr. 36, 38. The company's policy on missing work is that they prefer 24 hours notice, but in cases of emergency miners may call in one hour prior to the start of their shift. Tr. 101. In the previous year, Houston was issued several prior notices for call-in policy violations; however, at least one of these notices may never have been received by Houston after he moved and the company continued mailing to his old address. Tr. 78-80, 101-103. McCullough testified that the reason for the discharge was Houston's alleged violation of the call-in procedure on January 26, 2013. Tr. 103.

Miller told Houston to return Tuesday at 10:00 am to talk about the matter further. Tr. 37. Houston returned on Tuesday morning and had a meeting with union representatives, including Miller, Baker, and Spike,[6] as well as four representatives of the company, including superintendent Farmer and French. Tr. 38. They provided Houston the opportunity to discuss his missing work or calling in late. Tr. 39. Houston did not tell French at that moment that he was being fired because he made a safety complaint because mine management already knew of his complaints. Tr. 86-87.

[5] Tonya McCullough testified that she spoke with Houston in the afternoon. Tr. 106-107.

[6] The full name of Spike is not clear from the testimony. However, Houston testified that he was a union representative. Tr. 38.

French then told Houston that Highland Mining was firing him and made him sign a "quit sheet." Tr. 40. Houston did not want to resign, but he was told that a good recommendation from the company for future employment was contingent on his signing the quit sheet. Tr. 41-42. There was no grievance filed by the union on Houston's behalf because Houston elected to resign. Tr. 112, 118. Houston and Miller tried to discuss the matter further with French, but French would not reconsider the matter. Tr. 42-43. Employees 1 & 2 were also discharged on February 7, 2013 for alleged violations of the call-in policy.[7]

Houston went to the Community Methodist Hospital Emergency Room a few days after he was discharged. Tr. 56. An MRI was performed, and Houston said that no internal bumps, bruises, or contusions were detected. [8] Tr. 55-56.

Findings and conclusions

Protected activity

Houston engaged in at least two protected activities, either of which alone would be sufficient to prove the first element of the test for temporary reinstatement. Houston's first protected activity was his several complaints concerning the reckless driving, his injury, and his being left without a light underground in a roadway. Houston first told the mine superintendent Mickey Morris about the incident and his injury when he phoned to the surface. Tr. 21. Houston then complained to a face boss on the trip back on the second mantrip. Tr. 23. Houston then went to see Morris in his office. Tr. 28. Houston complained to Morris, with face boss Buckhorn listening, about Kennedy's erratic driving, his head injury, and his being left in the dark underground. Tr. 28. The next day, when Houston was experiencing wooziness, as

[7] Two employees are referred to here as Employee 1 and Employee 2 because Respondent's confidential documents from the employees' personnel files are under seal. Tr. 109-110.

[8] Similar to Judge Gill's finding in *Sec'y of Labor on behalf of Kenneth R. Wilder v. Private Investigation and Counter Intelligence Services, Inc. and Bledsoe Coal Corp*., 33 FMSHRC 1667, n. 5 (ALJ) (July 2011), I find the following is a list of ancillary facts broached at the hearing which may be relevant for a trial on the merits, but are beyond the scope of this limited temporary reinstatement hearing:

- Allegations of previous absenteeism or violations of the company call-in policy;
- Whether the union chose to grieve Houston's discharge;
- Why Houston sat in the back of the mantrip;
- Whether he had his cap light on or off while riding on the mantrip;
- Whether Kennedy drove erratically during other trips on that day;
- The discharge of Employees 1 and 2.

well as head, shoulder, hip, and back pain from his injury, he told McCullough in human resources about his injury. Tr. 31, 106-107. Later that day, Houston left a message for mine superintendent Aaron Farmer, where he also stated that he would not be at work because of the injuries sustained the previous day. Tr. 33.

The Respondent argues that the erratic driving was a "one-time event" and that Houston has not shown that it was a violation of a specific provision of the Mine Act or the Regulations. Tr. 126. This argument misunderstands the broad scope of activities protected under §105(c). The legislative history explains that "The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary." S. Rep. No. 95-181, at 35. Similarly, it states:

> The listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive. The wording of section [105(c)] is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse work in conditions they believe to be unsafe or unhealthful.

Id. at 35-36. The legislative history is clear that complaints concerning health and safety matters are protected by Section 105(c). The Mine Act and Regulations cannot possibly comprehend every unsafe and unhealthful activity in the mine, and it is not incumbent upon the miner to cite to a specific health or safety regulation in making a complaint. Such a "hypertechnical and purpose-defeating interpretation" would limit the ability of miners to make legitimate health and safety complaints. *Donovan on Behalf of Anderson v. Stafford Const. Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984).

Houston's second protected activity was his calling off work on February 7, 2013, the day after he was injured.[9] Houston's head injury caused him to be knocked out for one to several minutes. Tr. 17, 28. On that day he experienced popping in his ear on the side where he hit his head, and he felt a great deal of soreness and pain in his shoulder, back, and hips. Tr. 29-30. He also developed a visible bump on the back of his head. Tr. 29. When Houston awoke the next morning, he was woozy, his head was in a great deal of pain, and his body was stiff. Tr. 30. Houston had to sit on the side of his bed "just trying to get myself together." Tr. 30. Houston felt there was something wrong and needed to go to the doctor. Tr. 30-31. Therefore, Houston called into work and told them that he would not be coming to work that day. Tr. 30-31.

[9] There is also a third protected activity in Houston's prior complaints about Kennedy engaging in unsafe acts, such as ramming him with the ram car. Tr. 82. However, there is not enough in the record to indicate when these complaints occurred and what the results were.

Houston's injury, as well as the symptoms he described, made it unsafe for him to go to the mine on February 7. His calling in and stating that he would not be at work was essentially a refusal to work in unsafe conditions. "Section 105(c) confers on a miner the right to refuse to work if he sincerely believes his working conditions expose him to an identifiable danger. Thus, the right to refuse work is personal to the miner who fears a perceived danger." *Mountain Top Trucking Co., Inc.*, 1997 WL 34994, *23 (ALJ) (Jan. 1997). In *James Eldridge v. Sunfire Coal Company*, 5 FMSHRC 408, 464 (March 1983), Judge Koutras held that a miner's work refusal was protected when he refused to work beyond his normal shift because of his communicated concerns that he was "too tired and exhausted" to continue working on a pillar section until the entire pillar was extracted. 5 FMSHRC 408, 464 (ALJ) (March 1983). Similarly, here Houston's refusal to work with a head injury, pain, wooziness, and instability constituted protected activity.

Nexus between the protected activity and the alleged discrimination

Having concluded that Houston engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely the February 7, 2013 suspension with intent to discharge followed by the intended discharge.[10]

The Commission has recognized that a nexus between protected activity and a subsequent adverse action is rarely supplied exclusively by direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. More often, the determination of nexus is made by the trier of fact drawing an inference from circumstantial evidence. *Id.* In the instant case, inferences may be drawn from the evidence presented. 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; and (3) coincidence in time between the protected activity and the adverse action. *CAM Mining, LLC,* 31 FMSHRC at 1089. The Commission has also stated that it is appropriate for the judge to look at instances of disparate treatment of the complainant. *See*, *e.g.*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510. It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, *4 (ALJ) (Dec. 2012).

Knowledge of the protected activity

[10] The Respondent argues that Houston resigned and therefore did not suffer an adverse employment action. Tr. 126. However, the record clearly shows that Houston was given a 5-day suspension with the intent to discharge on February 7, 2013. Tr. 36, 38. On February 12, 2013, McCullough gave Houston the option of being discharged or resigning. Tr. 108. Houston was given a pre-printed "quit sheet" and understood that he had the choice of being discharged and receiving a poor reference or resigning and receiving a positive reference. Tr. 40-42. Houston did not have the option of retaining his job, therefore this was an adverse employment action.

Houston's supervisors had knowledge of his complaints and concerns about the February 6 incident, as well as his refusal to attend work on February 7. Regarding the February 6 incident, the record reveals that Houston complained to every coworker and supervisor that he could find. Even though the incident occurred at the end of his shift, Houston complained to a coworker and face boss on the second mantrip, his coworkers in the shower room, a face boss and mine superintendent, an HR manager, and another mine superintendent. 23, 27, 28-29, 31, 33. Considering the short span of time between the injury caused by the erratic and unsafe driving and Houston's termination, he directly complained to a large group of people. As a result, mine personnel and management had ample knowledge of the incident.

Houston's supervisors also had knowledge of his refusal to attend work on February 7. Houston called the company call-in line several times to tell them of his refusal to come into work. Tr. 30-31. He left a message on the call-in line, spoke with McCullough in human resources, and left a message on the machine of superintendent Farmer. Tr. 31, 33. Houston's coworkers even knew about the reason he called off. This is shown by the call Houston received on Saturday from a union representative telling him that he should bring a doctor's note on Monday. Tr. 34-35. Accordingly, I find sufficient evidence that the Respondent had knowledge of Houston's protected activities.

Hostility or animus towards the protected activity

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). Animus can take the form of action or inaction. In *Sec'y of Labor on behalf of Turner v. National Cement Company of California*, the Commission found animus where the operator was not responsive to the miner's safety concerns. 33 FMSHRC 1059, 1069 (May 2011). Houston had previously complained to management about his safety concerns regarding Kennedy's handling of equipment and treatment of him underground. Tr. 81-82. However, nothing was ever said to Kennedy. Tr. 82. When Houston suffered a head injury due to Kennedy's reckless driving, and was left underground in the dark, Houston relayed the incident to his fellow coworkers, to Hendrickson (a face boss), twice to Morris (a mine superintendent), to McCullough (the HR manager), and to Farmer (a mine superintendent). Tr. 21, 23, 27, 28-29, 31, 33, 106-107. The only responses he received were from McCullough, who told him to see a doctor, and Morris who first told him to wait for a second mantrip and then responded that he would provide Houston with a replacement cap light. Tr. 22, 28, 31-32. There is nothing in the record to suggest that any actions were taken on Houston's concerns and complaints or that any corrective measures were taken. I find that such silences in the face of serious safety complaints and injury constitute animus toward a miner's protected activity.

Circumstantial evidence of animus toward the protected activities can also be found in the Respondent's rush to check Houston's personnel record for dischargeable offenses after his complaint. Houston complained of the unsafe driving and his injury on February 6, and he refused to work on February 7 because of this injury. On February 7, following these protected activities, the company suspended Houston with the intent of discharging him for an alleged absence almost two weeks prior. Tr. 103. Considering the record as a whole, I find that Respondent had hostility or animus towards Houston's protected activity.

Coincidence in time between the protected activity and the adverse action

With regards to coincidence in time between the protected activity and the adverse action, the Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC,* 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant case, Houston's protected activities occurred on February 6 and 7. He was given a 5-day suspension with intent to discharge on February 7, and was discharged and essentially forced to sign a "quit sheet" on February 12. Tr. 36, 38, 40. I find that this short coincidence in time between the protected activity and the adverse action is circumstantial evidence of a nexus.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). In the instant case, the Respondent submitted evidence of Employees 1 and 2 who were allegedly discharged for violating the call-in policy. However the circumstances of these other discharges, or whether the call-in policy was uniformly applied by the Respondent, remain unknown. There is no evidence on record of any other employees punished less severely for the same or similar alleged misconduct. This issue has not been fully developed, hence there is no evidence of disparate treatment. However, the Commission has previously held that

evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id*. at 2510-2513.

Conclusion

The Secretary has carried his burden of showing that Houston's complaint was not frivolously brought. At the hearing, Respondent repeatedly attempted to shift various responsibilities to Houston when it was mine management personnel, well aware of the incident that gave rise to the safety complaint, who took no action to ensure the injury was properly investigated, reported, and handled. For example, there is no evidence that mine management informed the safety department of the injury, which could result in the need for Part 50 reporting to MSHA. Rather, on this record, management engaged in a review of Houston's personnel file, an action that presents circumstantial evidence of an intent to discharge him immediately after hearing of the results of the reckless driving incident. I find that temporary reinstatement of Houston is warranted.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Highland Mining Company is **ORDERED** to provide immediate reinstatement to Brad Houston, 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. Based on the evidence in the record and the history of unsafe and uncorrected incidents that Houston has been exposed to at the mine, it may be wise for the parties to consider economic reinstatement.

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

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

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April 29, 2013

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. PENN 2010-445-R
v.	:	Order No. 7065170; 04/12/2010
	:	
	:	Docket No. PENN 2010-446-R
SECRETARY OF LABOR	:	Order No. 7065171; 04/12/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 36-05466
Respondent.	:	Mine: Emerald Mine No. 1
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2010-647
Petitioner,	:	A.C. No. 36-05466-224615
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA for the Secretary

R. Henry Moore, Esq., and Jason P. Webb, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA for Respondent

Before: Judge Harner

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000) (the "Mine Act" or "Act"). This matter concerns Citation No. 7065252 issued under Section 104(a) and Order Nos. 7065170 and 7065171 issued under Section 104(d)(1) of the Act and served on Emerald Coal Resources, LP, ("Emerald" or "Respondent"). A hearing was held in Pittsburgh, Pennsylvania on May 15-17, 2012, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs and Reply Briefs, which have been fully considered.

Citation No. 7065176 was also initially included in the hearing. However, after some initial testimony, the parties were able to reach a settlement of this Citation. The parties entered the agreement on the record which is set forth below.

JOINT STIPULATIONS

The parties stipulate to the following:

1. Emerald Coal Resources, LP operates the Emerald Mine No. 1 where the citations and orders in contest were issued.

2. Emerald Mine No. 1 is an underground coal mine in Greene County, Pennsylvania.

3. Emerald Mine No. 1 produced 4,901,640 tons of coal in 2010.

4. Emerald produces coal using longwall methods and continuous miners.

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

6. Operations of Emerald at the coal mine where the citations were issued in this proceeding are subject to the jurisdiction of the Act.

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

8. The individual whose signature appears in Block 22 of the Citations at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

9. True copies of the citations and orders at issue in this proceeding were served on Emerald as required by the Act.

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).

The Citation and Orders in dispute and discussed below have been designated by the Secretary as significant and substantial and unwarrantable failures to comply with mandatory safety standards. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id*. MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

By its definition, an unwarrantable failure suggests more than ordinary negligence. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). A judge may also determine, in his discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC at 353 ("*Consol*"); *Cyprus Emerald Res*. *Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Beth Energy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Company*, 31 FMSHRC at 1351.

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Citation and Orders which are alleged to be S&S and an unwarrantable failure meet the above noted criteria.

Citation No. 7065252

On April 8, 2010, Inspector Allan Jack ("Jack") wrote Citation No. 7065252 citing a Section 104(a)[1] violation of 30 C.F.R. § 75.400 stating:

> Accumulations of coal and coal dust black in color and dry to the touch was dumped in the face of the No. 2 entry of the operating E-Mains section (MMU 025-0). These accumulations made a pile 3 to 6 feet in height, 20 feet in length, and 16 feet in width. Management was put on notice for accumulation violations in January of 2010.
>
> This standard has been cited 66 times at this mine in the past two years.

This Citation was designated as S&S and reasonably likely to cause permanently disabling injuries to two miners. The inspector evaluated the operator's negligence as high and assessed a penalty of $17,300.00. The citation was terminated when the operator removed the accumulations.

[1] In her Brief, the Secretary requests that I amend the citation to a Section 104(d)(1) Order alleging an unwarrantable failure. See pages 1 and 16 of her Brief. At no previous time in this proceeding did the Secretary seek to amend her petition. There is no Commission rule regarding amending penalty petitions. Therefore, pursuant to Commission Rule 2700.1(b), I am to be guided so far as practicable by the Federal Rules of Civil Procedure. Rule 15(b) of the Federal Rules permits amendments during and after trial provided certain conditions are met. Since the Secretary did not seek to amend her petition at the hearing, Section 15(b)(1) is inapplicable. Section 15(b)(2) permits amending the pleadings after trial if the issue is tried by the parties' express or implied consent. Here, it is clear that the Respondent did not consent and in fact objected to the Secretary's evidence that could have established an unwarrantable failure. In this regard, specific reference is made to the Secretary's Exhibits 4 and 5 and Respondent's objection thereto. Tr. 86-87. Further, Commission case law does not permit its judges to create new findings to support a violation not alleged. See e.g. *Mettiki Coal Corporation*, 13 FMSHRC 760, 764 (1991). Moreover, as to fundamental fairness in allowing such an amendment, I find it is too little, too late. There is no reason why the Secretary could not have alleged a Section 104(d)(1) violation well in advance of the hearing so as to give Respondent fair notice. Therefore, I decline to amend the pleading to allege a Section 104(d)(1) order.

Exhibit 1.[2]

30 C.F.R. § 75.400, entitled "Accumulations of combustible materials," 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. § 75.400-2 requires operators to establish and maintain a cleanup program that is available to the Secretary or authorized representative.

Jack has worked for the Mine Safety and Health Administration ("MSHA") in the Ruff Creek field office for four years and had previously worked in the mining industry as a machine operator and a fire boss for approximately eleven years. Tr. 19-20. During his inspection of the Emerald No. 1 Mine, Jack was accompanied by Lloyd Birt ("Birt"), a section foreman and the representative for Emerald at that time.

Jack testified that he observed accumulations of coal and coal dust that were black in color, pushed into the face of the No. 2 entry and were approximately twenty feet long, sixteen feet wide and three to six feet high.[3] Tr. 21-22. After picking up a sample of the accumulation, he determined that it was dry and composed of coal and coal dust. Tr. 22-23. According to Jack, Birt theorized that the accumulations had been pushed to the face during either the previous afternoon or midnight shift Tr. 24.

Jack then issued Citation No. 7065252 for a violation of 30 C.F.R. § 75.400 because coal and coal dust are combustible materials. Tr. 25. He designated it as reasonably likely[4] to result in permanently disabling injuries because Emerald had no set pattern to the mining cycle in the E-Mains and, therefore, it was unknown what piece of equipment, including electrical equipment, would be in a specific location at a specific time and traveling past the accumulations. Tr. 25-26. He determined that two people would be affected because, although there are at least ten miners on the section, in the event of a fire, about twenty percent of the crew would try to fight the fire while the others evacuated the mine. Tr. 41. He assessed the operator's negligence as high because Respondent was notified in 2010[5] that pushing

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[2] The Secretary's exhibits are marked as numbers and Respondent's exhibits are marked as letters. Further, Tr. followed by page numbers is a reference to the official transcript.

[3] The mine is approximately seven and a half to eight feet high in the area of the accumulation. Tr. 27.

[4] Jack first designated this violation as "unlikely," but changed the designation while writing the citation.

[5] Jack testified that a meeting was held in January 2010 to alert Emerald management to the change in the enforcement of this regulation and to clarify that the acceptable amount of accumulation was no more than what was found under the mining machine. Tr. 31-32; Ex. 32. *See also* Newhouse's testimony, Tr. 245.

accumulations to the face was no longer an accepted practice by MSHA and that the negligence designations would be increased for repeat violations. Tr. 26, 57. Before the time of the instant citation, Respondent was advised by MSHA that an acceptable amount of accumulation that could be pushed to the face was the amount of coal the mining machine was sitting on.[6] Tr. 30-31, 67-69, 71. Additionally, he wrote that management knew about the violation because a section foreman conducts a preshift and onshift examination every day and would have seen the accumulations. Tr. 43-44; Ex. 2. In his experience and opinion, this was not a common practice within the industry. Tr. 29.

Both Jack and Supervisory Health and Safety Inspector Robert Newhouse[7] ("Newhouse") expressed concern with the general lack of rock dust on the accumulations. Tr. 35-36, 80. This concern was exacerbated by the fact that the Mine was on a five day spot inspection due to the liberation of methane. Tr. 73-74. Jack explained that the rock duster in the section fan located a couple of blocks from this entry had deposited what little rock dust was present, but there was no indication of deliberate rock dust on the accumulation. Tr. 36, Ex. 2. Birt confirmed this method of rock dusting at the hearing. Tr. 145.

As part of his position, Newhouse attends pre-inspection conferences in which he discusses any trends for that particular mine, whether they be accident or violation trends, in order to explain MSHA's enforcement or accident initiatives at that particular time. Tr. 65-66. He testified that these conferences are typically attended by inspectors, the supervisor, the assistant district manager, mine management staff, the safety staff and, if relevant, the union safety committee. Tr. 66. He specifically testified that Section 75.400 was discussed during the January 2010 pre-inspection conference and that both Respondent and Safety Director Bill Schifko ("Schifko"), who manages compliance and litigation issues at the Mine, and the mine foreman were present. Tr. 67, 193. The purpose of this discussion was to reduce the number of violations under section 75.400 by more closely evaluating the negligence following a two-week grace period for the operator. Tr. 67-68, 83-84, 207. The particular issue of pushing coal to the face was not discussed. Tr. 208-209, 248-249.

Birt testified that the continuous miner mines continuously through a cycle[8], dumping the coal behind itself as it proceeds. Tr. 122-123. Schifko explained that the cleanup process has always involved preventing loose coal from lying around on the mine floor to prevent it from being pulverized by passing machines, which included pushing residual material to the face to be picked up during the next mining cycle. Tr. 194, 200. This residual material is a combination of the coal left by the loader when the continuous miner leaves the entry and coal that is deposited as a result of spillage in the feeder. Tr. 124-127. The scoop generally pushes the coal to the face

[6] The amount of coal under a continuous miner would result in an accumulation about sixteen feet wide in a twenty foot entry, but only six to eight inches in depth. Tr. 80.

[7] Newhouse has worked for MSHA for thirty-five years and his overall industry experience amounts to approximately forty-four years. Tr. 63, 65.

[8] A cycle consists of mining the entry completely and then mining the crosscut and hauling the coal into the previous entry. Tr. 123.

until the cutting cycle brings the miner back to that entry. Tr. 125-127. There are a total of six entries in the E-Mains section of the Mine. Tr. 136.

Birt attempted to differentiate Emerald's cleanup process from stockpiling by explaining that stockpiling is accumulating cut coal that a mine wants to do something with at a later time. Tr. 142. The cleanup process at Emerald only involves cleaning up the cycle and leaving it at the face. Tr. 142. He does admit, however, that the accumulation created is more than what is left under the continuous miner, but testified that no one in mine management informed him that this process was a violation of 30 C.F.R. § 75.400. Tr. 142-143. Schifko added that prior to 2010, this practice was never cited and asserts that the practice is not unsafe because there are no ignition sources in the area of the accumulations. Tr. 195, 202-203, 205. To the contrary, Newhouse stated that despite Respondent's insistence of its worth, this practice is essentially the intentional stockpiling of coal and was unacceptable. Tr. 70-71, 79. Moreover, he testified that the accumulations do not follow Respondent's cleanup program.[9] Tr. 75.

Respondent entered the testimony of three former MSHA inspectors who retired between 2006 and 2009. Each offered testimony that the cleanup program practiced by Emerald was once not only accepted, but encouraged by MSHA. Tr. 162-190. However, as I made clear at the hearing, this testimony has little relevance to what is acceptable to MSHA now, as the testimony of Newhouse clearly establishes that MSHA's position on the accumulations has changed and Respondent had been apprised of the change. Consequently, I accord no weight to this testimony as it does not relate to what was acceptable at the time of the citation in dispute.

After considering all of the evidence, I find that Respondent has violated § 75.400, a mandatory safety standard under the Act. Respondent was on clear notice that the size of the accumulation in the citation far exceeded the acceptable amount of accumulation. An accumulation was intentionally created at the face of the No. 2 Entry. Tr. 21-22, 125-127, 200. Although Schifko argued that, in his opinion, an accumulation occurs "where you don't want it, where you shouldn't expect it," I am not persuaded by this argument. Tr. 118. If this definition of an accumulation were allowed to stand, operators could argue that accumulations in basically any location were wanted and could then explain how they do not create a hazard. This would significantly limit the plain language and spirit of the regulation and the Mine Act.

However, I am constrained to find that this citation is non-S&S in the circumstances herein. I do not suggest that an accumulation of this nature can never be S&S; rather, I limit this ruling strictly to the evidence in this particular case. In different circumstances, there could be a confluence of factors that would create an S&S violation, e.g. an ignition source in the area, the size and composition of the accumulation, a disruption to the ventilation, the lack of rock dusting and whether the mine is liberating methane. However, looking at the evidence presented at the hearing as a whole, I find that the Secretary did not satisfy her burden of establishing that an injury was reasonably likely to occur, the required third element of the *Mathies* formula. Jack admitted that no ignition sources were in the vicinity of the accumulations and no methane was present at the time of the inspection. Tr. 42-43. The Secretary also failed to show that there

[9] The cleanup program is part of the required ventilation plan that is designed by the operator and submitted to MSHA. Tr. 76.

were any ignition sources in the area or that electrical equipment would pass by the accumulations. Moreover, although the Secretary argued generally that an accumulation could create ventilation blockage, inspector Jack's air readings; although difficult to obtain, showed that the ventilation was not disrupted by the accumulation and that a methane reading was zero. Tr. 89, 126-127. Thus, the Secretary's evidence failed to establish an injury was reasonably likely to occur from this particular accumulation. In light of the preceding evidence, I find that the *Mathies* test has not been met and the violation is non-S&S.

However, I do find that Respondent was highly negligent in establishing and allowing this accumulation to exist. Whether or not the pre-inspection conferences attended by both MSHA and representatives of the Mine specifically discussed the issue of pushing coal to the face, this was not the first time that Respondent had received a citation for this particular activity. Tr. 99-100; Ex. 4. Further, Birt admitted that MSHA had spoken to Mine management at least one time for dumping too much coal at the face. Tr. 140. Even though the warning had been issued, Respondent allowed an accumulation measuring twenty feet long, three to six feet high and sixteen feet wide, which by anyone's calculation is a large amount of coal, to exist in its No. 2 Entry. Tr. 21-22; Ex. 1. In addition, it admits that it would have existed in that condition for at least one week before being cleaned up. Tr. 145. All of this tends to show not only that Respondent knew of the violative condition, but it did nothing to correct it. In fact, Respondent encouraged the practice. Respondent clearly knew that its practice was in violation of MSHA's enforcement initiatives.

Respondent's management argues that its action was not the result of high negligence because through the diligence of management, the Mine's violations of 30 C.F.R. § 75.400 are less than the national average. Tr. 210. It further states that it initiated discussions with MSHA about altering its cleanup plan to better comply with MSHA's interpretation of the regulation, but no alternatives were offered. Tr. 213, 225; Ex. A-2. To be sure, attempts at better compliance should be applauded, but Respondent continued to behave in the very way that it had been cited for in the past. Moreover, it is not MSHA's responsibility to demonstrate how to comply with the regulation, which clearly states that accumulations are not acceptable. I find that there are no mitigating factors present and affirm the Secretary's high negligence designation.

Based on the penalty criteria found in 30 C.F.R. § 100.3, I find that a reasonable penalty for this cited violation is $8,000.00. This takes into consideration the operator's size, its history of violations, its level of negligence, the reduced gravity of the violation, the operator's demonstrated good faith in quickly correcting the violation and the its ability to continue in business.

Order Nos. 7065170 and 7065171

On April 12, 2010, Inspector Ronald Rihaly ("Rihaly") wrote 104(d)(1) Order No. 7065170 citing a violation of 30 C.F.R. § 75.364(a)(2)(iii) stating:

> The weekly examination of the B-7 bleeder system has not been conducted in its entirety to assure ventilation and air quality, including bleeder evaluations points

B-5, B-4 and monitoring point No. 2. The last entire examination entered in the Mine Examines (sic) record book was dated 3/16/10.
This violation is an unwarrantable failure to comply with a mandatory standard.

3 citations issued under this standard the previous 2 years at this Mine.

This Order was designated as S&S and highly likely to result in fatal injuries to ten miners. The inspector evaluated the operator's negligence as high and evacuated all personnel from the B-7 bleeder system and the B-7, 021-0 longwall section, except persons making examinations and those persons needed to correct the condition. A penalty of $60,000.00 was assessed for this violation. The Order was terminated four days later when the weekly examination of the B side bleeder system, including all bleeder evaluation points and EP #2, was completed.

Exhibit 7.

30 C.F.R. § 75.364(a)(2)(iii) entitled, "Weekly examination" provides:

At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

Also on April 12, 2010, Rihaly wrote 104(d)(1) Order No. 7065171 citing a violation of 30 C.F.R. § 75.370(a)(1) stating:

The Operators Approved Ventilation Plan was not being followed in that water was permitted to accumulate in the B-7 bleeder entry from E-x cut (between B-6 and B-5 longwall bleeder evaluation points) and extending inby as far as cap light would travel. The water was knee deep (approximately 20 inches) at E-x cut and appeared to be deeper inby (from observation on pumpable cans, roof support). This has affected the bleeder system, evaluation points and monitoring station.
This violation is an unwarrantable failure to comply with a mandatory standard.

22 citations issued under this standard the previous 2 years at this Mine.

This Order was designated as S&S and highly likely to result in fatal injuries to 120 miners. The operator's negligence was assessed as high and the entire mine was evacuated, with the exception of those persons needed to correct the conditions and those who conducted examinations. A penalty of $60,000.00 was assessed for this violation. The Order was terminated four days later when the water accumulation was pumped from the bleeder system.

Exhibit 8.

30 C.F.R. § 75.0370(a)(1) entitled, "Mine ventilation plan; submission and approval," provides in pertinent part, "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

As the testimony and evidence for the two Orders are indistinguishable, they will be discussed together. I separate the Orders in the analysis.

Rihaly has worked for MSHA as a coal mine inspector for approximately twenty-two years.[10] Tr. 257. As part of his experience with MSHA over the last seventeen or twenty years, he has inspected longwall mines and bleeders systems, such as those at issue here. Tr. 339-340. Prior to becoming an inspector, he worked in the industry for fifteen or sixteen years at three mines in various positions. Tr. 257-258. He obtained his mine foreman's certification during this time as well. Tr. 258.

Rihaly testified that when he arrived at the Mine on April 12, 2010, someone informed him that he "ought to look at the B7 weekly examination records." Tr. 341. While neither he nor Inspector Jack recollected exactly who gave them this information, they had reason to believe that it was an employee of Emerald who stated that he did not want to file a "G"[11] complaint. Tr. 341-342, 574. Upon looking at the examination books, Rihaly and Jack realized that the most recent weekly examination of the B7 bleeder[12] run was not completed in its entirety. Tr. 343; Ex. 12. The entry in the examination stated, "One, H2O over hip boots, inby E crosscut, B6 to B5. H2O knee deep outby B6 sump." Tr. 347; Ex. 12. He and Jack then continued to work backwards and found that the weekly examination of the B7 bleeder had not been completed in its entirety since March 16, 2010. Tr. 347; Ex. 12.

Rihaly traveled down the B7 bleeder until he reached the water, near the B regulator. Tr. 352; Ex. 17. At that time, he decided to travel back through the water to the furthest point that the mine examiner had. Tr. 352-353. Using a stick in the center of the travelway to determine how deep the water was, his best estimate was that it was two and half to three feet deep. Tr. 353. Upon reaching the furthest point that the examiner traveled, Rihaly testified that "I looked

[10] Note that Rihaly was first sworn in to testify to Citation No. 7065176, also part of this docket, which settled after the completion of the testimony. He remained sworn in to testify to the current Orders.

[11] A § 103(g) complaint allows a miner to anonymously report a violation or imminent danger to the Secretary for immediate inspection. Such a complaint must be reduced to writing and served upon the operator prior to the inspection. *See* 30 U.S.C. § 813(g).

[12] Rihaly explained that the bleeders provide the ventilation for the longwall. Bleeder evaluation points are variously referred to herein as B6, or BEP6, where the number indicates the location of the evaluation point in the bleeder system.

as far as my cap light would see. There was nothing. There was just water." Tr. 371. He estimated that the water at this point was approximately four and a half feet deep.[13] Tr. 372. Rihaly further testified that the water was murky with yellow boy[14] in it, so any obstructions in the water could not be seen. Tr. 391-392.

Rihaly's main concern with the water accumulation was that it would prevent ventilation and methane from the gob would be allowed to buildup in the bleeder and travel to the longwall face. Tr. 354-355, 361-362. He admitted, however, that he had no idea whether the air at the longwall was, in fact, affected. Tr. 423. The records showed that, since that water had been allowed to accumulate, air readings had fallen over sixty percent, indicating that the efficiency of the bleeder system and the air quantity was diminishing because the water was restricting air flow to the 7 bleeder fan. Tr. 356-357, 369-370; Ex. 14. He further noted that during the time that the water was allowed to accumulate and the air quantity was diminishing, the longwall was active with equipment and miners were underground with no pumps running. Tr. 365-366.

When Rihaly left to go underground, Inspector Jack discussed the lack of examinations with General Mine Foreman John Hunchuck ("Hunchuck"). Tr. 557. Hunchuck explained that Respondent had discovered a six-inch discharge line that was broken near BEP B5, which it assumed flooded the bleeder. Tr. 557. He stated that the damage had been repaired and pumpers were continuously pumping the water on every shift to get the water to recede. Tr. 557-558. Although the examinations were not being conducted, Jack testified that he was informed by former union representative Randy Hartley that the B7 longwall was operating about three hours each shift. Tr. 558. This was verified in a production report. Tr. 559-560; Ex. 15.

Once the problem was examined and noted, Rihaly discussed the situation with the mine examiners. Tr. 358. Specifically, Rihaly wanted to know why the examiners had observed the water accumulation and dropping air quantity, but had not made any effort to pump the water out of the bleeder. Tr. 358. No real answer was given. Tr. 359. At that point, Rihaly informed mine management that he would be contacting Newhouse, who told him to issue a verbal withdrawal order until Newhouse could drive to the mine to determine the extent of the violation. Tr. 359-360. Upon arrival, Newhouse determined that the entire mine was affected and Rihaly issued the written Order at this time.[15] Tr. 378.

Rihaly testified that he designated Order No. 7065170 as highly likely to result in a fatal injury because of the air quantities at the BEPs and the fact that the intake regulator had gone

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[13] This testimony was corroborated by MSHA ventilation supervisor Swentosky who testified that retired Mine Superintendent Tom Rager admitted at a meeting with the District that there was four and a half feet of water in the B7 bleeder and it was not operating. Tr. 397, 543; Ex. 33.

[14] "Yellow boy is an iron compound that normally occurs in water." Tr. 629.

[15] Prior citations had been issued to Emerald for failing to conduct weekly examinations and these had only encompassed the longwall. Tr. 544.

down two weeks after the condition was reported. Tr. 389; Ex. 7. He designated the operator negligence as high because Respondent knew that the condition had existed for several weeks, but, in Rihaly's opinion, had not allocated adequate resources to correcting it in a timely manner. Tr. 390; Ex. 7. However, Rihaly did admit that he had no idea whether more miners and equipment was allocated to the bleeder system once the Orders were issued. Tr. 415-416. Further, two sumps and seven or eight air pumps were located in the bleeder system to pump water. Tr. 435-438.

Later that day, Jack returned to the Mine to gather more information upon orders from Newhouse and was informed that the examination had been conducted and no dangerous levels of methane or abnormal air readings were found. Tr. 562-564. Members of management then offered to take him back to the area by boat, which Jack declined testifying, "That is not what we're about. We're about health, safety, and that's not safe." Tr. 564-565. Jack testified that he was not aware of any mines that used boats to conduct examinations due to buildups of water. Tr. 566.

On April 15, 2010, Emerald contacted the Ruff Creek field office to inform Newhouse and Rihaly that the water accumulation had been corrected, and it was ready to be inspected for the purpose of termination of the orders. Tr. 400. Although the water had receded, Rihaley testified that the water was still about knee deep and the bleeder system was still not safe for travel. Further, several miners exited the bleeder system with hip waders that were wet.[16] Tr. 400-404. Therefore, Rihaly did not lift the withdraw orders. Tr. 401.

The Orders were finally terminated on April 16, 2010 by Steve Davidovich ("Davidovich"), a MSHA inspector and ventilation specialist with approximately five years of experience. Tr. 407-408, 576-577. Davidovich's notes stated, "Traveled B7 No. 3 entry from 13 crosscut to EP2, NVO[17]. […] At 67 crosscut, there was water measuring 15 inches deep. At the deepest point extending approximately 70 feet inby and outby this point, getting shallower as you go. There is one three-inch and two two-inch air pumps pumping this water and six people manning pumps." Tr. 579; Ex. 11. Although he testified that he was able to travel safely through the entirety of the bleeder system, he testified that he observed watermarks on the pumpable ribs that looked "fresh" and indicated that the water had been nearly two feet from the roof at some points. Tr. 580. He further observed discharge lines along the gob side rib that had at least three repairs that he observed as new because there was no yellow boy on the them and the bolts were clean. Tr. 581, 583.

Dennis J. Swentosky ("Swentosky") has been the ventilation supervisor in MSHA's District 2 since 1996. Tr. 458. He began with MSHA as a regular inspector in 1972 and became a ventilation specialist in 1982. Tr. 459. As ventilation supervisor, Swentosky's duties

[16] Rihaly testified that water accumulations about ankle-deep were often expected in the bleeder systems and were not particularly considered a problem. Tr. 412. Further, he revealed that there is no hard and fast rule for when the depth becomes an issue; rather, it is a combination of depth, color and what is apt to be lying beneath the water that must be considered. Tr. 413.

[17] "NVO" is an abbreviation for "no violations observed." Tr. 579.

include overseeing two ventilation specialists and mine ventilation plan approval as well as other plans that come into the office. Tr. 458. Through his work, he has had a lot of experience reviewing the Emerald Mine's ventilation plan and is familiar with its bleeder system. Tr. 460-461.

Swentosky explained that "the bleeder system itself controls the air through the worked-out area, and it carries methane to the back end into the internal flow fans and out the back and then in the fan." Tr. 469. He also testified that the purpose of the evaluation points in the bleeder system is to ensure that the air quantity and quality are sufficient and the air is moving in the correct direction. Tr. 463, 465. Specifically, checking the air direction ensures that methane is carried through the worked-out area, into the worked out area and out through the fan, rendering the methane harmless. Tr. 466. This is particularly important because Emerald is on a spot inspection for the release of methane. Tr. 473.

As for the weekly examinations, Swentosky testified that such examinations give the operator the opportunity to evaluate the system as a whole. Tr. 477. Not only does the examiner check the air direction, quantity and quality, he also evaluates the roof conditions as well as water accumulations that could restrict airflow or cause it to move in different or unwanted directions. Tr. 477, 479, 481. The completion of each examination then creates a history of records, so that the operator can determine any changes in the bleeder system. Tr. 477. Without complete examinations being conducted, the operator cannot accurately evaluate its ventilation system. Tr. 478.

Swentosky stated that failure to complete an examination is not just a technical violation but is an integral part of the examination in determining whether methane is building up or being taken through the course and to the surface. Tr. 484. In reviewing the air quantity readings at the Emerald No. 1 Mine from February 23, 2010 to April 6, 2010, Swentosky opined that the readings revealed that something had occurred in the bleeder system that should be "looked into." Tr. 486-487. If more than fifty percent of the airflow has been restricted, it has been redirected and the operator must know where the air is going to determine what the problem is and ensure that the air is moving down the longwall where miners are working. Tr. 487-489.

Water accumulations would have an effect on air quantity measurements because it restricts the air. Tr. 492. Air restrictions increase the possibility of methane build-up, especially at the face. Tr. 493. However, Swentosky admitted that he did not know whether Emerald had degasification holes[18] in the particular sections affected by the water. Tr. 517. Further, he stated that methane readings taken from each side of the water would provide some general information concerning the presence of methane; however, these do not show readings of any methane accumulated at the back end. Tr. 521-522. The readings taken by Emerald during this period were less than one percent, which is acceptable. Tr. 522-523. Due to the long history of deep water in the bleeder system contained in the record books, Swentosky concluded that Emerald had not really taken measures to get rid of the condition. Tr. 494-503.

[18] Degasification holes are drilled horizontally into the coal seam to extract methane prior to the seam being mined. Tr. 517.

John Hunchuck has worked at the Mine since 1980 and is currently the mine manager. Tr. 667. During the relevant time period, Hunchuck was the general mine foreman and, as such, his main responsibility was to ensure that there was ventilation underground while the men were working. Tr. 667-668. He received his Bachelor's degree in education from California State University in Pennsylvania and later attended Penn State's mining technology program for which he is only a few hours short of receiving an Associate's degree. Tr. 670. He further has certifications as a mine examiner, assistant mine foreman and mine foreman. Tr. 669. Since assuming the position of general mine foreman, he has dealt with examining and evaluating the bleeder system. Tr. 670.

As a possible explanation for the amount of water in the bleeder system, Hunchuck explained that the Mine borders the Robena Mine, which has been previously sealed and basically flooded. Tr. 688-689. In addition, there are other mines that are mined out and flooded near the Emerald Mine. Tr. 692. There is very little that Emerald can do about this except to maintain the pumping system. Tr. 689. He stated that when prior problems with the bleeder system had arisen, MSHA had given the Mine extensions and worked with management to correct the issues. Tr. 707. In this instance, however, he admitted that that he did not call the MSHA field office; rather, he told one of the field inspectors, notably leaving out the fact that the water was chest high. Tr. 733.

On March 24, 2010, Hunchuck was alerted to the fact that the weekly examination could not be fully conducted on March 23, 2010. Tr. 690. He immediately made plans for dayshift to conduct it and contacted the foreman and his pumper, who was also a certified examiner because he suspected a break in the line between B6 and B5. Tr. 690-691. A break was later found in the main six-inch discharge line and a dresser sleeve was placed on it. Tr. 691. The miners reported that the water was flowing at that time. Tr. 691, 694. The next day, however, a two-inch pump had to be repaired as well. Tr. 694. Under cross-examination, Hunchuck admitted that he knew that failure to conduct a weekly examination was a violation; however, he stated that he was simply trying to correct the problems and was operating from the knowledge of MSHA's prior extensions. Tr. 731-732. As noted, he did not inform the MSHA field office of the water problem prior to April 12, 2010, when the orders were written by Rihaly.

At the hearing, Hunchuck incredibly testified, not withstanding his knowledge that the required weekly examinations could not be accomplished because of high water in the bleeder system, that he was able to monitor the conditions of the bleeder system by monitoring fan charts for any discrepancies and examining the daily foreman's report and examination books for changes in air and methane readings. Tr. 696-697, 702-703. The fan charts show the water gauge of what the fan is pulling in. Tr. 697. If there is a problem, the chart will spike, indicating, at the least, resistance or a possible stopping or ventilation control that is out. Tr. 697; Ex. N. During the weeks of March 18 and 25, 2010, the charts did not show any signs of the existence of problems, but he acknowledged that the fan will pull in a certain amount air regardless of whether evaluation points are blocked. Tr. 699-700, 702, 747; Ex. N. He further testified that he personally checked the gob and inland evaluation points and found no significant change in the air from the previous readings. Tr. 707. After evaluating the preshift reports, fan charts and weekly examination records and speaking to the section foreman, Hunchuck

determined that air was moving as it should be and he did not shut down the longwall because he believed that no danger was present even though the weekly examination had not been conducted and the pooled water spanned approximately one mile.[19] Tr. 705-707, 755. Although he testified that a significant decrease in air quantity would concern him, Hunchuck was somewhat dismissive of the sixty percent drop in air quantity, stating, "Over a period of time, yes, it is, I guess." Tr. 735.

In light of his evaluation that no danger was present due to the water and without correcting the problem, Hunchuck went on vacation on March 27, 2010 and returned on April 5, 2010. Tr. 709. During this time, retired Emerald employee, Charles Warren ("Warren") substituted for Hunchuck. Tr. 709. Warren's instructions were to continue monitoring the water and call Hunchuck at home if anything occurred. Tr. 710. During this time, Warren reported that repairs were made to pumps and additional discharge pipes were taken down to the pumps; however, the examination on March 30, 2010 was unable to be completed. Tr. 711-712. When Hunchuck returned, he was told that the water had receded, but there was still a pool of it. Tr. 710-711. By April 6, 2010, the Mine had lost ground on the water issue and the weekly examination could not be completed again. Tr. 713. Hunchuck explained that the pump problems were actually exacerbated by the water problem, basically creating a cycle of water accumulation and pump breakage. Tr. 727.

As pervasive and serious as the problem was, Hunchuck waited until the midnight shift the next day to address the problem. Tr. 716-718. He testified that there was only one pumper on day shift and he did send a few men down during the afternoon shift. Tr. 721. His explanation for not calling in more pumpers on the day shift was that he did not have enough pumpers to maintain both the bleeders and the rest of the Mine and the men did not want to work overtime if they knew that they had to go back into the bleeders.[20] Tr. 721-722, 742. Further, from all the reading and personal travel through the bleeders, Hunchuck never believed that the bleeder was not functioning properly or that the Mine was unsafe. Tr. 729.

Hunchuck admitted that he had the authority to pull men off the longwall and assign them to the bleeder at any time necessary. Tr. 740. However, he did not do so because he did not feel that the extensive water was a hazard to the men. Tr. 471. After the withdrawal order was issued, the abatement effort was basically "all hands on deck." Tr. 740. Approximately ten miners, a shift foreman and two pumpers were in the bleeders at one time trying to pump the water out to terminate that withdraw order. Tr. 740. The men found two more line breaks that were previously under water. Tr. 738.

Jason Scott Hustus ("Hustus") has been the Engineering Manager at the Mine since 2008 and is responsible for ventilation, roof control, surveying, mapping and supervising the

[19] Hunchuck first testified that the distance was approximately two miles; however, this statement was corrected under redirect. Tr. 739.

[20] This testimony that employees did not want to work overtime shows Respondent's lack of attention to correcting the problem as management clearly had the power to compel overtime work.

engineering staff. Tr. 761-762. He has both a Bachelor's and Master's degree in Science and Engineering of Mines from West Virginia University. Tr. 765. Prior to this position, he held numerous positions at Respondent's Cumberland Mine for approximately twelve years, both in engineering as well as operations. Tr. 762. During his time at the Cumberland Mine, he was responsible for the installation of eighty ventilation seals as well as working air changes[21] and conducting ventilation surveys.[22] Tr. 763. He testified that his oversight at the instant Mine involves these same issues, including those in the bleeder system. Tr. 764.

Hustus was familiar with the bleeder system during the time in question and, after going over Respondent's documents, he testified that he did not believe that the bleeder system was ineffective due to the water. Tr. 766. He stated that all of the readings indicated that air was coursing in its proper direction and methane was being diluted and rendered harmless.[23] Tr. 766-767. Therefore, he concluded that it was safe to continue working with the water's existence. Tr. 767. Further, he was not concerned with the water roofing out because the location was the low spot in the bleeder system; therefore, if the water rose, it would level out at the higher elevations. Tr. 768. Moreover, he testified that if the water were to roof out, there would be an immediate increase in the water gauge at the No. 7 bleeder fan, which was being monitored.[24] Tr. 768-769.

Hustus testified that the goal of the bleeder system is to create negative pressure to pull methane away from the active longwall face. Tr. 778. The methane from the gob would report to the back of the bleeder system and exit through the No. 7 bleeder shaft and the gob vent bore holes.[25] Tr. 778. Although he offered no explanation to his assertion, Hustus stated that the bleeder system was doing what it was designed to do in April 2010. Tr. 779, 783. However, he also admitted that he knew that the failure to pump water from the bleeder entry system to a passable level is a violation of Respondent's ventilation plan and that he was aware of the water problems before Rihaly issued either of the Orders. Tr. 783, 784.

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[21] Air changes involve making evaluations and rerouting or redirecting air during ventilation plan changes. Tr. 763.

[22] Ventilation surveys involve obtaining quality pressure and methane readings, typically to build simulation models. Tr. 763-764.

[23] Hustus made this evaluation by looking at readings from the other evaluation points, methane levels in the No. 7 bleeder shaft and readings at the gob vent bore holes. Tr. 767.

[24] The significance of the fan is that it is the collection point of the entire bleeder system and "[a]ll of the area ultimately ends up at the bleeder fan, so it is an accumulation of all of the readings." Tr. 769.

[25] Gob vent bore holes are horizontal holes drilled into the coal seam to degasify the coal seam prior to mining. Tr. 779.

Hustus believed that the bleeder system could be effectively evaluated without BEPs 4 and 5 because the operator must look at how the system as a whole is functioning, not just a few individual points. Tr. 771-772. He further opined that BEPs 6 and 7 were much more critical because they had the most influence over the current longwall panel that was being mined. Tr. 773. He stated that prior to 2009, Respondent was only required to evaluate BEPs 6 and 7, but admits that a letter was issued in 2008, long before this violation, stating that operators must evaluate all of the evaluation points, not just the current and adjacent ones. Tr. 772-776, 789. He further acknowledged that he knew that the failure to conduct a complete examination was a violation. Tr. 783.

As the engineering manager, Hustus attended meetings with former mine superintendent Tom Rager at the district office in which the Mine's intent was to modify the existing order to change the affected area from the entire mine to just the B district. Tr. 779-780. Hustus and Rager presented the readings from the No. 7 air shaft and the readings from the evaluation points that had previous been obtained. Tr. 780. MSHA explained that it could not simply accept Respondent's evaluation and the water would have to be pumped down so that an inspector could travel the bleeder. Tr. 781. MSHA also stated that it would work with Respondent if something occurred that caused the water to rise, i.e. a pipe or pump break. Tr. 789-790. Although he was aware that Respondent could have contacted MSHA to discuss the water problem in March and April 2010 and that this initiative had been taken for other problems[26], it did not do so in this instance. Tr. 785-786, 790.

1. Order No. 7065170

I find that this violation is S&S as well as an unwarrantable failure to comply with a mandatory safety standard. However, I find that the violation was the result of reckless disregard rather than high negligence based on the evidence discussed below.

From the facts and testimony at hearing, it is clear that there was a violation of 30 C.F.R. § 75.364(a)(2)(iii). Not only was the weekly examination not completed for one week, it could not be completed for several weeks. Ex. 12. Rather than pulling its miners until the examination could be completed and any hazards could be corrected as required by the regulation, Respondent decided to continue mining. This significantly contributes to the opportunity for miners to be affected by low air quantities, low air qualities or the build up of methane, all of which could result in serious, if not fatal, injuries. Respondent's own charts reveal that the air quantity in the bleeders had decreased by roughly sixty percent. Ex. N. Further, because Respondent did not complete an examination for several weeks, it had no real knowledge of what conditions actually developed in the bleeder system during that time.

Respondent argues that this violation does not rise to the level of S&S because there were no ventilation problems within the bleeder system. However, other than its fan charts, it has no evidence to support this assertion. Hustus admits that although Respondent examined the adjacent evaluation points, the evaluation points at issue could not be reached. Tr. 767. Further,

[26] A separate BEP had previously been eliminated from the ventilation plan due to low oxygen levels. Tr. 790.

Swentosky testified that the fan is going to pull in a certain amount of air, regardless of where it comes from, which was corroborated by Respondent. Tr. 553, 770-771. In *Coal River Mining, LLC*, ALJ Andrews sums up the importance of MSHA's examination scheme providing, "The examinations required by 30 CFR Part 75 are designed to protect miners from the dynamic conditions in underground coal mines by monitoring for and correcting unsafe conditions before and during shifts. 30 C.F. R. § 75.360; 30 C.F.R. § 75.362. Additionally, a weekly examination is required for less frequently accessed areas of the mine as additional protection for miners. 30 C.F.R. § 75.364. Without these examinations, miners are vulnerable to potentially unsafe conditions and may be unaware of the hazards nearby until it is too late to prevent an accident." *Id*., 34 FMSHRC 1087, 1095 (May 2012)(ALJ). As acknowledged by MSHA, a proactive examination scheme is the only way to prevent conditions from becoming worse. As much as Respondent would like to argue that watching a fan chart from an office is sufficient, it simply is no substitute for the required weekly examination of the evaluation points and does not meet any of the requirements of the regulation.

I also find that this violation was an unwarrantable failure to comply with a mandatory safety standard and is the result of Respondent's aggravated conduct as evidenced by its reckless disregard of the standard. In *Oak Grove Resources, LLC*, the operator allowed miners to enter the mine despite the fact that weekly examinations could not be conducted in certain locations due to water. *Id*. 2012 WL 894523 (Mar. 2012)(ALJ). The ALJ found an unwarrantable failure based on the fact that the operator was "on notice" about the failure to conduct the weekly examination. *Id*. In *Pine Ridge Coal Company, LLC*, the ALJ found the operator's failure to conduct an adequate weekly examination to be an unwarrantable failure due to the prophylactic nature of the regulations requiring examinations. *Id*., 2012 WL 601258 (Jan. 2012)(ALJ).

Here, Hunchuck knew that the examinations were unable to be completed and that this failure constituted a violation of the regulation. Tr. 690, 731. In fact, he signed off on a report that the water in the bleeder system was over the height of hip boots. Tr. 752-752; Ex. 12, pg 91. Instead of alerting MSHA to the problem and assigning an adequate amount of pumpers and miners to correct the water problem in the bleeder system so that a proper examination could be conducted, he continued to allow mining at the longwall and, inexplicably, went on vacation and told another member of management to simply "monitor" the problem. Tr. 709-710. To say that this displayed the absence of any care for the regulation is an understatement. Further, Hustus's testimony that the operator should be concerned with the system as a whole rather than the individual evaluation points indicates a deep misunderstanding of the regulations. Tr. 771-772. The purpose of the evaluation points *is* to allow the operator to understand the system as a whole based on these individual points. If the Mine had not been shut down, there is little to suggest that Respondent ever would have placed any emphasis in pumping the water and completing the weekly examination of the bleeder system.

Further, Respondent's testimony concerning the preshift and onshift examinations at the face is unpersuasive in that the conditions in mines can change quickly and unexpectedly. Rihaly and Swentosky both testified that a storm front or low pressure system could move through, pushing the low air and any accumulated methane down the longwall where miners were working and equipment is running. Tr. 356, 514. This careless attitude toward examinations creates any number of opportunities for a serious, even fatal, accident to occur.

Further, Swentosky acknowledged that mines have petitioned for amendments to their ventilation plans so that certain evaluation points did not have to be inspected, but Emerald never asked for any such amendment. Tr. 508-509, 538. Newhouse corroborated this. Tr. 634. Instead, it was content to simply not perform the required weekly examinations.

Based on the above, I find that Respondent's negligence is more appropriately characterized as reckless disregard. Based on the penalty criteria found in 30 C.F.R. § 100.3, I find the reasonable penalty for this violation is $70,000.00. This takes into account all penalty criteria listed above. Further, I have increased the penalty given Respondent's cavalier attitude of reckless disregard for the safety of its miners.

2. Order No. 7065171

I find that this violation is S&S as well as an unwarrantable failure to comply with a mandatory safety standard.

The testimony and evidence at hearing clearly confirms a violation of 30 C.F.R. § 75.370(a)(1). The Order states that water extended as far as the cap light would reach and it was approximately twenty inches deep. Ex. 8. However, testimony at the hearing revealed that the water was actually much deeper than this. Tr. 353, 397, 543. Although some water is expected in the bleeder systems, three to four feet of water is not a suitable condition for the bleeder system, especially in light of the fact that it actually was affecting airflow. Tr. 356-357; Ex. 4.

Respondent argues that MSHA's issuance of this Order is inconsistent with its past acknowledgements that the agency understands that water collects in the bleeders and it expects operators to use reasonable efforts to control it. I find this unpersuasive. Whether MSHA has acknowledged that water tends to collect in the bleeders has no bearing here. This was not an accumulation of a couple inches, or even a couple of feet, of water. At certain points, even Respondent admits that the water was chest high and weeks worth of examination records indicate that the water was high enough to be over the miners' hip boots. Tr. 800, 806; Ex. E. Common sense leads to the conclusion that this was not the reasonable accumulations to which MSHA referred.

Having found that a violation of the regulation exists, I further find that the violation is S&S in nature. During his testimony, Newhouse[27] testified that several issues could arise due to the presence of the water, including the ventilation changing direction, dropping air pressure and increasing methane. Tr. 615. Further, in his opinion, Bleeder Evaluation Point No. 6 was the most critical evaluation point because it was precisely where gas would be expected to be found. Tr. 617; Ex. 17. He explained that the Pittsburgh seam is noted for intrusions of sandstone, which can cause an ignition if methane is allowed to build and the miner bits strike the sandstone. Tr. 619. In the event of an explosion, Newhouse expected it to travel throughout the entire mine because it would pick up coal dust and loose coal as it traveled through the B and C Districts down to the eastern side of the Mine. Tr. 620-622. Given that Respondent continued

[27] It is noted that Newhouse testified that he had been involved with the ventilation plan at the Mine for the previous thirty-five years. Tr. 613.

its normal mining operations despite the water in the bleeder, it contributed to the hazard of methane accumulating and traveling to the face where it could then be ignited by equipment or a spark. It is reasonably likely that this could result in fatal injuries to any or all of the miners in the Mine, depending upon how the ignition traveled.

During his testimony, Rihaly stated that prior violations had been issued to Respondent for water in this part of the bleeder system, indicating that Respondent knew that it was an ongoing problem. Tr. 394-395. Further, John Balaz[28], who was a pumper for Respondent's Mine in 2008, testified that the bleeders encountered many flooding problems in the past and when a problem occurred, Respondent's response was to send someone when "available." Tr. 594-596. As a whole, this testimony, as well as the record as a whole, repeatedly shows that Respondent was aware that the bleeder system had problems with flooding, but did very little to correct the problem over a period of several weeks. As such, I find that high negligence is the appropriate designation for this violation.

Respondent appears to argue that the violation is not the result of high negligence because several efforts had been made during the initial development of the bleeder system to anticipate any problems that may occur. This included the placement of several pumps and posts to repair bad top, among other measures. Tr. 671-681, 685; Ex. 12. While Respondent made some effort to reduce the water in the bleeder system, the testimony establishes that its efforts were haphazard and not indicative of a concerted effort to correct the problem.[29] The testimony also reveals that this was not Respondent's first problem with water in the bleeder and the issues of obstacles had been discussed several times with members of management. Tr. 629-630; Ex. 21-1. Further, and telling, Respondent never contacted MSHA about the water, presumably because it knew the longwall would be shut down until the condition was corrected. This behavior shows a general lack of regard for the safety of the miners who could be affected.

The Secretary argues that this Order could have been designated as reckless disregard, but I decline to find such. Although Respondent allocated very few resources to pumping the water, it did make some token efforts. Over the course of two days, a discharge line and at least two pumps were repaired. Tr. 431; Ex. 12. On March 30, 2010, Respondent added an extra pump in the bleeder system. Tr. 429; Ex. 12. Three days later, Respondent also moved the pickups, or suction lines for the pump, to the deeper water in order to continue pumping. Tr. 430; Ex. 12. Although Respondent was aware that these efforts would not be enough to control the problem, they did show that some care uncharacteristic of reckless disregard. Based on the above findings, Order No. 7065170 is affirmed as written, including the $60,000.00 penalty assessment.

[28] Balaz is currently an inspector with MSHA.

[29] In this regard, it is significant that, once the withdrawal order was issued on April 12, 2010, it took four days on concerted effort and man power to correct the water problem in the bleeder system before the Order was terminated on April 16, 2010.

CITATION NO. 7065176

As previously noted, during the course of the hearing, the parties agree to settle this citation. The Secretary requests that Citation No. 7065176 be modified to reduce the negligence attributable to the operator from "High" to "Moderate" and the assessed penalty from $33,400.00 to $8,000.00. Based on the testimony heard by the Court, these reductions in the negligence and penalty are appropriate. Tr. 898.

ORDER

It is **ORDERED** that Citation No. 7065252 be **MODIFIED** from "Reasonably Likely" to "Unlikely" and to delete the significant and substantial designation. It is **ORDERED** that Order No. 7065170 be **MODIFIED** to increase the negligence from "High" to "Reckless Disregard." It is further **ORDERED** that Order No. 7065171 is **AFFIRMED** as written. It is also **ORDERED** that Citation No. 7065176 be **MODIFIED** to reduce the negligence attributable to the operator from "High" to "Moderate." Finally, it is **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of $146,000.00 within 30 days of the date of this Decision.[30] Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 30, 2013

PARAMONT COAL COMPANY VIRGINIA, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. VA 2010-369-R
	:	Order No. 8166777; 04/07/2010
v.	:	
	:	Docket No. VA 2010-370-R
	:	Order No. 8166778; 04/07/2010
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
Respondent	:	Deep Mine #35
	:	
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA,)	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 2010-458
Petitioner	:	A.C. No. 44-07213-223318
	:	
v.	:	
	:	
	:	
PARAMONT COAL COMPANY VIRGINIA, LLC.,	:	
Respondent	:	Deep Mine #35

DECISION

Appearances: Cheryl E. Carroll, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner.

Cameron S. Bell, Esq., PENN, STUART & ESKRIDGE, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty and contest proceedings, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), hereinafter the "Mine Act", concern two Section 104(a) citations served on the Respondent on April 5, 2010, for alleged violations of mandatory safety standards 30 C.F.R. §§ 75.400, and 75.1731(b). Also at issue are two contested Section 104(b) orders issued for the alleged failure by the Respondent to timely abate the cited conditions.

A hearing was held in Abingdon, Virginia, on March 27-28, 2012, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and I have considered their arguments in the course of this decision.

The parties stipulated in relevant part to the following (Ex. ALJ-1):

1. The Respondent's mine is covered by the Mine Act, and the Secretary has jurisdiction in these proceedings.

2. The Citations/Orders were duly served on the Respondent by the inspector on the dates indicated.

3. The Respondent is a large mine operator and the mine is considered a large mine for purposes of 30 U.S.C. § 820(I).

4. The maximum civil penalties that can be assessed for the violations will not adversely affect the Respondent's ability to remain in business.

5. The Respondent's history of violations for the 15 months preceding the issuance of the aforesaid violations is accurately reflected in Exhibit B attached to the stipulations.

6. The information contained in Exhibit A, attached to the Secretary's civil penalty petition, accurately reflects the Respondent's production tonnage and the production of Mine #35.

The Alleged Violations

Section 104(a) non - S&S Citation No.8166773, issued at 11:30 a.m., on April 5, 2010, alleges a violation of 30 C.F.R. § 75.400, and states as follows (Ex. P-l):

> Float coal dust (black in color) has accumulated along the offside and in adjacent crosscuts along the No. 3 belt conveyor starting at the belt drive and

extended in by to the tail piece. In addition, float coal dust has accumulated at spot locations on the travelway side starting at crosscut #82 and extending to the tail piece. Float coal dust and coal fines had accumulated between the two new constructed regulators along the No. 3 belt conveyor near stopping No. 82. No methane was detected.

The time for abatement was scheduled for 9:00 a.m., April 6, 2010. The Section 104(b), Withdrawal Order No. 8166778, applying to "the belt aircourse entry containing the No. 3 belt conveyors", was issued at 10:20 a.m., April 7, 2010, and it states as follows (Ex. P-5):

No apparent effort was made to eliminate the accumulation of float coal dust along the offside in the adjacent crosscuts along the No. 3 belt conveyor. When examined, float coal dust, black in color, was observed along the off side and in the adjacent crosscuts along the belt conveyor. The belt air course containing the No. 3 belt conveyor is hereby ordered withdrawn from service until the float coal dust is eliminated in the area and a MSHA inspector can examine the area.

The Order was terminated on April 7, 2010 at 2232 hours, and the justification states, "The coal fines has (sic) been removed and a coat of rock dust has been applied to the affected area".

Section 104(a) "S&S" Citation No. 8166774, issued at 11:30 a.m., on April 5, 2010, alleges a violation of 30 C.F.R. § 75.1731(b), and states as follows (Ex. P-3):

The No. 3 belt conveyor was not properly aligned and the belt was rubbing against several belt roller hangers. A total of 14 bottom roller hangers were observed where the belt was rubbing and creating heat from friction. Two of the hangers were hot to the touch and the atmosphere in the area had a strong odor from the rubbing belt. This condition was located at crosscut 84 and extended outby between Crosscut 82 and 81. Float dust was present in the area and was cited in Citation #8166773.

The time for abatement was scheduled for 6:00 p.m., April 5, 2010. The Section 104(b), withdrawal Order No. 8166777, applying to the No. 3 belt conveyor, was issued at 10:00 a.m., April 7, 2010, and it states as follows (Ex. P-4):

No apparent effort was made to properly align the No. 3 conveyer belt. When examined, the belt continued to run back and forth and rub against various bottom roller hangers. Several hangers were warm and hot to the touch from heat created by friction from the rubbing of the conveyor belt against the hangers. The No. 3 conveyor belt is ordered withdrawn from service until the conveyor belt is properly aligned and a MSHA inspector can observed the alignment.

The Order was terminated on April 7, 2010, at 2220 hours, and the justification states "The No. 3 belt conveyor has been realigned, adjustments were made to several bottom belt hangers from crosscut #34 to crosscut #80,

Pretrial Motions

The Respondent filed a Motion In Limine on March 21, 2012, a week before the hearing, based on information that Inspector Robinette placed a telephone call to the mine asking questions regarding the location of the #3 belt, without the knowledge or approval of counsel for the parties.

The Respondent asserted that the inspector's contact with a mine operator, represented by counsel, about a pending matter, was improper and that any testimony he may offer as an "expert", including his opinions with respect to the reasonably likelihood of injury and "significant and substantial" finding associated with Citation Nos. 8166774 and 8166773, issued by Inspector Bobby Hall, should be excluded. Further, Respondent requested the exclusion of any information gained in the telephone conversation.

The Secretary filed an opposition to the motion and stated that Mr. Robinette's telephone contact with the Respondent's mine was of his own volition and without the knowledge of the Secretary. Counsel for the Secretary stated that the call was made to learn the exact location of the belt drive, and that no testimony will be elicited about the substance of the call, and that the Secretary's hearing diagram will not contain information regarding the exact location of the belt drive. Counsel stated that the call was a "minor incident" and caused no harm or prejudice to the Respondent.

The Secretary opposed the exclusion of the inspector's testimony regarding the "S&S" issues associated with the citations and stated that the inspectors were qualified to apply the "S&S" elements enunciated by the Commission in Mathies Coal Company. 6 FMSHRC 1 (January 1984, and Cement Div.- Nat'l Gypsum Co.,3 FMSHRC 822, 825 (Apr. 1981).

The Secretary took the position that she does not need to establish that a mine fire or explosion was reasonably likely to occur at the time the cited conditions were observed by the inspectors in order to prevail on the "S&S" issue.

Motion to Amend Citations

On March 20, 2012, one week before the hearing, the Secretary filed a Motion to Amend Citation No. 8166773, to reflect modifications to Block 10(A) from unlikely to reasonably likely; Block 10(B) from lost workdays or restricted duty to fatal; and Block 10(c) to significant and substantial (S&S). The original citation, as issued by the inspector, designated the violation as non -S&S, moderate negligence, and lost workdays or restricted duty.

In support of the proposed amendments, the Secretary stated that "after depositions in this case, it became clear that the facts support the proposed amended S&S designation for Citation No. 8166773". The Secretary explained that the inspector designated the citation as non-S&S because he found no heat source in the affected area, as recorded in his notes. However, in Citation No. 8166774, issued after No. 8166773, the inspector noted numerous heat sources that rendered the float coal dust cited in No. 8166773, an S&S violation, including the misaligned belt causing the belt to rub the roller hangers, and his notes that two wooden regulators over the No. 3 belt were in contact with the belt, causing frictional heat.

The Secretary argued that the facts are sufficient to establish the violation as S&S under the Mathies Coal Co., supra, criteria. Similarly, the Secretary argued that the proposed amendment of Citation No. 8166774, from lost workdays as restricted duty to fatal, is supportable because the violation contributes to the same discrete safety hazard as Citation No. 8166773, namely, a mine fire or explosion, and would be of a reasonably serious nature, including death.

The Secretary states that the proposed amendments are acceptable pursuant to Rule 15, Federal Rules of Civil Procedure, Fed. R. Civ. P. 15 (a), and comply with the Commission's decisions in Secretary of Labor v. Wyoming Fuel Company. 14 FMSHRC 1282 (1992), and Cyprus Empire Com. 12 FMSHRC 911, 916 (1990).

The Secretary concluded that the proposed amendments would not result in any legal prejudice to the Respondent in that the amended citations will be based on the same facts initially alleged in those citations, and accompanying inspector's notes, as well as a relation Citation No. 8166775. Although S&S Citation 8166775 is not a part of these proceedings and has become a final order of the Commission, the Secretary noted that the two regulators cited in Citation No. 8166775, were the same regulators where float coal dust accumulations were observed by the inspector in Citation No. 8166773.

Finally, the Secretary moved to amend the pleadings to propose higher penalties for Citation Nos. 8166773 and 8166774, based on the proposed modifications of the citations. The Secretary conceded that any final decision in this regard is dependent on the evidence presented at the hearing and that penalty assessments are made de novo by the presiding judge taking into account the civil penalty criteria found in Section 110(1) of the Mine Act.

The Respondent filed an opposition to the motion to amend on March 20, 2012, and pointed out that the Secretary's request to increase the gravity and associated penalties comes almost two years after the citations were issued and one week before the hearing, and if granted would increase the initial proposed penalties by almost four-hundred percent (400%).

The Respondent stated that the Secretary offered no explanation for the late proposed amendments other than "after depositions it became clear" that MSHA thought the enforcement should have been greater than was written, and that amendments should not be granted at any point in the litigation based on a mere assertion of no prejudice.

The Respondent argued that leave to amend is properly denied when a party knows facts at the inception of the litigation and delays pleading the facts or claims based upon those facts, citing Wright, Miller, et al., 6 Federal Practice and Procedure 1488. as follows: "(b)y failing to introduce the matter contained in the proposed amendment at as early a stage in the litigation as possible, the pleader has demonstrated bad faith in not apprising the opponent of its true position in the action."

Citing Gray v. St. Martin's Press. Inc., 221 F.3d 243, 253 (1st Cir. 2000), the Respondent concluded that where the facts upon which the amendment is based have been known since the outset of the litigation and amendment is sought following discovery and close to trial, the amendment is properly denied. The Respondent further cited cases where an amendment was denied where the complaint had been filed two years previously and the proposed amendment could have been asserted at any time, Continental Bank. N.A. v. Meyer. 10 F. 3d 1293,1298 (7th Cir. 1993; and First Nat'l Bank v. Master Auto Service Corp., 693 F. 2d 308, 314 (4th Cir. 1982), where an amendment filed 19 days prior to trial based upon information the party had previously known or had access to was denied.

The Respondent argued all of the facts relied on by the Secretary seeking the amendments were known by the experienced inspectors, and the Secretary cites the language of the citations themselves in support of her motion, and has offered no explanation for the delay or the proposed amount at the eleventh hour of these proceedings.

The Respondent maintains that it will be prejudiced by the amendment to Citation 8166773 to S&S in that the Secretary now claims that the inspector relied upon conditions cited in a citation that is not the subject of this litigation, namely, Citation No. 8166775, issued by the inspector four hours after he issued Citations 8166773 and 8166774.

In addition to being a new issue in this case, the Respondent concludes that the Secretary's argument begs the question of how the inspector could rely upon a condition in the citations at issue here (8166773 and 8166774) based upon a condition that he discovered four hours later when he wrote Citation No. 8166775. The Respondent concludes that these issues would require additional discovery and therefore would be prejudiced if the amendments are allowed. The Respondent concludes that the increase in the number of people affected and the severity of the injury were not investigated during discovery in this matter, and will prejudice its defense.

The Respondent stated that when it did not accept the citations and orders and expressed its intention to proceed to hearing, the Secretary moved to amend to increase the penalties by almost $20,000 or 400% from what was written at the mine almost two years ago. Respondent points out that the Secretary's own argument shows that the amendment is not to serve the purposes of the Mine Act to protect miners (for citations and orders that have been abated for years and constitute the only B orders that this mine had ever received). Instead, purportedly based upon the identical facts that the inspector knew in 2010, two years later and a week before

the hearing, MSHA suddenly has decided that both citations are S&S, fatal, and would affect nine people.

The Respondent further notes that the inspectors involved in this matter are the head of the ventilation section and an inspector who had decades of mining experience. They are not new inspectors who might not have realized the gravity of a situation they perceived. Under the circumstances, the Respondent asserts that the timing and the basis for this proposed amendment show that the true purpose of this amendment is to punish it for exercising its rights to contest these citations and orders, and to chill its challenge to the inspectors' citations and orders.

Bench Rulings

Upon convening the hearing, the witnesses were sequestered and the parties presented oral arguments In Camera, and on the record, regarding the Respondent's Motion In Limine, (Tr. 10-19), and the Secretary's motion to amend the citations (Tr. 19-55). I have considered the written and oral arguments submitted by the parties with respect to my rulings on these issues.

With respect to the Secretary's Motion In Limine, and Inspector Robinette's telephone contact with the Respondent's mine, the Secretary stated that he did so only to determine the location of the No. 3 belt drive in order to prepare a diagram in that the location could not be determined from a mine map and no other information relevant to the case was obtained (Tr. 11).

Although the Respondent believed the Secretary would introduce the inspector as an expert witness, counsel for the Secretary stated that she would not offer the inspector as an expert, but only as a fact witness based on what he observed during the inspection and his years of experience in coal mining (Tr. 13). Under the circumstances, the Respondent's motion was DENIED. The inspector was not offered or accepted as expert and testified with respect to the conditions he observed during the inspections, including his opinions and conclusions with respect to those conditions.

With regard to the Secretary's motion to amend the two citations, counsel confirmed that inspector Hall issued three citations in sequence on April 5, 2010, after he observed the conditions. The two contested citations reflect that they were issued at 11:30 a.m. A third citation that is not part of these proceedings reflects that it was issued at 3:00 p.m. as a Section 104(a) S&S Citation No. 8166775, citing a violation of 30 C.F.R. § 75.1731(a), for allowing materials that may contribute to a factional heating hazard to be in a belt conveyor entry (Tr. 22-24). The citation states as follows (Ex. P-12):

> Material in the form of wooden boards was observed on the sides and across the top on the belt conveyor at two locations on the No. 3 belt conveyor which contributed to a frictional heating hazard. This material had been used in the construction of ventilation controls located between crosscuts 82 and 81 in an attempt to reduce the air flow along the belt air course. The conveyor belt was

not aligned properly and was rubbing the wood materials and the atmosphere smelled of an odor of smoldering wood. Float coal dust and coal fines were present in this area. The alignment and float coal dust were cited in Citations #8166774 and #8166773 respectively.

The parties agreed that the actual issuance of the citations were made hours after the inspector initially observed the conditions and recorded them in his notes (Tr. 21-22). The Secretary's counsel confirmed that notwithstanding the fact that the inspector observed float coal dust and the belt rubbing, the belt continued to run and was not shut down. Counsel stated that while the inspectors did not believe those conditions posed a fire danger, the conditions were significant and substantial in the context of continued mining operations and that "the two hot rollers would get even hotter, more rollers could get hot as well, and then that could escalate into something. But they did not think that the conditions immediately posed a fire danger" (Tr. 23).

I take note of the fact that in the course of her arguments, counsel referred to "hot belt rollers" (Tr. 23). However, the conditions described in Citation No. 8166774, refer to roller hangers, and not the rollers. With regard the terms "wooden baffles" and “wooden regulators" referred to by the parties (Tr. 22-24), I find that the terms regulator and baffle are used interchangeably, and refer to an opening constructed in the belt system to regulate the flow of air while ventilating the mine.

The Secretary's counsel stated that the "wooden baffles" observed by the inspectors were considered a heat source because they were "smoking very badly". However, they were immediately removed and the remaining rubbing belt itself did not pose any imminent danger (Tr. 23-24). The "baffles" referred to by the parties were the subject of Citation No. 8166775, and those cited conditions were observed well after the inspector's observations and issuance of the two contested citations. In this regard, I take note of the fact that the inspector did not use the term "baffle" or "regulator" in Citation No. 8166775. He described the materials cited as "wooden boards used in the construction of the ventilation controls".

The parties agreed that the "new constructed regulators" referred to by the inspector in Citation No. 8166773, were the aforementioned wooden materials (Tr. 25). When asked to explain why the inspector did not include the materials used to construct those regulators, i.e., cinder block, or steel, counsel stated that the inspector's contemporary notes taken on April 5, 2010 (Ex. P-6), "clearly identified that the regulators were wooden" (Tr. 26). I have reviewed the notes and find that in reference to Citation No. 8166773, the inspector simply refers to "2 new constructed regulators near stopping #82", with no description of how it was constructed or the materials used (Ex. P-6, at 5).

The inspector's notes related to Citation No. 8166775, do not refer to any "regulator" or "baffle", and describe "material in the form of wooden boards on the sides and across the top of the No. 3 belt at two locations". The inspector notes that the material was used in an attempt to reduce the belt air and that the belt was not properly aligned and rubbing the material "causing a smell or odor of smoldering wood" (Ex. P-6, at 7).

The Secretary's counsel stated that written discovery was completed in these cases in August, 2011, and that depositions were taken on February 23, 2012 (Tr. 27). During a bench colloquy explaining the delay in seeking to amend the citation, counsel stated as follows at (Tr. 35-36):

> THE COURT: But what bothers me in these cases is two years later here we are with all this stuff that probably should have - let me ask you a question. The inspector goes in, and when he was writing the citations, did it ever dawn on him that wait a minute, here I am issuing a dust violation, where are the ignition sources?
>
> MS. CARROLL: I think it should have dawned on him. I think he - in his notes he saw the dust first and then saw the heat sources and he should have recognized that those are in the same locations and he should have gone back at the time and modified the citation or his notes so that later, in a few hours when he typing the citation, that it accurately reflected the conditions.
>
> I mean, the Secretary hasn't explained that. One of the reasons why I didn't move to make these amendments months ago was I was proceeding in this case with Supervisor Robinette because Inspector Bobby Hass had been retired. I had not contacted him at all about the case.
>
> He was retired and I had another eyewitness to all of the citations and orders in this case. So my discovery, the verification is only signed by Lloyd Robinette. It contains only information I gleaned from him.

And, at (Tr. 36-37):

> THE COURT: You have a supervisor inspector, one cut above the regular inspector, right? Did it ever dawn on him to seek an amendment, not immediately but at least six months later, a year later?
>
> MS. CARROLL: No. He doesn't -I have spoken to him about that He says he does not instruct his inspectors what paper to write. He reviews their paper to ensure that whatever they've cited in their notes at least supports the minimum, but he doesn't make it a habit of telling them you need to make that stronger, you need to change this, you need to change that. They are the ones who saw it.
>
> THE COURT: Well, they both observed the conditions.
>
> MS. CARROLL: Well, sure.

The Secretary's counsel conceded that no written amended citations were issued, and took the position that the Respondent's counsel deposed the inspectors who discussed why they believed the facts as they saw them supported S&S findings for both citations. Counsel pointed out that the Respondent's counsel had an opportunity to inquire about any expected injuries but

did not inquire further (Tr. 39-40). The depositions were not offered and are not a part of the record.

Counsel further argued the proposed amendment does not prejudice the Respondent and is not based on new facts relied on by Inspector Hall when he issued the citations, and that the S&S designations are supportable by facts documented by the inspector in his notes (Tr. 50-51).

Upon conclusion of oral arguments, the Secretary's motion to amend Citation No. 8166773 from non - S&S to S&S, was DENIED (Tr. 54). The motion to amend both citations to allege an increased gravity level of "fatal" was granted based on my conclusion that it was not a substantive change.

The denial of the motion to amend was based on my bench findings that the Secretary had more than ample time prior to the hearing to amend the citation, but did not do so. I found that the passage of time, two years from the issuance of the citations, and the "eleventh hour" filing of the motion, a week before the hearing, constituted prejudicial surprise and untimely notice, and a lack of basic fairness. I further found that the untimely motion adversely effected and prejudiced the Respondent's right to timely contest the substantially increased Part 100 civil penalty assessments proposed by the Secretary (Tr. 53-55).

I take note of the fact that although Citation No. 8166774, reflects that nine (9) persons were allegedly affected, Citation No. 8166773, reflects that one (1) person was affected, and the Secretary's motion to amend did not include any proposed change.

Although Mr. Robinette testified that according to both inspectors notes, nine (9) miners were working inby the area (Tr. 212), my review of Inspector Hall's notes for April 5, 2010, as well as Mr. Robinette's notes (Ex. P-6 and P-7), do not reflect the number of miners in the area cited. Under the circumstances, I find that the number of people affected as one (1), on the face of the citation, stands as issued.

The record reflects that Inspector Hall modified Citation No. 8166775 the next day to reflect a violation of 30 C.F.R.§ 1731(c), rather than 30 C.F.R. § 1800(c). Since the cited condition was relied on by the inspector constituted facts that he believed were crucial to his belated S&S awakening with respect to Citation No. 8166773, he had more than ample time to amend that citation, but did not do so. I agree with the Respondent's argument that those facts could have been asserted at any time during the past two years, and that the failure to do so presented new issues advanced two years after-the-fact.

I agree with the Respondent's assertion that the S&S issue associated with the Secretary's proposed amendment begs the question as to how the inspector could rely on the conditions described in the two citations in issue in the proceedings, based on a condition he discovered four hours later with respect to Citation No. 8166775, that is not part of these proceedings.

Inspector Robinette confirmed that he was with Inspector Hall when he issued the two citations, but did not review mem before they were issued. However, he testified that he does review citations issued by inspectors who he supervised "to visualize by the condition cited in the citation itself what he has seen, and what hazards may be involved and the importance of what he is saying", and will discuss any concerns that he may have with the inspector (Tr. 207-209). Inspector Hall, however, testified that Mr. Robinette reviewed and approved Citations 8166773 and 8166774, at the time he issued them (Tr. 159).

Mr. Robinette testified that he does not agree with Mr. Hall's initial determination that the conditions described in Citation 8166773 were unlikely to cause any injury. He was of the opinion that the conditions would contribute to a discreet ignition safety hazard that should not have been issued as non - S&S. He confirmed that this conclusion is based on the conditions described in Citations 8166774 and 8166775, and his experience that continued and uncorrected belt rubbing against hot hangers in the presence of float coal dust would cause something more serious, including a fatal injury (Tr. 209-211).

On cross-examination, Mr. Robinette confirmed that as part of the MSHA conference reference report dated April 14, 2010, at page SEC000027, he stated that he traveled with the inspector (Hall) on the day the citations were issued and that he "fully concurred" with the inspector's evaluation of the conditions (Ex. P-l1). He explained that he agreed with the non - S&S citation and that his "fully concur" comment means that he "at least" agreed with the citation (Tr. 134-135). He further commented that "if I were evaluating the citations, I would have evaluated them differently" (Tr. 236). I find Mr. Robinette's explanations concerning Mr. Hall's citation are contradictory and raise new credibility issues regarding the after-the-fact S&S evaluations made by the inspectors.

Inspector Hall's non - S&S Citation No. 8166773, included a gravity finding that an injury was "unlikely". He confirmed that he made the non - S&S finding on the fact that he detected no methane or a heat source that would cause the cited float coal dust to catch fire, and detected no suspended float coal dust or any exposed wires (Tr. 144-147). He conceded that Citation No. 8166774 does not reflect that the belt was rubbing any wood, and confirmed the belt was fire resistant and retardant (Tr. 141,145).

Inspector Hall testified that he observed the conditions and issued the citation at 11:30 am., and that he did not include any statement that there was a heat source from wood rubbing on the belt because that was not happening at that time. The heat source that he supplied to his evaluation occurred four hours later when he observed the two baffles that prompted him to issue Citation No. 8166775 (Tr. 157).

Inspector Hall further testified that the float coal dust he observed was on the off-side of the belt and that the travelway was on the opposite side, and he observed no foot prints because it was not probable that anyone would be there (Tr. 73-75). His testimony contradicts the speculative testimony of Inspector Robinette that anyone walking in the area could place float coal dust in suspension (Tr. 256).

Inspector Robinette believed that float coal dust placed in suspension could cause a fire or explosion, and stated that a non-vulcanized belt splice, and the fact that the mine was on a spot inspection cycle and was "liberating the usual methane" would be potential heat sources (Tr. 210-212). However, Inspector Hall found no methane, and his citations do not mention any defective belt splices.

Although Inspector Robinette considered the float coal dust as his "issue and big concern", and believed that suspended coal dust can be ignited by rubbing belt hangers, and that a piece of railing rock dust, or anyone walking in the area could place the dust in suspension (Tr. 255-156), he confirmed that the citations, orders, and his citation conference notes do not mention the possibility of railing rock dust, float coal dust in suspension, or any coal accumulations turning in any belt rollers (Tr. 257-258). Although several references to "hot rollers" were made in the course of the hearing, the citations do not include rollers. I find that a belt hanger is not synonymous with a belt roller.

Both of the inspectors confirmed they observed the two baffles while on their way out of the underground area to return to the surface, and they confirmed that mine Foreman Cantrell immediately destroyed the wooden baffle materials by knocking them out with a sledge hammer to abate and terminate Citation No. 8166775. The citation reflects that the violation was abated and the citation was terminated within 30 minutes, and the record reflects that the new baffles were constructed with cement blocks and a wooden frame.

I find that although the belt may have continued to operate after the inspectors returned to the surface, the cited wooden baffle materials that were the source of the heat relied on by the inspectors to support their belated S&S opinions were eliminated and no longer existed. I find this undermines their assumptions that any continued mining operations would exacerbate the assumed hazard. Under the circumstances, I reject the belated attempt to retroactively resurrect the perceived hazard to support an S&S violation.

On the facts of this case, and based on all of the aforementioned findings, and assuming that I were to grant the motion to amend Citation No. 8166773 to S&S, I would nonetheless conclude that in the absence of any ignition source at the time the inspector observed the conditions and in the context of continued mining operations, the cited float coal conditions did not expose anyone to any discrete hazard and did not present a reasonably likelihood or contribution to an injury of a reasonably serious nature. Accordingly, my bench ruling denying the motion **IS AFFIRMED.**

The Secretary's Trial Testimony

Retired MSHA Inspector, Bobby Hall issued Citation No. 8166773 and he confirmed that he worked in the ventilation department before retiring on November 23, 2010. His prior experience included work as a mine foreman and fire and belt examiner. He was at the mine on April 5, 2010, to conduct ventilation inspection, and to follow-up on previously issued citations.

He was accompanied by his supervisor Lloyd Robinette who was observing his job performance (Tr. 57-60).

Mr. Hall identified Citation No. 8166773, citing a violation of Section 75.400 (Ex. P-2), and explained that the float coal dust was present continuously on the ribs along the entire entry, on the upper ribs, somewhat on the ground walkway, in the crosscuts, and on the belt structure at spot locations. He confirmed these observations reflected the conditions on the offside of the belt as stated in the citation. He stated the area was black and there were no footprints because the travelway was on the other side and it was not probable that anyone would be there (Tr. 72-75).

Mr. Hall further described the float coal dust areas he observed as noted in diagram Exhibit P-l, as noted in the citation, namely the adjacent crosscuts, spot locations and the floor and belt structions, including float coal dust and fines between two newly constructed regulators used to reduce the air flow going to the section. The regulators would be constructed with block, some wood, and rubber belt to restrict the air (Tr. 77-79).

Mr. Hall identified a copy of an additional citation, No. 8166775, he issued on April 5, citing an alleged violation of 30 C.F.R. § 75.1731(c), for the presence of wooden boards on the No. 3 belt allegedly contributing to a frictional heating hazard (Ex. P-l2). Mr. Hall confirmed that he issued the citation the same day as the float coal dust Citation No. 8166773, because it was creating a heat source. However, when he issued that citation he found no heat source and determined that it was a non-S&S citation. He later found a heat source when he observed the belt rubbing the structure as it was running through the baffles and wood that he cited and confirmed that he observed the baffle situation after the float coal violation (Tr. 84-85).

Mr. Hall stated that the wooden boards cited in Citation No. 8166775 were related to the two newly constructed regulations referred to in Citation No. 8166773, and they were at the same location as the float coal dust (Tr. 85). He confirmed that the baffles were initially constructed entirely of wood that was removed to abate the citation, and the newly constructed regulations were block with a wooden frame (Tr. 86).

Mr. Hall confirmed that Citation No. 8166773 was issued as a non - S&S citation, but that in view of the cited float coal conditions, and "after further review", he "could have, and should have" determined it was S&S "when I found the smoldering and the smoke and the heat" (described in that citation as an atmosphere smelled of an oder (sic) of smoldering wood) (Ex. P-12;Tr. 88).

Mr. Hall stated that his mitigating moderate negligence finding was based on his belief that the Respondent "should have known some degree of the condition", and that he had not at that moment in time established a heat source. He believed the float coal conditions existed for more than one shift based on his experience and the extent of the conditions (Tr. 91). In view of the extent of the float coal dust, he would have been surprised if anyone told him the entire belt had been rock dusted the day before. He confirmed that he fixed an abatement time at 9:00 a.m.,

April 6th, believed it was reasonable, and there was no complaint or any request for an extension (Tr. 91-93).

Mr. Hall stated he issued Citation No. 8166774 for an alleged violation of Section 75.1731(b), (Ex. P-3), because the conveyer belt was not properly maintained and was rubbing against 14 bottom stand hangers, but not on a consecutive row. Referring to a diagram of the belt (Ex. P-l), he confirmed that the 14 hangers were generally located between the No. 81 and 84 crosscuts, and he saw them rubbing because the belt "was just out of line" (Tr. 94).

Mr. Hall stated that he touched two of the hangers and they were "hot to the touch" (Tr. 95). He also smelled a "strong odor like wood burning" from the rubbing belt, and observed float coal dust where the belt was rubbing "on the offside, the ribs, the crosscuts and spot locations on the travelway side" (Tr. 96).

Mr. Hall confirmed he based his "S&S" finding on the fact that the belt was out of alignment and was making contact with the wood and belt structure, producing a heat and smoke smell, and the possibility of a fire (Tr. 96). He believed this would be reasonably likely to occur and that miners walking towards the mine face would be exposed to the hazards of smoke, fire, heat, and air contamination. He further believed the hazards would affect a miner's ability to escape by becoming disoriented or losing direction (Tr. 98).

Mr. Hall confirmed the negligence level as "moderate" because the Respondent had reason to know to a certain degree that the condition existed and was extensive because examiners are in the area on a daily basis. However, he did not issue a violation for any inadequate pre-shift examination because he reviewed the mine books and only remembered a "needs dusting" entry (Tr. 99).

Mr. Hall believed that the 6:00 p.m. abatement time was reasonable and that no one complained or requested more time (Tr. 100). He confirmed that he extended the time for the violation that prompted his visit to the mine, and he explained the circumstances related to that citation that is not an issue in the instant case. He confirmed that he extended the abatement time related to that citation because an effort was made to correct it, and he extended it two times because the fan was eventually changed. Although he could have issued a Section 104(b) order, he did not do so because of the effort made to correct the condition (Tr. 103-105).

Mr. Hall stated he and Mr. Robinette returned to the mine to abate the instant citation on April 7, 2010, and he identified his notes made that day (Ex. P-8). He stated he observed the No. 3 belt that day, and they walked the belt line from the tail piece back down to the drive, and the cited float coal accumulations were not totally cleaned up, and the belt had not been properly aligned, and the previous hazardous conditions were still present (Tr. 106-107). He confirmed his notes relating to his orders state that "no effort" was made to correct the float coal dust and alignment citations (Ex. P-8, at 7-8).

Mr. Hall confirmed that he issued Order No. 8166777 on April 7, 2010, (Ex. P-4). He stated that the belt was misaligned and rubbing the belt hangers "at about the same location that I had previously issued", and that it was "pretty well equally misaligned". He counted 10 hangers but could not recall that day whether he touched any of them. However, his notes reflect they were "warm hot to the touch" (Ex. P-8, at 8), (Tr. 109).

Mr. Hall stated the belt condition on April 7th was a violation of Section 75.1731 (b), and that it was in the same condition he observed on April 5, and no evidence of any attempts to abate the violation, or any evidence that any splice had been changed. He confirmed that he "eyeballed" the belt from the travelway and the belt was running and that he placed his hand on the belt structure to determine whether it was warm or hot (Tr. 111).

Mr. Hall could not recall whether anyone informed him that a belt splice was changed. Although he could not recall seeing any evidence that any belt rollers had been added or replaced prior to issuing the order, he stated it was mentioned "after the fact" (Tr. 112). He further could not recall that anyone informed him prior to issuing his order that belt cradles were removed (Tr. 113). He explained the process for properly aligning a belt (Tr. 113-114).

Mr. Hall stated that his notes reflect that he informed mine management (Jeff Cantrell) that he could not extend the abatement times for the two preceding citations because the violations would be "specially assessed", and MSHA policy required him to notify management that he would do so (Tr. 115-117), and that he did in fact notify the foreman (Tr. 115-118).

Mr. Hall confirmed that he issued Order No. 8166778 on April 7, 2010, and that the cited black float coal condition was the same as what it was on April 5, and the belt line "was black all the way down through there" in the adjacent crosscuts and he saw no evidence of attempts to abate the underlying citation (Tr. 119). In response to whether he observed any newly applied rock dust, he responded as follows (Tr. 120): "The offside and adjacent crosscut, it looked the same as I originally issued the paper. The right - the walkway side, they could have -I don't know. They may have improved, but it was a question as well."

Mr. Hall stated that he walked the belt before terminating the orders and walked from the tail piece to the tail piece at the boom at the very end of the belt and past the drive. Someone was with him but could not recall who it was and does not recall walking alone (Tr. 125). He recalled speaking with mine foreman Jeff Cantrell underground after walking the belt line after issuing the orders and "red tagging" the belt. He stated that Mr. Cantrell informed him that "he didn't go back and look but he took their word for it, he didn't check on it himself but he took their word" (Tr. 126). Mr. Hall stated that before he issued the order Mr. Cantrell did not inform him about any efforts to correct the conditions, but did discuss it with him after the order was issued, and the area looked the same as when he issued the citations (Tr. 126-127).

Mr. Hall stated that he found no justifications for further extending the terminations of the order. He confirmed that there are no methane or float coal suspension in the air issues

related to the citations and orders in these proceedings and that he took methane readings and detected none (Tr. 130).

On cross-examination, Mr. Hall stated that since the violations were issued two years ago, he has difficulty remembering some of the specifics without reviewing his notes. He confirmed there was a separate roadway entry adjacent to the belt entry, and that he stopped at the baffles located between crosscuts 81 and 82. He could not recall any baffles at crosscuts 77 and 78, or 76 and 77, (Tr. 131-134). He confirmed that he initially observed float coal dust and the belt rubbing on some hangers at the baffle location. He observed the hot belt hangers somewhere between breaks 81 and 84 according to his notes, and rubbing at 14 hangers, two of which were hot. He could not specifically state the location of the hangers, and explained they were consecutive, but at different locations at crosscuts 82 and 84 (Tr. 136-138).

Mr. Hall stated the hot hangers were "warm to the touch", but he was not burned. He did not determine any hanger temperatures, and agreed that it would take 140 degrees to start a belt fire. He did not know how much friction was generated by the intermittent rubbing against the hangers. The belt was fire resistant and retardant. Although he believed that a belt fire can start "at the right temperature", he did not know what that might be (Tr. 141). He confirmed the "discreet safety hazard" would be the belt catching fire or the float coal dust that needs an ignition source to start a fire. He detected no methane, suspended float coal dust, or any exposed wires (Tr. 144).

Mr. Hall stated that when he issued the two citations, the heat sources that he had in mind for a belt fire were the belt rubbing the hangers and the float coal dust in proximity to the two hangers that were hot to the touch. Although he also referred to "wood", he conceded that any wood being rubbed is not mentioned in the belt alignment Citation No. 8166774 (Tr. 145). However, he was concerned that a belt contacting a hanger would cause enough heat to catch the belt on fire, and that a belt may catch float dust on fire (Tr. 147).

Mr. Hall confirmed that when he issued Citation No. 8166773, as a non - S&S violation he did so because no methane was detected and he found no heat source that would cause a float coal dust fire (Tr. 147). He now believed that with the presence of enough heat a belt could catch the wood part on fire, if a spark was present to ignite the coal (Tr. 148). He stated that when he observed the belt related to Citation No. 8166774, he determined that it was not likely that a belt fire would occur, but nonetheless believed "if it was to continue", it was reasonably likely "it very well could" (Tr. 148).

With regard to the float coal dust violation, Mr. Hall stated there was no way to measure float coal dust other than by hand similar to "soot". He did not measure the rock dust and did not know the required temperature to ignite float coal dust. He did not measure the float coal dust, and he estimated that it was probably on the rib three to four feet from the two hot belt hangers, on the floor, and occasionally on the belt structure (Tr. 150-152).

Mr. Hall confirmed he observed the float coal dust at 11:30 a.m., when he observed the belt rubbing the hangers at the location of the baffles. He then traveled to the face, but he could not recall coming back when he issued Citation No. 8166775, at 3:00 p.m., for the belt rubbing wood, four hours after he issued the prior citations (Tr. 157). He stated that foreman Cantrell knocked the baffles out with a sledge hammer to terminate that condition (Tr. 158). He confirmed that his supervisor Mr. Robinette reviewed and approved the citations he issued, and that the time to abate the belt citation was 6:00 p.m., on April 5th and the time to abate the dust violation was 9:00 a.m., April 6th. He did not return to the mine that day (Tr. 160).

Mr. Hall confirmed that he would have no reason to disagree with any miner testimony that the belt was running correctly by April 5th, 6:00 p.m., and that the belt was properly dusted by April 6th, at 9:00 am., because he wasn't there. Due to the extent of the coal dust, he could not state yes or no why it would be black (Tr. 160-161). He stated he returned to the mine on April 7th, as expected, and he confirmed his statement that no apparent effort was made to properly align the belt or to eliminate the float coal dust as stated in his orders, was based on what he saw when he made those determinations (Tr. 163).

Mr. Hall stated that while underground on April 5th, an area of the belt was raised and that when he returned it was no longer raised. He could not state whether the lowering was an effort to correct the citation (Tr. 164). However, he agreed that on April 5th, the belt ran along a certain elevation, and then came up and then back down, and when he returned on April 7th, that was not the case (Tr. 165). He recalled that the "high" belt place was inby the cited belt alignment area, and in order to "train" the belt "you would have to go outby" (Tr. 165). He did not know whether the entire belt had to be trained after it was lowered.

Mr. Hall stated there was float coal dust from the belt drive to the tail piece when he returned on April 7th, and it appeared to be identical as it appeared on April 5th. He confirmed that foreman Cantrell informed him about the work that had been done when he returned on April 7th, to terminate the order. He stated that he does not look at work orders unless they are given to him. He could not remember whether he or inspector Robinette gave Mr. Cantrell the closure tag, but stated "I thought I hung it up" (Tr. 170). He stated that he informed Mr. Cantrell that the conditions had not been abated and that Mr. Cantrell informed him "I didn't go back and look. I took their word for it" (Tr. 170). Mr. Hall stated he then told Mr. Cantrell that he was going to issue the B order to close the belt down because the cited conditions had not changed (Tr. 171).

Mr. Hall stated that when he was at the belt drive with Mr. Cantrell he could not recall asking him for the location where he issued the belt rubbing citations. He denied that he asked for the location because the belt had been lowered and he did not recognize the area when he returned and that he was confused. He stated "I had that pin-pointed and pretty much knew where it was at" (Tr. 172).

Mr. Hall believed that any confusion related to where the belt had been lowered and it was difficult to determine where it had previously been up, and that it was not necessarily where

the cited 14 belt hangers were located. He could not identify the break area location of the raised belt (Tr. 173). He confirmed that when he returned on April 7th to abate and terminate order No. 8166778, it states "The coal fines has been removed and a coat of rock dust has been applied to the affected area" (Tr. 173).

Mr. Hall confirmed that belt Order No. 816777 termination states that the belt was realigned and adjustments were made at several bottom belt hangers from crosscuts 34 - 80. However, he believed that it is a "misprint of the numbers,, and I wrote it down wrong" (Tr. 174). He did not believe it would indicate that the corrections were made at those crosscuts and that he wrote it down correctly because "I would go back where I originally issued the citation" (Tr. 173-174). He also commented that he wrote down the wrong time for the rock dust termination order, and it should have been 20:32, and not 10:30.

Mr. Hall confirmed that his notes relating to the abatement of the belt alignment violation reflects that the corrections were made from crosscut 34 to 80, as stated in the abatement order, indicating they started at 34 and went to 80. He stated that "It's either I wrote it down wrong or that's where I started from" (Tr. 176; Ex. S-10, at 4). He further stated as follows (Tr. 176):

> Q. Well, why did you write that down?
> A. Maybe sometimes you just write something down wrong or you get sidetracked or you get interrupted or whatever the case may be. The termination is more - is more important as the violation itself.
>
> Q. And the import for the orders are that the condition existed in the same location that the citation was issued, right?
> A. Yes.

Lloyd Robinette, MSHA supervisory ventilator safety specialist, testified that in April, 2010, Inspector Hall was assigned to his group on a temporary 90-day assignment to help out. Mr. Robinette discussed his mining experience with various coal companies, the Commonwealth of Virginia, and MSHA, since graduating from Virginia Polytech Institute and State University as a mining engineer in 1972. He has Virginia mine and surface mine foreman's certifications and is a certified MSHA inspector (Tr. 191-193). He confirmed that he accompanied Mr. Hall to the mine on April 5, 2010, as part of his field review of Mr. Hall's performance as an inspector temporarily assigned to his group. Mr. Hall was there for a six-month ventilation plan review and to check on a previously issued ventilation citation (Tr. 194-198).

Mr. Robinette reviewed the condition or practice described in Citation No. 8166773, and confirmed it accurately describes the locations and extent of the float coal dust that he observed. He confirmed that he has never measured float coal with a ruler because it settles on top of previously rock dusted surfaces in layers that vary in thickness (Tr. 204). He could not recall observing any foot prints in the float coal dust. He believed there would be more accumulations along the offside of a belt than across the travelway because the travelway is rock dusted when the entry is rock dusted. The offside in the adjacent crosscuts takes "a little bit more time and effort" and these areas are frequently missed. It is easier to see float coal accumulations on the

offside by walking, but it is difficult to see those areas when riding because the belt conveyor impairs vision across and under the belt and adjacent crosscuts (Tr. 206).

Mr. Robinette believed the ignition sources concerned the belt misalignment violation. He observed the hot hangers and float coal and believed this heat source could have caused a fire or fatal explosion if the float coal were placed in suspension. He also believed that non-vulcanized belt splices would also have been a heat source (Tr. 210-212). He confirmed that the mine was on a spot inspection cycle and was liberating the usual methane. He believed nine miners were working in the area and he explained the available escapeways. The secondary escapeway belt air course would provide the quickest mine exit and if there were smoke in that area, the miners would be exposed to it (Tr. 213).

Mr. Robinette agreed that the condition or practice stated in Citation No. 8166774, accurately describes the location and extent of the misaligned and rubbing belt that he observed on April 5, 2010, and he did not instruct Mr. Hall regarding his gravity and negligence determinations (Tr. 216). He confirmed that he touched several belt hangers and they were hot. He also smelled the odor of belt rubbing and observed float coal dust near and on the belt structure, but not on the hangers (Tr. 216). He agreed with Mr. Hall's S&S finding and believed the belt hazards were the same as those related to Citation No. 8166773. He also believed the abatement time was reasonable and that no one complained or asked for an extension (Tr. 217).

Mr. Robinette stated the float coal dust was still present at the No. 3 belt line on April 7th and presented the same hazard that existed on April 5th. He stated that he was informed that the mine ran coal on both days. The belt condition on April 7th surprised him because he did not expect that the two citations still existed and were not terminated. He confirmed that Order No. 8166777, accurately reflected the location and extent of the misaligned and rubbing belt he saw on April 7th. He observed the belt rubbing "at various locations" along the belt line, particularly in the areas that were warm and hot to the touch, from the day the citation was issued, particularly between crosscuts 84 and 82 (Tr. 221).

With regard to the statement "no apparent effort" was made to abate the condition as stated in the order, Mr. Robinette stated "I can't say no apparent effort I don't know if any effort had been made". However, he saw no evidence that an effort had been made (Tr. 221).
He believed the belt was more misaligned on April 7th, at more locations, and that "some of them were still heating up", particularly at crosscut 84 and 82, the same area where he observed the belt rubbing on April 5th (Tr. 221). He did not believe the condition could have reoccurred to that extent in that short period of time (Tr. 221).

Mr. Robinette confirmed that after he and Mr. Hall observed the existence of the same conditions, they discussed it with Jeff Cantrell and he appeared to be surprised. He stated that he asked Mr. Cantrell if he had seen that the cited conditions were corrected, Mr. Cantrell stated "No. I took word (sic) for it" and that "he acted as disgusted about it and surprised as I was" (Tr. 223). He confirmed that Mr. Cantrell did not walk the belt with him while underground.

Mr. Robinette confirmed the issuance of the float coal dust Order No. 8166778, and he agreed to the accuracy of the described condition or practice, except for the statement "no apparent effort" had been made to eliminate the condition. He confirmed that he did not know "how much effort was put forth, but there wasn't enough effort in my opinion to warrant from what I saw that day to warrant an extension of the citation" (Tr. 224). When asked if he saw any effort or attempts to clean up the float dust, he stated "there was apparently no effort—and appeared to be little effort to take care of the coal dust underneath the belt, on the offside of the belt, as well as in the adjacent crosscuts" (Tr. 225).

Mr. Robinette further believed that if any rock dust had been applied it was in the travelway, but there were "still places along the travelway in my opinion deserved more rock dust" (Tr. 225). He did not believe the float coal under the offside of the belt and adjacent crosscuts could have accumulated during the two production shifts. It did not appear that eight pallets of rock dust had been applied in the entry before he got there (Tr. 225).

On cross-examination, Mr. Robinette agreed that Inspector Hall's citations and orders "were at least warranted", and that is what he meant by "fully concurred" when he submitted his conference statement. He confirmed that he reviewed all citations through his office as the ventilation supervisor for all underground mines in Virginia (Tr. 234-235). In response to a question if he was responsible for the Secretary's motion to amend Mr. Hall's dust citations to S&S and both citations to fatal, he replied that he would have evaluated them differently. He agreed that at the end of April 2010, after being underground and reviewing the actions, he fully concurred and did not seek to change them at that time (Tr. 236).

Mr. Robinette confirmed that he assisted in the creation of Exhibit P-l, a diagram of the No. 3 belt, the crosscuts, the travelway, the #4 entry belt line, and the alleged locations of the float coal dust, the wood baffles, and the misaligned belt. The information for the diagram came from the citations and it is not to scale (Tr. 239). He did not know how close the baffles were, but they were in between the same two crosscuts 81 and 82. He stated he and Mr. Hall traveled the entire length of the No. 3 belt and the travelway slope belt in a personnel carrier with Bobby Tilley (Tr.241).

Mr. Robinette confirmed that his notes, at page 8, and his conference statement do not mention the belt rubbing on wood. He could not recall how long it took him to walk the entire belt, or whether Mr. Tilley walked the entire belt with him. He did not know the distance from the tail piece to the belt drive or the number of crosscuts because the office mine map is inaccurate with respect to the location of the belt drives and he had questions about the map (Tr. 243).

Mr. Robinette stated that on his way out of the mine, he observed the belt rubbing on wood and Jeff Cantrell knocked them out with a sledgehammer. He then went to the surface and did not return to the mine until April 7th, and did not know what work was done before that time (Tr. 244). He confirmed he was aware of the documents and arguments advanced by the

Respondent at the conference to which he responded, and also was aware of the Respondent's work orders. He still believed that when he traveled the belt on April 7th, the offside of the belt and the adjacent crosscuts "were just as bad as on the 5th" (Tr. 245).

Mr. Robinette believed it was not a good habit or safe to rock dust with miners working nearby, but did not know what may have occurred in this case. He stated it was absolutely acceptable to rock dust on a non-production shift. He confirmed he was at the mine at 5:30 am on April 7th - and rode underground to the face with the crew and went past the baffles (Tr 247-248). He could not state whether the hot belt hangers on April 7th were the exact same hangers he observed on April 5th. He explained that the belt hangers on April 7th were along the No 3 belt flight in close proximity of the hot belt rollers he observed on April 5th (Tr. 248).

Mr. Robinette further stated that the rollers that were warm and hot to the touch were along the belt flight. He explained that a belt comprised of a tail section and a drive, or a head roller, is considered a "flight" and if there are rock dust belt alignment issues, it is along the flight, not a specific roller or hanger place or crosscut. He confirmed that Citation No. 8166774 specifically cited the location as break 81 to 84, "but it was the No. 3 belt flight" that was cited (Tr. 249).

Mr. Robinette confirmed that if the belt were rubbing structures at break 84 on April 5, and was rubbing at break 81 on April 7th, it would not necessarily justify a 104(b) order. He stated it was not necessary to cite the same hangers because the alignment of the belt flight was cited and not the hangers. He was of the opinion that the belt misalignment was not corrected when he returned on April 7th (Tr. 250). He recalled that the belt had one Flexco splice that was replaced, but knew of no other metal splices, and did not know the exact length of belt (Tr. 254).

Mr. Robinette confirmed his opinion that the belt citation was significant and substantial because two of the fourteen hangers were hot to the touch and several were warm. He stated "I didn't say the belt would catch on fire. Float coal dust was my issue and my big concern" (Tr. 255). He stated that suspended float coal dust can be ignited by the rubbing belt hangers, and if this continued unabated it could increase the hanger temperature. If a rock or a piece of rock-dust fell there is a likelihood of a fire or explosion. Anyone walking in the area could place float coal dust in suspension. He stated the belt was running continuously on two of the hot hangers but he did not recall how long he observed the belt (Tr. 256).

Mr. Robinette confirmed that the citations, orders, and his conference notes do not mention the possibility of falling rock dust, or float coal dust in suspension (Tr. 257). He further confirmed no one observed any coal spillage that could accumulate where the belt roller turns on the bearing, and that would be a more serious condition (Tr. 258). He stated that the extent of the float coal dust he observed when he returned "was more than the normal". In the event eight pallets of rock dust were applied, it would have been put down the number 3 entry travelway and the adjacent crosscuts toward the entry and not the off-side of the belt and the adjacent crosscuts (Tr. 260).

Mr. Robinette believed that if rock dust was applied to the No. 3 travelway, it would have still been there when he returned. When asked if he found no rock dust still present at that location, he responded as follows at (Tr. 261):

> THE COURT: And you're saying it wasn't?
> THE WITNESS: I'm saying that the float coal dust was still untouched on the offside of the belt and in the adjacent crosscuts. Some rock dust could have been to the travelway where the belt examiner travels in adjacent crosscuts connecting the number 3 belt.
>
> THE COURT: But was the travelway completely - when you went back, were the travelways still completely covered with coal dust?
>
> THE WITNESS: No, sir. The travelway wasn't the main issue to begin with. It was underneath the belt, the offside of the belt and adjacent crosscuts where the gray is on the map there.

Mr. Robinette clarified the off-side belt area that had not been rockdusted, and it was described as the area alongside the belt in the No. 4 entry immediately adjacent to the belt. He stated that area is not as wide as the No. 3 travelway and cannot accommodate a larger mantrip and it is not normally walked (Tr. 263).

The Respondent's Trial Testimony

David L. Goode, formerly employed by the Respondent, testified he was a certified mine foreman and electrician. He stated that he worked the evening shift from 2:30 to 1:00 a.m., on April 5, 2010. He confirmed that he performed a belt examination that evening and identified Exhibit R-1 as a copy of the belt examination report for the stacker, slope, and belt numbers one through five (Tr. 167-268). Mr. Goode explained his shift notations on the report, including "No. 3 belt, nothing found", "No. 4 belt, it needs rock dusting from tail piece to drive". He confirmed that the notation "No. 3, belt has been dusted" was made by someone else (Tr. 268).

Mr. Goode confirmed that he found some areas on other belts that needed to be corrected on April 5, but found nothing on the No. 3 belt that needed correcting. He stated that another notation indicating that the No. 3 belt was dusted appears on the upper portion of the report which covered the day shift (Tr. 270). Mr. Goode stated that he has conducted belt examinations from eight to ten years and knows what float coal dust looks like. If he had seen it on April 5, he would have reported it (Tr. 271).

Mr. Goode identified the second page of Exhibit R-1, as his belt examination report for the 4:00 p.m. shift that he conducted on April 6, 2010, and he explained his notations, including two bad belt cradles on the No. 1 belt that he removed from service (Tr. 272). He confirmed he

conducted his examination from 8:00 p.m. to 9:50 p.m. He stated that the No. 3 belt did not need dusting and the belt was not misaligned and was not rubbing at any location (Tr. 273).

Mr. Goode identified belt cradles as the "bowed" top roller shown at page two of Exhibit P-l and confirmed that he replaced the No. 3 cradle (roller) on the belt off-side because it was split and could cut into the belt if it continued in that condition. He confirmed that this condition had nothing to do with any belt misalignment. He also confirmed that the No. 3 belt was not misaligned on April 5th or April 6th, and did not need rock dusting on his shift (Tr. 274).

Mr. Goode explained a misaligned belt condition and confirmed that if it were actually rubbing and up on a hanger, it could cause a fire. He stated that a properly aligned belt should run "dead center" on the cradle when the belt is loaded or not loaded with coal. If he observed a belt rubbing a hanger, he would shut the belt down and replace the hanger (Tr. 275).

Mr. Goode confirmed that a belt can move back and forth without being completely misaligned and this can be addressed by '"training" the belt by using a hammer or sledgehammer, while wearing safety glasses, and knocking the cradles one way or the other. If this were done, it would affect the way the belt will run at different locations. It would be preferable to "train" the belt in sequence, starting at one end of the belt to the other (Tr. 276).

Mr. Goode identified Exhibit R-2 as a copy of a statement he prepared and signed explaining that he observed two top belt cradles on the No. 3 belt on April 6, 2010, and that he removed them and observed the belt with and without coal, and that he trained and traveled the belt for two breaks to make sure coal stayed in the center of the belt and the belt in the center of the cradle. Mr. Goode further noted no belt rubbing during the duration of his belt examination and the work he performed. He confirmed that he prepared his statement because a fire occurred shortly thereafter that destroyed the mine office building and his book and notations were lost (Tr. 277).

On cross-examination, Mr. Goode stated that he left his employment with the Respondent because of black lung. He stated that as a certified belt examiner, he usually checked the belt when he starts his normal work day shift, and a second time three hours before the next oncoming shift He confirmed that the belt examination report for the belts, (Ex. R-l) on the first page, reflects that he inspected the belts for the evening shift at 4:00 p.m., on April 5th, as well as April 6th, and that the reports reflect two belt examinations as combined on shift and pre-shift examinations (Tr. 280-286).

Mr. Goode confirmed that on April 6th, he removed and replaced two belt cradle rollers at two different locations approximately ten breaks apart because they were split. He shut the belt down to make those corrections and checked the belt for approximately one hour, but did not walk it and remained in the general areas where each correction was made (Tr. 287-288).

Mr. Goode stated that the belt was not misaligned at the time he made the cradle roller corrections and he simply removed the cradles and the belt was still in line. He confirmed his

deposition statements confirming that the cradles were at "break 36, and around break 43 to 45", and that "the belt wasn't rubbing with or without pulling on it but I wanted to make sure that the belt was dead center of the cradle" (Tr. 289). Mr. Goode further confirmed his statement that the belt "may have been offset just a little bit but they still weren't rubbing", and that "it may have been offset about an inch at this location and maybe some other locations" (Tr. 289).

Mr. Goode stated that after he changed the belt cradle, he examined the belt, starting at the head rollers to the location of the cradle, and stayed in that general area checking the belt after it was corrected. He then proceeded to the second cradle location down the belt, made the correction, and continued down the belt (Tr. 292-293).

Mr. Goode confirmed that when he conducted his two No. 3 belt examinations on April 6th, he walked around the head drives and tail piece to make sure the guards were on, and he rode the rest of the belt and did not walk it. He did not take the temperature of the belt and has never done so at that mine (Tr. 293-294). He confirmed that on April 5th, he drove the entire No. 3 belt, and it was aligned, and that on April 6th he observed the entire belt two times and it was properly aligned (Tr. 294). He also confirmed that the belt was properly rock dusted during that same time frame (294-295).

Tim Amburgy, roof bolter on the "hoot owl" shift, 11:00 p.m., Sunday, through 7:00 a.m., Thursday, testified that the No. 3 belt is normally dusted on Sunday because all of the belts are not in operation that day. When he arrived at work the evening of April 5, 2010, foreman Elliot Plaster and shift foreman Mark Van Dyke, informed him about the work that would be done. He identified a work order dated April 6th, for work to be performed on the April 5th "hoot owl shift" (Tr. 299-300; Ex. R-3).

Mr. Amburgy stated that the work order included dropping the belt down at the #84 line brattice, cleaning up block and trash, and dusting the No. 3 belt "from the tail piece to drive, make sure you get off side good. 8 pallets dust". He confirmed that he participated in that work, described how the belt was lowered, and that it was checked and operated over several breaks to insure it was centered, and that it was "running good" (Tr. 303).

Mr. Amburgy explained that the No. 3 belt line was rock dusted on April 5th, using a track dusting machine that throws out the dust over and under the belt and through the breaks. Dusting started at the No. 3 belt tail piece and ended at the No. 3 head. He explained that he stopped after three breaks and looked under the belt to make sure it was dusted as noted in the work order. He stated that the belt "didn't look bad when I started, but it looked really good when I got done with it" (Tr. 303-304).

Mr. Amburgy stated that he made a splice on the No. 3 belt the following evening of April 6th,to replace an older type splice and not because of any belt misalignment. He checked the belt after he completed the splice and it was running correctly (Tr. 305). He confirmed that additional belt dusting was done by hand by other crew members but he did not participate in that work. He stated that the belt area where he made the splice two breaks, outby break #84, at

break #82 was rock dusted "and still looked good to me" on the evening of April 6th (Tr. 306. He confirmed that he signed a statement that confirmed the work that he testified to, and that no one made him sign, and that it is accurate (Tr. 307; Ex. R-4).

On cross-examination, Mr. Amburgy confirmed that he rock dusted on the evening owl shift of April 5th and into April 6th, pursuant to the work order. Although dusting the belts occurs on Sundays, it may be done as needed on other days. He also confirmed the splice work he performed, at break #82, and stated that a flexco splice is metal and would be touching a belt hanger if the belt were rubbing against it (Tr. 309).

Mr. Amburgy confirmed that he did not write out his prior statement and signed it after he was asked if it reflected the work that he had done (Tr. 313). He confirmed that he signed the statement after the orders were issued and was unsure of the date (Tr. 316). He further confirmed that he performed the work required by the work order and that he applied eight pallets of dust on the section. He stated that each sack of rock dust weighs 50 pounds and he believed that each pallet contains two tons of rock dust. He guessed that the work order note ordering him to re-rock dust the belt because the inspector did not return to check it, indicated the inspector did not return the next day (Tr. 321).

Robert Tilley, chief electrician, testified that on April 5, 2010, he went underground with Inspectors Hall and Robinette by means of a four-man diesel ride. Referring to Exhibit P-l, he explained they were in the No. 3 travelway entry because the diesel would not fit in the belt line. They stopped at the baffles because Inspector Robinette wanted to look at the baffles and he was with the inspectors the entire time. The inspectors did not walk to the No. 3 belt drive and that as far as he knew they did not walk to the belt tailpiece, which he estimated was 2,000 feet or better from where they stopped at the baffles. They then proceeded to the face where he "handed off the inspectors to Jeff and Mac" and that was the end of his involvement (Tr. 322-324).

On cross-examination, Mr. Tilley confirmed that he rode with the inspectors to the location of the cinder block baffles where they walked around the area, and he was with them the entire time. He stated that he and the inspectors walked up and down four or five breaks inby toward the belt tail piece, and they did not walk to the belt drive (Tr. 325).

In response to bench inquiries, Mr. Tilley stated that he was with the inspectors for an hour and a half at the baffles area and not the entire time they were in the section when he handed them off. He could not confirm whether they walked down to the tail piece and the other end of the belt after he left them (Tr. 328-329).

Mac Sluss, weekend general mine foreman since 1980, stated that he met the inspectors at the face of the section tail piece on April 5, 2010, while they were there to check on a ventilation problem. They proceeded to the No. 3 belt line and stopped at the baffle or brattice location. Inspector Robinette commented that he smelled smoke and Mr. Sluss confirmed that he too smelled smoke. The belt had been rubbing on a wooden board across the baffle and Mr. Cantrell informed the inspector that he would remove the brattice (Tr. 329-332). Mr. Sluss stated that he and Inspector Hall walked the belt from the baffle area for three to four breaks and found

the belt rubbing on two bottom belt hangers. Mr. Sluss checked them with a thermometer that recorded a temperature of 74 and 75 degrees, and Mr. Hall did not comment (Tr. 332-334).

Mr. Sluss stated that he only observed the two hangers, and Mr. Hall informed him that he had observed 12 hangers that had rubbed the belt and cut into the hangers at some time. Mr. Sluss stated that the two hangers he observed showed rust and were "darkish and gray" in color and not shiny. He informed Mr. Hall that hangers used at other belt structures are used again if they are handy and that may account for the fact that the used hangers may have rubbed on metal. Mr. Sluss stated that he and Mr. Hall did not walk the entire Number 3 belt line and they left the area and returned to the surface after the baffles were taken out (Tr. 334-335).

Mr. Sluss stated he returned to work the next day on April 6th, even though it was not his normal work day, and informed Mr. Cantrell that he would check the belt to insure that the citations were abated. He traveled the belt for two hours with Dave Barrett, and they replaced four bottom belt rollers where the belt had sagged when it was lowered the prior evening (Tr. 336). He stated that he and Mr. Barrett walked the belt line for an hour from break 81 to break 52, and while the belt "walked back and forth" they observed that it was not rubbing on either side. They also walked to the tail piece, and he walked the back side, and Mr. Barrett walked the travelway side, and did not observe the belt rubbing anywhere. They proceeded to the break and observed the belt for two hours and while it was "still walking back and forth", it was not rubbing at any place. They left the area and proceeded to the surface (Tr. 337).

Mr. Sluss confirmed that he observed the rock dust on April 6, 2010, and it was "grayish and blackish", the usual colors of the dust used. He measured it with a tape measure and it was "four to five inches deep in that area", but did not describe the area. He confirmed that he signed two statements describing the work that was done (Tr. 338). He confirmed that Exhibit 12-5, notes the temperature of the belt hangers he observed with Mr. Hall. The second page reflects the work that was performed on the belt rollers with Mr. Barrett. He confirmed that he was not at work on April 7th, when the inspectors returned because it was his day off (Tr. 339-140).

On cross-examination, Mr. Sluss stated that Mr. Hall told him that he had touched a hanger and that it was hot, but he did not see him do so. Mr. Sluss confirmed that he did not touch any of the rollers and confirmed that the temperatures were 74 to 75.5 degrees. The belt continued to run while he was with Mr. Hall and coal was produced during that day and evening shift, but he did not know if any belt rubbing continued after that time (Tr. 344-345).

Mr. Sluss stated that the belt rollers that were installed on the April 6th day shift were installed because the belt was sagging and not because it was off center, and the fact that it was cited the next day for being misaligned was a coincidence. He observed a flexco metal belt splice on April 6th , that was causing the belt to "walk", a condition that occurs when the belt is not centered. The splice was not changed because of any damage (Tr. 347-348).

Mr. Sluss further explained that a "walking belt" or a belt running "a little side-to-side" could be caused by a roller "build up or a crooked splice", and that a misaligned belt would possibly rub the hangers if it were not centered. If he had observed the belt rubbing on hangers, he would have noted it, he would have shut the belt off, and straightened the roller and trained it. He did not believe the cited belt conditions were abated when he arrived at work on April 6th, but the conditions were corrected before the inspectors arrived (Tr. 357).

Mr. Sluss stated that a misaligned belt could destroy a belt and result in down time, and that he was concerned about safety as chairman of the mine safety committee. He stated that he was on the section with the inspectors on Monday, April 5th, and did not believe there was any difference in the belt conditions on that day and the next day. He stated that his Sunday crew on April 4th, applied eight tons of rock dust to all of the belts (Tr. 362).

With regard to the cited float coal dust condition, Mr. Sluss confirmed that he observed float coal dust at the baffle or stopping and that he dragged or blew off "a trace of black coal dust or what I call coal fines" (Tr. 362). He observed no float coal dust at the other locations noted in the citation because he was only at the area between belt breaks 77 to 81, on the day he was with the inspectors (Tr. 363).

Dave Barrett, roof bolter for eleven years, stated that he was with Mr. Sluss observing the belt on April 6th, and confirmed that they installed four bottom belt rollers, and the belt was running aligned and not rubbing on any hangers. He stated that the rock dust "looked good", and that when he was there the next day on April 7th, he observed the No. 3 belt from the drive to the tail piece and that "it still looked good like it did on the 6th" (Tr. 369-370).

On cross-examination, Mr. Barrett stated that the belt was misaligned on April 6th, when the additional rollers were added at breaks 81 to 84, the areas cited by the inspector. He explained that the rollers were added to provide more belt support, but that the belt was not rubbing. He stated that the belt was not "especially" off-centered before the rollers were added (Tr. 371).

Mr. Barrett confirmed that he was deposed on February 24, 2012, and stated that the belt "was a little off center" but was not rubbing on the hangers. He further stated he "probably" looked at the belt splice on April 6th and that one splice was different from the others and that "it was causing the belt to ride a little, so I think we had to make that splice that night" (Tr. 373).

Mark Van Dyke, Respondent's evening shift foreman from 3:00 p.m. to 1:30 a.m., has been employed with the Respondent for twenty years, and he confirmed that when he arrived at the mine on April 5, 2010, the citations had already been issued. He identified Respondent's Exhibit R-3, as work orders he issued for work to be performed on the owl shift which started that day. The work order was for dusting the No.3 belt to abate the violation (TR 379-380).

Mr. Van Dyke stated that he observed parts of the belt when he arrived at work, but not the full belt. He confirmed that at the area where the baffles had been he observed "some float

dust, but did not believe it warranted a violation because "it really wasn't that much, but there was some, there's no definition, and it's just a judgment call on the float dust both ways I guess" (Tr. 380). Mr. Van Dyke confirmed that he looked at and rode the belt the next day on April 6th, from the tail piece to the head roller, otherwise known as "the boom" at break #34. He stated the belt "looked real good" and the alignment "was fine" when he checked it, and the orders had been issued prior to his arrival at that time. He confirmed the day-shift crew was in the process of bringing in dust and dusting, when he arrived there, and his evening shift finished the dusting and he "guessed" that inspector Hall was called to come back to abate the orders, and the belt was down during this time but was turned on when he came back (Tr. 381-382).

He stated that he and inspector Hall traveled the belt from the head roller to the tail roller after he came back to abate, and he agreed that some of the belt rollers were adjusted between breaks 34 to 80, "but not very many" because the belt had been off and it was dried out and had an "extreme amount of dust on it from the dusting", and it took a few minutes to clear it off. He explained that the belt usually has water at all times to keep float coal down and it runs differently when it is wet and needed to be cleared off just to run properly. He confirmed that he and the inspector rode half of the belt but mostly walked it (Tr. 383).

On cross examination, Mr. Van Dyke stated that when he observed the belt on April 5th, after the citations were issued it "may have been" misaligned and rubbing in a few places, and commented "I really don't remember exactly," and "it probably was" (Tr. 383). He confirmed that when he was deposed on February 23, he stated that the belt was misaligned or rubbing "in a few places" (Tr. 384). He did not ride or walk the No. 3 belt tail piece to the drive on the evening shift of April 5th, but did ride the complete belt the next shift on April 6th, when Jeff Cantrell asked him to check it, but did not walk it. He checked the off-side of the belt from his ride, and that it was possible that his vision could be blocked in some places because of the way the belt hangs. He could see over the top of the belt, but not under it, and did not get off the ride at any time to look at the off side (Tr. 385-386).

Mr. Van Dyke stated that the rock dusting on April 6th, "looked good and was white", and some training rollers were installed on April 7th, after the 104(b) orders were issued, but "not necessarily" because the belt was misaligned, and that it may have been "a preventive thing". He further stated the belt was running when he arrived and had no way of knowing if it was misaligned. However, he stated that "in a way it was, we had trouble with it, or we have had a violation, and was going to make sure that we didn't have any more trouble". He could not recall where the rollers were installed (Tr. 387-388).

Mr. Van Dyke recalled his deposition when he stated the belt was misaligned when he observed it on April 7th, and that it was off for several hours and had dried off (Tr. 389). The rock dusting to abate the order dried out the belt and contributed to the belt rubbing when the inspectors returned (Tr. 389,392).

Jeffrey Cantrell, Respondent's general mine foreman for eight years and a forty-two year mine employee, referred to a mine map and explained the extent of the No. 3 belt line and the relevant belt locations (Ex. R-5 and R-6; Tr. 395-398). He further described breaks and headings, and stated that the distance from the belt drive to the tail piece was 2,400 feet, and that the distance from the belt drive to the boom was an additional 2,400 feet, for a total belt distance of 4,800 feet, with the belt drive at the mid-point (Tr. 399-400).

Mr. Cantrell stated that as he and the inspectors were walking outby the face they stopped at a baffle where there was a smell of wood, and they observed that the belt was rubbing a baffle. One baffle was between the 77-78 break and one at the 76-77 break. The baffle was constructed of cinder block, plaster, plaster coated wood frame, and flame-resistant belt. He knocked out the baffle with a sledge hammer and the citation for that condition was abated. They then went to the mantrip and drove the haul road to the surface. He stated that after stopping at the baffle, the inspectors did not walk all of the way to the tailpiece, but did not know whether they went to the drive (Tr. 403-405).

Mr. Cantrell did not believe the float dust citation should have been issued because it was not at the cited location but "probably float dust at the baffle". He could not recall seeing any there because the belt person may have cleaned and dusted as an "ongoing thing". He confirmed that he observed no belt rubbing on hangers and did not believe that it was reasonably likely that any injury would occur because in his 32 years in the mines he has observed hangers cut in two or other structural damage but never considered it was a fire hazard. He agreed that such a condition could damage a belt or belt structure, resulting in metal to metal sparks, but that a belt rubbing a hangar would not result in heat or sparking (Tr. 406-407).

Mr. Cantrell stated that the belt was aligned on April 5th, prior to the 6:00 p.m. abatement time, and that the dust citation that needed to be terminated at 9:00 am., April 6th, was dusted on Sunday by the hoot owl shift from the tail piece to the drive, and he described the work orders for this work, and confirmed that he traveled the areas on the day shift on April 6th, and the area "looked good" (Tr. 409-411).

Mr. Cantrell stated that when he observed the belt on April 6th, he believed that everything had been done to terminate the citations and expected the inspectors to return to abate the citations, but they did not return that day (Tr. 412). He explained the work that was done on the evening of April 6th, including installing belt hangers to prepare for belt movements. He also ordered a splice to be made for the no. 3 belt to make it compatible with all the other splices and not because of any belt misalignment or belt rubbing. He confirmed that all of the work was done to address the citations, as well as normal maintenance work, and that all of the existing 6 belts were treated the same way (Tr. 413-414).

Mr. Cantrell stated that he returned to his normal shift on April 7th, at 5:30 a.m., and that the inspectors were there dressed and ready to go underground. He had earlier spoken to Dave Barrett and sent him to check the areas in advance of the inspection because they came to check it and he wanted to insure that the conditions had been taken care of, and Mr. Barrett informed

him that "it looked good" (Tr. 415). Mr. Cantrell stated that inspectors went underground ahead of him because he was not dressed and that he sent one of his field bosses, Jeff Messer, to go with the inspectors. Mr. Cantrell then dressed and caught up with the inspectors in 30 or 40 minutes and they returned to the previously cited areas to abate the citations, namely the area of the belt rubbing, and the dusting citation (Tr. 416).

Mr. Cantrell stated that after catching up with the inspectors, Inspector Robinette was going down the belt and inspector Hall was near break 78, where the baffle that was removed was initially located, and that he asked him for the location of the belt rubbing citation. Mr. Cantrell stated he informed Mr. Hall that "you done passed it up about seven breaks", at break 80. Mr. Cantrell stated that he realized that the cited belt had been lowered after the citation was issued in order to level it and that Inspector Hall may not have realized where he was at, and stated "Okay", and they then proceeded to walk to the number 3 belt drive and when they arrived he was issued a closure order on the belt by inspector Robinette (Tr. 417).

Mr. Cantrell reiterated that when he met up with the inspectors, they had already walked past the section where they had issued the citations, and that Inspector Hall had asked him for the location of the citation that he had issued two days earlier concerning the rubbing belt. Mr. Cantrell concluded that Inspector Hall walked by the belt and it looked okay to him, "because if it was rubbing, he would have knowed it to me". Mr. Cantrell stated after informing Inspector Hall that he had passed the section where the citations had been written, Mr. Hall did not turn around and walk back (Tr. 418).

Mr. Cantrell stated that he was not informed that an order was going to be issued before Inspector Robinette handed it to him and commented "You didn't do anything to your belts". Mr. Cantrell responded "Bull Crap. We did a lot of work to the belt". He then shut the belt down and production ceased, and he informed his boss that an order was issued on the belt. He denied that he informed the inspector that he had not looked at the belts, or that he merely relied on what people had told him what had been done. Mr. Cantrell stated that he looked at the belt several times but not on April 7th (Tr. 420).

On cross-examination, Mr. Cantrell stated that walking with inspectors is part of his job as a mine foreman and that he takes the termination of citations seriously. He confirmed that on April 5th, when the inspectors first arrived, he did not travel underground with them because he was already at the face and did not know they were there until they arrived at the face. He stated that when the inspectors returned on April 7th, at 5:30 a.m., to terminate two citations, he had not been underground since the day shift of April 6th, which ended at 4:00 p.m., or the evening and owl shifts that day or on April 7th , before the inspectors arrived.

Mr. Cantrell stated that the mine was rock dusted on Sunday, April 4th, and that it was still there on April 5th, and that what the inspectors claim they observed was "their opinion". He also believed that Mr. Van Dyke's testimony that the belt did need dusting when he worked the evening shift on April 5th was "his opinion". Mr. Cantrell stated that he had no notes to corroborate his detailed testimony where he walked underground on April 5th and 7th, "Because

all my notes are gone", and that his testimony of where he walked two years ago is based on his memory (Tr. 428).

Mr. Cantrell confirmed that he did not tell the inspectors that he had not been underground on the morning of April 7th, when the orders were issued, or since the day shift on the day before, and did not tell them about all of the abatement efforts that were made at the time the order was issued. He also confirmed that he did not tell them about the belt splice that was made, the four additional rollers that were added to the belt, or that two top cradles had been removed. He explained that he was under an order and saw no point in arguing with the inspectors. He confirmed that he did not ask for an extension and believed that they should have asked him before issuing an order, and that he said nothing further (Tr. 436-441).

Mr. Cantrell stated that the inspectors were at the mine initially on April 5th, to follow-up on a prior citation issued on the mine belt and ventilation system. They checked the baffles that day and extended the citation abatement time and did not issue an order (Tr. 442). Mr. Cantrell stated that the belt air citation was corrected the same day by the inspectors, and he believed the inspectors issued the order as an excuse to shut the belt down to address the ventilation problem (Tr. 446). He agreed and admitted that float coal dust was at the baffle on April 5th, and that it would probably support a citation (Tr. 447).

Mr. Cantrell explained the process for making a flexco metal splice, but did not believe the splice would necessarily "be rubbing a belt hanger if the belt was rubbing the hanger. He confirmed that he often took the temperature of belt rollers or hangers, which ranged from 70 to 80 degrees at normal belt speed, and from 140 to 150 degrees with speed reducers and bearings. He did not believe that a "hot" roller or hanger would pose an "S&S" hazard, but a roller that breaks down resulting in metal-to-metal sparks that causes it to glow would be (Tr. 456-460).

Mr. Cantrell stated that when he observed the belt on the evening of April 5th, as stated in his deposition of February 24, he agreed that it needed some training or adjustment but the belt dusting was "Okay". He confirmed that the belt always needs to be trained to keep it in alignment, and that on April 5th, it was "walking from side-to-side" but was not rubbing. He considered this to be routine belt maintenance (Tr. 462-467).

Findings and Conclusions

The Section 104(a) Citations

The Respondent argues that Citation No. 8166773 should not have been issued and that the Secretary has not established a violation of Section 75.400, by a preponderance of the credible evidence. In support of its argument, the Respondent asserts that the evidence establishes that on April 4th, before the citation was issued, the #3 belt was rock dusted with a machine while the belt was not operating, and that when the inspectors arrived at the mine on

April 5th, only two to three cuts had been taken, and that the amount of coal could not account for the amount of float coal dust the inspectors claim they saw along the #3 belt.

The Respondent further disputes any suggestions that the cited float coal dust accumulations existed along the entire length of the #3 belt from the belt drive to the belt tailpiece based on the testimony of Mr. Tilley who was with the inspectors during their inspection on the section.

Mr. Tilley testified that although he was with the inspectors on April 5th, for an hour and a half, he was not with them while they were on the section the entire time and could not confirm whether they walked to the belt tailpiece and the other end of the belt after he left them (Tr. 325, 328-329).

The Respondent relies on the testimony of Mr. Cantrell and Mr. Sluss who testified that at the time the inspectors viewed the belts at the baffle area, rock dust was not needed. Respondent cites the testimony of Mr. Cantrell that the citation should not have been issued on April 5th, based on his visit and review of the area after the citation was issued and found the area "did not look like it needed to be rock dusted" (Tr. 406, 409).

The Respondent also cites the testimony of Mr. Goode who states that when he "made the belt" on the evening of April 5th, he believed the rock dust was appropriate. Also cited is the testimony of Mr. Van Dyke, who confirmed that while the area around the baffles might have needed some rock dusting, the condition was not so severe to warrant a citation.

I take note of the fact that when Mr. Van Dyke arrived at the evening shift on April 5th, the citation had already been issued (Tr. 379-380). He testified that he observed some float coal dust, but did not believe that a violation was warranted because "it really wasn't that much, but there was some, there's no definition, and it's just a judgement call on the float dust both ways I guess (Tr. 380).

Mr. Sluss testified that he was with the inspectors on April 5th, and that he observed float coal dust that day at the baffles and that he "dragged or blew it off and that it was "a trace of black coal dust or what I call the coal fines" (Tr. 362). He did not see any coal dust at the other cited locations because that day he was only present at the baffle between breaks 77 to 81 (Tr. 361-361). Mr. Sluss further testified that when he returned the next day, April 6th, he observed rock dust that was "grayish and blackish" in color, that he claimed was the "usual colors of the dust used (Tr. 338).

I take note of the fact that when Mr. Cantrell was asked by the Court to further clarify his earlier testimony that float coal dust existed "to some extent", he confirmed that he was referring to the existence of float coal dust at the baffle area, and admitted that the condition existed at that location that was not taken care of and that it would probably support the citation (Tr. 447).

After careful consideration of the Respondent's arguments and reliance on the testimony of its witnesses regarding the existence of the cited coal dust, I reject the Respondent's assertion that it establishes that no accumulations of float coal dust existed at the time the citation was issued on April 5, 2010, and that the alleged violation should be vacated.

I conclude and find that the credible testimony of Inspector Hall, including his notes made at the time of the inspection (Ex. P-6, at 6), as well as the testimony of the Respondent's witnesses, support a violation of Section 75.400 requiring accumulations of float coal dust to be cleaned up and not permitted to accumulate.

With regard to the extent of the cited float coal dust accumulations, the first sentence of the citation states that float coal dust, black in color, accumulated along the off-side and in the adjacent crosscuts along the No. 3 belt conveyor from the belt drive to the tail piece. That entire area is shown in the diagram of the belt (Ex. P-l), and the float coal dust is shaded in a gray color that gives the impression that the float coal dust was present along the entire length of the belt. The Secretary's counsel described the area in question as the travelway side of the belt, and stated that the float coal dust was at "spot locations", and that the area from crosscut 82 to the tail piece depicted in gray color also reflected float coal dust in "spot locations" (Tr. 69).

The remaining float coal dust area described in the citation, and shown on the diagram, was at the two newly constructed regulators (baffles) near belt stopping No. 82. Although the "spot locations" are not otherwise described in any detail, I find that the presence of float coal dust accumulations noted by Inspector Hall at the adjacent crosscuts, and at the baffles in the areas of Stopping 82, has been established by his credible testimony that is consistent with his notes made at the time he issued the citation on May 5, 2010 (Ex. P-6).

Based on all of the aforementioned findings and conclusions, I conclude and find that the Secretary has established a violation of the cited Section 75.400, by a preponderance of the credible evidence adduced in this case and the violation **IS AFFIRMED**. Further, based on my earlier findings and conclusions denying the Secretary's motion to amend the citation to S&S, I AFFIRM Citation No. 8166773, April 5, 2010, as a non - S&S violation of Section 75.400.

With respect to Citation No. 8166774, citing Section 75.1731(b), for failure to properly align the No. 3 belt to prevent it from rubbing against the structure or components, the Respondent argues that the citation is inaccurate. In support of its argument, the Respondent relies on the testimony of Mr. Sluss who stated that he observed the belt rubbing against two hangers on April 5th, and that Inspector Hall's contention that 12-14 were rubbing is not accurate.

The Respondent asserts that Mr. Hall relied on belt hanger marks that were the result of prior rubbing, and that this was refuted by Mr. Sluss who testified that the hangers were dull and rusty, and did not show signs of recent rubbing and were likely from the belt structure when it was in some other location.

The Respondent argues that while the two hangers may have been a technical violation, no injury could be expected to the nine people listed as affected. The Respondent asserts that the inspectors had no basis to conclude that a fire would have been reasonably likely, or whether the belt was even capable of catching the belt or float coal dust on fire. Under these circumstances, the Respondent maintains that the citation should not have been designated S&S or affecting nine people, or specially assessed.

Inspector Hall's notes state that the misaligned belt caused it to rub against 14 belt hangers that he observed. His notes reflect his belief that the rubbing created heat from friction, but only two hangers were hot to the touch, and he noted that one hanger was at cross-cut #84, and the other one was at cross-cut #81. Referring to the belt diagram, Exhibit P-l, Mr. Hall testified that he observed the 14 bottom belt hangers rubbing the belt in the general area between cross-cut #81 and #84, but he could not state the specific hanger location, and indicated they were not in a consecutive row (Tr. 94,136).

Mr. Goode testified that a properly aligned belt should run "dead center" on the belt cradle regardless of whether the belt is loaded or unloaded. He believed that a "misaligned" belt is one that is actually up on the hanger that could rub it and cause a fire (Tr. 274-275). He also believed that a belt can move back and forth without being completely misaligned and this may be corrected by "training" the belt by striking the cradles with a hammer or sledgehammer (Tr. 276).

Mr. Sluss confirmed that he was with the inspectors on April 5th, at the #3 belt baffle location and that Inspector Robinette commented that he smelled belt smoke where the belt had been rubbing on a wooden board across the baffle and that he too smelled smoke. He stated that he and Inspector Hall walked from the baffle for three or four breaks and they observed the belt rubbing on two bottom belt hangers (Tr. 332).

Mr. Sluss stated that he and Inspector Hall looked down the belt line "and you could see there was something like I think Bobby said 12 hangers that at some time or another the (sic) had rubbed them and they had cut into the hangers", but that he (Sluss) only observed two hangers that were rubbing the belt (Tr. 334-335).

Mr. Sluss testified that after returning to work the next day on April 6th, the belt "walked back and forth", but was not rubbing, and that he and Mr. Barrett performed some corrective work, and after observing the belt for two hours, it was still "walking back and forth", but was not rubbing at any place and they left the area and proceeded to the surface (Tr. 366-337). Mr. Barrett testified that the belt was misaligned on April 6th, when additional belt rollers were added to the belt at breaks 81 and 84, the areas cited by the inspector, but the belt was not rubbing (Tr. 391).

Mr. Sluss confirmed that a "walking belt" condition occurs when the belt is not centered (Tr. 347). He believed that a belt running "a little side-to-side" could be caused by a roller build up or a crooked splice, and that a misaligned belt would possibly rub the hangers if not centered

(Tr. 357). He further believed that a misaligned belt could destroy a belt and result in down time, and would be a safety concern (Tr. 360).

Mr. Van Dyke testified that when he observed the belt on April 5th, after the citation was issued, it may have been misaligned and rubbing in a few places, and while he could not exactly remember, he stated that "it was probably" misaligned. He confirmed that when he was deposed he stated that the belt was misaligned or rubbing "in a few places" (Tr. 383-384). He also recalled stating that on April 7th, when he observed the belt it was misaligned "a little" and that "we did some training" to abate the order because the belt had not been running for several hours and had dried out and had rock dust on it (Tr. 388-389).

Mr. Cantrell confirmed that when he observed the belt on the evening of April 5th, as stated when he was deposed, he agreed that it needed some training or adjustment, and that a belt always needs to be trained to keep it in alignment, and that on April 5th, the belt was "walking from side-to-side" but was not rubbing, and he considered this to be routine belt maintenance (Tr. 462-467).

I conclude and find that the Respondent's reliance on the aforementioned testimony of its witnesses speaks more to the hazards associated with a misaligned belt rubbing a belt hanger, and is relevant to the S&S gravity determinations made by Inspector Hall, rather than the initial issue concerning whether or not the cited belt was properly aligned to prevent the moving belt from rubbing against the belt structure or components as requested by Section 75.1731(b).

I conclude and find that the credible testimony of the inspectors, and in particular Inspector Hall's testimony that is consistent with his notes made on April 5, 2010, (Ex. P-6), and in part by the Respondent's witnesses, establishes that the No. 3 belt was not properly aligned to prevent the belt from rubbing against at least two hot belt hangers at cross-cuts #81 and #84, as well as other rollers that he observed. Accordingly, I conclude and find that the Secretary has established a violation of Section 75.1731(b), by a preponderance of the evidence adduced in this case, and the violation **IS AFFIRMED**.

Significant and Substantial Issues

A significant and substantial (S&S) violation is described in Section 104(d)(l) 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." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, Buck Creek Coal, Inc. v FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary,* 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g *Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *US. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *US. Steel Mining Co.,* Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(l), 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); *US. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc*., 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial 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).

In support of the inspector's S&S determination for Citation No. 8166774, the Secretary cites several ALJ decisions concluding that a belt rubbing the structure or component parts produces frictional heat and constitutes a potential hazardous ignition source. Citing the S&S criteria in Cement Div., Nat'l Gypsum Co. and Mathies Coal Co., the Secretary argues that the failure by the Respondent to ensure that the belt was in proper alignment and not rubbing on the belt structure or components contributed to a discrete safety hazard of ignition on the belt or a belt fire, given the presence of an ignition source. The asserted heat source was the misaligned belt rubbing bottom roller hangers, creating frictional heating and causing two of the hangers to be hot to the touch in the same area that Inspector Hall cited float coal dust in Citation No. 8166773.

The Secretary asserts that it is not necessary to prove that a belt fire or ignition was reasonably likely to occur at the mine on the day the citation was issued, and that the fact that Inspector Hall could not testify as to how long it would take for the two hot rollers he observed would get hot enough to ignite the belt or the nearby float coal dust, as claimed by the

Respondent, does not affect the S&S finding by Inspector Hall. The Secretary further states that the fact that the inspector did not measure exact temperature of the hot rollers does not affect his S&S finding since the belt examiner Goode testified that in the eight to ten years of doing belt examinations, he admitted that he has never taken the temperature of a belt at the mine (Tr. 293-294).

Incorporating the arguments associated with dust Citation No. 8166773, the Secretary argues that the inspectors believed it was reasonably likely that the hazard contributed to-a belt fire or ignition on the belt-would result in an injury to miners because the rubbing of the 14 bottom hangers constituted a frictional source of heat which would be reasonably likely to result in injury if those conditions continued unabated. Assuming normal continued mining operations, the Secretary concludes that the belt continuing to rub the bottom hangers would have resulted in increased friction and caused the temperature at those points of contact to increase over time and were likely to cause a fire or ignition given the quantity and extent of the belt float coal dust.

The Secretary asserts that the inspectors confirmed that the entry housing the No. 3 belt line shared the same air as the secondary escapeway which ran parallel to the belt line in the next entry. The Secretary states that this added an additional concern because a belt fire would affect the secondary escapeway which was the normal and quickest route of escape for miners working inby because it was the main travelway that could be traveled by mantrip (Tr. 90, 213, 252).

The Secretary further cites Inspector Robinette's testimony that on April 5th, the mine was using exhaust ventilation, which pulls the air from the belt line toward the working section where nine miners work, and if an ignition occurred on the No. 3 belt line, the smoke from the ignition would go to the working section where the miners were working. The last concern advanced by the Secretary adding to the risk of ignition was the fact that the mine was on a 15-day 103(I) spot inspection on April 5th, for liberating methane in excess of 200,000 cubic feet in a 24-hour period. Under all of these circumstances, the Secretary concludes that the evidence establishes that a confluence of factors was present on April 5th that made a fire, ignition, or explosion reasonably likely and supports the S&S determination by Inspector Hall.

With regard to the last prong of Mathies, the Secretary states that the evidence establishes that the injury caused by a belt fire or ignition would be of a reasonably serious nature, including death, in that the miners working inby would be expected to suffer smoke inhalation or death if they were unable to escape the mine in time. Given that nine miners were working inby the No. 3 belt line at the time of citation, it is likely that as many as nine miners would suffer smoke inhalation or be unable to escape the mine if overcome with smoke during a belt fire or ignition .

Inspector Hall described the discreet safety hazard as the “coal dust or the float dust” catching fire from an ignition heat source, and he was concerned with the possibility that the belt, coal dust, or the mine would catch fire (Tr. 144-145).

Inspector Hall identified the ignition heat sources as the belt hangers that he stated were rubbing the belt, and in particular two of the hangers that were “hot to the touch”, and “the

wood" (Tr. 144). His "wood" reference related to a subsequent citation, that is not part of the case, that he issued because the misaligned belt was rubbing two ventilation baffles that he believed contributed to a frictional heating hazard (Ex. P-12).

I find that the affirmance of the violation of mandatory safety standard 30 C.F.R. § 75.1731 (b), establishes the first Mathies prong. With respect to the second prong requiring a discreet safety hazard, Inspector Hall confirmed that he based his S&S finding on the fact that the misaligned belt was causing the belt to rub against the cited belt hangers, a condition that he believed resulted in a frictional heat source from at least two rubbing belt hangers that could ignite the coal dust or float coal dust and possibly catch the belt on fire. I agree that a misaligned belt rubbing against belt hangers in the presence of a heat source presents a potential discreet safety hazard of a belt ignition fire. Accordingly, I conclude and find that the second Mathies prong has been established.

The third and fourth Mathies prongs require a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, and a reasonable likelihood that the injury will be of a reasonably serious nature. The focus of the inspector's concern was the possibility of a belt fire, and in the event it occurred, the possibility that the miners would be at risk due to the exposure of smoke, fire, heat, and air contamination that would impede their escape from the mine.

The Secretary's reliance on the wooden baffle materials as a source of ignition contributing to the inspector's S&S finding is not well taken. The evidence establishes that those materials were removed by Mr. Cantrell and the Secretary's counsel confirmed that the baffles were "taken down immediately, so that heat source was taken down and dispensed with, which just left the belt rubbing, and they did not feel that itself was an imminent danger" (Tr. 23-24).

I take note of the fact that when the inspectors initially observed the cited float coal conditions and the belt rubbing the hangers, they took no action to shut the belt down and it continued to run coal. They continued their inspection for several hours before returning to the area later in the afternoon when then they issued the citation (Tr. 21-22).

The Secretary's explanation for not stopping the belt was based on the inspectors belief that the conditions did not immediately pose a fire danger, and that any S&S assessment would have to be considered in the context of continued mining operations (Tr. 23). I find the explanation to be contradictory in that normal mining operations were allowed to continue in spite of their observations that the belt was creating friction and heat by rubbing several belt hangers, two of which were hot to the touch, in an area of accumulated float coal dust.

Inspector Robinette confirmed that his opinion that the citation was S&S was based on the fact that two of the 14 belt hangers were hot to the touch and the rest were warm. When asked to explain the belt catching fire, he responded "I didn't say the belt would catch on fire. Float coal dust was my issue and my big concern". When asked to further explain what would

catch the float dust on fire, he responded,"[s]uspended float coal dust" (Tr. 255). He further stated that if a piece of rock dust should fall, with suspended float coal dust in the area, "there is a likelihood of a fire or explosion" (Tr. 255-256). I find Mr. Robinette's testimony regarding float coal in suspension is unsupported speculation and not credible, given the fact that he and Inspector Hall observed no float coal in suspension.

I further find Inspector Robinette's testimony that in the absence of any falling rock dust "I guess something else would have to suspend float coal dust, maybe some walking or traveling the area" (Tr. 256), is likewise speculative. Indeed, he could not recall if he observed any foot prints on the float coal dust (Tr. 205). In this regard, Inspector Hall observed no foot prints on the ground at the offside walkway, and confirmed that no one would probably be there (Tr. 73-75).

Mr. Robinette conceded that none of the citations, orders, or his inspection and CLR conference notes mention the possibility of falling rock dust or suspended float coal dust (Tr. 256-257). He further confirmed the absence of any evidence of coal spillage, or accumulations, or the backup of coal in the belt rollers, or any float coal accumulations turning in the rollers (Tr. 257-258).

Inspector Robinette believed nine miners were exposed to hazards, and there were two escapeways provided, namely the intake air course escapeway and the secondary escapeway. He confirmed that the normal and quickest escape route would have been the secondary escapeway to the belt air course. However, in the event the course was contaminated with smoke, the miners would be exposed to smoke in the secondary escapeway (Tr. 212-213).

I take note of the fact that the inspectors went to the mine on April 5, 2010, to follow up on a previously issued citation. Inspector Robinette's notes reflect that he and Mr. Hall were there to terminate a ventilation violation due that day, and they were at the face working on that problem before discovering the cited conditions in this case on their way to the surface.

Inspector Robinette explained that the mine had an exhaust fan that pulled air out of the return air course and up the intake air course to the belt air course. He stated the Respondent was in violation because it could not prevent the air from the belt air course from entering the working section, and if the belt air course was contaminated with smoke it could end up on the working section (Tr. 214). Except for the brief testimony of the inspectors regarding the escapeways, I find absolutely no references in their notes or the CLR conference reflecting any potential escapeway hazards associated with the cited conditions in this case.

With respect to the ventilation violation alluded to by Inspector Robinette, no further relevant testimony or evidence was forthcoming with respect to that matter. However, I take note of the fact that Inspector Hall's notes of April 5, 2010, state in part that "[t]he operator has developed a plan to change exhausting fan system to a blowing fan system. The belt air entering the 001 mm has been significantly reduced. More time is granted for further efforts to eliminate the belt air from entering the mm..." (Ex. P-6, at 8). It would appear to me that the violation and

problem that concerned Mr. Robinette was being addressed on April 5, 2010, and presented no hazards requiring immediate attention.

Inspector Hall confirmed that his methane readings did not detect the presence of any methane, and he observed no float coal dust in suspension, or any exposed wires (Tr. 130,144). He confirmed that his notes do not reflect the presence of any smoke, and I find that the only mentioned an "odor of smoldering wood, and not smoke" (Tr. 188-189). He confirmed that the float coal dust on the mine floor was "probably on the rib from three to four feet" from the two hot hangers, and "occasionally on the structure" (Tr. 151-152).

Inspector Hall confirmed that the belt was fire resistant and fire retardant, and that it is designed to extinguish a belt fire at a certain temperature after a direct flame is applied, but he did not know the temperature required to start a fire (Tr. 141-142). However, he agreed that it would take more than a temperature of 140 degrees Fahrenheit to ignite a belt fire, and confirmed that he did not take the temperature of any belt hangers (Tr. 140-141).

Mine Foreman Sluss testified credibly that he measured the two belt hangers that he and Inspector Hall observed were rubbing the belt, and they measured 74 and 75 degrees on his digital thermometer (Tr. 332). Mr. Sluss confirmed that from that vantage point he and Inspector Hall looked down the moving belt line and that Mr. Hall commented that "at some time or another the belt had rubbed them and cut into the hangers" (Tr. 334).

Inspector Hall testified that the belt hangers were located at different places and not consecutively in a row. When asked it the belt was actively rubbing any of the hangers as he observed it, he replied, "[y]es". When asked how many were rubbing, he stated "fourteen". When asked if all 14 hangers were touching the belt, he responded, "[n]o". He confirmed he saw damaged hangers and evidence they had been rubbed at some point (Tr. 139-140).

I find that Inspector Hall's testimony that he observed all 14 belt hangers being rubbed by the belt, while at the same time confirming that none of the hangers were touching the belt is inconsistent and contradictory. I find credible the testimony of mine Foreman Sluss who stated that while they were observing two of the hangers, Mr. Hall commented that the belt had rubbed the hangers "at some time or another". Based on the conflicting testimony of Inspector Hall, and the confirmation of his comments by Mr. Sluss, I conclude and find that it is just as likely as not that what Mr. Hall observed when he looked down the running belt line was evidence of past belt rubbings and not the belt actually and actively rubbing the remaining belt hangers.

In addition to all of the aforementioned circumstances, the credible evidence in this case establishes the following prevailing conditions; (1) the absence of any methane; (2) the absence of any float coal dust in suspension; (3) no exposed electrical wires; (4) no float coal dust turning or backed up in any of the belt rollers; (5) a fire resistant and retardant belt line; and (6) the absence of any rock dust or foot prints on the float coal dust accumulations that would indicate the presence of anyone in the area.

After careful consideration of all of the arguments and evidence presented with respect to this violation, I cannot conclude that the third and fourth prongs required by the Mathies test have been established by a preponderance of the credible evidence. Based on all of the foregoing findings and conclusions, and in the context of continued mining operations, I conclude and find it unlikely and improbable that the two belt hangers observed by the inspector, as well as the remaining hangers that evidenced past rubbing by the belt were viable heat sources that would contribute to, or result in a belt fire, or an injury of a reasonably serious nature. Further, I find no credible evidence of any confluence of factors could have come together to produce any ignition, combustion, fire, or other injury producing hazards described by the inspector. Accordingly, his significant and substantial (S&S) violation finding **IS MODIFIED** to non-significant and substantial (non - S&S).

The Section 104(b) Orders

In order to establish the validity of a Section 104(b) Order, the Secretary has the burden of proving by a preponderance of the evidence the existence of the initial underlying citation, including a reasonable time for abatement; the expiration of the abatement time; the failure to abate the cited violative conditions; and that the abatement time should not be extended. Clinchfield Coal Co. v. UMWA, 11 FMSHRC 2120,2135 (November, 1989).

The Respondent may rebut a prima facie case of validity by the Secretary by establishing that the alleged violative conditions described in the citation were abated within the abatement time fixed in the citation, but had recurred. Mid-Continent Resources. Inc., 11 FMSHRC 505, 509 (April, 1989).

The Secretary's position is that in order to terminate a Section 104(b) Order, the conditions cited in the underlying citation must be totally corrected and abated. However, if an operator has made an effort to abate the conditions, an inspector has the discretion to extend the time for abatement (Tr. 481-482). Inspector Hall confirmed his understanding that a Section 104(b) order should be issued when an operator fails to abate or make any kind of effort to totally abate the violation (Tr. 128).

The Respondent's contests of the Section 104(b) Orders are based on its assertion that the violations alleged in the underlying citations did not exist, had been abated and that the orders were issued for different conditions than those initially cited. The Respondent does not contend that the initial abatement times were unreasonable, that the cited conditions recurred, or that the inspector should have extended the time for the abatements.

Based on my findings and conclusions affirming the cited violations, including the existence of the cited conditions on April 5th, when the inspectors observed the conditions and issued the citations, I reject the Respondent's assertion that Mr. Cantrell's visit underground that same day after the inspectors left, and his belief that the belt appeared properly rock dusted and

aligned and was not rubbing, is uncontradicted evidence that the conditions were abated at that point in time. The Respondent points out that the inspectors did not return to the mine until April 7th, two days after the citations were issued, and therefore did not, and could not, testify that the Respondent failed to correct the conditions prior to the termination times.

Relying on the testimony of its witnesses, and including the contemporaneous work orders documenting what the Respondent believes were significant efforts to insure the timely abatement of the cited conditions, the Respondent argues that during the two days prior to the return of the inspectors, steps were taken to dust the belt and to make sure the belt ran properly trained.

The Respondent states that tons of dust was applied in a careful manner, including the offside, the belt was lowered, trained, watched, inspected, dusted again, and observed by numerous employees. Sluss came to work on his normal day off to see that the cited conditions did not exist. Barrett worked on the belt. Cantrell observed the belt. Amburgy and the owl shift worked on the belt both nights. Goode inspected the belts and changed out top cradles, and a belt splice was replaced. The Respondent concludes that all of these efforts contradicts the vague testimony of the inspector about the condition of the belt.

With regard to Order No. 8166777, the Respondent disputes the credibility of the inspectors who testified that when they returned on April 7th, the belt alignment and rubbing conditions appeared to be the same as they appeared on April 5th, and that no effort was made to correct the conditions. The Respondent asserts that the inspectors made no effort to show that on April 7th, the belt was actually rubbing at the same locations they claimed was rubbing on April 5th. The Respondent states that Inspector Hall was confused about the location of the belt that prompted the issuance of the underlying citation.

In support of its assertion that Inspector Hall was confused about the belt rubbing location, the Respondent cites Mr. Cantrell's testimony that when the inspectors returned on April 7th, to abate the citation, Inspector Hall asked him for the location of the area where the belt had been raised and then lowered, and that he informed Mr. Hall that he had passed by the area by several breaks while walking by the area (Tr. 416-417).

The Respondent further argues that Inspector Hall's confusion continued when he abated the order and identified the belt location where the belt corrections (realignment, adjustments to several bottom belt rollers) were made in the area from crosscuts #34 to #80, and not the areas between breaks 81-84, as described in his underlying citation.

The Secretary relies on the testimony of the inspectors that the originally cited belt misalignment and rubbing conditions located between crosscuts 81 and 84, were not abated on April 7th, and still existed at the same location that was cited on April 5th, and were not a recurrence (Tr. 108-109; 221). With respect to Inspector Hall's “confusion” regarding the area where the original belt condition was cited, the Secretary asserts that Mr. Hall asked Mr. Cantrell

about the location of the area where the belt had been previously raised up, but was not confused as to the location of the originally cited area (Tr. 172).

The Secretary states that even if Inspector Hall was confused underground, there is no suggestion that Inspector Robinette was similarly confused, and that they both walked down the No. 3 belt from the tailpiece to the drive on April 7th (Tr. 172, 219, 417). The Secretary further states that the inspector's contemporaneous notes, and Mr. Robinette's notes from the CLR conference, written approximately three weeks after the order was issued, are consistent with their testimony.

With regard to Order No. 8166778, the Respondent argues that it undertook major efforts to dust the belt, and that tons of dust were applied in a careful manner, including the off-side, and was dusted again and observed by its employees. The Respondent further cites the rock dusting work orders and instruction to the hoot owl crew and the testimony of the crew who dusted the belt on April 6th and 7th (Ex. R-l).

I take note of an April 6th work order notation that states "Dust #3 belt from tail piece to drive, make sure you get the offside good. 8 pallets dust". An April 7th notation states, "[r]e-dust #3 belt where you dusted last night. It looks good but inspectors didn't come and check it".

The Secretary argues that when the inspectors returned to abate the order on April 7th, they found the originally cited condition had not been abated. Instead, Inspector Hall observed float dust accumulations along the offside of the belt and in the crosscuts adjacent to the offside, one of the same areas he previously cited (Tr. 119-120, 161, 225).

The Secretary cites the testimony of Inspector Robinette that based on his 40 years of mining experience, the conditions cited on April 5th, could not have recurred to the same extent as what he saw on April 7th, if the condition had been fully abated before they returned because not enough time had passed to allow recurrence to worsen (Tr. 225). Further, the Secretary states that it is undisputed that the inspectors walked the length of the No. 3 belt from the drive to the tailpiece together on April 7th (Tr. 172, 219), and that this was confirmed by Mr. Cantrell (Tr. 417).

Inspector Hall testified that he was called by the Respondent on April 7th, to return to the mine to abate the citations and that he arrived at approximately 6:05 p.m. He stated that the work was still ongoing to correct one or both of the orders and he was informed that "a few more minutes" was needed to complete the abatements, and that he terminated both orders at approximately 10:20 to 10:30 p.m. (Tr. 123-124).

The abatement time for Citation No.8166773, was April 6, 2010, at 9:00 a.m. However, the inspector did not return until the April 7th day shift at 5:30 a.m. Inspector Hall's notes reflect that "no apparent effort was made to eliminate the accumulations of float coal dust along the No. 3 belt along the offside and adjacent x-cuts" (Ex. P-8, at 8). Inspector Robinette's day shift notes

of April 7th, state "traveled to secondary escapeway to #3 belt T.P., walked belt air course. Float coal dust present in x cuts and on ribs, B order issued, traveled to surface" (Ex. P-9, at 8).

Inspector Hall testified that after he issued the Section 104(b) order on April 7th, Mine Superintendent Darrell Holbrook telephoned his office and stated that the mine was ready for inspection at 6:00 p.m. (Tr. 123). Mr. Hall's notes reflect that he arrived at the mine at 6:05 p.m., and Mr. Holbrook informed him that the cited conditions would be ready for examination at 6:00 p.m. (Ex. P-10, at 2).

Inspector Hall testified that Mr. Holbrook informed him that he needed "a few more minutes to complete it", and Mr. Hall concluded that work was still taking place to abate one or both of the orders "that he needed more time on", and that he subsequently terminated the order at 10:20 p.m. (Tr. 124). (Note: Mr. Holbrook did not testify in this case.)

Inspector Hall testified that on April 7th, he walked the belt from the tail piece to the drive and that the float coal dust accumulations had not been totally cleaned up (Tr. 106). When asked if he observed any newly applied rock dust, Mr. Hall responded "The right - the walking side, they could have -1 don't know. They may have improved, but it was a question as well" (Tr. 120).

Inspector Robinette testified "there appeared to be little effort to take care of the coal dust underneath the belt, on the offside of the belt, as well as in the adjacent crosscuts". He further believed if any rock dust had been applied it was in the travelway, but "there were still places deserved more rock dust" (Tr. 225).

Inspector Robinette further confirmed that some rock dust could have been in the travelway where the belt examiner travels in crosscuts connecting the belt. When asked if the travelway was completely covered with coal dust, Mr. Robinette responded "no, sir. The travelway was not the main issue. It was underneath the belt, the offside of the belt and adjacent crosscuts" (Tr. 261).

The April 5th citation issued by Inspector Hall, describes float coal accumulations at three locations, namely (1) the offside on an adjacent crosscuts from the belt drive to the tailpiece; (2) spot locations on the travelway at crosscut #82 extending to the tailpiece; and (3) between two newly constructed regulators near stopping #82. Inspector Hall's notes reflect that the Order was based on his observations that "no apparent effort" was made to clean up the float coal accumulations along the belt offside and adjacent crosscuts, one of the three locations described in the citation. There are no notations regarding the other two locations.

.

I disagree with Inspector Hall's conclusion that "no apparent effort" was made by the Respondent to address the cited float coal accumulations. He testified that the walkway side of the belt could have been rock dusted and may have improved the conditions, and Mr. Robinette testified that the travelway was not completely covered with coal dust and that some rock dust may have been applied at that location.

I find that the credible testimony of the Respondent's witnesses Amburgy, Sluss, and Van Dyke concerning the rock dusting work they performed on April 5th- 6th, reflects some effort by the Respondent on those two days to correct and abate the cited conditions. However, I find no evidence that any of these individuals observed the conditions when the inspectors returned on April 7th to abate the conditions, and I am not convinced that the rock dusting work that they performed completely or totally abated the initial conditions cited by the inspectors prior to their return on April 7th.

Mr. Cantrell testified that he was underground at the face when the inspectors arrived on April 5th, and that when they arrived on April 7th, he had not previously been underground since the day shift on April 6th (Tr. 423-425). He confirmed that he was at the mine when the inspectors returned on April 7th, but since he was not dressed, he sent Mr. Barrett and field boss Jeff Messer to the section to meet the inspectors. He confirmed that when he traveled to the section to meet the inspectors, they had already passed the area where the citations were issued (Tr. 414-418). (Mr. Messer did not testify.)

When asked if the belt conditions on April 7th, were in the same poor conditions as the inspectors claimed they were on April 5th, Mr. Cantrell responded, "[n]o" (Tr. 420). He then stated "I went and looked at it several times. I didn't look at it on the day of the 7th, no" (Tr. 420). Although it would appear that Mr. Cantrell may have observed the underground conditions of the No. 3 belt on April 5th, when the citation was issued, based on his own testimony, he did not observe them after the day shift on April 6th, or on April 7th. Under the circumstances, I have given little persuasive weight to his conclusions that the cited float coal accumulations did not exist, or were totally abated before, or on, April 7th when the inspectors returned.

Mr. Cantrell confirmed that he understood the difference for a Section 104(b) Order, and that even though work had taken place to correct the cited float coal dust conditions, if they were not fully abated an order would be issued (Tr. 421). He further confirmed that he did not argue that more time should have been given for abatement because of his belief the citation, as well as the order, should not have been issued, and there was no point in arguing with the inspectors (Tr. 422,438).

After careful consideration of all of the testimony and evidence adduced with respect to this citation, and taking into consideration my finding that the Respondent made an effort to timely abate the cited float coal conditions, I nonetheless conclude and find that the credible testimony and observations by the inspectors with respect to those conditions, as well as the ongoing abatement work that was still taking place after Inspector Hall was summoned to the mine to abate the conditions, establishes that they were not timely and completely corrected and abated and that any extension of time was not warranted. Accordingly, the Section 104(b) Order No. 8166778, **IS AFFIRMED**.

Inspector Robinette testified that Order No. 8166777 accurately reflected his observations of the belt rubbing "at various locations" on April 7, 2010, particularly at the areas between crosscuts 84 and 82 that were warm and hot to the touch " from the day the citation was

issued" (Tr. 221). He stated that on April 7th, the belt was still misaligned at more locations, and some were still heating up. He did not believe the conditions could have reoccurred to that extent since April 5th. He could not confirm Inspector Hall's comment that "no apparent effort" was made to abate these conditions and had no knowledge whether any effort had been made in that regard (Tr. 221).

Inspector Robinette's notes for April 7th, reflect brief notations stating "Belt hangers still being rubbed by conveyor belt, order issued (B). Float coal dust present in x cuts and ribs (B) order issued. No further details regarding locations are recorded (Ex. P-9).

The Secretary's argument that Inspector Robinette's inspection and conference comments provide credible evidence confirming his observations that the cited belt conditions had not changed between April 5th and 7th, must be considered in context. I find that his notes simply confirm his testimony that he concurred with Inspector Hall's observations. I further find that Inspector Robinette's inspection and conference notes do not include any meaningful or credible explanations related to the actual conditions he observed on April 7th, including the locations where they were observed.

Inspector Robinette agreed that in the event the belt was rubbing at break #84 on April 5th, and he found it rubbing at break #81 on April 7th, it would not necessarily justify a Section 104(b) Order. He stated that it was not necessary to cite the same belt hangers because the citation related to the alignment of a "belt flight" and not the hangers. I find this contradictory and not credible.

Inspector Robinette could not confirm that the hot belt hangers on April 7th, were the same as those he observed on April 5th. He further explained that a "belt flight" consists of a tail section and a head roller drive, not any specific roller, hanger, or crosscut. Although the citation cited the location of the condition as breaks 81 to 84, he believed it was the no. 3 belt flight that was cited (Tr. 249). I find that the citation issued by Inspector Hall speaks for itself, and find nothing in the conditions described as a violation, as well as his supportive testimony, do not reference any "belt flight".

I find credible Mr. Cantrell's testimony, that when he walked the belt with Inspector Hall on April 7th, Inspector Hall asked him for the location of the belt area where it was rubbing the hanger and that he informed the inspector that he had already walked past the area by seven breaks (Tr. 416-417). I further find that Inspector Robinette's telephone contact with mine management prior to the hearing requesting information about the cited rubbing belt area supports a reasonable inference that he was unable to document the location, and made the inquiry in preparation for his hearing appearance with Inspector Hall.

Inspector Hall testified that on April 7th, the belt was running and he "eyeballed" it and counted 10 hangers rubbing the belt, and confirmed they were hot by placing his hand on the belt structure (Tr. 111). He stated that the hangers were located "at about the same location"

described in his citation, and realized "right off the bat" that the cited condition was not abated (Tr. 109).

Inspector Hall's April 7th, day shift notes state that when he examined the belt it was still rubbing bottom roller hangers "at several locations along the belt" (Ex. P-8). However, the locations of the hangers are not noted, and the notes do not include any comments that the conditions were the same, or at the same locations previously cited on April 5th. Inspector Hall's April 7th, evening shift notes state that he traveled down the roadway to the No. 3 belt drive "down x-cut from x-cut 34-80, several bottom hangers were adjusted and belt realigned terminated 104-b order 2220" (Ex. P-10).

Inspector Hall testified that with the passage of time over the last two years he had some difficulty in remembering some of the specifics of the violations without reviewing his notes (Tr. 132). He confirmed that his abatement Order #816777 clearly describes the location of the corrective abatement work as the area from crosscuts #34 to #80, and not crosscuts #81 to #84, as described in his underlying citation

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Inspector Hall explained that the abatement area described in his order "was apparently a misprint of the numbers, or I wrote down wrong", or it indicated the starting point of his re-inspection (Tr. 174). However, the notes that he relied on to refresh his recollection confirm the same location described in the April 7th, abatement and termination order.

Given the fact that the abatement orders, as well as the citations, are clearly typed, I seriously doubt the crosscut numbers in question were misprints. Further, I find the inspector's suggestion that the crosscuts may have been his "starting point" is not credible, and I conclude and find that the noted corrective work adjusting the bottom belt hangers and belt realignment that prompted the abatement and termination of the order occurred at crosscut areas #34 to #80, and not at crosscuts #81 and #82.

I conclude and find that in order to establish the validity of a Section 104(b) Order for the alleged failure to timely abate the cited violative conditions, the burden of proof lies with the Secretary to establish by a preponderance of the credible evidence that the conditions and locations as described in the initial underlying Section 104(a) Citation, were not corrected or abated on or before the time fixed for abatement, and that they were the same conditions as those described in the citation.

Based on the foregoing circumstances and findings, I conclude and find that the evidence adduced and relied on by the Secretary does not establish that the conditions observed by the inspectors in support of Inspector Hall's order of April 7th does not establish that the belt conditions they observed that day were the same conditions they observed on April 5th when Inspector Hall issued the initial citation, or that the Respondent failed to correct and abate those conditions. Accordingly, Section 104(b), Order No. 8166777, April 7, 2010, 30 C.F.R. § 75.1731(b), IS VACATED.

History of Prior Violations

The parties stipulated to the Respondent's history of prior assessed violations for the 15 months preceding the citations and orders issued in these proceedings (Ex. ALJ-1; Ex. P-15). The record reflects the issuance of 82 Section 104(a) citations, 60 of which are non - S&S, with minimum penalty assessments, and no Section 104(b) or (d) orders of any kind. With the exception of four cases in which hearings were requested, the Respondent paid in full the assessed penalty assessments for all of the remaining violations, all of which were assessed with a notation of "no excess history".

I conclude and find that for an operation of its size, and taken in context, the Respondent has a good compliance record that does not support any additional increases in the penalty assessments made in this case. Indeed, the Secretary's counsel agreed that this was the case and that the Respondent's violations history is not egregious (Tr. 474-476).

Good Faith Compliance

Although the Respondent's failure to timely abate the cited conditions prompted the issuance of the orders, I nonetheless recognize the corrective work that began after the citation was issued on April 5th, and continuing on April 6th, until the inspectors returned on April 7th, when abatement efforts were ongoing but not completed.

Gravity

Based on my non - S&S findings, I conclude and find that the violations were not serious and were unlikely to result in serious hazards or injuries.

Negligence

Inspector Hall's citations reflect that the violations were the result of moderate negligence, and he confirmed at hearing that this was the case (Tr. 99). I agree and affirm those designations as my findings.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

The parties stipulated that the Respondent is a large mine operator and that the penalties assessed for the violations will not adversely affect its ability to remain in business (Ex. ALJ-1).

ORDER

In view of the foregoing findings and conclusions in these proceedings, **IT IS ORDERED** AS FOLLOWS:

(1) Section 104(a) non - S&S Citation No. 8166773, April 5, 2010, 30 C.F.R. § 75.400, **IS AFFIRMED**. The Respondent shall pay a civil penalty of $1,400.00.

(2) Section 104(a), S&S Citation No. 8166774, April 5, 2010, 30 C.F.R. § 75.1731(b), **IS MODIFIED** to a non- S&S violation, and **IS AFFIRMED**. The Respondent shall pay a civil penalty of $600.00.

(3) Section 104(b) Withdrawal Order No. 8166778, April 7, 2010, 30 C.F.R. § 75.400, **IS AFFIRMED**.

(4) Section 104(b) withdrawal Order No. 8166777, April 7, 2010, 30 C.F.R. § 75.1731(b), **IS VACATED**.

The Respondent is **ORDERED** to pay a total civil penalty assessment of $2,000.00, in satisfaction of the aforesaid violations issued in this matter. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, these matters are **DISMISSED**.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

April 1, 2013

CLAUDE LAYNE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2013-235-D
v.	:	Case No. PIKE-CD-2012-08
	:	
EXCEL MINING, LLC,	:	
Respondent	:	Mine: Preparation Plant
	:	Mine ID: 15-14324

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Factual Background

Claude Layne was employed by Rhino Excavating, LLC, a trucking company that contracted exclusively with Respondent, Excel Mining, LLC, at Excel's preparation plant in Martin, Kentucky. On August 16, 2012, Layne filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") under section 105(c)(1) of the Act. Layne's complaint states:

> On August 19, 2011, I was involved in a serious accident at the Excel Mining Preparation Plant in Martin, Kentucky. The MSHA investigation revealed that the failure of Excel Mining to properly maintain the haul road resulted in the accident. I am currently pursuing a Workers Compensation claim against my employer (Rhino Excavating) but I also filed a civil action against Excel Mining LLC. As soon as I filed the claim I was escorted from the mine site and was told not to come back to work. My boss, Terry Raines, said that it was Excel Mining that would not let me come back to the mine site because they were upset because I had filed my lawsuit. I have had no wages since June 19, 2012. I wish to have my wages paid.

On or about November 5, 2012, MSHA's Assistant Director for the Technical Compliance and Investigation Office, Carolyn T. James, sent a standard *pro forma* dismissal letter to Layne, with copy to Respondent, stating in relevant part:

> Your complaint of discrimination filed under Section 103(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) has been thoroughly investigated by a Special Investigator of the Mine

> Safety and Health Administration (MSHA). A careful review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section 105(c). Therefore, the discrimination, within the confines of the Mine Act, did not occur.[1]

On November 27, 2012, counsel for Complainant Layne filed an action under 105(c)(3) appealing and challenging MSHA's investigatory "no-go" determination and enclosing Layne's original complaint.

On December 26, 2012, Respondent, Excel Mining, LLC ("Respondent" or "Excel") filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, with supporting memorandum. In its motion, Respondent Excel argues that Layne's 105(c)(3) complaint fails to state a claim upon which relief can be granted because it does not allege protected activity or an unlawful adverse employment action. Therefore, Respondent contends

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[1] Although the Mine Act grants the Secretary discretion to establish an internal appeal process for 105(c)(2) determinations, to my knowledge, no such process currently exists. *See generally*, S. Rep. No. 181, 95th Cong., 1st Sess. 36,(1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 624 (1978). As a result, a special investigator's section 105(c)(2) determination may never be reviewed by the Solicitor of Labor or other individuals with formal legal training. Further, the lack of an internal appeals process allows the special investigator to issue a *pro forma* letter that states only that "discrimination, within the confines of the Act, did not occur." The *pro forma* finding that "discrimination, within the confines of the Act, did not occur" under section 105(c)(2) is arguably premature and certainly subject to reversal by the Commission under section 105(c)(3). Put differently, the determination at the 105(c)(2) level could be more accurate if, in accordance with MSHA internal procedures, the determination stated that *insufficient evidence* exists to establish that discrimination occurred, with supporting rationale. *See* MSHA, U.S. Depart. of Labor, *Special Investigations Procedures*, at 7-16 (2005), *available at* http://www.msha.gov/READROOM/HANDBOOK/PH05-I-4.pdf (The Technical Compliance and Investigation Office "will issue a letter to the complainant(s) indicating that MSHA did not find sufficient evidence to sustain that a violation of Section 105(c) of the Mine Act has occurred, and advise the complainant(s) of the right to file an independent action directly with the FMSHRC under Section 105(c)(3)"). Otherwise, if a complaint is filed under section 105(c)(3), complainants and the Commission are left only to guess as to the reasons for the special investigator's finding. Compare the practice under the National Labor Relations Act where, after investigation, the Regional Director issues a dismissal of an unfair labor practice charge for insufficient evidence, with supporting rationale, which is appealable to the NLRB General Counsel.

that the case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *Mot. at 1, 4-8*.[2]

On January 10, 2013, Layne, through counsel, filed a Response to the Motion to Dismiss. In his response, Layne claims that prior to the August 19, 2011 accident when he lost control of his rock truck due to alleged improper maintenance of the haul road, he made safety complaints to his Rhino supervisor and to Excel personnel about the alleged dangerous conditions of the haul road, but his safety concerns were not addressed. *Resp. at 1-2.* Layne further claims that an MSHA investigation was conducted and citations were issued to Respondent and Rhino for failure to maintain a safe work place due to the condition of the haul road. *Resp. at 2.* In addition, Layne states that he initiated a Kentucky Workers Compensation action against Rhino on February 22, 2012, and returned to work for Rhino at Excel's mine, without incident. *Resp. at 2*.

Thereafter, on June 13, 2012, Layne filed a civil action against Excel and certain of its agents in Pike County, Kentucky Circuit Court. Layne claims that his civil suit was based in part on Excel's duties under the Mine Act to ensure a safe environment for all persons on the mine site. *Resp. at 2*. Layne further claims that the Pike County, Kentucky Circuit Court Clerk's Office served Excel with a copy of his civil lawsuit on June 18, 2012. Layne claims that when he reported to work on June 19, 2012, he was notified (by Rhino) that he was no longer allowed on the property of Excel and he immediately was escorted from the property. *Id.; see also* August 16, 2012 complaint: "As soon as I filed the claim I was escorted from the mine site and was told not to come back to work. My boss, Terry Raines, said that it was Excel Mining that would not let me come back to the mine site because they were upset because I had filed my lawsuit." Layne argues that since Rhino was working exclusively for Excel, and Layne was not allowed on Excel's property, the actions of Excel caused his discharge. *Resp. at 2*.

On January 24, 2013, this matter was assigned to the undersigned. I convened a conference call with the parties on March 8, 2013 to discuss the outstanding motion and response. After full discussion of the parties' respective positions, as augmented by their filings, Respondent's Motion to Dismiss was denied. I ruled that review of the record indicated that Complainant Layne had raised a viable claim that he had engaged in protected activity under the Mine Act when he filed a civil suit against Excel, which was arguably related to prior safety complaints that he made to Excel and Rhino, who contracted exclusively with Excel. I further ruled that the temporal proximity between Layne's alleged exclusion from Excel's property and the alleged animus or hostility expressed by Excel to Rhino management shortly after Excel obtained knowledge of Layne's alleged protected activity could establish a *prima facie* case that

[2] The Commission has no specific rule regarding dismissal for failure to state a claim. Commission Rule 29 C.F.R § 2700.1(b), however, states that "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedures Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure."

Excel caused the discharge of Layne from Rhino's employ by prohibiting Layne's return to the mine site. I stated that this written order would follow.

Following the conference call, in preparation of this written Order, the undersigned requested a copy of the civil suit, with copy to Respondent.

Discussion and Analysis

Having carefully reconsidered my prior ruling, I see no basis to depart from it. I note that in applying Rule 12(b)(6) to discrimination proceedings, the Commission has established a high threshold for dismissal. In *Perry v. Phelps Dodge Morenci, Inc*., the Commission stated:

It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

18 FMSHRC 1918, 1920 (Nov. 1996) (citations omitted); *see also Ribble v. T & M Dev. Co.*, 22 FMSHRC 593 (May 2000). Respondent's Motion to Dismiss fails to meet this high standard when claiming that no viable claim for protected activity or adverse employment action exists.

As noted, Complainant's Response to the Motion to Dismiss alleges that the filing of his civil action against Excel, in part premised on Excel's statutory duty under the Mine Act to maintain a safe work environment, is protected activity. In addition, Complainant's Response points out that his civil suit against Excel was instituted after complaints to Excel and Rhino about failure to maintain the haul road went unheeded and resulted in an accident, which triggered an MSHA investigation and citations to both operators. Furthermore, according to the complaint, the day after Excel learned of Layne's suit, it directed Rhino to exclude Layne from the mine site. More specifically, "[m]y boss, Terry Raines, said that it was Excel Mining that would not let me come back to the mine site because they were upset because I had filed my lawsuit."

The anti-discrimination language of Section 105(c)(1) of the Mine Act is broad indeed. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (February 1994)("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.' ") (*quoting* S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)). It states, in pertinent part, as follows:

> "[n]o person shall discharge or in any manner discriminate against or *cause to be discharged or cause discrimination against or otherwise interfere with* the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying

> the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . *has instituted or caused to be instituted any proceeding under or related to this chapter* . . . ."

30 U.S.C. § 815(c)(1) (emphasis added).

After careful consideration of this broad statutory language, I reaffirm my prior ruling that Layne has raised a viable claim that he engaged in protected activity under the Mine Act when he filed a civil suit against Excel Mining. That civil suit purportedly was grounded in a statutory duty under the Mine Act to maintain a safe haul road, and arguably was related to prior safety complaints that Layne made to Excel and Rhino. Review of the civil suit confirms this.

Respondent contends that Layne's allegation that he made safety complaints to Rhino and Excel prior to his accident cannot be considered in determining the adequacy of the complaint because such claims were not set forth specifically in Layne's initial complaint to MSHA.[3] The Commission has found that the initiating complaint does not govern the permissible ambit of the investigation undertaken by the Secretary, and it is the scope of the investigation that is controlling. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997). Moreover, Layne's prior complaints to Rhino and Excel, even if they fall outside the 60-day period from the alleged violation under 105(c)(2), may be relevant as background evidence of animus, particularly since the 60-day period is not considered a statute of limitation by the Commission. *Cf. Cordero Mining LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1237 (10th Cir. 2012).[4] In addition, discrimination complaints need not include a complete presentation of all facts or legal theories underlying the alleged discrimination. Instead, Commission Rule 42 requires that a discrimination complaint

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[3] In the circumstances of this case, I need not resolve whether a timely filed complaint may be amended by allegations outside the 60-day period set forth in section 105(c)(2) that are closely related to the original timely file complaint. *Cf. Redd-I*, 290 NLRB 1115, 1118 (1988) (establishing a "closely related" test to permit otherwise untimely complaint allegations to be added to a timely filed charge). Under this test, one looks to whether the untimely allegations involve the same legal theory and section of the Act, arise from the same factual situation or sequence of events, and generate the same or similar defenses. *Id.*

[4] The 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir 1984). The Commission has held that a "miner's late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996) (citations omitted). "[T]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation." *Id*. at 1922.

"include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R § 2700.42.

In any event, I find Layne's complaint to MSHA is legally sufficient as it includes a basic statement of his alleged protected activity, the filing of his lawsuit against Excel, and requests back pay from the date of his discharge. Specifically, Layne's complaint may be construed to allege that Excel caused Layne's discharge as soon as Excel obtained knowledge that Layne had sued Excel, in part, for failure to maintain a safe work environment under a duty imposed by the Mine Act and state law. As more fully fleshed out in Layne's response to Excel's motion to dismiss, Layne sought a safe haul road and had unsuccessfully complained to Excel and Rhino about the condition of the haul road prior to MSHA's post-accident investigation and citation of both operators.

It is noteworthy that Section 105(c)(1) specifically states that instituting any proceeding related to the Act constitutes a protected activity. While the nature of the alleged protected activity here may present a novel issue for the Commission, under the facts and circumstances presented, I conclude at the pleading stage that the filing of Layne's civil suit against Excel *may* qualify as a proceeding related to the Mine Act and thus be protected. In addition, the temporal proximity of Layne's alleged exclusion from Excel's property and the alleged animus or hostility expressed by Excel to Rhino management shortly after Excel obtained knowledge of Layne's alleged protected activity could establish a *prima facie* case that Excel caused the discharge of Layne from Rhino's employ by prohibiting Layne's return to the mine site. Put differently, a reasonable person in Layne's shoes could assume that Excel had caused his discharge based on statements made by Rhino at the time of Layne's exclusion from Excel's mine site.

In light of the foregoing, Respondent's Motion to Dismiss is **DENIED**. The matter is set for hearing in Pikeville, Kentucky on May 7, 2013 and continuing days thereafter until concluded. A Notice of Hearing shall be issued under separate cover. The parties are encouraged to continue settlement discussions.

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

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/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 1, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-35 A.C. No. 11-02752-164772
v.	:	
THE AMERICAN COAL COMPANY, Respondent	:	Mine: Galatia Mine

Before: Judge McCarthy

ORDER LIFTING STAY

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), against American Coal Company, Inc. ("American Coal" or "Respondent"), 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").

This case involves two section 104(d)(2) orders for alleged violations of 30 C.F.R. § 75.400 concerning float coal dust and loose coal accumulations. Both orders were assessed as flagrant violations under the "repeated failure" provision of section 110(b)(2) of the Mine Act. A hearing was held on August 23-24, 2011 in Evansville, Indiana. The parties introduced testimony and documentary evidence, and witnesses were sequestered. On October 19, 2011, the parties filed a Joint Motion for Extension of Time to File Post-Trial Briefs. I granted an extension of the briefing period until November 18, 2011. Thereafter, reply briefs were filed by the parties on December 2, 2011.

During the drafting of my decision, the Commission granted interlocutory review on the issue of whether a violation not deemed attributable to reckless conduct may be deemed flagrant under the "repeated failure" provision of section 110(b)(2) based on the operator's history of prior similar violations. *See Conshor Mining*, LLC, Unpublished Order dated February 15, 2012. The instant matter presented the same issue of first impression, i.e., what is meant by the "repeated failure" provision. Accordingly, I concluded that it was not an efficient use of judicial resources to decide this matter at that

time. Rather, I deemed it prudent to stay this matter for six months or until the Commission decided *Conshor Mining*, whichever was to occur sooner. At that time, I stated that I would revisit the stay or ask the parties to address whether a supplemental hearing or additional briefing would be warranted in light of any Commission decision in *Conshor Mining*.

On March 6, 2012, the Secretary filed a motion to vacate the Commission's February 15 order for interlocutory review in *Conshor Mining*. As grounds for the motion, the Secretary stated that she was no longer seeking assessment of the three violations at issue in *Conshor Mining* as "flagrant" violations and that the issue directed for review by the Commission was moot. The Commission received no opposition from the Respondent. On March 23, 2012, the Commission granted the Secretary's motion to vacate.

On March 27, 2012, however, the Commission granted interlocutory review in another case presenting the same issue of whether a violation may be deemed a repeated "flagrant" under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. *See Wolf Run Mining Company*, Unpublished Order dated March 27, 2012. On November 16, 2012, the Commission heard oral argument on the repeated flagrant issue. On December 6, 2012, the Commission conducted an open meeting on the issue. On March 20, 2013, the Commission issued its eight-page decision in *Wolf Run Mining Co.*, 35 FMSHRC ___, slip op., No. WEVA 2018-1265, 2013 WL 1249150 (Mar. 20, 2013).

The instant matter presents the same issue of first impression as in *Conshor Mining* and *Wolf Run.* Accordingly, I lift the stay and finalize my decision for issuance. The parties are given until close of business on Wednesday, April 15, 2013 to file an additional brief, limited to eight pages, concerning how *Wolf Run* affects this matter, if at all.

Accordingly, the stay of proceedings is **LIFTED**. My decision will issue shortly after this additional briefing period.

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

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