

January 2017

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Secretary of Labor v. Rock n Roll Coal Company, Inc., Docket Nos. WEVA 2015-889, et al. (Judge McCarthy, November 30, 2016)

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

January 11, 2017

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

Docket No. LAKE 2014-219-M

v.

NORTHSHORE MINING COMPANY

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

DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Secretary of Labor is appealing an Administrative Law Judge’s determination that Northshore Mining Company (“Northshore”) was not required to report an eye injury sustained by one of its miners to the Department of Labor’s Mine Safety and Health Administration (“MSHA”). The Judge concluded that the injury was not reportable under 30 C.F.R. § 50.20(a)¹ as an “occupational injury” within the meaning of 30 C.F.R. § 50.2(e).² The Judge dismissed two citations MSHA had issued to Northshore for failing to report the injury and for subsequently filing an inadequate report. 37 FMSHRC 2352, 2383-89 (Oct. 2015) (ALJ).

¹ 30 C.F.R. § 50.20(a) requires that

[t]he principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. . . . The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

² 30 C.F.R. § 50.2(e) defines “occupational injury” as “any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.”

For the reasons that follow, we reverse the Judge's decision and assess the penalties stipulated to by the parties.

I.

Factual and Procedural Background

On May 23, 2013, a miner working at Northshore's taconite pellet plant felt a small particle on his right eye. *Id.* at 2384. When he was not able to flush it out with a saline solution or with tap water, a member of Northshore management took him to a clinic. *Id.* at 2384, 2387. There a doctor flushed the eye and told the miner to use artificial tears and over-the-counter painkillers. *Id.* at 2387. The doctor instructed the miner to come back if he needed further treatment. *Id.* at 2385.

The miner's first scheduled day back at work after the incident was May 29. On that day, the miner worked for four hours and then used "personal time" to take the rest of the day off. *Id.* at 2387. The miner used this time to go back to the clinic.

At the clinic, a doctor found that the miner's right eye remained irritated. Using a slit lamp and magnification, he located a foreign body on the miner's cornea, and removed it with a specialized instrument called an eye foreign body spud.³

The miner returned to work the following day, informed his supervisor that he had visited the clinic again, and provided a doctor's note. Sec'y Ex. 17, at 3-4. The doctor's note stated that the miner "should be off work [on May 29]" in order to rest the eye and keep "it closed as much as possible", but could return to work on May 30 with a "precaution about returning immediately [to the doctor] if the eye is not better." *Id.* at 3.

"Occupational injuries" must be reported to MSHA pursuant to 30 C.F.R. § 50.20(a).⁴ Northshore did not report the miner's eye injury. The failure to report the injury was discovered by MSHA after it audited the operator's records. MSHA issued the operator Citation No. 6556658 alleging a violation section 50.20(a), attributable to a moderate degree of negligence.

A second citation No. 6556659, was issued by MSHA because the occupational injury investigation report that was filed by Northshore to abate the violation lacked some of the

³ A "spud" is "[a] blunt triangular knife used for removing foreign bodies from the cornea." 37 FMSHRC 2388 at n.33 (*citing The American Heritage Medical Dictionary* (2007, 2004) Houghton Mifflin Company, <http://medical-dictionary.thefreedictionary.com/spuds> (last visited September 11, 2015.))

⁴ Form 7000-1 is the form used by mine operators to report occupational injuries or illnesses to MSHA. The form must be submitted within ten working days of an occupational injury. 30 C.F.R. § 50.20-1.

information required by 30 C.F.R. § 50.11(b).⁵ The citation stated that the violation had no likelihood of causing an injury or illness, and that the violation was the result of the operator's low negligence. 37 FMSHRC at 2384.

Northshore contested the two citations before a Commission Judge. The Secretary presented documentary evidence obtained in the audit, and the MSHA inspector who performed the audit testified. The operator's sole witness for these citations was the miner's supervisor. The miner who was injured had been terminated from Northshore before the hearing took place and did not appear.⁶

The Judge vacated both citations after concluding that the Secretary failed to demonstrate that the miner received "medical treatment" for the eye injury as defined by 30 C.F.R. § 50.20-3(a)(5)(ii).⁷ *Id.* at 2388-89. The Judge acknowledged that the miner was unable to perform his job duties while he was at the medical clinic on May 29, but found that the Secretary did not prove that the miner received "medical treatment" rather than "first aid treatment" because the evidence in the record did not show definitively whether the foreign body was imbedded in the miner's eye. *Id.* at 2389; *see* 30 C.F.R. § 50.20-3(a)(5)(ii) "(Medical treatment cases [for eye injuries] involve removal of imbedded foreign objects, . . .)".

On appeal, the Secretary argues that the Judge committed three errors. First, the Secretary argues that the Judge erred by requiring the Secretary to prove two of the outcomes identified in section 50.2(e) as constituting an occupational injury. Second, the Secretary argues that the Judge erred by finding that the foreign body was not imbedded in the miner's eye, and that, in

⁵ 30 C.F.R. § 50.11(b) requires that investigation reports prepared by the operator must include, among other things, the date the investigation began, a description of steps taken to prevent a similar occurrence in the future, and identification of any report submitted under section 50.20.

⁶ After the hearing, the Judge issued an order sealing the record in this case. Unpublished Order dated Oct. 9, 2015. In order to protect the miner's privacy, his name has not been used in this proceeding.

⁷ Section 50.20-3(a)(5) states that, for eye injuries:

(i) First aid treatment is limited to irrigation, removal of foreign material not imbedded in eye, and application of nonprescription medications. A precautionary visit (special examination) to a physician is considered as first aid if treatment is limited to above items, and follow-up visits if they are limited to observation only.

(ii) Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other professional treatment.

30 C.F.R. § 50.20-3(a)(5)(i)-(ii).

conjunction with that error, he misinterpreted the meaning of “imbedded” and imposed an overly strict burden of proof on the Secretary to “definitively” show that the particle was imbedded. Finally, the Secretary argues that the Judge erred by failing to consider evidence that the miner received professional treatment and prescription medication.

Northshore contends that the Judge properly analyzed the issues. It also argues that several of the articles, definitions, and web materials that the Secretary included in his PDR should not be considered by the Commission because they were not presented to the Judge below.

II.

Disposition

The sole question before the Commission is whether the miner’s injury was reportable under 30 C.F.R. § 50.20(a).⁸ Upon review, we conclude that the Judge’s finding that the miner’s injury was not reportable is not supported by substantial evidence.⁹ Uncontroverted evidence demonstrates that the miner was unable to work on the day of his second visit to the doctor. The Judge erred by failing to consider this evidence.

Section 50.20(a) requires that all occupational injuries be reported to MSHA. In 30 C.F.R. § 50.2(e), “occupational injury” is defined as

any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, *inability to perform all job duties on any day after an injury*, temporary assignment to other duties, or transfer to another job. [Emphasis added.]

In *Freeman United Coal Mining Co.*, the Commission stated that “sections 50.2(e) and 50.20(a), when read together, require the reporting of an injury if the injury . . . occurs at a mine

⁸ At the hearing, the parties stipulated that if the miner’s injury was found to be reportable, the operator would accept the section 50.11(b) violation. Tr. 47-49. The parties also agreed that if the injury was held to be reportable, Northshore would accept the Secretary’s proposed gravity and negligence designations and penalties for these violations. Tr. 16.

⁹ When reviewing an Administrative Law Judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

and if it results in *any* of the specified serious consequences to the miner.” 6 FMSHRC 1577, 1579 (July 1984) (emphasis added). Thus, Commission case law establishes that proving any one of these consequences makes an injury a reportable occupational injury.

In this case, the Judge’s inquiry focused almost entirely on whether “medical treatment” as defined by section 50.2(e) was administered to the particle in the miner’s eye.¹⁰ As a result of the Judge’s narrow focus, he largely ignored the fact that the “inability to perform all job duties on any day after an injury,” by itself, constitutes an “occupational injury” under section 50.2(e).

Section 113(d)(2)(A)(iii) of the Mine Act states that “[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.” 30 U.S.C. § 823(d)(2)(A)(iii). In order for the Commission to consider an issue on review, the issue “must have been presented below in such a manner as to obtain a ruling” by the Judge. *Sec’y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 6 (Jan. 2005) (citing *Beech Fork Processing*, 14 FMSHRC 1316, 1320 (Aug. 1992)).

The issue of the miner’s inability to perform all of his job duties on the day of his second doctor’s appointment arose several times during the hearing below and the Judge clearly had an opportunity to address it. The MSHA inspector testified that the miner’s inability to work, by itself, was sufficient to make his injury reportable, and the Judge acknowledged the issue by questioning him specifically about this conclusion. Tr. 301. The operator had the opportunity to cross-examine the inspector about his statements on this issue, but did not do so. In its posthearing brief, Northshore argued that the miner did not miss any time at work due to the injury. The Judge even discussed the miner’s inability to work in his opinion, although he analyzed the issue from a perspective of whether a visit to the doctor, by itself, is sufficient to make an injury reportable. 37 FMSHRC at 2388-89.

Thus, the Judge was clearly aware of the issue of the miner’s ability to work and made a factual determination about it in his opinion. Consequently, the issue was sufficiently presented below to obtain a ruling.

The uncontroverted evidence demonstrates that the miner was unable to work because of his injury. The “report of workability,”¹¹ which was signed by the doctor, states that the miner

¹⁰ The Secretary focused the entirety of his posthearing brief for this citation on whether the taconite particle was “imbedded” in the miner’s eye. By directing the Judge’s attention away from the issue of the miner’s inability to work, the Secretary likely contributed to the Judge’s error.

¹¹ Northshore objected to the report on workability at the hearing on the basis of foundation. Tr. 291-92. However, it did not raise that objection in its brief on appeal and did not dispute the contents of the exhibit.

should not work during the remainder of May 29.¹² Sec’y Ex. 18. The report of workability carries a great deal of weight in our analysis because it reflects a doctor’s contemporaneous determination that the miner was unable to do any work for the remainder of the day on May 29.

There is additional evidence in the record which shows that the miner was not able to perform all of his job duties on a day after his injury. The miner’s discharge instructions were signed at 11:25 a.m. on May 29, at which point the miner still had 4.5 hours left in his shift. Sec’y Ex. 17, at 2; Tr. at 309-310. The doctor’s notes from the miner’s second visit reflect that there was some blurring of the miner’s vision caused by the procedure. The notes also contain instructions for the miner to stay out of the wind, keep the eye closed as much as possible, and try to sleep. Sec’y Ex. 17, at 3. Northshore does not dispute these facts.

Taken together, these uncontroverted facts demonstrate that the miner was unable to perform all of his job duties for the rest of the day after he saw the doctor on May 29. This finding is dispositive because the inability to work on any day after an injury to a miner at a mine site is specified in 30 C.F.R. § 50.2(e) as establishing an occupational injury which must be reported. As discussed, *supra*, only one of these consequences must occur for an injury to be reportable. The record has established the requisite facts, and Northshore was required to report the miner’s injury to MSHA.

Because we conclude that the miner was unable to work on May 29 based on the evidence in the record, we do not reach the questions of whether the particle was imbedded, the attendant issue of whether the additional materials cited by the Secretary in his posthearing brief can be considered, or whether the Judge applied the wrong standard of proof.¹³

¹² The Judge correctly noted that the fact that the miner was not expected to return to work that day because he used personal time to take the rest of the day off was irrelevant. 37 FMSHRC at 2388.

¹³ Commissioner Cohen would reverse the Judge’s decision because of an additional reason: 30 C.F.R. § 50.20-3(a)(5) provides that for eye injuries, follow-up visits are considered as “first aid treatment” if they “are limited to observation only,” while “medical treatment” includes “other professional treatment” (along with “removal of imbedded foreign objects” and “use of prescription medications”). Hence, irrespective of whether or not the foreign body was technically imbedded in the miner’s eye, his second visit to the clinic on May 29 was not “limited to observation only.” Because a medical procedure – the removal of the foreign object – was performed on May 29, this visit involved “other professional treatment,” pursuant to section 50.20-3(a)(5)(ii). Consequently, the miner received “medical treatment” for his eye injury, and the injury constituted an “occupational injury” within the meaning of section 50.2(e) which Northshore was required to report to MSHA pursuant to section 50.20(a).

III.

Conclusion

We conclude that the miner's injury was reportable, reverse the Judge's determination to the contrary, and affirm both citations. Because the parties have stipulated to all of the remaining elements of both citations and agreed to a penalty amount, we assess a penalty of \$117 for Citation No. 6556658 and a penalty of \$100 for Citation No. 6556659.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

January 24, 2017

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

v.

THE AMERICAN COAL COMPANY

Docket Nos. LAKE 2008-666
LAKE 2008-667
LAKE 2009-6-A

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, Commissioners¹

DECISION

BY: Young, Cohen and Althen, Commissioners²

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) is appealing determinations made by an Administrative Law Judge with regard to three Mine Act violations committed by The American Coal Company (“AmCoal”). The Judge affirmed the violations, but modified the Secretary’s negligence, gravity, and unwarrantable failure designations. 36 FMSHRC 1311, 1369-70 (May 2014) (ALJ).

For the reasons that follow, we affirm the Judge’s decision in part and reverse the Judge’s decision in part. We remand the cases for assessment of penalties consistent with this opinion.

I.

General Factual and Procedural Background

AmCoal operates a large underground coal mine in Illinois. The three orders at issue in these cases were issued by MSHA Inspector Steven Miller. The orders involve an electrical violation, an accumulations violation, and an on-shift examination violation. The electrical

¹ Commissioner Patrick K. Nakamura participated in the consideration of these matters, but his term expired before issuance of this decision.

² Chairman Jordan joins sections I, II, and IV of this decision.

violation and the accumulations violation were assessed as flagrant violations under section 110(b)(2) of the Mine Act. 30 U.S.C. § 820(b)(2).³

The Secretary argues that the Judge erred in concluding that none of the violations resulted from an unwarrantable failure to comply. He also challenges the Judge's modification of the gravity and negligence designations.

Finally, the Secretary maintains that the assessed penalties are too low. The Secretary proposed total penalties of \$409,800 for the three orders; the Judge assessed \$26,500.

II.

Legal Framework for Unwarrantable Failure Violations

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *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 the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (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); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000).

³ Section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2), provides for a penalty of up to \$220,000 for a "flagrant" violation (now adjusted for inflation to \$250,433). *See* 30 C.F.R. § 100.5(e). A "flagrant" violation is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). The Judge found that the violations were not flagrant. The Secretary does not contest those findings.

III.

The Electrical Violation—Order No. 7490572

A. Factual and Procedural Background

In September 2007, Maintenance Mechanic Chris Cowsert and Maintenance Foreman John Jones were troubleshooting the electrical panel of a malfunctioning feeder. The panel had been re-energized so that Jones, who had 20 years of mining experience, could troubleshoot it. In accordance with MSHA regulations, Jones wore gloves and a meter while he troubleshot the energized panel. Cowsert stood a safe distance away from Jones. 36 FMSHRC at 1313-14, 1317.

The panel was mounted at waist height in a four-foot-wide, 18 to 20-inch high, and 14-inch deep metal box. The housing door was hinged along the bottom of the box. A breaker and three 480 volt vacuum lugs were on the left half of the panel. From the center to the right, there were other connections, including numerous connections to a bus bar along the bottom of the panel. The other connections were primarily control circuits, which operated at 110 volts or less. The bus bar was equipped with non-conductive fins to prevent accidental contact with the conductors. The power center was approximately 100 to 200 feet away from the panel. *Id.* at 1314, 1318.

After fixing the problem, Jones took off his gloves and meter and began to close the panel door with bare hands. As he closed the door, Jones noticed wires at the bottom of the panel that the door might pinch as it closed. While still using his bare hand, he lifted the wires into the panel and out of the way. *Id.* at 1314.

Inspector Miller saw Jones closing the panel and lifting the wires with his hand. MSHA interprets opening and closing the panel housing as doing “work” that requires that the panel be deenergized, locked, and tagged out. Cowsert and Jones were aware of this policy because AmCoal had adopted MSHA’s interpretation as a company policy and incorporated it into its training. Jones admitted to Miller that he was “taking a short cut.” *Id.* at 1314-15.

The inspector issued an order alleging a violation of 30 C.F.R. § 75.509, which requires power circuits and electric equipment to be deenergized before they are worked on.⁴ The violation was assessed as flagrant and designated as significant and substantial (“S&S”)⁵ and an unwarrantable failure. The inspector designated the degree of negligence as “reckless disregard” and gravity as likely to cause one fatality. The Secretary proposed a penalty of \$161,800 for this order. *Id.* at 1313.

⁴ 30 C.F.R. § 75.509 states that “[a]ll power circuits and equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.”

⁵ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

The Judge found that Jones' hand came within 10 inches of the uninsulated 110 volt lugs, and even closer to the bus bar at the bottom of the box. However, he also found that although Jones may not have been able to see his hand because the panel door was partially closed, he could see the wires as he lifted them to avoid their being pinched as the panel door closed. *Id.* at 1317-18.

The Judge found a violation of the standard. He deferred to the Secretary's interpretation of section 75.509; the act of closing the panel box was "work" covered by the standard. *Id.* at 1315. The Judge determined that the violation was S&S, the result of high negligence, and that one person was reasonably likely to suffer a serious injury. However, he found it was neither a flagrant nor an unwarrantable failure violation. He assessed a penalty of \$15,000. *Id.* at 1367. The Secretary challenges the Judge's findings on unwarrantable failure, negligence, gravity, and the penalty.

B. Disposition

1. Unwarrantable Failure

The Secretary maintains that the Judge erred in several respects in determining that the electrical violation was not the result of an unwarrantable failure. The Secretary contends that these errors also affected the Judge's analysis of the gravity and negligence for this violation, and that as a result, the Commission should reverse the Judge's reductions in gravity and negligence. Finally, the Secretary claims that a higher penalty should be assessed. After considering the Secretary's arguments, we affirm the Judge's findings as supported by substantial evidence.⁶

In analyzing the facts herein under our unwarrantable failure jurisprudence, the Judge properly considered all of the necessary factors described, *supra*, at page 2. The Judge found that the violation was not extensive and had only existed for a few seconds, with no opportunity for the operator to abate the specific occurrence. *Id.* at 1319. He also noted that the company had taken steps to prevent such occurrences by incorporating the Secretary's standard in its training

⁶ When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

policy and disciplining personnel who violated the policy. *Id.* Additionally, the Judge found the operator had not been placed on notice that greater efforts were needed.⁷

In addition to considering the factors discussed above, the Judge considered and discussed the other unwarrantable failure considerations. He noted that Jones' actions in moving the wires into the electrical panel were obvious. *Id.* at 1320-21. Further, the Judge recognized that Respondent had knowledge of the cited condition. *Id.* Finally, the Judge found that Jones' actions met the S&S standard as being reasonably likely to result in serious injury. *Id.* at 1321. However, the Judge found a degree of danger lower than that asserted by the Secretary. *Id.* at 1313, 1321.

In analyzing the potential dangers involved in closing the energized panel and reaching into the panel, the Judge found that Jones was "very familiar" with the layout of the panel and the location of the various energized components. *Id.* at 1318. There was also evidence that Jones received new task training on the feeder in June 2007, a little less than three months before the incident. Resp. Ex. 30 at 4. Further, it was undisputed that Jones had 20 years of mining experience and worked as a maintenance foreman. The Judge's conclusion that Jones was "very familiar" with the layout of the panel appears to be a reasonable inference based on Jones' years of mining experience and position as a maintenance foreman.

The Judge also noted that the electrical connections along the bottom of the panel were recessed between nonconductive fins. Jones was able to see the location of the wires, the wires were insulated, and Jones could see the wires as he lifted them. He also found that Jones was unlikely to contact any of the energized lugs because of the way he was positioned at the panel housing. 36 FMSHRC at 1317-18 (citing Resp. Ex. 27). Substantial evidence supports these factual determinations and reasonable inferences.

Thus, the Judge made factual determinations about the layout of the panel and Jones' positioning near the panel that would mitigate the degree of danger to both Jones and Cowsert. He found that Cowsert, a rank-and-file miner, was standing a safe distance away and not moving. There is no evidence that the ground was unsteady, or that moving persons or machinery were nearby. The Judge also found that even if the miners did come into contact, it was not likely that Cowsert would sustain injuries. Due to the low voltage of the wire Jones was most likely to contact, the miners' clothing would likely have provided enough insulation to prevent injury to Cowsert if Jones were shocked. *Id.* at 1317-18, 1321.

After discussing each of the unwarrantable failure factors independently, the Judge considered all of the facts and circumstances together. The Judge discussed reasonably and thoroughly the relationships among the unwarrantable failure factors. In doing so, the Judge

⁷ The Judge rejected several arguments made by the Secretary that other citations and previous issues at the mine constituted prior notice. Specifically, one previous citation had been issued for using a feeler gauge in an electrical panel and lights while equipment was energized, and another citation had been issued after an inspector observed that AmCoal had installed relays on a surface panel at its surface facility. 36 FMSHRC at 1319-20. The Judge found that "[t]he incidents of record, two in 14 months, do not support an inference that AmCoal was put on notice that greater efforts to comply with section 75.509 were necessary." *Id.* at 1320.

exercised his discretion and determined that the facts relating to the degree of danger, the time the condition existed, the extensiveness of the violation, AmCoal's efforts at abatement, and the lack of notice outweighed other factors.

The Secretary and our dissenting colleague essentially base their positions that the violation must be an unwarrantable failure on two grounds: (1) Jones was a supervisor and (2) he knew or should have known closing the panel and/or touching the insulated wires constituted a violation. The gravamen of their position is that Jones' status as a supervisor, by itself, must outweigh every other unwarrantable failure factor. Essentially, they would reject the Judge's careful weighing of all the facts in the record.

Of course, Jones' status as a supervisor is an important consideration. Foremen are held to a high standard of care under the Mine Act. *Midwest Material*, 19 FMSHRC at 35; *Lion Mining Co.*, 19 FMSRHC 1774, 1778 (Nov. 1997). In particular, violations committed by a supervisor in front of rank-and-file miners can be unwarrantable failures because they set a bad example. *Capital Cement*, 21 FMSHRC 883, 893 (Aug. 1999). However, the involvement of a supervisor, standing alone, does not obviate the need for a review of all factors related to the possible occurrence of an unwarrantable failure.⁸ "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." *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007). The weighing of facts and circumstances for an unwarrantable failure determination is a matter left to the Judge's discretion. *IO Coal*, 31 FMSHRC at 1350-51.

Here, the Judge's decision not to give decisive weight to the fact that Jones was a supervisor was not an abuse of his discretion because substantial evidence supports his analysis of all the other factors. Another Judge might have placed outcome determinative weight on the fact that Jones was a supervisor, but the Judge's decision not to do so here did not constitute an abuse of his discretion.

In this case, the Judge weighed the evidence and found that the unwarrantable failure factors militated against an unwarrantable failure. Jones' supervisory status is one of many facts and circumstances involved in the citation, several of which militate against a finding of unwarrantable failure. The Judge balanced the seconds-long duration of the violation, the steps

⁸ In *Lion Mining*, 19 FMSHRC at 1774-75, for example, a foreman saw a continuous miner operator violating the mine's roof control plan. Instead of trying to stop the violation, the foreman instructed the continuous miner operator to keep mining coal until a shuttle car with timbers could be brought up and unloaded. *Id.* at 1778. In *Capital Cement*, 21 FMSHRC 884, a foreman was injured when he left a crane cabin and stepped out onto the craneway, without deenergizing the third rail or attaching a safety belt to the craneway. The foreman was injured when he reached over the side of the craneway and contacted the third rail. *Id.* Stepping onto a craneway without deenergizing the third rail or donning fall protection, and then reaching over to the other side, requires a series of intentional, reckless actions. Telling a miner to keep working in dangerous conditions until supplies needed to fix the problem are brought in and unloaded shows a conscious decision to put another miner in danger. In both cases, supervisors purposely disregarded a recognized danger. Unlike the foremen in these cases, however, Jones' actions appear almost reflexive in the context of the work he was doing.

AmCoal took to prevent violations, the infrequency of past violations, and a mitigated degree of danger against the knowledge and obviousness of the violation resulting from Jones' supervisory status and the slight possibility of injury to Cowser. After considering and weighing each factor, the Judge concluded that Jones' high negligence still "did not rise to the level of reckless disregard." 36 FMSHRC at 1322. Similarly, the Judge acknowledged that Jones had knowledge of the standard but found that, when balanced with the other factors, the violation did not constitute unwarrantable failure.

The Judge's opinion gave greater weight to other factors than Jones' knowledge of the violation and his status as a supervisor, which was within his discretion as he considered all of the facts and circumstances in his unwarrantable failure analysis. Had the Judge decided that Jones' supervisory status overrode all other factors, we well may have sustained a finding of unwarrantable failure. But the Judge reasonably evaluated all the factors and reached a different conclusion. *Id.* at 1319-22. Substantial evidence supports the Judge's factual findings and his weighing of those findings.

Finally, the Secretary takes issue with the Judge's statement that the Secretary's interpretation of the standard was not compelled by the regulation and his statement that "[i]t would be extremely difficult to characterize the mere closing of an energized panel as S&S or an unwarrantable failure." *Id.* at 1322. However, the Judge did not base his decision upon disagreement with the Secretary over the interpretation of the standard. To the contrary, the Judge deferred to the Secretary's interpretation, and decided the case before him after considering all of the relevant facts and circumstances.

For the foregoing reasons, we affirm the finding that the violation did not constitute an unwarrantable failure.

2. Negligence

MSHA cited the violation as the result of reckless disregard. The Judge found high negligence. The Secretary objects to this reduction in the negligence finding, requesting that the Commission increase the negligence finding to reckless disregard. The Secretary relies upon the same arguments that supported his position on unwarrantable failure.

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.

As with the unwarrantable failure finding, we do not find sufficient reasons to reverse the Judge's considered decision. The Judge's appraisal of Jones' negligence is contained in the conclusion of his unwarrantable failure analysis. His finding of high negligence, therefore, essentially rests upon the same grounds as his unwarrantable failure conclusion. Jones wore gloves in performing the repairs but made a serious error in taking the gloves off prematurely – that is, before closing the panel – and in lifting wires inside the panel with his bare hand. As

evaluated by the Judge, this error and violation constituted high negligence but did not rise to the level of reckless disregard. As with the unwarrantable failure analysis, substantial evidence supports this conclusion.

3. Gravity

The Secretary claims that the alleged errors in the unwarrantable failure analysis also afflict the Judge's gravity finding. As set forth above, the Judge made factual determinations about the layout of the panel and Jones' positioning near the panel. He found that, while Jones may have been within 10 inches of the 110 volt lugs, Jones was not as close to the 480 volt lugs as Miller thought. He further found that the electrical connections along the bottom of the panel were recessed between nonconductive fins. Additionally, Jones was able to see the location of the wires that might get pinched, and he could see the wires as he lifted them. 36 FMSHRC at 1317-18 (citing Resp. Ex. 27).

The Judge also considered the potential for contact between Jones and Cowsert, noting the very brief duration of the violation. The duration of the violation was so brief – a matter of seconds – that it would have been difficult for human error on Cowsert's part to play a role in the accident. *Id.* at 1318. The Judge also found that the relatively low voltages involved “virtually eliminated” the possibility of the electric current arcing to Cowsert. *Id.* at 1321. Indeed, the Secretary assessed the citation as affecting only one person.

Based upon these considerations and other factors discussed regarding unwarrantable failure, the Judge found it “reasonably likely that one miner would suffer a serious injury.” *Id.* at 1322. We conclude that the Judge carefully analyzed factors affecting gravity and that his decision is supported by substantial evidence.

IV.

The Accumulations and On-Shift Examination Violations

A. Factual and Procedural Background

Inspector Miller examined the belts at the mine during an inspection in January 2008. Coal travels by belt several miles from the face to the surface, moving from the longwall belt to the Flannigan No. 3 belt, to the Flannigan No. 2 belt, and then to the Flannigan No. 1 belt. Miller started his inspection at the Flannigan No. 3 belt and worked his way outby.⁹ Around the transfer point between the Flannigan No. 2 and Flannigan No. 1 belts, Miller noticed several violations. *Id.* at 1341.

⁹ This means that the inspector proceeded away from the mine's face, toward the surface. The Dictionary of Mining, Mineral, and Related Terms defines “outby” as “[n]earer to the shaft, and therefore away from the face, toward the pit bottom or surface; toward the mine entrance. The opposite of inby.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 383 (2d ed. 1997) (“DMMRT”).

At the No. 2 head drive,¹⁰ the belt's bottom rollers were turning in packed coal fines, and the head drive area was covered with black float coal dust. At the transfer point, where the No. 2 belt head overlapped the No. 1 belt tail, some coal fines were "carry[ing] back" under the No. 2 belt as it wrapped around the head roller and traveled back toward the tailpiece. Loose coal accumulations ranging from six to 24 inches deep existed from the No. 2 belt head drive to crosscut No. 50, which was about 1,200 feet inby the head drive. Along this stretch of the belt, Miller also observed wooden crib ties, plastic buckets, and cardboard boxes. The conditions that Miller found took over 100 man-hours to abate. *Id.* at 1341-42, 1346.

Additionally, approximately one crosscut – about 150 feet – inby the No. 2 belt takeup, a broken bottom roller was clanking loudly and throwing metal shavings into the coal accumulations three feet below it. The Judge found that the broken roller was not a realistic ignition source because it was merely warm to the touch, and there were no indications that the roller was generating significant heat. *Id.* at 1341, 1343 n.34.

AmCoal conducts pre-shift examinations during the three hours before each shift begins and on-shift examinations during each shift. The examination reports indicated that spilled coal in the area around the No. 1 tail and No. 2 head was being cleaned up each day, but the broken roller, the coal fines, and the dust packed under the belt take-up were not noted in any of the on-shift examination reports from January 22 until the orders were issued on January 24. *Id.* at 1349-50, 1353.

Pre-shift reports conducted on those days, including one between 5:00 a.m. and 8:00 a.m. on January 24, did indicate that the tail of the No. 1 belt was dirty. The No. 1 belt tail and the No. 2 belt head are in the same area. *Id.* at 1341, 1349. Additionally, in the "remarks" area of the January 22 day and evening shift pre-shift reports, there were notes that the No. 2 belt was "getting black" from the takeup to crosscut No. 46. The Judge determined that the area had most likely not been rock dusted since then. *Id.* at 1347-48.

The Galatia mine is a "gassy" mine that liberates over three million cubic feet of methane in a 24-hour period, but Miller had never detected methane in the belt entries or the cited area. AmCoal maintained redundant safety systems around the belts, including fire suppression systems at its belt transfer points and carbon monoxide sensors along the belt lines. These safety systems were in good working order on the day of the inspection. AmCoal also had specially trained fire brigades on each shift to respond promptly to ignitions. The air in the belt entry at the Galatia mine flows inby, but is coursed into a return before it reaches the working section. Although the return that the belt air flowed into was a secondary escapeway, the Judge found that miners evacuating the mine would almost certainly use the primary escapeway, which was ventilated with intake air. The mine's air courses were also separated by stoppings designed to contain the airflow in the entries. *Id.* at 1343-44.

¹⁰ The "head drive" is a conveyor's "driving mechanism"; the term 'head' refers to the drive's position. *DMMRT* at 171. The head end of a drive is "[u]sually the ultimate delivery end of the conveyor" and "includes the head section, a power unit, and, if required, the connecting section and a belt takeup." *DMMRT* at 256.

In response to these conditions, Inspector Miller issued two orders. The first order (“accumulations violation”) alleged a violation of 30 C.F.R. § 75.400, which requires that coal dust, loose coal, and other combustible materials not be allowed to accumulate. This violation was designated as flagrant, S&S, and an unwarrantable failure. The operator’s negligence was designated as high. The Secretary proposed a penalty of \$188,000. *Id.* at 1340-41.

The Judge concluded that AmCoal violated section 75.400, and that the violation was S&S and the result of moderate to high negligence, but that the violation was not an unwarrantable failure or flagrant. The Judge assessed a penalty of \$7,500. *Id.* at 1368.

The second order (“on-shift examination violation”) alleged a violation of 30 C.F.R. § 75.363(b), which requires the operator to record hazardous conditions and corrective actions in an examination book. The violation was designated as S&S and resulting from an unwarrantable failure, and the operator’s negligence was designated as high. The Secretary proposed a penalty of \$60,000. *Id.* at 1352.

The Judge concluded that AmCoal violated the standard, that the violation was S&S¹¹ and attributable to moderate to high negligence, but that there was not an unwarrantable failure. The Judge assessed a penalty of \$4,000. *Id.* at 1369.

B. Accumulations Violation—Order No. 6673874

For the reasons that follow, we reverse the Judge’s findings of no unwarrantable failure and his negligence and gravity determinations. We vacate and remand the penalty assessment.

1. Unwarrantable Failure

The Judge found that the violative conditions were extensive, noting that the accumulations were six to 24 inches deep over a distance of 1,200 feet, and that they required over 100 man-hours to achieve abatement. He further found that AmCoal had been put on notice of a need for greater compliance efforts based on prior violations and Inspector Miller’s repeated discussions with AmCoal managers about accumulations violations. *Id.* at 1345-46, 1351. With regard to the length of time the accumulations existed, the Judge found that the float coal dust accumulations had existed for two or three days before Miller’s inspection, and that the packed coal fines and dust under the belt and rollers in the area of the No. 2 belt take-up had been accumulating for more than a couple of shifts. *Id.* at 1346-47, 1350. However, the Judge found that the designation of unwarrantable failure was not justified because the conditions did not pose a high degree of danger, because some of the accumulations were not obvious and were not known to AmCoal, and because AmCoal had taken steps to abate a portion of the accumulations. *Id.* at 1351-52.

a. Degree of Danger

In affirming the S&S designation, the Judge concluded that “the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified

¹¹ Neither of the Judge’s S&S determinations was appealed.

by Miller, posed a reasonable likelihood of a fire and resultant injuries.” *Id.* at 1343. However, in vacating the unwarrantable failure designation, the Judge concluded that the conditions “did not present a high degree of danger.” *Id.* at 1346.

In *San Juan Coal Co.*, 29 FMSHRC at 132-33, the Commission concluded that a Judge erred when he determined that a violation of section 75.400 was S&S but failed to relate those findings to the “degree of danger” factor in his unwarrantable failure analysis. Comparably, in the case at hand, the Judge made inconsistent findings when he concluded that a mine fire was reasonably likely to occur as part of his S&S analysis, but then concluded that the accumulations did not present a high degree of danger as part of his unwarrantable failure analysis.

We find that the Judge’s S&S analysis and determination in this case are sufficient to establish that the fire hazard posed a degree of danger to miners sufficient to sustain an unwarrantable failure finding. As the Seventh Circuit has held, it is a “common sense conclusion” that a fire would present a serious risk of smoke and gas inhalation to any miners who are present. *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995). The Secretary need not demonstrate that the mine’s redundant—and required—safety measures are in a state of disrepair, or prove violations of other standards, in order to show that a violation involves a high degree of danger.

The existence of a trained fire brigade, though laudable, does not sufficiently offset the danger of a mine fire for purposes of the unwarrantable failure evaluation in this case. Despite the existence of a fire brigade, a mine fire is still very dangerous, and the miners on the fire brigade themselves would be exposed to its dangers. Thus, the Judge was not warranted in placing significant reliance upon fire brigades.

Similarly, he erred to the extent he gave weight to the Bentley Report on mine fires.¹² The report cannot provide a reliable basis for determining the potential dangers presented by conditions in, or projecting the consequences flowing from, hazards cited in a particular mine.

b. Knowledge and Obviousness

The Judge found that the obviousness factor weighed in favor of a finding of unwarrantability. 36 FMSHRC at 1351. However, he erred by making an inconsistent finding that the packed fines under the belt rollers were “not obvious,” but that a competent examiner should have seen them. *Id.* The packed coal fines in which the belt was turning were the most dangerous accumulations. *Id.* at 1343, 1352. If a competent examiner should have discovered them, as the Judge found, then they were obvious. Hence, the factors of knowledge and

¹² The report covered the time period from 1980 to 2005, and its conclusion that no fatalities or lost time injuries from belt fires occurred during that period presents a grim irony in light of the 2006 Aracoma Mine fire, which killed two miners. The Judge acknowledged that the Aracoma disaster shows that belt fires can pose a serious threat, but stated in his opinion – without any evidentiary basis – that the conditions in AmCoal’s mine were very different from the Aracoma mine. 36 FMSHRC at 1346.

obviousness should have been given more significant weight in favor of a conclusion of unwarrantable failure.

It was also error for the Judge to consider AmCoal's regular safety inspections as a mitigating factor. Pre-shift and on-shift examinations are required by law. They are not extra efforts that the operator makes to correct an accumulation problem. As a result, the same considerations that apply to the Judge's consideration of mandatory, redundant safety measures as a mitigating factor apply to the consideration of mandatory pre-shift and on-shift inspections.

Even if safety examinations might be considered mitigating in some abstract sense, in this case the operator was cited for, and admitted to, an inadequate inspection in this area. The Judge found that a serious hazard that should have been obvious to an examiner – belt rollers turning in a large accumulation of coal fines – had not been noted for multiple shifts, even though pre-shift and on-shift examinations were being conducted in the area. *Id.* at 1351. In the face of this evidence, the fact that the areas were being examined regularly is not mitigating.

c. Abatement Efforts Prior to the Issuance of the Order

It was error for the Judge to consider the cleaning crew sent to clean the tail of the No. 1 belt as a mitigating factor for the operator's efforts to abate the violation. First, this was not the area where the cited accumulations were located. The Judge acknowledged that the cleanup crew was sent to clean the tail of the No. 1 belt – not the accumulations under the No. 2 belt take-up, nor the float coal dust, nor the loose coal in by the transfer point. However, the Judge speculated that the broken roller near the loose coal might have gotten the crew's attention and prompted them to correct the other problems.

The No. 2 belt take-up is near the belt head, and the Judge found that the belt head was in the same area as the No. 1 belt tail. *Id.* at 1350-51 (citing Resp. Ex. 76). The Judge discussed the operator's efforts to clean up the hazards, which had been recorded in the pre-shift reports, and noted that "at least the hazardous conditions were being promptly addressed by the mine manager." *Id.* at 1352. However, there is no substantial evidentiary support for abatement of the hazardous accumulations at issue.

Moreover, even if the clean-up crew had been dispatched to the area in question, it is unlikely that the crew would have been adequate for the clean-up of the hazardous accumulations. There is no testimony about the size of the crew that was sent to clean the area, but the accumulations took more than 100 man-hours to abate. *Id.* at 1346. Consequently, there were no mitigating abatement efforts. *See Amax Coal*, 19 FMSHRC 846, 851 (May 1997) (inadequate efforts to clean accumulations not mitigating).

d. Conclusion

We conclude that the Judge erred on issues related to the degree of danger, knowledge and obviousness of the violation, and abatement efforts. We reverse and find that the violation was the result of the operator's unwarrantable failure.

2. Negligence

While the Secretary had designated the negligence level as high, the Judge characterized the operator as moderately to highly negligent. As explained in our reversal of the Judge's unwarrantable failure determination, the obvious nature of the accumulations under the belt, combined with AmCoal's inadequate cleanup efforts, reflect a higher level of negligence than the "moderate to high negligence" that the Judge assessed. We thus reverse and find that the level of negligence was high.

3. Gravity

The parties took widely divergent but quite specific positions on gravity. The Secretary contended that smoke and fire would contaminate the airways. The Secretary reasoned, therefore, that 10 miners working in by the ignition point were highly likely to suffer fatal injuries. AmCoal, on the other hand, argued that any injuries reasonably likely to result would be no more serious than lost workdays, and that the number of persons affected should be no more than two or three.

After reviewing the arguments of the parties, the Judge accepted AmCoal's position and found the violation was reasonably likely to result in lost workday injuries to two miners. In electing to accept AmCoal's position in this case, the Judge erred by failing to account for the entirety of his findings. More specifically, as set forth above, the Judge did not consider many factual findings he had made in relation to his S&S determination. Moreover, the Judge was not confined to a Hobson's choice between a gravity finding of a few lost workdays or finding fatalities for all in by miners. Rather than narrowly parsing gravity determinations, we have consistently considered gravity holistically, considering "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

The grave dangers of a fire are obvious – smoke inhalation and/or burns. If a fire occurs, miners may escape injury entirely, suffer painful and fatal injuries, or suffer injuries between these extremes. The key element of the gravity determination is judging the type and extent of injuries or illnesses reasonably likely to occur based upon the record in the case.

In this regard, the Judge found the existence of accumulations six to 24 inches deep over a distance of 1200 feet, with packed coal fines in which the belt was turning, and with substantial float coal dust. 36 FMSHRC at 1341-42. The Judge specifically concluded that "the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified by [the inspector], posed a reasonable likelihood of a fire and resultant injuries." *Id.* at 1343. The Judge also found that a significant amount of float coal dust covered the No. 2 head drive and had accumulated under the belt and rollers for more than a couple of shifts. *Id.* at 1341-42, 1347-48. Notably, in *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014), the Commission recognized float coal dust accumulations as so inherently dangerous that they are specifically mentioned in section 75.400 as a material that must not be permitted to accumulate.

In light of the findings discussed above and in the Judge's S&S analysis, we are compelled to conclude that the level of gravity from the occurrence of a fire in this section of the mine is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.

C. On-Shift Examination Violation—Order No. 6673876

The Secretary claims that, as a result of the errors in the Judge's findings for the on-shift violation, the unwarrantable failure determination should be reversed. The Secretary also contends that the Judge's reductions in the levels of gravity and negligence were erroneous. Finally, the Secretary claims that a higher penalty should be assessed.

1. Unwarrantable Failure

The accumulations violation and the on-shift examination violation arose from the same set of facts, and the underlying hazard is the same for both orders. In light of the extensive detail with which the Judge discussed his findings for the accumulations violation, he properly relied on them when making his determinations for the on-shift examination violation. The relevant considerations for many of the factors in the unwarrantable failure analysis are the same. We discuss some additional considerations below.

a. Notice That Greater Efforts At Compliance Were Necessary

The Secretary asserts that the operator had a history of similar violations of examination standards, and was thus on notice that greater efforts were needed to comply. There is evidence in the record that AmCoal had a significant history of similar violations in the 24 months before this order was issued. Sec'y Ex. 1. The Judge did not mention these citations in his analysis of the on-shift examination violation.

b. Degree of Danger

The Judge found that the combination of the accumulations of float coal dust, loose coal, and the carry back fines and dust under the belt take-up was extensive. The float coal dust had existed for two days, the loose coal for one shift, and the carry back material for several shifts. 36 FMSHRC at 1348-51. The Judge also found that AmCoal had been put on notice that greater efforts were required to comply with the standard. Further, as the Secretary notes, the failure to note the accumulations in the inspection books and take actions to correct them not only posed a high degree of danger, but also subjected additional crews to that danger. The coal fines packed under the rollers, which the Judge deemed the most dangerous part of the violation, were also the condition that the Judge determined should have been noted in at least two examinations.

With reference to S&S, the Judge found that additional crews were put at risk because the operator failed to report and correct the accumulations for multiple shifts. *Id.* at 1353. However, in considering the factor of degree of danger in his unwarrantable failure analysis, the Judge failed to consider that additional crews were put at risk by the failure to record and correct the hazard.

For these reasons, we conclude that substantial evidence does not support the Judge's degree of danger determination and that there was a high degree of danger.

c. Duration

The Secretary claims that the Judge failed to consider the duration of the violation, which lasted for a minimum of two shifts, thus supporting an unwarrantable failure finding.

The Judge discussed the duration of the violation extensively in his opinion, but in his final analysis he did not determine whether the duration weighed in favor of a finding of unwarrantable failure. *Id.* at 1351-52. In his analysis of the duration of the accumulations violation, however, the Judge accepted Inspector Miller's estimate that the coal fines "had been accumulating for more than a couple of shifts." *Id.* at 1350. Duration, therefore, is an aggravating factor in the unwarrantable failure analysis.¹³

d. Knowledge and Obviousness

The Judge erred by failing to reconcile his finding that the packed fines under the belt rollers were "not obvious," while at the same time finding that a competent examiner should have seen them. *Id.* at 1351. As discussed above, if a competent examiner would have discovered the coal fines, the accumulations were obvious, especially in an area that is inspected multiple times per day.

Moreover, the Judge erred in considering the operator's regular safety inspections as a mitigating factor in evaluating the operator's efforts to abate the violation. *Id.* at 1353. The fact that the operator was conducting pre-shift and on-shift examinations is not mitigating, for the reasons discussed in our analysis of the accumulations violation.

f. Conclusion

The Judge erred in his analysis of whether the operator had notice that greater efforts at compliance were necessary, the degree of danger, the duration of the violation, the operator's knowledge of the violation and the obviousness of the violation. Consequently, we reverse and reinstate the unwarrantable failure designation for this violation.

2. Negligence

As with the accumulations violation, the Judge characterized the operator as moderately to highly negligent, whereas the Secretary had designated it as high negligence. The reduction in the level of negligence is not supported by substantial evidence. The purpose of the on-shift inspection is to identify and correct hazards. The Judge found as a fact that the hazard should have been discovered by a competent examiner. The fact that packed accumulations under the belt were not noted by AmCoal's examiner, combined with AmCoal's inadequate cleanup

¹³ AmCoal acknowledges that a violation that exists for more than one shift may be an unwarrantable failure. Resp. Br. at 35 n.7.

efforts, reflects a higher level of negligence than the “moderate to high negligence” that the Judge found. We reinstate the designation of high negligence.

3. Gravity

Because the same hazard is involved in both the accumulations and on-shift examination violations, it was not error for the Judge to incorporate his gravity analysis from the accumulations violation into his analysis for this examination order. However, the dangers described in our analysis of the accumulations violation apply to this violation as well, and the dangers affected additional crews. Accordingly, we reverse and find the gravity for this violation is a reasonable likelihood of serious or fatal smoke inhalation or burn injuries to a number of miners.

V.

Conclusion

We affirm the Judge’s decision with regard to the electrical violation, Order No. 7490572, in all respects. We reverse the Judge’s decision with regard to the accumulations and on-shift examination violations, Order Nos. 6673874 and 6673876 respectively, and conclude that they resulted from an unwarrantable failure to comply, with high negligence and gravity as set forth above. We remand Order Nos. 6673874 and 6673876 for the imposition of penalties consistent with this opinion.

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

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

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

Chairman Jordan, dissenting:

With respect to the accumulations violation and the on-shift examination violation, I agree with my colleagues' findings regarding unwarrantable failure, negligence, and gravity. However, I would reverse the Judge's ruling on the violation of the electrical standard and find that it too was the result of the operator's unwarrantable failure.

The undisputed facts of this violation paint a stark picture of a supervisor who, in the presence of another miner, blatantly disregarded an MSHA safety standard. Maintenance foreman John Jones had been working on a feeder's electrical panel, which had previously been de-energized and locked and tagged out at the power center, which was approximately 100 to 200 feet away. The electrical panel was de-energized so that Jones could work on it, but he wore gloves and a meter while he did his troubleshooting.

However, after he fixed the problem, he removed his gloves and meter and began to close the panel door without first de-energizing and locking and tagging out the panel. He then noticed wires at the bottom of the panel that could be caught in the door as it closed. He reached into the panel with his bare hands and moved the wires to permit the door to close. 36 FMSHRC 1318 (May 2014). When the inspector reminded Jones that electrical panels must be de-energized, locked and tagged out before they can be opened or closed, Jones acknowledged that he was "taking a short cut." *Id.* at 1314-15.

The inspector issued an order alleging a violation of 30 C.F.R. § 75.509. This standard requires power circuits and electric equipment to be de-energized before work is performed on them.

This is a quintessential example of an unwarrantable failure, which, as we have held, is "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). We characterize unwarrantable failure as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). The foreman's willingness to cut corners – in full view of another miner – is the epitome of indifference and reckless disregard. In fact, the Judge found that Jones' actions could be characterized as intentional misconduct. 36 FMSHRC at 1321.¹ The Judge also found that the inspector was "undoubtedly correct when he surmised that Jones [was] tired of walking back to the power center to de-energize the panel and lock/tag the circuit." *Id.* at 1320 (citing Tr. 107).

Moreover, under well-established and longstanding Commission law, Jones' position as a supervisor is a critical aggravating factor in supporting a finding that the violation was unwarrantable. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (because supervisors are held to a high standard of care, the involvement of a supervisor in a violation is an important factor supporting an unwarrantable failure); *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (reversing a Judge's finding that a violation was not due to the operator's

¹ His conduct was so egregious that, in my view, it would have supported a charge under section 110(c) of the Mine Act for a "knowing" violation. 30 U.S.C. § 820(c).

unwarrantable failure in part due to the Judge’s failure to recognize that the violation took place in the presence of a foreman who, under Commission precedent, is held to a high standard of care); *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (holding that the fact that a foreman observed the violative condition was a factor tending to establish an unwarrantable failure); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (under unwarrantable failure analysis, heightened standard of care required of section foreman and mine superintendent). As a supervisor, Jones was “entrusted with augmented safety responsibility and was obligated to act as a role model.” *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999).

It is of no consequence that all of the criteria that might potentially support an unwarrantable failure determination may not be met here. *Cf. IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). We have held that even if many of the factors used to support an unwarrantable failure finding are not present, a violation may still be found unwarrantable. *See e.g., LaFarge Constr. Materials and Theodore Dress*, 20 FMSHRC 1140, 1145-47 (Oct. 1998) (affirming an unwarrantable failure determination based solely on foreman’s failure to take extra precautions on observing dangerous condition, even when it was not obvious that the condition was dangerous). Here, for example, the duration factor has no relevance. *See Midwest Material*, 19 FMSHRC at 36 (recognizing that violations that are dangerous and known are “readily distinguishable” from violations where the duration factor is relevant, such as accumulations violations “where the degree of danger and the operator’s responsibility for learning of and addressing the hazard may increase gradually over time”). Similarly, the extensiveness of the violation is not a relevant concept to consider under the facts of this violation.

My analysis is not based on a checklist of factors, but rather on the deliberate actions of a supervisor who paid no heed to a safety standard.² Given that this is the epitome of an unwarrantable failure to comply, I respectfully dissent.³

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

² I do note that, at a minimum, the *IO Coal* factors of the operator’s knowledge and the obviousness of the violation are met here.

³ For the reasons stated above, I would reverse the Judge’s finding of high negligence and reinstate the level of negligence as reckless disregard. However, I agree with my colleagues that the Judge’s gravity determination is supported by substantial evidence.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

January 11, 2017

SANDRA G. McDONALD

v.

GEORGE KING, MARK TOLER,
GUARDCO SECURITY, LLC, and
NEW TRINITY COAL, INC.,
as successor-in-interest to
FRASURE CREEK MINING, LLC

Docket No. WEVA 2014-387-D

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

ORDER

BY THE COMMISSION:

These proceedings were brought before the Commission pursuant to section 105(c)(3), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). The Complainant, Sandra McDonald, was a security guard. Her employers, George King and Mark Toler, had been contracted to provide security services to a mining company, Frasure Creek Mining, LLC. Her employers' successor was Guardco Security, LLC ("Guardco"). The successor to Frasure Creek was New Trinity Coal, Inc. ("New Trinity").

On November 21, 2016, the Administrative Law Judge assigned to this matter issued a Decision Approving Settlement, Dismissal Order and Order to Pay. 38 FMSHRC ___, No. WEVA 2014-387-D (Nov. 21, 2016). The settlement reached by the parties required both Guardco and New Trinity to make payments to the Complainant and to pay Complainant's attorney fees. *Id.*; slip op. at 2-3. The terms of the order required New Trinity to pay Complainant \$5,000 by October 30 and \$10,000 by November 30, 2016. *Id.* at 2.

Complainant's attorney noted in the motion to approve settlement and dismiss that, as of the date of the motion, New Trinity had failed to make the first required payment and requested that the proceedings remain open until payments had been made pursuant to the agreement. The Judge declined to do so, but did provide that "Counsel for McDonald may take whatever legal actions deemed appropriate to compel New Trinity to perform as required by this Order." *Id.* at 3 n.4.

When the second payment date passed and New Trinity still had not made any payment, Complainant filed a motion to compel with the Administrative Law Judge, charging that New Trinity had refused to make the payments and demanding imposition of a \$5,000 daily penalty and injunctive relief due to New Trinity's "extreme negligence and lack of good faith." Mot. to Compel at 3.

The Commission's procedural rules provide that the Judge's jurisdiction over a matter terminates upon the issuance of the Judge's decision. 29 C.F.R. § 2700.69(b). The Judge thus sent the Motion to Compel to the Commission's General Counsel. The Judge's law clerk sent an e-mail to the parties stating that the issues in the motion had been referred to the Commission.

The decision of the Judge became the final decision of the Commission on January 3, 2017, 40 days after its issuance. 30 U.S.C. § 823(d)(1). Consequently, under these unique circumstances, we construe McDonald's motion to compel as a motion to reopen pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In reopening closed cases, the Commission has sought guidance in, and has applied "so far as practicable" and as appropriate, Rule 60(b), which deals with relief from judgments, orders or proceedings. *See* 29 C.F.R. § 2700.1(b). *See also, e.g., M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1270-71 (Sept. 1986). For example, in reopening a case in aid of post-judgment compliance, the Commission relied on Rule 60(b)(6) ("any other reason that justifies relief"). *See Johnson v. Lamar Mining Co.*, 10 FMSHRC 506 (Apr. 1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618-19 (Apr. 1990); 12 James Wm. Moore et al., *Moore's Federal Practice* (3d. ed. 2015) ¶ 60.48. Accordingly, as an initial matter, we grant the Complainant's motion to reopen.

However, in the present case, the attorneys for McDonald and New Trinity have informed the Commission that the required payments had been made after the Judge referred the Complainant's Motion to Compel to the Commission's General Counsel. Payment was made within 30 days of the Judge's Decision Approving Settlement, Dismissal Order and Order to Pay. Thus, the need to compel payment or to order the injunctive relief sought has become moot, and the case is hereby dismissed.¹

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

¹ While the Complainant sought a daily penalty for non-payment, and asserted that the Commission's ability to fashion a remedy is "relatively unlimited," we find it unnecessary to reach this issue. Mot. to Compel at 3.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

January 18, 2017

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

v.

POCAHONTAS COAL COMPANY, LLC

Docket No. WEVA 2015-187
A.C. No. 46-07191-362763

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 21, 2014, the Commission received from Pocahontas Coal Company, LLC (“Pocahontas”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) demonstrate that the proposed assessment was delivered on September 25, 2014, and

became a final order of the Commission on October 27, 2014. Pocahontas asserts that the mine had been shut down and placed in “nonproducing” status six months prior to receiving the proposed assessment, and that the mine’s personnel were reallocated. As a result, the proposed assessment was not properly processed and sent to counsel for the operator. The Secretary does not oppose the request to reopen. However, he urges Pocahontas to ensure that future penalty assessments are contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Pocahontas Coal Company, LLC has not established good cause to reopen this civil penalty case.

As grounds to reopen the proceeding, Pocahontas asserts that Josephine No. 2 mine was placed on "Non-Producing" status on March 31, 2014, six months before the proposed assessment was delivered on September 25, 2014. The operator contends that personnel and job duties were reallocated following the mine closure. These changes resulted in the operator's failure to properly process the assessments and send them to the operator's counsel. The operator submits this failure was the result of "inadvertence" or "mistake" within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. Operator's Motion to Reopen, at 2.

In my view, Pocahontas' contention that its failure to timely file the contest form was the result of excusable inadvertence or mistake is woefully insufficient, and the operator has not established good cause to reopen the proceeding.

As my colleagues note, when considering motions to reopen, the Commission is guided by Federal Rule of Civil Procedure 60(b). Courts applying Rule 60(b)(1) have consistently held that the burden of proof is on the party seeking relief from judgment to establish that such relief is warranted. See *Williams v. Virginia, State Bd. of Elections*, 524 Fed. Appx. 40 (4th Cir. 2013); *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2nd Cir. 2004); *Williams v. Meyer*, 346 F.3d 607, 612-613 (6th Cir. 2003); *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002); *Helm v. Resolution Trust Corp.*, 684 F.3d 874, 878 (7th Cir. 1996); and *U.S. v. Proceeds of Sale of 3, 888 Pounds Atlantic Sea Scallops*, 857 F.2d 46, 48 (1st Cir. 1988). As the Sixth Circuit put it succinctly, "[t]he burden is upon the [movant] to bring himself within the provisions of Rule 60(b)." *In re Salem Mortg. Co.*, 791 F.2d 456, 149 (6th Cir. 1986); see also *U.S. for Use and Benefit of Fischbach & Moore v. Leeth Const., Inc.*, 988 F.2d 126 (9th Cir. 1993) ("The [movants] bear the burden of proving Rule 60(b) relief is justified."). This is true whether the final decision to be set aside was determined on the merits or was the result of a default. See *In re Wallace*, 499 Fed. Appx. 870, 873 (10th Cir. 2004) ("The defaulting party has the burden of establishing that the default judgment should be set aside."); and *North Cent. Illinois Laborers' Dist. Council v. S.J. Groves & Sons Co., Inc.*, 842 F.2d 164, 167-68 (7th Cir. 1988).

Therefore, in the instant matter, Pocahontas bears the burden of showing that its failure to answer the Petition for Assessment was the result of mistake or inadvertence. In order to carry that burden, Pocahontas is required to establish a factual evidentiary foundation as the basis for its claim. See e.g. *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) ("the trial court ought not reopen a default judgment simply because a request is made by the defaulting party; rather, that party must show that there was good reason for the default . . ."). When a movant fails to provide a solid evidentiary basis for believing that mistake, excusable neglect, or inadvertence occurred, a court is justified in rejecting a motion to reopen. See *Mitchell v. Sikorsky Aircraft*, 533 Fed. Appx. 354, 359-60 (5th Cir. 2013); *Vela v. Western Elec. Co.*, 709 F.2d 375, 377 (5th Cir. 1983); *S.E.C. v. Bilzerian*, 729 F. Supp. 2d 9, 17-18(D.D.C. 2010); *In re A.H. Robins Co., Inc.*, 221 B.R. 166 (E.D.Va 1998).

For example, in *Smith v. Johnson*, the Fifth Circuit considered the case of federal prisoner who claimed that he failed to file his habeas application in a timely manner because he was mentally incompetent. 247 F.3d 240 (5th Cir. 2001). In considering that claim under Rule 60(b)(1), the court noted that the prisoner's motion failed to demonstrate a right to relief because, "he never alleged facts sufficient to support his contention that he is mentally incompetent." *Id.* The fact that the prisoner had "mentioned [his incompetence claim] in supporting memoranda" at the district court was not adequate. *Id.* Similarly, it was not enough to simply state in his Rule 60(b) motion that he had an IQ of 75 and an educational level of 3.9, because "he never verified, for example through affidavit, that these facts were reliable." *Id.* at n. 2. In short, the prisoner never demonstrated "his claim of incompetence was anything more than a bald assertion." *Id.*

Other circuits have also required more than a mere claim of mistake, inadvertence, or excusable neglect to support a reopening under Rule 60(b)(1). In *Ben Sager Chemicals Intern., Inc. v. E. Targosz & Co.*, the Seventh Circuit refused to provide relief from judgement on a theory that movant's counsel made justifiable mistakes or engaged in "excusable neglect" because he was "preoccupied with personal matters." 560 F.2d 805, 809 (7th Cir. 1977). In making that determination, the court stated that there was "nothing in the record to support [movant's] contentions . . ." *Id.* As the court put it, "a party cannot have relief under Rule 60(b)(1) merely because he is unhappy with the judgment. Instead he must *make some showing* of why he was justified in failing to avoid mistake or inadvertence." *Id.* quoting Wright and Miller, Federal Practice & Procedure, § 2858, p. 170 (emphasis added); see also *Williams v. Borg-Warner Automotive Electronics & Mechanical System Corp.*, 97 F.3d 1457 (8th Cir. 1996) (court refused to grant relief under 60(b) when there is no factual basis to support movant's claims). In *Chavez v. Public Defender Dept. State of N.M.*, the Tenth Circuit refused to reopen a case based on counsel's alleged "inadvertence" in leaving out a page and a half of a response to a summary judgement motion because the movant's evidence consisted of a "bald assertion" with "no explanation for the reasons why mistake or inadvertence occurred." 946 F.2d 900 (10th Cir. 1991).

Even if a movant provides some evidence, courts will look into the substance of that evidence to determine whether the evidence sufficiently supports the movant's claim. For example, the Eleventh Circuit found that when an affidavit in support of a motion to reopen failed to establish "good cause" for an attorney's failure to meet a deadline, it was inappropriate to set aside the default judgment. *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1297-98 (11th Cir. 2003). In a district court case, *In re FEMA Trailer Formaldehyde Products Liability Litigation*, the judge rejected evidence produced by a movant to establish that she could not stay in contact with the court because of a medical issue. __F. Supp 2d__, 2011 WL 6748489 (E.D. La. 2011). While the movant had produced an affidavit regarding the medical condition, the court ruled that this evidence was insufficient because it consisted primarily of hearsay and did not provide sufficient details regarding the medical treatment to substantiate the claim. *Id.* Similarly, in *Timbisha Shoshone Tribe v. Kennedy*, the movant claimed that counsel's failure to file necessary documents was the result of "inadvertence." 267 F.R.D. 333, 336 (E.D.Ca 2010). While the movant submitted "declarations" explaining that counsel had inadvertently sent incomplete draft documents, those declarations "provide[d] no explanation as to how or why [counsel] filed an unfinished version of the document by mistake" and the court refused to grant relief. *Id.* at 336-37.

In short, when a party seeks to reopen a matter under Rule 60(b) that party has an obligation to prove, with competent evidence, that there is good reason to set the judgment aside.

Looking at the situation here, Pocahontas has manifestly failed to meet its obligation. The entirety of the relevant portion of Pocahontas's submission is the following:

In this case, the Josephine No. 2 mine was placed in "NonProducing" status on March 31, 2014, six (6) months before the proposed assessment. Because of the mine's closure, personnel and job duties were reallocated. Due to the changes these changes (sic) and in personnel and job duties, the Proposed Assessment was not properly processed and sent to counsel.

Pocahontas Mot. at 2. Not only is this representation lacking in detail, but it is an assertion by a lawyer, without any supporting evidence. The operator, represented by experienced counsel, has provided no foundation for its motion. Its only exhibit consists of copies of the assessment and citations. There are no affidavits or declarations from persons with first-hand knowledge of the operation. In fact, there is nothing in the record that can be considered evidence that substantiates the operator's bald assertion that it failed to act because of disruption in the mine office as a result of the mine closure.

It does not appear that finding such evidence would have been particularly difficult. The sparse record here shows that the assessment was delivered to and signed for by "L. Claypool." L. Claypool accepted the document on September 29, 2014, less than two months before the operator filed its Motion to Reopen. Presumably L. Claypool could have furnished an affidavit or declaration explaining what happened with the assessment and why it was not processed in the correct manner. Even if L. Claypool could not recall that particular penalty assessment, he/she could have provided a statement explaining the operator's general mail-handling procedures after the mine was placed in "non-producing status. It is, of course, possible that the operator was unable to find L. Claypool for one reason or another. However, if that was the case, the operator should have provided the Commission with that information. Beyond L. Claypool, there were doubtless other employees and officers at Pocahontas who could have provided the Commission with necessary information regarding the assessment processing procedure after the mine ceased production. Such information would have given the Commission a basis to evaluate the operator's assertions regarding disruption and confusion at the mine. Unfortunately, as it stands the Commission has no basis for assessing the operator's actions or excusing its failure to properly file its contest to the assessed penalty.

Given the absence of actual evidence in the motion and its sketchiness, the only reasonable conclusion is that the operator's excuse for failing to contest the proposed assessment is unacceptable. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

In the instant matter, the operator was undoubtedly aware of the underlying order, because it had been served on Superintendent Jim Meadows on March 6, 2014 by Inspector Justin H. Crane. The operator also knew from that issuance that this was a section 104(d)(1) Order that was designated S&S. Pocahontas is a large operator with a large mine and an extensive history. While the operator may not have been aware that the Secretary would take six months to propose a penalty, it was undoubtedly aware that an assessment, very likely a substantial assessment, was going to be issued by MSHA in the future.¹ Despite those facts, the operator apparently took no action to ensure the proper processing of the assessment documents.

It may be that after the mine went into “non-producing” status, Pocahontas did create an adequate system to handle proposed assessments from MSHA, and this was a situation where the proposed assessment inadvertently slipped through the cracks. But we have no way of knowing it based on the operator’s motion. We have not been given evidence of how this proposed assessment came to be inadvertently ignored, but only the cursory representations by counsel, a person with no first-hand knowledge.

I cannot conceive that a federal District Court would reopen a final judgment under Rule 60(b)(1) based on the pathetic motion Pocahontas has made here. Therefore, I respectfully dissent.

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

¹ The proposed penalty of \$70,000 in this case was by way of a special assessment pursuant to 30 C.F.R. §100.5.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 26, 2017

GENE ESTELLA

v.

NEWMONT USA LIMITED

Docket No. WEST 2016-31-DM

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3) (2012). On December 22, 2016, Administrative Law Judge William B. Moran issued a decision finding that Newmont USA Limited (“Newmont”) discriminated against miner Gene Estella in violation of section 105(c) of the Mine Act. The Judge further ordered the parties to submit an agreed settlement or the parties’ positions regarding remedies for Estella within 30 days of his decision. On January 23, 2017, Newmont filed a Protective Petition for Discretionary Review of the Judge’s decision.

Section 113(d) of the Mine Act allows for review of an administrative law judge's final decision in a proceeding under the Mine Act. 30 U.S.C. § 823(d)(2). The Commission has held that a Judge's decision finding a violation of section 105(c) is not final until the Judge has awarded all relief due to the complainant. *See Sec'y of Labor obo Shemwell v. Armstrong Coal Co.*, 35 FMSHRC 2056, 2057 (July 2013). In his decision in this case, Judge Moran explicitly retained jurisdiction of this matter to determine the monetary remedy for Estella. Accordingly, we determine that the Judge's decision has not become final and appealable.

For the reasons set forth above, Newmont's Protective Petition for Discretionary Review is denied.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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January 31, 2017

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

v.

SOUTH CENTRAL COAL
INDIANA, LLC

Docket No. LAKE 2015-23
A.C. No. 12-02431-360684

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 21, 2015, the Commission received from South Central Coal Indiana, LLC (“South Central”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May 4, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to South Central’s failure to timely answer the Secretary of Labor’s November 13, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 4, 2015, when it appeared that the operator had not filed an answer within 30 days.

South Central asserts that it had retained an outside attorney to address MSHA matters at its mine. The operator states that it failed to timely respond to the Order to Show Cause because it was in the process of moving offices, which caused the operator to miss some deadlines. South Central further states that it does not expect to miss deadlines in the future since it does not expect to move its office again, and that it has also asked one of its employees to take specific responsibility to ensure timely responses to MSHA filings and Commission orders in the future. 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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed South Central’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. In particular, we note that the Secretary’s Petition for Assessment of Civil Penalty was not sent to the attorney designated by South Central, and that the Order to Show Cause likewise was not sent to the attorney. When South Central discovered the default, it quickly requested reopening.

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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave. N.W., Suite 520N
Washington, DC 20004-1710

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

January 31, 2017

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

v.

WILLITS COMPANY, INC.

Docket No. WEST 2014-1049-M
A.C. No. 48-01540-360049

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 10, 2015, the Commission received from Willits Company, Inc. (“Willits”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 30, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Willits’s failure to timely answer the Secretary of Labor’s November 7, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 1, 2015, when it appeared that the operator had not filed an answer within 30 days. On July 27, 2015, MSHA mailed a delinquency notice to Willits.

Willits claims not to know how the case became a final order of the Commission and that it has been negotiating the case with the Solicitor in the Denver Regional Solicitor’s office. The Secretary does not oppose the request to reopen, and he confirms that ongoing negotiations have been occurring between the operator and the Solicitor, and that the Solicitor was unaware that the case had been closed for default. The Secretary also notes that Willits filed an answer in another case and has been negotiating it with the Solicitor as well. However, the Secretary notes that his decision not to oppose reopening in this case should not be construed as condoning Willits’s failure to take orders of the Commission seriously, and that the Order to Show Cause clearly alerted the operator that it needed to respond to the order within 30 days.

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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Willits’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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 31, 2017

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

v.

ESSROC CEMENT CORP.

Docket No. WEVA 2013-1310-M
A.C. No. 46-00007-330019

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 10, 2014, the Commission received from Essroc Cement Corp. (“Essroc”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 18, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Essroc’s failure to timely answer the Secretary of Labor’s October 21, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on January 21, 2014, when it appeared that the operator had not filed an answer within 30 days. On May 28, 2014, MSHA mailed a delinquency notice to Essroc. After receiving no response, MSHA sent the case to the U.S. Treasury for collection on September 18, 2014.

Essroc asserts that it submitted a detailed position statement, dated December 13, 2013, to MSHA and the Commission, and believed that it was participating in ongoing negotiations regarding the case with the Conference and Litigation Representative (“CLR”) and Solicitor. The operator offers e-mail correspondence demonstrating that it submitted the answer to MSHA on December 17, 2013. The answer, however, does not appear to have ever been sent to the Commission, and the operator does not offer any proof of delivery of the answer to the Commission. The operator further claims that it was led to believe by MSHA that negotiation of the case was still ongoing. Specifically, it cites e-mail correspondence where the CLR allowed additional time for the operator to submit its position statement¹ as well as an e-mail where the CLR thanked the operator for submitting the answer while informing Essroc that it would “start reviewing [its] mitigation” upon returning after the holidays. The operator also cites an e-mail

¹ A CLR does not have the authority to grant an extension of time for an operator to file an answer.

from the Solicitor giving notice of substitution of counsel to the operator on March 4, 2014 and inquiring about the operator's settlement positions. Finally, Essroc claims that it never received the Order to Show Cause, and that it did not know that the case had been closed until it was contacted by the collections office on November 6, 2014. However, U.S. Post Office records show that on December 21, 2013, a notice of attempted delivery of the Order to Show Cause was left with Essroc.

The Secretary does not oppose the request to reopen, and he confirms that he received the December 13, 2013 position statement from the operator. However, he notes that his decision not to oppose reopening in this case should not be construed as condoning Essroc's "inadequate or sloppy office procedures." The Secretary urges the operator to take steps to ensure that it timely responds to petitions, Administrative Law Judge's orders and MSHA delinquency notices 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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Essroc's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Essroc's December 13, 2013 position statement represented a very substantial, albeit untimely, response to the Secretary's Petition for Assessment of Civil Penalty, and the Secretary's counsel continued discussing resolution of the case with Essroc past the time when the Order of Default became final.

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/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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January 6, 2017

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

v.

PROSPECT MINING AND
DEVELOPMENT COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2016-0089
A.C. No. 01-03389-396647

Docket No. SE 2016-0103
A.C. No. 01-03389-398986

Mine: Carbon Hill Mine

DECISION AND ORDER

Appearances: C. Renita Hollins, Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee for Petitioner

J.D. Terry, Prospect Mining & Development Company, Inc., Jasper,
Alabama for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These cases are before me upon Petitions for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Docket No. SE 2016-0089 involves one section 104(a) citation charging Respondent, Prospect Mining and Development Company, Inc. (“Respondent”), with an alleged violation of 30 C.F.R. § 75.208. Docket No. SE 2016-0103 involves one section 104(a) citation charging Respondent with an alleged violation of 30 C.F.R. § 75.512-2.

A hearing was held in Birmingham, Alabama on November 2, 2016. During the hearing, the parties offered testimony and documentary evidence.¹ Pursuant to the Commission’s procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e). The issues presented are whether Respondent violated the cited standards, and if so, whether the S&S, gravity, and negligence designations were appropriate, and what civil penalties should be assessed. For the reasons discussed below, I modify Citation No. 8530836 to reduce the level of negligence from “moderate” to “no” negligence. I assess a penalty of \$362. I affirm Citation No. 8531669, as written, and assess a penalty of \$807.

¹ In this decision, “Tr. #” refers to the hearing transcript, and “P. Ex. #” refers to the Petitioner’s exhibits. P. Exs. 1-7 were received into evidence at the hearing.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). By contrast, the gravity of a violation “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that “the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury... but rather on the effect of the hazard if it occurs”). Alternatively, a violation is S&S if, “based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).² The S&S determination should be made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).³

² The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts’ uniform adoption of *Mathies* test and parties’ recognition of authority of the test); *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

³ *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission’s rejection of “snapshot” approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

Once the fact of the violation has been established, step two of the *Mathies* analysis focuses on “the extent to which the violation contributes to a particular hazard.” The Commission has recently clarified that this step is “primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (citing *Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) “a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy*, 38 FMSHRC at 2038.

The third step of the *Mathies* analysis is “primarily concerned with gravity,” and whether the hazard identified in step two “would be reasonably likely to result in injury.” *Id.* at 2037 (internal citations omitted). The third step’s inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* “is not whether it is likely that the hazard . . . would have occurred[,]” but “whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result.” *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm’n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

For violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied when a “confluence of factors” is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations.⁴ *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); *Texasgulf*, 10 FMSHRC 498, 501 (Apr. 1988); see, e.g., *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). In particular, “the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area.” *Excel Mining, LLC*, 37 FMSHRC 459, 465 (Mar. 2015).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies*’ factors are often combined in a single showing. *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the

⁴ I note that under the clarified *Mathies* test, the determination of whether a particular safety hazard is reasonably likely to occur has shifted from the third step to the second step. The third *Mathies* step now assumes the existence of the hazard. *Newtown Energy*, 38 FMSHRC at 2037; *Knox Creek*, 811 F.3d at 161-65.

likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.⁵

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that “[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Criteria

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator’s history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator’s negligence; 4) the operator’s ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g., Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary’s proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (*citing Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir.

⁵ Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked “reasonably likely,” “highly likely,” or “occurred,” and item 10.B is marked “lost workdays or restricted duty,” “permanently disabling,” or “fatal.” *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citation omitted).

My independent penalty assessment for each citation at issue is set forth herein.

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Jurisdiction exists because the Respondent was an operator of a mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.
2. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to section 105 of the Mine Act.
3. Prospect Mining and Development Company, Inc., Mine ID 01-03389, is subject to the Federal Mine Safety and Health Act of 1977, as amended.
4. Prospect Mining and Development Company, Inc. is an "operator" as defined in section 3(d) of the Mine Act.
5. Prospect Mining and Development Company, Inc., [sic] operations affect interstate commerce.
6. Prospect Mining and Development Company, Inc., worked 89,576 hours in 2014 and produced 84,876 tons of coal in 2014.
7. Prospect Mining and Development Company, Inc., worked 106,644 hours in 2015 and produced 84,876 tons of coal in 2015.
8. Citations at issue in this proceeding were served by certified mine inspections acting in their official capacity as authorized representatives of the Secretary of Labor during the time of the inspection and when the citations was [sic] issued.
9. Prospect Mining and Development Company, Inc., demonstrated good faith in abating the cited conditions.

10. The assessed penalty for each docket will not affect the operator's ability to remain in business.

P. Ex. 1.

B. Docket No. SE 2016-0089 (Citation No. 8530836)

Citation No. 8530836 was issued on September 22, 2015 by MSHA inspector, Sheila Dawkins, who was conducting respirable dust surveys at Respondent's Carbon Hill Mine. Tr. 34. Dawkins arrived at the mine on September 22 at 6:30 a.m., and after inspecting the mine's record books, traveled underground to conduct an imminent danger run and take respirable dust samples. Tr. 51; P. Ex. 3, at 12-7. She did not issue any citations during her record book inspection, her imminent danger run, or her respirable dust surveys. P. Ex. 3, at 12-7.

Around 12:45 p.m., Dawkins and Bobby Meadows, the mine superintendent, were watching the continuous miner mine a 25-foot section of coal in the No. 6 entry. Tr. 35. They were standing "back a little distance" from the continuous miner, because the size of the continuous miner and the four foot height of the coal seam made standing close to the continuous miner hazardous.⁶ Tr. 35-37. They were also unable to see past the continuous miner into the No. 6 entryway at that time. Tr. 38. As the continuous miner finished loading the shuttle car and moved out of the No. 6 entry, Dawkins saw that the final row of roof support bolts was not marked by a visible warning (usually a bright red or pink reflector), as required under 30 C.F.R. § 75.208. Tr. 35-36. Dawkins brought the alleged violation to Meadows' attention, and they both searched the area for a fallen reflector, but could not find anything in the vicinity of the entry. Tr. 36, 39, 58-59.

Dawkins then issued Citation No. 8530368, alleging a violation of 30 C.F.R. § 75.208,⁷ based on the following condition:

A readily visible warning or physical barrier was not installed to impede travel beyond permanent support in the #6 entry on the 2-15 section. Twenty-five feet had been mined out of the entry.

P. Ex. 2. The Secretary alleges the violation is S&S, reasonably likely to cause fatal injuries to one person, and the result of Respondent's moderate negligence. The Secretary proposes a penalty of \$807.

After failing to find the reflector in the vicinity of the No. 6 entry, Meadows had someone install a new reflector. Tr. 36. While waiting about ten minutes for the installation of the new

⁶ Dawkins testified that the continuous miner is eighteen feet wide and thirty or forty feet long. Tr. 35.

⁷ 30 C.F.R. § 75.208 provides that, "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support."

reflector, Dawkins remained in the No. 6 entry to ensure that no miners traveled underneath the unmarked, unsupported roof. Tr. 64-65.

1. The Violation in Citation No. 8530836 was S&S.

The Secretary requests that I affirm Citation No. 8530836, as written, and assess the Secretary's proposed penalty of \$807. Tr. 22-25. The Respondent challenges the Secretary's allegations regarding the fact of the violation, the S&S designation, the negligence designation, and the proposed penalty. Tr. 16.

In Commission proceedings, the Secretary must prove his allegations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). The Commission has explained that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *Id.* (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), quoting *Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993)).

In applying the Commission's *Mathies* factors, I must first determine whether the conditions cited by Dawkins in Citation No. 8530836 constitute a violation of 30 C.F.R. § 75.208. Section 75.208 provides that, "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." 30 C.F.R. § 75.208. Dawkins testified that prior to issuing Citation No. 8530836 at 12:45 p.m., she had inspected all the working faces of Carbon Hill Mine. Tr. 22, 25. On cross examination, Dawkins admitted that it was "more than likely" that the required reflector was in place at the No. 6 entry at the time of her initial inspection, and that it could have been knocked down by the continuous miner or by someone else coming into contact with it. Tr. 52, 61, 64.

Regardless of when the reflector was knocked down or otherwise removed from the last row of roof support bolts, Dawkins' un rebutted testimony indicates that the reflector was not in place when the continuous miner finished mining in the No. 6 entry. Tr. 35-36. While section 75.208 does permit the absence of a visible warning or physical barrier during the installation of roof support, Respondent has not argued (and the record does not reflect) that roof support was being installed when Dawkins issued Citation No. 8530836. I therefore find a violation under the strict liability principles contemplated by the Mine Act.

I next identify the hazard in the first part of step two of the clarified *Mathies* test. *Newtown Energy*, 38 FMSHRC at 2038. As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the

hazard is the actual cited section [of the Code of Federal Regulations].” *Id.* The clear purpose of section 75.208 is to prevent miners from traveling under unsupported roof. I therefore define the hazard contributed to by the violation as miners traveling under unsupported roof. Tr. 41-42.

Having determined that the lack of a visible warning reflector presents a hazard to miners, I now consider whether “there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed.” *Newton Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8530836, I must determine whether the lack of a visible reflector or physical barrier is reasonably likely to lead to miners traveling underneath the unsupported roof. I note that, under Commission precedent, “[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations.” *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm’rs Holden and Riley, plurality) (citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co.*, 7 FMRHC 1125, 1130 (Aug. 1985)). I also consider conditions on a mine-wide basis. *Id.* (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (Aug. 1994)).

I find that the Secretary has shown that miners were reasonably likely to travel underneath the unsupported roof in the No. 6 entry. Respondent argues that because Dawkins stood in the No. 6 entry for the ten minute duration between the issuance of Citation No. 8530836 and its abatement, there is no likelihood that miners would have traveled underneath the unsupported roof. Tr. 64-65. However, the S&S inquiry must consider “the violative conditions as they existed both prior to and at the time of the violation and *as they would have existed had normal mining operations continued.*” *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (emphasis added and internal citations omitted). While Dawkins’ presence in the No. 6 entry undoubtedly prevented miners from exposure to any roof fall hazard in the particular facts of this case, “normal mining operations” do not include an inspector warning miners to stay away from potentially hazardous conditions. *See Jim Walter Resources, Inc.*, 28 FMSHRC 579, 604 (2006) (“The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector.”) (citing *U.S. Steel Mining Co.*, 7 FMSHRC at 1130). I therefore reject Respondent’s argument that Dawkins’ presence in the No. 6 entry reduced the likelihood that miners would travel underneath the unsupported roof during continuous normal mining operations.

Dawkins testified that under normal mining operations, the next stage in the mining process (after the continuous miner left the No. 6 entry) was the installation of permanent roof support in the mined-out area. After installing the permanent roof bolts, the roof bolter would normally have hung the required reflector on the last row of roof bolts, and the scoop operator would then enter the No. 6 entry to clean up loose coal, rock dust, and advance the ventilation curtain. Tr. 40, 56. Had Dawkins not remained in the No. 6 entry, the roof bolter might very well have traveled underneath the unsupported roof while installing the permanent roof support. Furthermore, Meadows or another supervisor may have done so when checking the cut. When the violative condition underlying Citation No. 8530836 is viewed under the circumstances as they would have existed under normal mining operations, I find that the Secretary has met his

burden of proof to show that miners were reasonably likely to travel underneath the unsupported roof in the No. 6 entry.⁸

I now turn to the third and fourth *Mathies* steps, i.e., whether the hazard identified in step two (miners traveling underneath unsupported roof), would be reasonably likely to result in an injury of a reasonably serious nature. Dawkins' testimony at hearing indicated that she was concerned that miners traveling underneath the unsupported roof in the No. 6 entry could be injured or killed by a roof fall. Tr. 42. Despite Dawkins' testimony regarding the likelihood that a roof fall would fatally injure a miner, she gave no testimony regarding the likelihood of a roof fall *occurring* in the No. 6 entry. The Secretary offered no evidence or testimony regarding the roof conditions or history of roof falls at Respondent's Carbon Hill Mine. Nor did the inspector offer general testimony (based on her personal knowledge and experience in the mining industry) regarding the likelihood of roof falls. However, the Commission has recognized the serious safety concerns posed by roof falls, and "has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning." *Consolidation Coal Company*, 6 FMSHRC 34, 37 (Jan. 1984); *see also See Halfway, Inc.*, 8 FMSHRC 8, 13 (Jan. 1986) ("Our decisions have stressed the fact that roof falls remain the leading cause of death in underground coal mines."); *Black Beauty Coal Co.*, 33 FMSHRC 1482, 1496 (June 2011) (ALJ) (upholding the Secretary's S&S designation based in part on the fact that newly cut, unsupported roofs are likely to fall). As Dawkins testified:

If you go inby [the last row of permanent roof support] and the roof falls, it's very clear that you're not going to make it with the extent that it was 25 feet of unsupported top And if that top falls, you're going to be crushed and [suffer] internal injuries, broken bones. There's a good possibility that you're not going to make it if the top falls on you and you go inby this area that's not supported.

Tr. 41-42. I therefore find that there exists a reasonable likelihood that miners traveling underneath the freshly-cut, unsupported roof would be seriously injured if not killed by a roof fall.

In conclusion, I have found that the violation of section 75.208 occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that the hazard created by the violation was reasonably likely to result in a reasonably serious injury. *Newtown Energy*, 38 FMSHRC at 2038. I therefore find that the violation of section 75.208 in Citation No. 8530836 was S&S, and reasonably likely to result in fatal injuries to one person.

⁸ Section 75.208 states that "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." While it might be argued that the regulation provides a blanket exception in the case of roof support installation, I decline to adopt an interpretation of the regulation that exposes miners to the significant hazard of traveling underneath unsupported roof.

2. The Violative Condition in Citation No. 8530836 was Not Caused by Respondent's Negligence.

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. The Secretary alleges that the missing reflector was the result of Respondent's moderate negligence, and Dawkins testified that "management should have known that this condition existed. . . . [I]t's important that management informs their people as well as the supervisor that at all times a visible warning sign should be hung on the last row of permanent support." Tr. 44. Dawkins also testified that Meadows offered no mitigating circumstances regarding the violation. *Id.* However, under the Commission's traditional negligence standard as outlined above, I find that the violative condition did not result from Respondent's negligence. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) ("[Commission] judges may evaluate negligence from the starting point of a traditional negligence analysis.")

As noted above, Dawkins admitted on cross-examination that the required reflector was "more than likely" in place at the No. 6 entry at the time of her initial inspection, and that it could have been knocked down by the continuous miner or by someone else coming into contact with it. Tr. 52, 61, 64. Dawkins also admitted that it was "reasonably likely" that, after being knocked down, the reflector had been "sent down the conveyor chain and loaded onto a shuttle car." Tr. 60. Moreover, Dawkins testified that the continuous miner blocked her view of the No. 6 entry while she was observing the mining process, and it was only after the miner moved out of the No. 6 entry area that she was able to see into the entry itself and notice the missing reflector. Tr. 38.

Since Dawkins admitted that the reflector was likely in place before the continuous miner began cutting in the No 6 entry, and she was only able to view the entry and note that missing reflector after the continuous miner left the area, I cannot conclude that the operator knew or should have known that the reflector was missing prior to the time when the continuous miner left the area. In other words, the Secretary produced no evidence that an agent of management knew or should have known of the violation prior to the time that the inspector first observed it after the continuous miner operator pulled out of the entry. The Secretary thus failed to show any breach of duty on the part of management. *See Leeco, Inc.*, 38 FMSHRC 1634, 1637-38 (July 2016) (finding no negligence where the Secretary failed to introduce evidence demonstrating what actions a reasonably prudent operator would have taken). I also find that Meadows' prompt action of calling someone to replace the missing reflector after Dawkins first drew his attention to the violation was consistent with the actions that a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken in similar circumstances. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. I therefore find that the Secretary failed to establish that the violative condition in Citation No. 8530836 was the result of Respondent's negligence.

3. Penalty Assessment

The Secretary proposed a penalty of \$807 for Citation No. 8530836. The parties stipulated that Respondent's miners worked 89,576 hours and produced 84,876 tons of coal in 2014, and worked 106,644 hours and produced 84,876 tons of coal in 2015. P. Ex. 1, Stips. 6-7. Accordingly, I find that Respondent is a medium-sized mine. *See* 30 C.F.R. § 100.3, Table I. The parties have stipulated that "[t]he assessed penalty for each docket will not affect the operator's ability to remain in business." P. Ex. 1, Stip. 10. The parties stipulated that Respondent demonstrated good faith in abating the cited conditions. P. Ex. 1, Stip. 9. Section 75.208 was cited in one citation out of the 52 violations that Respondent received at Carbon Hill Mine in the 15 months preceding the issuance of Citation No. 8530836. I have affirmed the Secretary's S&S designation, and modified Citation No. 8530836 to reduce the level of negligence from "moderate" to "no negligence." Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of \$362.

C. Docket No SE 23016-0103, Citation No. 8531669

Citation No. 8531669 was issued on October 26, 2016 by MSHA inspector Darryl Allen as part of his regular E01 inspection of the Carbon Hill Mine. Tr. 73-74. Allen began his inspection by checking the pre-shift, on-shift, belt, and electrical record books. Tr. 75. During his subsequent underground inspection, Allen found what he thought was an alleged violation on the scoop charger. Tr. 75.⁹ He returned above ground to review the electrical record books to determine whether the alleged violation had been recorded, and he discovered that the record books did not contain any record of the scoop charger. Tr. 79. Based on the lack of records related to the scoop charger, Allen concluded that the electrician conducting the required weekly electrical examinations had not included the scoop charger in his examinations. Tr. 79, 81-82.

Allen issued Citation No. 8531669, alleging a violation of 30 C.F.R. § 75.512,¹⁰ based on the following practice:

Record of weekly electrical examinations can not [sic] be provided for the Co. No. 1 outby scoop charger located at the South Main track cross cut 16. (Exide brand, Serial No. CL110645) The scoop charger has been in service for an undetermined length of time of at least 2 months. The scoop charger is observed in unsafe operating condition at the time of inspection. If this condition is allowed to continue to exist under normal mining conditions, it is reasonably likely that

⁹ Although Allen issued a citation regarding the allegedly hazardous condition on the scoop charger, the citation was later vacated after Allen spoke with an MSHA electrical specialist and determined that the condition was not a violation. Tr. 83-84.

¹⁰ 30 C.F.R. § 75.512-2 provides that "[t]he examinations and tests required by § 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition."

miners will receive injuries of a serious nature as a result of undetected and uncorrected hazardous conditions of various types.

P. Ex. 5. The Secretary alleges that the violation is S&S, reasonably likely to cause injuries resulting in lost work days or restricted duty for one miner, and the result of Respondent's high negligence. *Id.* Allen terminated the citation on October 28, 2015, when he returned to the mine and was informed by a certified electrician that the scoop charger had been examined, and the examination had been recorded in the weekly electrical examination record book. Tr. 128.

1. The Violation in Citation No. 8531669 was S&S.

The Secretary requests that I affirm Citation No. 8531669, as written, and assess the proposed penalty of \$807. Respondent argues that the pre-shift examinations done on the scoop charger indicate that it was in safe operating condition for the two-month duration of the violation, and that gravity and negligence should be modified accordingly. Tr. 173, 200.

I begin with the fact of the violation. Section 75.512-2 requires that electrical examinations be conducted at least weekly. 30 C.F.R. § 75.512-2. Allen's un rebutted testimony indicates that Respondent was unable to produce electrical examination records for the scoop charger. Tr. 79, 81-82. Although Meadows assisted Allen in searching through Carbon Hill Mine's examination record books, they could find no record indicating that an electrical examination had been conducted on the scoop charger. Tr. 80, 87. I therefore find the violation occurred as alleged by the Secretary.

I next identify the hazard in the first part of *Mathies'* second step. Section 75.512-2 specifies the frequency with which the electrical examinations required under section 75.512 must be performed. Regular examinations for the purpose of detecting and correcting hazards are "of fundamental importance in assuring a safe working environment underground." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). In the context of electrical equipment, inspector Allen testified that the failure to conduct regular inspections could result in the failure to correct hazardous conditions that could expose miners to fire hazards as a result of possible ignitions or electrocution (including electrical burns). Tr. 84-86. I find that Respondent's violation of section 75.512-2 contributed to the safety hazards of a mine fire or electrocution. *Id.*

I now consider whether, "based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard[s] against which [section 75.512-2] is directed." *Newtown Energy*, 38 FMSHRC at 2037. At hearing, the Secretary elicited testimony from Allen on two specific types of hazards, an electrocution and a mine fire. While Allen gave specific testimony on *how* any number of component failures on the scoop charger itself might cause ignitions or electrical fires, Allen gave no testimony regarding the *likelihood* of any such component failures. For example, Allen testified that

it's reasonably likely that any type of failure, whether it be at the power center and, say, on the charger cable, on the charger itself, it would possibly produce a

ground that would put power on the frame of the machine. There's just a multitude of things that can happen

Tr. 84-85. Allen also testified that if the scoop charger is not properly maintained,

it has the capability of starting a fire. It's a 480-volt piece of equipment with a long cable that can be damaged at any time. That combined with a failure of the breaker or something else that is, you know, common mine history. A failure of electrical equipment has resulted in mine fire.

Tr. 85-86. The Secretary cannot merely allege that a violation *could* contribute to a hazard resulting in injury; the Secretary must present evidence that a violation is *reasonably likely* to contribute to a hazard resulting in an injury. *See Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010) (“We note that in past cases we have not agreed that it is sufficient that a violation “could” result in an injury.”) (citing *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995) (affirming ALJ’s decision that the Secretary failed to meet his burden of proof under the third prong of *Mathies* where the inspector testified that miners “could” be exposed to respirable dust, pneumoconiosis “could” result, and methane ignitions “can” result)).¹¹

The Commission has held that when evaluating violations that may contribute to fire hazards, the adjudicator must evaluate the “confluence of factors” inside the mine that might trigger an ignition, fire, or explosion under normal mining conditions. *Ziegler Coal Co.*, 15 FMSHRC at 943. These factors include possible ignition sources, methane levels, and the type of equipment in the area. *Excel Mining, LLC*, 37 FMSHRC at 465 (Mar. 2015). The Commission has also recognized that fires and explosions are reasonably likely to occur when the “fire triangle” of oxygen, a fuel source, and an ignition source is present. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 449 (May 2005) (“The hazard in this case involves the danger posed when the three ingredients needed to sustain a fire or explosion—sufficient oxygen, fuel, and an ignition source—come into close proximity.”) (citing *Alabama By-Products*, 25 FMSHRC 227, 229-30 (Apr. 2003) (relying on inspector testimony that “a fire or explosion can occur when you have the right mixture of fuel, heat, and oxygen”). Beyond Allen’s general statement that a component failure on the scoop charger could cause the charger itself to catch on fire, the Secretary did not introduce any specific evidence or testimony regarding the particular circumstances surrounding the equipment, or in the Carbon Hill Mine generally, that could contribute to a mine fire hazard. Allen gave no testimony regarding the possible causes of component failure or how likely a component failure might be to occur on the scoop charger. Nor did the Secretary present evidence regarding accumulations, float coal dust, or methane within the mine that might satisfy the oxygen and fuel components of the fire triangle. I therefore find that the Secretary has not shown, by a preponderance of the evidence, that Respondent’s failure to conduct weekly examination of the scoop charger contributes to the reasonable likelihood of a mine fire or ignition. *Newtown Energy*, 38 FMSHRC at 2037.

¹¹ I note that under the clarified *Mathies* test, the determination of whether a particular safety hazard is reasonably likely to occur has shifted from the third step to the second step. The third *Mathies* step now assumes the existence of the hazard. *Newtown Energy*, 38 FMSHRC at 2037; *Knox Creek*, 811 F.3d at 161-65.

Allen also testified that Respondent's violation could contribute to the hazard of electrocution. The roof at Carbon Hill Mine is composed of shale, and commonly falls in thin layers between the roof bolts. Tr. 86. Allen testified that the thin, sharp shale pieces can cause nicks in electrical cables. *Id.* If a piece of shale falls and nicks the scoop charger cable, any miner who touches the cable would be exposed to electrocution or an arc burn. Tr. 85, 87. Since Respondent was not conducting weekly examinations of the scoop charger and its electrical components, including the charger's cable, miners would have been unaware of any potentially hazardous condition resulting from cable damage caused by fallen shale. Tr. 84-87. Although Respondent argues that the required pre-shift examinations would have identified and immediately corrected any hazardous conditions associated with the scoop charger before miners were exposed to them, Respondent submitted no evidence at hearing (either as exhibits or in the form of witness testimony) from which I can conclude that the scoop charger was, in fact, included in routine pre-shift examinations. Given Allen's testimony that falling shale is "common" at the Carbon Hill Mine, I find that the Secretary has shown, by a preponderance of the evidence, that Respondent's failure to conduct weekly electrical examinations on the scoop charger contributed to the reasonable likelihood that miners would be exposed to the hazards of electrocution or an arc burn. Tr. 86.

I also find that the electrocution or arc burn hazards presented by the lack of scoop charger examinations are reasonably likely to result in an injury of a serious nature, thereby satisfying the third and fourth *Mathies* factors. Congress and the Commission have recognized that the shock hazards resulting from damaged cables pose a significant danger to miners. S. Rep. No. 91-411, at 71 (1969), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975); *see also Spartan Mining*, 30 FMSHRC at 707-08 (finding that the failure to protect cables from damage contributed to an electrocution hazard that was reasonably likely to result in an injury of a reasonably serious nature).

In conclusion, I find the violation of section 75.512-2 occurred as alleged by the Secretary in Citation No. 8531669. I further find that such violation was S&S and reasonably likely to result in an injury of a reasonably serious nature to one miner.

2. The Violation in Citation No. 8531699 was the Result of Respondent's High Negligence.

Allen designated Citation No. 8531669 as resulting from Respondent's high negligence. Allen testified that "weekly examinations are as basic as it gets." Allen had "no doubt" that Respondent knew (and certainly should have known) that weekly examinations were required to be conducted on the scoop charger. Tr. 87. Although Meadows assisted Allen in searching through the record books to locate the weekly electrical examination records, Meadows never told Allen that the examinations had been conducted, but were just not recorded. Tr. 88. Respondent provided no evidence that Respondent had been conducting weekly electrical examinations on the scoop charger. The scoop charger was in service for at least eight weeks without being examined by a certified examiner. P. Ex. 5. Accordingly, I affirm the Secretary's high negligence designation. P. Ex. 5, Tr. 89.

3. Penalty Assessment

The Secretary proposed a penalty of \$807 for Citation No. 8531669. The parties stipulated that Respondent's miners worked 89,576 hours and produced 84,876 tons of coal in 2014, and worked 106,644 hours and produced 84,876 tons of coal in 2015. P. Ex. 1, Stips. 6-7. Accordingly, I find that Respondent is a medium-sized mine. 30 C.F.R. § 100.3, Table I. The parties have stipulated that "[t]he assessed penalty for each docket will not affect the operator's ability to remain in business." P. Ex. 1, Stip. 10. The parties stipulated that Respondent demonstrated good faith in abating the cited conditions. P. Ex. 1, Stip. 9. Section 75.512-2 was not cited in any of the 52 citations issued at Respondent's Carbon Hill Mine in the 15 months preceding the issuance of Citation No. 8531669. I have affirmed the Secretary's gravity and negligence designations. Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of \$807.

IV. ORDER

For the reasons set forth above,

Citation No. 8530836 is **MODIFIED** to reduce the level of negligence from "moderate" to "no negligence," and

Citation No. 8531669 is **AFFIRMED**, as written.

Respondent, Prospect Mining and Development Company, Inc., is **ORDERED** to pay a total civil penalty of \$1,169 within thirty days of the date of this Decision and Order.¹²

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

Distribution:

C. Renita Hollins, Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

J.D. Terry, Prospect Mining and Development Company, Inc., 218 Highway 195, Jasper, AL 35503

/cc

¹² Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
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January 10, 2017

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

v.

ALCOA WORLD ALUMINA, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-0128
A.C. No. 41-00320-366885

Docket No. CENT 2015-0365
A.C. No. 41-00320-377526

Docket No. CENT 2015-0401
A.C. No. 41-00320-378824

Mine: Bayer Alumina Plant

DECISION AND ORDER

Appearances: Lindsay Wofford, Esq., U.S. Department of Labor, Office of the Solicitor,
Dallas, Texas and

Maria C. Rich, CLR, U.S. Department of Labor, MSHA, Dallas, Texas for
Petitioner

Christopher Bacon, Esq., Vinson & Elkins L.L.P., Houston, Texas, for
Respondent

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a citation and two orders issued to Alcoa World Alumina, LLC (“Alcoa”), which were litigated at a hearing on January 12 and 13, 2016, in Victoria, Texas.¹ The parties presented testimonial and documentary evidence and filed post hearing and reply briefs.

¹ Citation No. 8778037 and Order No. 8856305 were assigned to Docket No. CENT 2015-0401. Order No. 8778039 was assigned to Docket No. CENT 2015-0365. Order No. 8778038 was assigned to Docket No. CENT 2015-0128. The parties requested that Order No. 8778038 be modified from a 104(d)(2) to a 104(d)(1) order. Tr. 8. The parties settled Order No. 8856305 in Docket No. CENT 2015-0401 prior to hearing. Tr. 8; J. Prehearing Rep. 2.

The relevant citation and orders (hereinafter “citations”) were issued as a result of MSHA’s investigation into an accident that occurred at Alcoa’s Point Comfort, Texas plant,² on September 3, 2014, that resulted in serious injury to a contract miner from an on-site contract maintenance company, Turner Industries (“Turner”). Tr. 34, 112-13. The citations allege that Alcoa failed to protect miners from the hazardous motion of a caustic liquid, that Alcoa did not require miners to wear necessary personal protective equipment (“PPE”) while exposed to dangerous chemicals, and that Alcoa allowed a miner to unsafely access a work area. Ex. S-18, S-19, S-20. The violations were all designated as significant and substantial (“S&S”) , unwarrantable failures to comply with mandatory standards, and allegedly the result of Alcoa’s high negligence. *Id.*

Alcoa does not contest the fact of the violations or the S&S designations, rather, Alcoa disputes the unwarrantable failure and high negligence levels assigned to the three citations. Resp. Br. 2-3; Resp. Reply at 7. In support of the unwarrantable failure and negligence designations, the Secretary asserts that Steven Alvarado, an Alcoa employee who was present at the scene of the accident, was an agent of Alcoa tasked with supervising the contractors, and that he failed to take reasonable steps to prevent the accident and keep the contract miners safe. Sec’y Br. 4. Alcoa contends that Alvarado did not have the requisite authority to be considered a “supervisor,” and was merely a rank and file miner present at the scene, and as such the negligence levels of each citation should be reduced, and the unwarrantable failure designations deleted. Resp. Br. 2. Alcoa also argues that even if Alvarado is found to be a supervisor, the negligence and unwarrantable failure categorizations are in error because Alvarado and Morales did not step into an area that would require wearing PPE until the moment of the accident, that Alcoa verified the system being maintained was free of harmful liquid, and that Alvarado reasonably believed that a Turner employee cited for kneeling/sitting on a pipe while working did not need fall protection and was safe. Resp. Br. 2.

Prior to the hearing the parties made the following stipulations:

1. At all relevant times, Alcoa’s Bayer Alumina Plant was a “coal or other mine” as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802.
2. At all relevant times, Respondent was operator of the Bayer Alumina Plant, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802. The products of Bayer Alumina Plant, MSHA ID No. 41-00320, entered the stream of commerce and/or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
3. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”);

² MSHA issued several identical citations to Turner Industries, which were settled without a hearing. Tr. 13; Resp. Br. 1. Citations were also issued to Alcoa, because Steven Alvarado, an Alcoa employee, was present at the time accident. Tr.13.

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter.
5. The Administrative Law Judge has jurisdiction over this matter.
6. The subject citations were served by a duly authorized representative of the Secretary on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance, but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The assessed penalties, if affirmed, will not impair the Respondent's ability to remain in business.
8. The parties have settled Citation No. 8856305 in Docket No. CENT 2015-401 and only Citation Nos. 8778037, 8778038 and 8778039 remain at issue.

J. Prehearing Rep. 1-2.

For the reasons that follow I conclude that Order Nos. 8778037, 8778039, and Citation No. 8778038, were all violations of the respective cited standards, properly designated as S&S, and that the gravity designations for each violation were appropriate. I conclude, however, that Alcoa exhibited low and moderate, rather than high negligence and that none of the violations were the result of unwarrantable failure.

This decision will begin with an overview of the relevant legal standards. Next, a factual background of the mine and the accident that gave rise to the citations will be given, followed by an analysis and the disposition of each alleged violation, and finally my assessment of civil penalties and order.

I. Basic Legal Principles

Significant and Substantial

All of the citations in dispute were designated by the Secretary as significant and substantial ("S&S"). The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission has held that a violation is properly designated S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at

905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

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

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

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

Generally, the Commission considered the third step of the *Mathies* test to ask both whether there was a reasonable likelihood that a hazard contributed to by the violation would occur *and* whether there was a reasonable likelihood that the occurrence would result in injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). As a result of this paradigm, the second step was often a given in S&S analysis, with the third prong traditionally being the most contended and discussed aspect the evaluation.³ The Commission recently revisited the S&S analysis to clarify the interplay between the second and third prongs of the *Mathies* test. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).

The Commission explained in *Newtown* that the ultimate inquiry at the heart of the *Mathies* test has not changed but now “the proper focus of the second step of the *Mathies* test is the likelihood of the occurrence of the hazard the cited standard is designed to prevent.” *Newtown Energy*, 38 FMSHRC at 3307, n. 8. The third step focuses primarily on gravity, and the focus shifts from the violation to the hazard (which is established in stage two), and whether the hazard would be reasonably likely to result in injury. *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016). Essentially whether the hazard was reasonably likely to occur is moved to the second step and the consideration of whether an injury was reasonably likely in

³ In *U.S. Steel Mining*, the Commission provided additional guidance regarding the third step: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*; *PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)).

the event of that occurrence remains in the third step. *Id.* The second step “likelihood” analysis and third step “gravity” analysis are tied together by the “hazard” at issue. *Newtown Energy*, 38 FMSHRC at 2038.

The *Mathies* test now requires that the judge adequately define the particular hazard to which the violation contributes in the second step of the test. The starting point of determining the hazard is the cited C.F.R. section, as the Commission defines “hazard” in terms of the prospective danger the cited safety standard is intended to prevent. *Id.* After a hazard is clearly identified and defined the judge must then determine whether the alleged violation sufficiently contributed to that hazard.⁴ This requires a determination of whether, in light of the facts surrounding the violation, there is a reasonable likelihood of the occurrence of the hazard the standard addresses. *Id.*

If a Judge concludes that based on the evidence the violation sufficiently contributes to the defined hazard, the occurrence is assumed, and he must move on to the third step of *Mathies*. *Id.* The third step then requires the judge to determine whether based on the particular facts, the occurrence of the hazard would be reasonably likely to result in an injury. *Id.* The Commission recognized that “reasonable likelihood” is not an exact standard and the degree of risk of injury cannot be quantified into precise percentage, but it is a matter of degree evaluation, requiring a judge to apply experience and discretion to resolve fact intensive questions. *Id.* at 2039. The fourth and final step in the analysis is to determine whether a resulting injury would be reasonably likely to be reasonably serious. *Id.*

Unwarrantable Failure

The three citations at issue were also designated as “unwarrantable failures” to comply with the cited standards. A violation of a standard is the result of an operator’s unwarrantable failure if it demonstrates “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). A violation is also an unwarrantable failure if it demonstrates the operator’s “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). A court must examine all relevant facts and circumstances to determine whether an operator’s conduct is aggravated or whether mitigation is present. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Specific factors to consider to determine whether a violation constitutes an unwarrantable failure include: 1) the length of time that the violation has existed, 2) the extent of the violative condition, 3) whether the operator has been placed on notice that greater efforts were necessary for compliance, 4) the operator’s efforts in abating the violative condition, 5) whether the violation was obvious or posed a high degree of danger and 6) the operator’s knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). All the factors must be considered, although the court may find some factors are not relevant or are more or less important than the others under the circumstances. *IO Coal*, 31 FMSHRC at 1351.

⁴ The “revised” *Mathies* test now requires two tasks, or sub steps, within the second step.

In addition to these six unwarrantable failure factors, other circumstances must be considered in the analysis. The Commission has held that the dangerousness of a violative condition in itself may be so severe as to warrant an unwarrantable failure finding. *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Additionally, the conduct of mine management must be considered in an unwarrantable failure analysis. When a supervisor, within the scope of his employment, violates a standard, the supervisor's misconduct is imputed on the operator and should be "considered in conjunction with the traditional unwarrantable failure factors." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2046 (Aug. 2016).

Negligence

The Secretary designated the three citations to be the result of "high" negligence on the part of the operator. The Mine Act creates a strict liability enforcement model³, and as result negligence is not an essential part of the calculus to determine an operator's fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required; irrespective of fault.⁴ Negligence, however, is central to the assessment of civil penalties⁵ and to the evaluation of the enhanced enforcement elements of S&S, unwarrantable failure, and flagrant violation.⁶

Negligence is considered in light of the action that would have been taken under the same circumstances by a "reasonably prudent person familiar with the mining

³ "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C.A. § 814(a) (emphasis added). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). See also, *A.G. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that each mandatory standard has an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet that duty can lead to a finding of negligence if a violation occurs).

⁵ Section 110(i) of the Mine Act requires that in assessing penalties, one criterion that must be taken in account is "whether the operator was negligent." 30 U.S.C. § 820(i). *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989) ("the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.").

⁶ Although the same or similar factual circumstances may be included in the Commission's consideration of an operator's misconduct with regard to an unwarrantable failure finding and the Commission's evaluation of an operator's negligence for purposes of assessing a civil penalty, the concepts are distinct and subject to separate analysis. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

industry, the relevant facts, and the protective purposes of the regulation.” *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Id.* Considerations regarding negligence include “the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.” *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The operator may be charged with varying degrees or levels of negligence, which becomes an important consideration during the penalty assessment. The Commission has described that ordinary negligence may be characterized by “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987). A finding of high negligence, however, “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (1998); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator’s intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992). Also, actual knowledge of violative conditions and the failure to act in light of that knowledge amount to high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Moreover, mine management is held to a higher standard of care, because they are tasked with the safety of their miners and must also set an example for miners under their direction. *Midwest Materials Co.*, 19 FMSHRC 30, 35 (Jan. 1997); *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).⁷

MSHA’s definition of negligence and corresponding degrees in part 100 are not binding on Commission judges, but are helpful in evaluating culpability. *Brody Mining LLC*, 37 FMSHRC at 1701-03 (holding that Commission judges are not bound to apply MSHA’s negligence definitions in 30 C.F.R. Part 100.). Negligence is defined in Part 100 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).⁸ MSHA’s Part 100 also takes into account mitigation, stating that “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” 30 C.F.R. § 100.3(d). Accordingly, reckless negligence is present if “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating

⁷ There is an exception to this principle that applies in limited circumstances. The Commission has held that where an operator takes reasonable steps to prevent accidents and the “erring supervisor unforeseeably exposes only himself to risk,” a finding of no negligence will be upheld, but if an operator was blameworthy in respect to hiring, training, safety procedures or the accident itself, there may be a negligence finding. *NACCO Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). Notably, the Commission has never applied the *Nacco* exception to preclude a finding of unwarrantable failure or to mitigate the civil penalty assessment for an unwarrantable failure violation.

⁸ “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d).

circumstances.” *Id.* Moderate negligence is properly attributed to the operator if “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is appropriate when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is appropriate if “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

Mitigation becomes an important consideration when analyzing the level of negligence attributable to the operator. Essentially, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. While mitigation is an important consideration, an ALJ is not constrained to an evaluation of “mitigating” circumstances, but is charged to consider the “totality of the circumstances holistically.” *Brody Mining LLC*, 37 FMSHRC at 1702; *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

Agency

As noted in the negligence and unwarrantable failure summaries above, the Commission has recognized that the negligence of an operator's “agent” is imputable to the operator for both penalty assessment and unwarrantable failure purposes. *Wayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) (“R&P”); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Wayne*, 19 FMSHRC 447 at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995).

The question of whether a miner is an agent is often contested, and demands an intensive factual analysis. The Mine Act gives a starting point for the inquiry. Section 3(e) of the Mine Act defines an “agent” as “any person charged with responsibility for the operation of all or part of a ... mine or the supervision of the miners in a ... mine.” 30 U.S.C. § 802(e). Next, the miner’s function, responsibilities, authority, and representations to MSHA must be taken into account. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (“We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine.”).

The Commission looks at the particular miner’s function, rather than solely his job title to determine whether a miner had supervisory or managerial duties. *REB Enters.*, 20 FMSHRC 203, 211 (Mar. 1998). It is important to examine the responsibilities of the miner at the time of the alleged negligent conduct, and whether they were those that would normally be delegated to management, or were crucial to the mine’s operation. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328–31, (Mar. 2009); *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the

Commission has concluded that in carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of *respondeat superior*); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant to the agency determination that an employee made required daily examinations and entered findings in an examination book).

In the same vein, a miner's authority is also important in an agency analysis. There are no hard and fast rules as to what authority a miner must have to be considered an agent of the operator. The authority to hire, fire, or discipline other employees in and of itself is not a prerequisite to a finding of agency, especially in light of other circumstances that indicate an agency relationship, because such authority often rests at a higher level due to the impact of these decisions. *Nelson Quarries, Inc.*, 31 FMSHRC 331-32. *Cf. e.g., REB Enters.*, 20 FMSHRC at 211-12 (holding that highwall leadman was not an agent because he did not have authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding discipline of employees).

Apparent authority, or how a miner is treated by co-workers, must also be taken into consideration. A miner is more likely to be considered an agent of the operator if other employees treated them as a supervisor. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (2009). *See also All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). Representations made to MSHA regarding authority are also relevant in an analysis of agency. *Ambrosia*, 18 FMSHRC at 1561 n.12 (finding relevant, based on analogy to common law agency principles, that employee held himself out as the employee in charge at the mine and signed MSHA documents as mine foreman); *Nelson Quarries, Inc.*, 31 FMSHRC 318, 331-32. On the other hand, the authority of a rank and file miner to tell other miners what to do on the job, does not on its own, make a miner an agent of the operator. The intrinsic nature of on the job training by fellow miners requires that more experienced miners give guidance to new miners on how to safely perform a job and to imply agency in such a situation would create an "every man for himself" atmosphere, detrimental to health and safety. *Martin Marietta Aggregates*, 22 FMSHRC 633, 640 (May 2000). Likewise, the Commission has held that the authority of a miner to tell miners to stop working on dangerous machinery and to remove it from service does not create an agency relationship. *U.S. Coal*, 17 FMSHRC at 1688. Also, a miner's independence is not dispositive in an agency determination. *See e.g., Whyne*, 19 FMSHRC at 451-52 (finding that an experienced miner who needs little supervision and assists less experienced miners is not necessarily a supervisor).

Gravity

In order to properly assess a civil penalty, a determination regarding gravity must be made. The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287,

294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)(ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be assessed assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Burden of Proof

The Secretary bears the burden of proving all elements of a citation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence."). *See also, Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976-1977 (Aug. 2014) (holding that to prove his imputed negligence is proper, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care). In general, this preponderance standard "means proof that something is more likely so than not so." *In re: Contest of Respirable Dust Sample Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995).

Penalty

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

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

2013)(ALJ)(explaining that based upon the statutory language, the Commission alone is tasked with assessing final penalties).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g*, 32 FMSHRC 1257, 1289 (Oct. 2010)(holding that the judge was justified in relying on utmost gravity and gross negligence in imposing a penalty substantially higher than that proposed by the Secretary); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (finding it appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that the judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592-01, 13,621(Mar. 22, 2007)(codified at 30 C.F.R. pt. 100).

In addition, Commission judges are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone*:

When it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Sellersburg Stone, 5 FMSHRC at 293.

Special Assessment

Through notice and comment rule making, the Secretary promulgated regulations specifying the “Criteria and Procedures for Proposed Assessment of Civil Penalties.” 30 C.F.R. Pt. 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the “regular assessment” process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.⁹ Nor do they identify how the amount of a special assessment will be determined, other than to state that “the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form.” *Id.* The narrative findings for special assessments are typically brief and conclusory. The Secretary’s proposed special assessment is not binding on the Commission; the Commission imposes civil penalties *de novo*.

II. Factual Background

The Mine and the Alumina Refining Process

Alcoa’s Bayer Alumina Plant in Point Comfort, Texas processes alumina, which is used to produce aluminum metal. Tr. 38-44; Ex. S-1. Alcoa extracts alumina from bauxite in a four step process referred to as the Bayer Refining Process. Tr. 15, 52, 55, 210; Ex. S-1. The accident giving rise to the citations at issue occurred during the second step, the clarification process. Ex. S-1; Tr. 41, 46.

⁹ In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. Criteria and Procedure for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 at 13,621 (Mar. 22, 2007).

During the clarification process liquid bauxite, which is referred to as “liquor”¹⁰ due to its reddish-brown color, is pumped from the digestion process area, to the clarification department, where it is passed through presses that remove impurities to refine or clarify it for the next step in the process. Tr. 45-46. The liquor is then moved via pipes to the precipitation department for the third step, and then to calcination for the fourth and final step. Tr. 42-46. The final product is alumina, a white powder composed of half aluminum and half oxygen. Ex. S-1.

The refining or clarifying process takes place in the clarification department. Tr. 47; Ex. S-3. The clarification department contains a press building, with three stories. Tr. 46. The bottom or first floor is the mud floor and contains drains to catch material or liquor that spills during clarification. Tr. 18, 26, 47. It also contains pump headers and pipes which push the liquor vertically up through the second floor valves and pipes, and then up to the presses on the top floor. Tr. 47-48, 73-74, 224.¹¹ The pipes that feed the presses are called risers, and are referred to by the press to which they connect. Tr. 50.

System Maintenance and the Flange Break Procedure

As the liquor cools and hardens when travelling through the piping system, scale, a rock-like substance, builds up along the walls within the risers. Tr. 56-57, 62, 66, 70, 403. This scale, often called “pancake,” can be removed either by hydro blasting, jackhammering, or a caustic solution wash. Tr. 62, 64, 70.¹² Cleaning by these methods is scheduled periodically to remove buildup. Tr. 403. In order to remove scale with caustic solution (“caustic”), pipes are removed from the production process, liquor is drained from the risers and a caustic is introduced into the

¹⁰ In the first step of the Bayer Refining Process, called digestion, raw bauxite is pulverized and mixed with sodium hydroxide in large pressure tanks, creating a caustic solution. Ex. S-1; Tr. 56. The alumina in the bauxite is dissolved and forms sodium aluminate, which is referred to as “liquor.” Tr. 40, 56, 61. The name is derived from the reddish brown color of the liquid. Tr. 60-61.

The Material Safety Data Sheet (“MSDS”) for sodium aluminate, or liquor, refers to the solution as “Bayer Liquor,” “Caustic Liquor,” “Alumina Refining Process Liquor,” or “Alumina Refining Process Liquor.” Ex. S-5 at 1. The MSDS for liquor describes it as caustic and corrosive. Ex. S-5 at 1. Additionally, the thermal temperature of liquor during the alumina refining process is about 220 degrees Fahrenheit. The MSDS warns that direct contact with liquor can cause “severe irritation, corrosive burns and permanent injury to eyes, skin and gastrointestinal tract,” and that liquor mists can seriously irritate or damage the respiratory tract. *Id.* The MSDS states that PPE should be worn when handling liquor, and safety goggles, a face shield, gloves, and protective clothing should be worn when exposed to liquor. *Id.* at 3.

¹¹ Presses are long tube-shaped devices with a series of screens that capture and filter solid materials like sand and mud from the slurry. Tr. 45-46; Ex. S-1.

¹² The caustic solution (“Caustic”) is sodium hydroxide, or NaSO₄, a corrosive base material that Alcoa uses to break down built up scale in pipes. Tr. 51, 54. When a caustic solution is sent through the pipes, the system is “on caustic.”

risers through ancillary lines. Tr. 51, 54, 320. One riser at a time is removed from the pumping process and drained before caustic is introduced through the ancillary lines. Tr. 54, 55, 320, 492.

The ancillary lines serve two risers and connect the pairs with a “T” pipe, which allows the caustic to flow into both risers. Tr. 51, 54, 215, 320. To isolate one pipe for cleaning and keep the other in production, a round flat metal plate, or blind, is placed between the joint of the T pipe to prevent flow of caustic between the risers. Tr. 68, 69. Another metal plate with a hole in the center, a dutchman, is placed on the other side of the T pipe to allow flow into that riser. Tr. 55, 68, 69.

In order to remove the caustic from one pipe, or take it “off caustic,” and begin using caustic on another (putting that pipe “on caustic”), the blind must be relocated and swapped with the dutchman, in a process called a blind swap. Tr. 403. The blind swap requires that the pipes be empty, and that the T pipe connecting the risers be removed by unbolting the flanges, referred to as a flange break. Tr. 118, 141, 356, 427, 441.

The flange break portion of the blind swap presents a danger because miners are opening the piping system, which might contain residual caustic liquid which can spray or leak out of the pipe. Ex. S-12. Miners are at risk of contact with a hazardous material if the riser is charged, containing liquid that can escape. Tr. 30-31. For this reason, Alcoa created a Standard Work Instruction (“SWI”) which outlines safety measures necessary for the task. Ex. S-12.

Alcoa’s flange break SWI requires miners to perform a lockout/tagout procedure on the piping system to isolate the flow of any liquid. Ex. S-12. Miners must then verify that the system is isolated by draining the pipes and then flushing them with water (conducting a “flush verification”), which should run clear. Tr. 32, 61, 505, 506; Ex. S-12.¹³ During the flange break miners are required to wear standard personal protective equipment (“PPE”) to avoid chemical or thermal burns, including a hardhat, goggles, long sleeve shirt, and hearing protection. Ex. S-12. Additional PPE, including a chemical suit, face shield, and rubber boots is required if verification is not performed before the flange break, or if a miner cannot place himself in a position above the flange being broken. Ex. S-12. Miners are also instructed to attempt to work from above the flange being unbolted, and to avoid putting body parts underneath the flange, in the area known as the “line of fire”. Ex. S-12. The area where the flange break is being

¹³ Alcoa’s Tagout/Lockout Verification Program defines verification as “the inquiry, observation and testing methods” used to ensure energy sources are isolated and secured in a safe position and that any “equipment, process or system is in a zero or controlled energy state” necessary for the task being performed. Ex. S-25. Flush verification is defined by Alcoa’s SWI as “the witnessing of water being flushed through piping, vessels, tanks, pumps and valves.” Ex. S-12. An observer is looking for the water to run clear, absent of color or material. Tr. 505-06. Additionally, the temperature of the pipe after flush verification may indicate whether liquor is drained, as a properly drained pipe will cool upon the introduction of water. Tr. 233-34.

The SWI states that if verification cannot be performed additional PPE must be worn and a “Flange Break Permit” must be completed and authorized by a superintendent or his designee before the flange break begins. Ex. S-12.

performed should be barricaded and barricading should be maintained if working above ground level to protect anyone who walks under the flange break from dripping liquid. Ex. S-12.

The Flange Break on September 3, 2014

On September 3, 2014, Turner contractors were tasked with performing a blind swap of risers 25 and 27, a pair of risers that shared a T pipe. Tr. 318, 403, 406. Riser 27 was to come off caustic and be put back into the clarification process (“on liquor”), requiring the blind swap. Tr. 403-04. At the time the task was assigned, a dutchman was in place allowing flow into Riser 27, but the caustic wash was removed. Tr. 403-04.

On the morning of September 3, before the blind swap was to start, Jeff McCaskill, an area supervisor for Alcoa, had a safety meeting with Turner employees, including their supervisor Rusty Morales, to discuss the hazards presented by the task. Tr. 167, 405-06. Morales then held a meeting with his team and went through a Job Safety Analysis (“JSA”) for the blind swap, and reviewed the safety measures the miners should take. Tr. 168-70; Ex. S-14, S-15.

Before the blind swap, Alcoa was to isolate the system, drain the 25 riser, verify the piping was empty, and perform the lockout /tagout, as Turner contractors were not authorized to lock out the system. Tr. 130. Alcoa has lockout/tagout procedures in place for flange breaks, along with an SWI that outlines the procedures necessary when a flush verification is not performed. Ex. S-12; Tr. 453. The Flange Break SWI states that verification must be performed before starting the task of unbolting “any flange associated with piping, vessels, tanks, pumps and valves.” Ex. S-12. The instruction explains that the individual performing the flange break “must personally observe the flushing of water across the flange being unbolted.” *Id.* The General Instructions in the SWI advise that proper lockout / tagout and verifications procedures should be followed before starting work, and that an individual must verify that a system has been flushed with water by witnessing the flushing and draining. Ex. S-12. If verification cannot be performed additional PPE must be worn and a “Flange Break Permit” must be completed and authorized by a designated individual before the task begins. Ex. S-12.

At around 8:00 a.m. Alcoa began the process of stopping the flow to Riser 25. Tr. 410. This required closing and tagging out Mud Floor Valve 30 between the pump and riser 25, to prevent flow to the riser, and to ensure that Valve 28 leading to riser 27 was closed. Tr. 417.¹⁴ When McCaskill believed the valve was closed, he hung a green tag on the valve to indicate the closure. Tr. 410-11. Liquor was then drained from the line and a white work permit was placed on the press floor control room to indicate that the lockout / tagout was complete, the system was isolated, and that work could commence. Tr. 413-14, 421-22. Alvarado testified that the 25 riser was not flush verified, despite the SWI requirement, because there was a blind between the 27

¹⁴ Alcoa employees closed the mud floor valve with a sledgehammer. Tr. 412. During this process Alvarado broke the siphon on the line to facilitate draining. Tr. 416-17. Rudy Peña, an Alcoa employee, then began to “rod out” or drill a line into the ball valve between riser 25 and valve 30 to remove scale build up. Tr. 414, 415. When Peña attempted to attach a hose to the ball valve to drain the line, liquor from the pipe sprayed him. Tr. 414. Peña received first aid to treat the skin that was exposed to liquor. Tr. 413.

and 25 risers, and the riser was “on caustic.” Tr. 453-54. Alvarado admitted that a flush verification could have been performed regardless of the blind. Tr. 454-55.

Morales and McCaskill then “walked out the job,” so McCaskill could show Morales that the tag-out process was done and to verify that the drain hose had no flow. Tr. 119, 174, 421.¹⁵ McCaskill informed Morales that he would be leaving the facility, and then left for the day around lunchtime. Tr. 158, 422. At around 1:00 p.m., Turner employees Morales, Dominic Cano, and Leo Gaytan arrived at the Press Building to begin the blind swap. Tr. 14, 360, 361. Morales and Alvarado went over the isolation points once more. Tr. 133, 144, 176, 426.

Turner employees Gaytan and Cano removed the T pipe connecting Risers 25 and 27 and the blind that was on Riser 25. Tr. 356. At this time they discovered a chunk of hardened scale, referred to as “pancake,” on the opening of the pipe behind the blind blocking the opening to Riser 25, which needed to be removed so caustic could be forced into the line. Tr. 356, 428.¹⁶ Gaytan testified that he saw liquor coming out of the drain hose at around 1:00 p.m., before he started breaking the flange. Tr. 360-61. Gaytan informed Morales, who then told Gaytan that the job was ready to go and that there was only a little liquid leaking. Tr. 360-61, 395. Gaytan said that Alvarado was nearby, about three or four feet away, when he told Morales about the liquid. Tr. 360-61, 396-97. Gaytan also stated that liquid was coming out of the hose while he was working. Tr. 378, 380-83.

Cano initially kneeled onto the pipe, about four feet from the ground and began jack hammering for twenty minutes until Gaytan took over. Tr. 273-74, 357. Gaytan jackhammered from a stand he had pulled over to the area. Tr. 104, 198, 316. The jackhammer broke through the scale and Alvarado, who was standing nearby noticed liquor coming out of a hole in the pancake, and began shouting for the miners to stop jackhammering. Tr. 431-32. Morales, who had been standing 8 to 10 feet away, walked up at this time and was struck in the back by the liquor spewing heavily from the riser. Tr. 431-32. Morales was not wearing the proper PPE for exposure to liquor when he was struck. Tr. 75, 432.

Alvarado pulled Morales into the chemical safety shower about ten feet away, where Morales rinsed himself under the solution for several minutes. Tr. 161-62, 433. Emergency medical personnel arrived thereafter. Morales suffered third degree burns from his elbow to shoulder, requiring skins grafts. Tr. 163. Morales’s tongue, ear and face were also burned. Tr. 162.

¹⁵ Alcoa did not flush verify the isolation of Riser 25, as mandated by the SWI. Tr. 453-54. The policy generally requires that the individuals performing the flange break observe the flushing of water across to the flange to be unbolted. Ex. S-12.

¹⁶ The pancakes are hard, like concrete, and are typically removed by jackhammering. Tr. 64, 70, 428.

MSHA Inspector Brett Barrick was assigned to conduct an investigation of the accident. Tr. 81-82.¹⁷ After investigating and questioning various Turner and Alcoa employees, he issued the disputed citation and orders.

III. Analysis

The parties agree that the three cited standards were violated, that the violations are properly categorized as S&S, and that the gravity designations are appropriate. However, Alcoa challenges the negligence levels and unwarrantable failure charges of each citation.

The Secretary supports his negligence and unwarrantable failure classifications in large part by arguing that during the violative conduct, Alvarado was Alcoa's agent, particularly, an acting supervisor, tasked with ensuring the safety of the Turner contractors in McCaskill's absence. Sec'y Br. 9, Tr. 404, 406, 410, 423. Conversely, Alcoa contends that Alvarado was simply a bystander and a mere rank and file miner who was present during the flange break because he needed to perform a task after the Turner employees were finished. Resp. Br. 8, Tr. 301-05. Before the citations are discussed, it is necessary to define Alvarado's role at the time of the incident, as it ultimately shapes the disposition of the violations.¹⁸

Agency Analysis

The dispute regarding both negligence and unwarrantable failure hinges largely on whether, at the time of the violations, Alvarado was charged with supervising other miners, and as such was Alcoa's agent.¹⁹ This will be determined by examining Alvarado's title, function, responsibility, authority, and representations to MSHA regarding the flange break procedure on September 3, 2014.

¹⁷ Brett Barrick was an MSHA Inspector at the time the citations were issued, but is now a Conference Litigation Representative ("CLR"). Tr. 23. Barrick was an inspector for four years, and conducted about 30 inspections of alumina facilities, including Alcoa plants. Tr. 24, 26. Barrick worked for companies that performed contract work for Alcoa for 19 years before becoming an MSHA Inspector, including 17 years working as the Safety and Health Manager for Rexco, a contract company imbedded at Alcoa. Tr. 27-29. While at Rexco, Barrick supervised flange breaks. Tr. 29-30.

¹⁸ The Secretary also alleges that Alcoa was highly negligent because it violated its own safety policies in favor of saving time by not requiring PPE for the flange break, not establishing a barricade, failing to flush verifying the piping, by failing to properly maintain the pipe system, and not requiring contractors to safe use safe means of access while working. Sec'y Br. 24-28, 34-36. Since the Secretary's negligence and unwarrantable failure arguments are specific to each citation, they will be addressed separately. Alvarado's role will be discussed first, as the dispute regarding his level of responsibility is common to all three violations.

¹⁹ The Mine Act defines an agent as any person charged with the operation of all or part of a mine, or the supervision of the miners. 30 U.S.C. § 802 (e).

Alcoa argues that Alvarado had not been designated as a supervisor on September 3, 2014, and as such, Alvarado was not responsible for the activities of Turner contractors. Resp. Br. 7. The Secretary asserts that Alcoa's failure to formally designate Alvarado as a supervisor is not determinative of Alvarado's role on the day of the violation. Sec'y Br. 20. On at least ten previous occasions, Alcoa management designated Alvarado as a Temporary Acting Supervisor ("TAS") for a shift. Tr. 449-51. This designation is given to an hourly employee before a full shift, when a regular supervisor is not available, and requires paperwork be filled out. Tr. 449. Alvarado receives a pay increase when he serves as TAS. Tr. 451. Alvarado had never been designated as a TAS for a partial shift before, and on September 3, 2014, he was the only Alcoa employee on the crew who had acted as a TAS. Tr. 449, 451. Barrick testified that he had no evidence that Alvarado was acting as a TAS on the day of the accident. Tr. 305-06. By all accounts, Alvarado was not named a supervisor after McCaskill left for the day.

The Commission looks to the miner's function to determine agency status, regardless of formal title or lack thereof. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Martin Marietta*, 22 FMSHRC 633, 637-38 (May 2000). The Commission examines whether the miner's function involved responsibilities normally delegated to management. *REB Enters.*, 20 FMSHRC 203, 211 (Mar. 1998). The Secretary alleges that Alvarado's function was to supervise Turner contractors during the blind swap, in McCaskill's absence. Sec'y Br. 19.²⁰ Alvarado told Barrick during the investigation, that he was asked to "keep an eye" on the Turner contractors. Tr. 309. Barrick conceded that it would not be unusual for an operator to ask its hourly employees to keep an eye on contractors. Tr. 337-40. Further, Barrick testified that all miners have the obligation to stop others from doing something unsafe, even without reaching the threshold of being a supervisor or an agent. Tr. 311. Alvarado testified that he was present during the flange break because he had to do a task once the blind swap was complete. Alcoa maintains that there would have been no need to designate Alvarado as a supervisor. Resp. Br. 8. Maly testified that Alcoa did not normally directly supervise contractors, contractors generally supervise their own work crews. Tr. 486-87. Maly also testified that Alvarado reported to Robert Clark in McCaskill's absence, and that in addition to Robert Clark, two other supervisors were present in the clarification department during the blind swap. Tr. 485-87.

Next, Alvarado's responsibilities will be analyzed, including whether Alvarado exercised managerial responsibilities at the time of his alleged negligent conduct. *Martin Marietta Aggregates Inc.*, 22 FMSHRC 633, 638 (May 2000). The Secretary notes that Alvarado had "tagging authority" over the blind swap and flange break, and that this authority militates

²⁰ The Secretary states that Alvarado admitted he was responsible for overseeing another Turner crew working on the top floor of the Press Building. Tr. 462-63. The Secretary's argument is misplaced, as Alvarado admits that he was assigned to "lock out" a job for Turner contractors, not that he was assigned to direct them or supervise them. Tr. 462-63.

towards Alvarado being a supervisor. S. Br. 20, Tr. 401, 443.²¹ Turner contractors did not have the authority to conduct a lockout/tagout on Alcoa equipment. Tr. 130. Alvarado had Level 2 tagout authority, which allowed him to lock out certain equipment and hang work permits. Tr. 402. The Secretary failed to show how this authority differed from that of other rank and file miners, or that only supervisory personnel had tagout authority.

In the absence of actual authority, the Commission also looks to apparent authority, or how a miner was treated by those with whom he worked, to determine whether a miner was an agent of the operator for negligence and unwarrantable failure purposes. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 (Sept. 1996). The Secretary alleges that Turner contractors reasonably believed Alvarado was an Alcoa supervisor for purposes of the flange break and blind swap. Sec’y Br. 19-21.

Morales testified that during the job walkout McCaskill informed him (Morales) that Alvarado would oversee the remainder of the job that day. Tr. 158.

Q. [Lindsay Wofford] And how did you get that understanding that his [Alvarado’s]—his role was to supervise the work being conducted?

A. [Rusty Morales] Jeff McCaskill told me that he would be over the job that we would be doing and that he would be there.
Tr. 158.

Morales also testified that he knew Alvarado “was in charge of the press building.” Tr. 160. Alcoa notes that Morales was likely being untruthful in his testimony regarding Alvarado being in charge of the job. Resp. Br. 9. Alcoa points out that Morales has filed a lawsuit against Alcoa and Alvarado for the injuries he sustained. Resp. Br. 9; Tr. 164. Barrick testified that he did not think Morales was credible. Tr. 294. Barrick was unable to interview Morales during his investigation, but witnessed his testimony at a deposition and then at trial. Tr. 294. Barrick said that Morales’s statements were contrary to those of three other witnesses- two Turner miners and Alvarado. Tr. 294. Morales’s testimony that he believed Alvarado to be in charge is not credible, based on Barrick’s observation on the inconsistencies among witnesses and Morales’s possible motivation to place blame on Alvarado for his injuries. Barrick testified that the documentation that Turner gave him after the incident seemed suspect and inconsistent. Tr. 298-99. In the past when Barrick dealt with Turner, he “found them at times to not be very credible.” Tr. 298.

²¹ Alcoa has a lockout/tagout policy that dictates what needs to be done to isolate a system before maintenance is performed. Tr. 31. With tagging, after a system is mechanically closed and isolated, a “tag” is hung on a valve or section of piping as a visual aid to show it has been properly isolated and to indicate that individuals are working on the system. Tr. 86, 210. An individual with tagging authority has the authority to isolate a system, to identify which components in the system need to be closed off. Tr. 31. Alcoa has various levels of “tagging authority” to indicate what each employee is permitted to do in the tagging process. Tr. 401-02. These levels are achieved through training and certification. Tr. 401. For example, a Level 2 tagout authority would allow someone to lock out equipment for general mechanical work. Tr. 401. A Level 3 authority would allow an individual to have the same duties as Level 2, in addition to being allowed to perform a confined space lockout. Tr. 401.

Leo Gaytan, one of the Turner contractors present during the incident, testified that he believed Alvarado was in charge because Alvarado was tagging the job with Morales. Tr. 355. Gaytan testified that a supervisor from Alcoa generally watched the flange break. Tr. 363. Gaytan also noted that Alvarado told him to clean the scale and reassemble the system. Tr. 384-85. It is important to note that this is the only thing Alvarado said to Gaytan, and Gaytan already knew he was going to be jackhammering the scale. Tr. 384-85. Gaytan admittedly knew what his tasks would be before Alvarado's alleged statements. This testimony does not weigh in favor of Alvarado being classified a supervisor.

Finally, neither Alcoa nor Alvarado ever made any representations to MSHA that Alvarado was a supervisor during the flange break. Tr. 302, 305. During the investigation Alvarado told Barrick that on the day of the incident he was "on tools," and that he was "[w]atching Turner to assist." Tr. 248. Barrick testified that Kelly Grones, Alcoa's health and safety manager, gave him the investigation report Alcoa compiled after the incident. Tr. 82, 296. Barrick believed it was very candid, although he disagreed with Alcoa's belief that the maintenance was done properly. Tr. 296-97.

Alvarado's tagging authority and assignment to "keep an eye" on Turner contractors are not sufficient to find that he was a supervisor or an agent of Alcoa on September 3, 2014. The unwarrantable failure and negligence classifications of the individual citations will be discussed, with Alvarado's role in each being that of a rank and file miner.

A. Citation No. 8778037, Blocking Against Hazardous Motion (Lock Out/ Tag Out)

On September 16, 2014, Barrick issued Citation No. 8778037 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.14105, a mandatory standard requiring that machinery or equipment must be powered off and blocked against hazardous motion before repairs on machinery are conducted.²²

The Citation alleges:

An accident occurred on September 3, 2014, when a contractor's supervisor working on the 25 press riser was struck in the back and upper arm by approximately 220 degree caustic liquor. Two contract employees had removed a 4 inch tee off of the riser and observed scale buildup. They then began chipping at the hydrated

²² The standards states:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

scale buildup in the 4 inch opening with a 30 lb. jackhammer. When the bit was removed from the hydrated scale hot liquor sprayed out of a hole. The contractor's supervisor was standing near the miner that was scaling the opening. It has been determined that the No. 30 Mud Floor Valve which is a part of the mechanical means of blocking the liquor[']s] movement was not seated completely and allowed liquor to re-enter the riser from below the drain filling the riser back up after it had been drained. The one inch drain line failed to show any drainage at the time indicating that it had scaled up. Failure to stop all motion of hot liquor in this equipment resulted in the contractor's supervisor receiving second and third degree burns to his back resulting in lost work days. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that they did not verify that the system was completely blocked against movement of liquor. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-18.

The citation was designated as reasonably likely to be permanently disabling, with one person affected, S&S, and the result of Alcoa's high negligence. *Id.*

The Secretary alleges that Alcoa violated 30 C.F.R. § 56.14105 because the flange break was "maintenance" as anticipated by the standard, the liquor was not completely removed or blocked from moving through the piping, and it subsequently sprayed out, injuring a miner. Sec'y Br. 22-23. Alcoa does not contest the fact of the violation.

1. S&S

Although Alcoa does not dispute the S&S designation, the S&S nature of the citation will be discussed briefly. The first prong of *Mathies* is satisfied because Alcoa failed to properly drain the pipes, thus the liquor was not blocked from moving through the pipes during maintenance, in violation of Section 56.14105.

Next, the second step of *Mathies* requires me to determine whether the hazard the cited standard was designed to prevent was reasonably likely to occur. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). Section 56.14105 requires that equipment be blocked against hazardous motion. 30 C.F.R. § 56.14105. As applied to this violation, the pipes should have been drained or blocked to prevent the corrosive and heated liquor from moving through the pipes and potentially escaping while maintenance (i.e. the flange break) was performed. Tr. 203. The failure to drain the lines resulted in the liquor escaping and burning a miner. The second step of *Mathies* is satisfied. Tr. 203.

The third *Mathies* criterion focuses on gravity. Generally a judge is to assume the hazard has been realized and then consider whether it is reasonably likely to result in injury. Once again, an injury occurred in this case, as Morales was burned by the spewing liquor during the flange

break process. The fourth step of *Mathies* looks to whether there is a reasonable likelihood that the injury in question would be of a reasonably serious nature. Morales sustained severe burns on his back, arm, and face from contact with the liquor. Tr. 162. These burns required hospitalization and skin grafts, and have kept Morales out of work. Tr. 115-16, 162. Based on these facts, the resulting injury was serious in nature. The citation was properly designated S&S.

2. Negligence

The Secretary argues that the high negligence level for Citation No. 8778037 is appropriate because Alcoa failed to follow its own lockout/tagout procedures and work instructions by omitting a flush verification and not isolating the pump system before performing a flange break, in an effort to save time. Sec’y Br. 25. According to the Secretary, flush verification was critical in this case because the drain lines were not properly maintained and thus clogged with scale. Sec’y Br. 26-27; Tr. 79-81. Alcoa counters that a classification of “no negligence” is appropriate for the citation because the accident was unforeseeable, the operator was diligent in ensuring that the 30 valve that allegedly caused the leak was completely sealed, and the omission of flush verification is irrelevant because it would have been futile. Resp. Br. 32-33.

The Secretary alleges that the flush verification was omitted only because Alcoa was in a rush to get the system back on line. Sec’y Br. 28. Flush verification can take quite a bit of time: 45 minutes to fill the system with water, and another 45 to allow it to drain. Tr. 496. The job was a top priority, but McCaskill was leaving early that day. Tr. 106, 361, 422. Moreover, the Secretary alleges that the accident was caused by Alcoa’s improper maintenance of the drain line. Alcoa designed three-inch by two-inch (“3x2”) drain lines to be installed on risers. Tr. 79-80. These large diameter drains are angled in such a way as to allow discharge to flow away from the miner and are less susceptible to plugging, clogging, and scaling than a 1-inch drain line opening. Tr. 80. At the time of the accident Alcoa was using 1-inch ball valves hooked to a hose to drain the lines rather than maintain the 3x2 drain lines. Tr. 80-81. The 1-inch valve can clog and prevent liquor from draining. This means that when liquor stops draining from the system, it may be due to a clog, not an empty system. Flush verification then becomes more important. Sec’y Br. 27.

Alcoa maintains that there were no aggravating factors to support a negligence finding. Resp. Br. 24. Alcoa contends that the Alcoa never communicated that the job was to be rushed; rather Morales told his crew that the job needed to be completed promptly. Tr. 379-80.²³ Gaytan said that the job was a priority because Alcoa wanted the system back in service, but did not testify that anyone from Alcoa specifically told him to rush the job. Tr. 364.

Q. [Maria Rich] Could you describe this job in terms of priority?

A. [Leo Gaytan] Yes, ma’am.

Q. Okay. Could you describe it for me? What priority was this job?

A. Because they want the unit back in service, that's the priority.

Q. Is it important to get these pipes back in production?

A. Yes, ma'am.

Tr. 364.

Later, Gaytan testified that Morales told him to jackhammer despite seeing liquor leaking because the job needed to be done. Tr. 379-80.

Q. [Christopher Bacon] Okay. And you told Mr. Morales "there's liquor coming out of that?"

A. [Gaytan] We told Mr. Morales and Mr. Alvarado knew about it.

Q. You said Mr. Alvarado knew but you didn't tell Mr. Alvarado; he was standing off to the side?

A. He was on the side.

Q. Yeah. And you were jackhammering?

A. I told Mr. Morales that and Mr. Morales

Q. He said, "It doesn't matter, keep doing it"?

A. He said, "The job needs to be done," he said, "They want it done, Alcoa wants it done."

Q. Okay. So Mr. Morales said, "Just keep the job -- just do the job even though that's coming out"?

A. Mr. Morales and Mr. Alvarado was rushing it.

Q. Mr. Alvarado was rushing you?

A. Yeah, it needs to be done.

Q. Okay. But Mr. Alvarado didn't tell you? He -- he didn't say anything?

A. Not that I know of.

- Q. Okay. So how -- why do you say -- if you don't know he say anything, then what makes you say that --
- A. Because Mr. Morales -- is what he told me, "the job needs to be done."
- Q. Okay. So the person who told you that the job needed to be done, the person who communicated that there was a rush was Mr. Morales?
- A. I don't know about that one.
- Q. Okay. But the person who was talking -- you-- you spoke to Mr. Morales about the liquor; you saw the liquor; am I right?
- A. Yes, sir.

Tr. 379-80.

In sum, Gaytan did not testify that Alvarado knew there was a leak in the line; he only stated that Alvarado was nearby.

In response to the Secretary's allegations that Alcoa did not verify isolation, Alcoa argues that it did verify that the system was completely blocked against the hazardous movement of liquor because it closed the 30 valve and verified that the system was completely drained. Resp. Br. 22; Tr. 420-21. Alcoa contends that flush verification was not necessary because the flush verification process is meant to ensure that caustic does not remain in the pipe after a caustic wash, and in this case liquor was in the pipe. Resp. Br. 23; Tr. 454-55, 474. Alcoa also posits that flush verification is generally used for horizontal piping, which is more likely to contain residue after a caustic wash, and the piping at issue was vertical. Tr. 454-55, 474.

Alcoa claims that the cause of the incident was likely the failure of valve 30 during jackhammering, and as such performing a flush verification would not have indicated a problem. Resp. Br. 23. Dwayne Maly, the training superintendent at Alcoa, testified that the spraying liquor was caused by the 30 valve. Tr. 477-79.²⁴

²⁴ Dwayne Maly has been the training superintendent at Alcoa for about six years. Tr. 471. His responsibilities include recording and directing employee MSHA training and reviewing SWI's. Tr. 471. Before this he spent 22 years in various roles at Alcoa, including serving as the superintendent in the clarification, digestion and precipitation areas and as a process engineer in digestion. Tr. 471. Maly assisted in drafting Alcoa's flange break SWI. Tr. 472. Maly has a bachelor's degree in Chemical Engineering from Texas A&M University. Tr. 472.

Barrick testified that he could not be sure of what caused the leak, but testified, “I truly believe in my heart of hearts flush verification may not have solved this...” Tr. 505. When Barrick began his investigation, Grones gave Barrick an email that the plant manager, Ben Kahrs, had sent out to many people at Alcoa the day after the incident, stating that “flush verification was not done correctly.” Tr. 296; Ex. S-11. Barrick agreed that one of the reasons he issued the lockout/tagout citation was this e-mail. Tr. 301. Maly stated that he did not agree with Kahrs’ email, because he did not believe flush verification would have made a difference. Tr. 499, 500. This assertion, coupled with Barrick’s admission regarding flush verification, indicated that it is objectively reasonable to believe flush verification was not necessary, and may not have prevented the liquor leak.

Low negligence is the appropriate designation for the citation. There was negligence on the part of Alcoa, because the lines were not adequately maintained. The testimony indicates that Alcoa could have used the specially designed 3x2 lines, which may have prevented the scaling, and that the 1-inch drain lines were more likely to give a false indication of a de-energized system. Moreover, flush verification could have been performed as an additional step, even if it was not deemed necessary.

Likewise, there were no aggravating factors to support a high negligence finding. The flush verification would likely not have prevented this issue, and Alcoa’s decision not to perform one does not rise to the level of high negligence. Alcoa bypassed the flush verification because it reasonably believed that flush verification was not necessary. There is no indication that Alcoa was rushed and omitted flush verification to save time. Morales and Gaytan indicated that the job was a priority, but did not credibly testify that they were told by Alcoa to rush the maintenance.

3. Unwarrantable Failure

The Secretary alleges that the unwarrantable failure designation is proper for Citation No. 8778037 because the facts demonstrate aggravated conduct on the part of Alcoa. Sec’y Br. 29-30. Alcoa disputes the designation and asserts that the Secretary did not establish aggravated conduct on the part of any Alcoa employee. Resp. Br. 2.

a) Length of Time

The Secretary alleges that the violative condition existed for an hour because Gaytan testified that he saw liquor coming from the hose before the blind swap started. Sec’y Br. 29; Tr. 361, 388, 390.²⁵ In response, Alcoa notes that work ceased as soon as Alvarado saw liquor seeping through the pancake, and that the valve believed to have become unseated, causing the leak, only became unseated after jackhammering began, lessening the amount of time the condition existed. Resp. Br. 24.

²⁵ Gaytan testified that he saw the hose draining, and reported to Morales that he saw the hose was still draining. Tr. 388-90. Barrick testified that Gaytan told him [Barrick] during the investigation that Gaytan saw fluid leaking from the drain line. Tr. 332. At another point during Gaytan’s testimony he states that he never looked at the hose, but then states he saw the hose draining before he began working. Tr. 388. Maly stated that Gaytan has a “safety conscious” attitude, and it seems unlikely he would see a leak without speaking up about it. Tr. 483-85.

Gaytan did not credibly testify that Alvarado, an Alcoa employee, knew that a persistent leak existed during the jackhammering. Gaytan testified that Alvarado was three or four feet away when Gaytan told Morales about the leak, but did not offer testimony that Alvarado heard the statement or acknowledged it in any way. Tr. 396. Moreover, Alvarado testified that he called on the Turner contractors to stop work the moment that he witnessed liquor seeping from system, which was almost the same time that Morales was struck by the liquor. Tr. 431. The length of time that the condition existed was brief, and as such does not weigh in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

The Secretary believes the violation's extensiveness is supported by Alcoa's failure to follow its own flush verification guidelines. Sec'y Br. 30. Alcoa notes that it verified the system twice, so the extent of the condition does not justify an unwarrantable failure finding. Resp. Br. 24.

The extensiveness of the condition does not support unwarrantable failure, as this leak existed in one area of the facility, for one task, and exposed the only the miners working in the area at the time.

c) Notice

The Secretary alleges that Alcoa had notice that greater efforts were needed to comply with Section 56.14105, because MSHA cited Alcoa for an injury sustained during a flange break a year prior to this incident. Tr. 343; Ex. S-23. Alcoa alleges that there was insufficient evidence that the prior citation was similar in nature to the citation at hand. Resp. Br. 25. Alcoa notes that the prior citation involved a high pressure screen, unlike the machinery at issue here, and that it was located in the clarification department. Tr. 343-44.

Without additional testimony regarding the previous violations, it is difficult to determine whether the prior citations were sufficient to put Alcoa on notice of the violative condition. On balance, the evidence that the prior citation involved a different piece of machinery is stronger. There is insufficient evidence to find that Alcoa was on notice for unwarrantable failure purposes.

d) Failure to Abate

The Secretary states that the disregard of the flush verification step before the flange break, and permitting it to be ignored, demonstrated Alcoa's failure to abate the violative condition. Sec'y Br. 30. Alcoa counters that it did all it could to reasonably abate the violation because Alvarado called the Turner contractors to stop working immediately upon seeing liquor seeping through the pancake. Resp. Br. 25; Tr. 360.

The Secretary does not meet his burden of showing that Alcoa's decision to omit flush verification amounted to a failure to abate. Additionally, by all accounts, the work ceased when

Alvarado witnessed liquor seeping through the pancake. This does element does not support a finding of unwarrantable failure.

e) Obviousness and High Degree of Danger

Alcoa admits that the conditions leading to the accident posed a high degree of danger, but argues that the condition was not obvious because there was no way to tell that the 30 valve would fail after having been verified to be closed twice. Resp. Br. 25. Alcoa disputes the obviousness of the condition by noting that Barrick testified, “if I walked up on it, would I say it was obvious that something bad’s going to happen here? No, it’s not – it’s not going to be obvious in that manner.” Tr. 251. According to Alcoa, any problem with scale breaking loose would be undetectable until jackhammering started. Tr. 479.

The corrosiveness of the liquor and possibility of a leak did present a high degree of danger, albeit not an obvious one.

f) Operator’s Knowledge

Similarly, the Secretary contends that Alcoa had knowledge that liquor was flowing from the line because Gaytan mentioned it, and Alvarado was nearby when he did so. Tr. 361, 390, 396-97. McCaskill also had difficulty seating the 30 valve before he left for the day and Peña had been injured at one point already. Tr. 412, 414.

Alcoa did not have sufficient knowledge of the violative condition to warrant a finding of unwarrantable failure. The failure to flush verify alone does not rise to the level of reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Brody Mining*, 37 FMSHRC 1687, 1691 (Aug. 2015). The leak did not exist for a significant amount of time; by all accounts the flow of liquid from the pipe was sudden. Tr. 182, 431. It was not established that Alvarado knew that the system was not properly verified. Gaytan vacillated when asked about observing the pipe leak, so it is difficult to say with certainty whether Alcoa had knowledge of the leaking pipe.

In sum, the high degree of danger of leaking liquor, alone, does not support an unwarrantable failure finding. There is insufficient evidence to show that Alcoa was on notice, had knowledge that the system was not properly isolated, that the condition was obvious, or that Alcoa did not attempt to abate the violative condition.

4. Gravity

Alcoa does not dispute the gravity of the violation. The condition was dangerous, as Alcoa concedes, and the fact of the accident and extent of injuries are undisputed. One person, Morales, was injured severely, justifying the gravity designations.

B. Order No. 8778038, The PPE Violation

On September 16, 2014, Barrick issued Order No. 8778038 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.15006, a standard that requires that special protective equipment and clothing be worn by miners whenever a hazardous condition is encountered.²⁶ The order alleges:

An accident occurred on September 3, 2014 when the contractor's area supervisor failed to use special protective equipment provided by the contractor to protect him from known chemical and thermal hazards in the area in which he was working. The supervisor was providing oversight for two contract miners on the No. 25 riser drain located on the mud floor of the press building. The two miners were de-scaling the riser with a 30 lb. jack hammer at a 4 inch flange opening. Personal protective equipment (PPE) had been established by the contractor in their job safety analysis review and is described in the mine operator's safe work instruction procedure[s] which was provided to the contractor prior to the work being done. The PPE required to be worn for the work is a chemical suit, face shield, chemical gloves, and rubber boots. The contractor's supervisor was working in the area wearing a hard hat, monogoggles, hearing protection and leather work boots. During the maintenance on the line the miners knocked an approximately 1.25 inch hole into the hydrated scale buildup. The approximately 220 degree liquor contained in the line shot out of the hole striking the supervisor in the back and upper right arm about 8 feet away resulting in second and third degree burns to the areas affected. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that a competent person/agent was present during the work and observed the supervisor not wearing the proper equipment. The competent person/agent failed to wear the required PPE as well and was in the immediate area of the release. Failure to use PPE that has been prescribed through job analysis and historical injury information in the mine increases the potential for miners being severely burned. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-19.

²⁶ 30 C.F.R. § 56.15006 reads:

Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.

The Order was designated as reasonably likely to be permanently disabling, a significant and substantial (“S&S”) violation, with one person affected as a result of “high” negligence. *Id.* The Order was later modified to a 104(d)(1) Order. Tr. 8.

Section 56.15006 requires that special protective equipment and clothing shall be provided, maintained and used if chemical or other hazards that could cause injury are encountered. 30 C.F.R. § 56.15006. The Secretary does not alleged that PPE was not provided or maintained, but rather that on the date of the accident it was not being used by a Turner employee and an Alcoa employee. Ex. S-19; Tr. 256. Barrick testified that he issued the PPE citation because Alcoa permitted Morales to enter the “line of fire,” or area where a caustic spray could occur, without adequate protective equipment. Tr. 256. Morales admitted that he was not wearing the PPE required for a flange break, as outlined in Alcoa’s SWI. Tr. 135.²⁷ The Secretary further alleges that Alcoa did not establish a barricade to protect miners from possible caustic spray, as required by Alcoa’s own SWI. Sec’y Br. 32-33; Ex. S-12.

1. S&S

The S&S nature of the citation is not in dispute, but will be addressed briefly. The fact of the violation was established, satisfying the first prong of the *Mathies* test. Alcoa does not dispute the fact of the violation. Morales admits that he was not wearing the PPE required for a flange break at the time of his injury. Tr. 135.

The hazard contributed to by the violation (i.e. the failure of miners to wear required PPE and establish a barricade) was a miner being struck by the corrosive 220 degree Fahrenheit liquor. Tr. 34, 112-13; Ex. S-20. Section 56.15006 seeks to protect miners from being injured by various aspects of a process or system, in this case contact with heated, corrosive liquor. It is likely that a miner in the line of fire without protective equipment would be injured if he came into contact with a dangerous substance. The third *Mathies* criterion is satisfied because the liquor, and the failure to wear protective clothing to protect his skin, caused Morales to be injured. Tr. 116, 162. These injuries were serious as they required a miner to undergo extensive hospitalization, skin graft procedures, and time out of work, satisfying the fourth prong of the *Mathies* test. Tr. 116, 162.

2. Negligence

Alcoa argues that the PPE citation should be modified from “high” negligence to “low” negligence, because it could not have predicted Morales would walk into the line of fire or would forego donning the PPE. Resp. Br. 32. The Secretary contends that there are no mitigating factors to justify reducing the level of negligence, and that Alvarado had the authority to require

²⁷ Alcoa’s Standard Work Instruction for a flange break outlined the PPE required to complete the task. In addition to the hardhat, google, long sleeve shirt, and hearing protection, the SWI requires the wearing of a chemical suit, face shield, chemical gloves and rubber boots. Ex. S-12. The SWI also instructs that the area of the flange break be barricaded. Ex. S-12.

PPE, establish a barricade, and prevent Morales from entering the line of fire, but failed to do so. Sec’y Br. 33.

The Secretary alleges that Alvarado ordered the Turner miners to remove the pancake in Riser 25 and observed the subsequent jackhammering, but did not verbally stop Morales from entering the line of fire without PPE. Sec’y Br. 33; Tr. 356, 362-63, 432. Barrick testified that Alvarado was in close proximity to the jackhammering, although Barrick did not know exactly where. Tr. 269. Alvarado conceded that if he saw any unsafe behavior or conditions, he would be able to call it out and stop work. Tr. 452. There is no proof that Alvarado saw and condoned Morales’s lack of PPE. Morales should have worn the extra PPE as a safe measure, since he had the potential to walk into the line of fire (and ultimately did).

The Secretary notes that Alvarado did not establish a barricade, although that step is outlined in the flange break SWI. Sec’y Br. 33; Ex. S-12. Alvarado testified that a barricade should have been put up, but he did not put one up because he did not start the work, and he thought Turner contractors should have done it. Tr. 453.

Alcoa argues that the negligence should be modified to low because Morales signed off on the job safety sheet that required PPE, but did not wear it, so he was ultimately responsible. Resp. Br. 32. Moreover, the violation occurred in a short period of time, and Alcoa had no way of knowing that Morales would walk into the line of fire without PPE. Resp. Br. 32.

Alcoa’s culpability should be modified to “low” negligence, as Morales was supervisor and contract miner, who knew he should have worn PPE, but did not. There is insufficient evidence to indicate that Alvarado was aware of the failure. Additionally, the standard for setting up a barricade for a flange break was not cited, and seems to be the result of a misunderstanding of the need for a barricade, and which individuals were tasked with setting it up.

3. Unwarrantable Failure

The Secretary alleges that the facts surrounding the PPE violation support a finding of aggravated conduct sufficient to justify an unwarrantable failure finding. According to the Secretary, the violative condition existed for a significant period of time, Alcoa was aware of the condition, did not mitigate the hazard, knew greater efforts were needed to comply with the PPE standard, and that the condition posed a high degree of danger. Sec’y Br. 32. Alcoa notes that Morales’s decision to walk into the line of fire without proper PPE cannot be imputed on the operator because Morales was a supervisor who knew of the risk, was responsible for his safety, and that of his crew, but chose to forego donning additional PPE, and that Alcoa could not have stopped him. Resp. Br. 18. These arguments are discussed further below.

a) Length of Time

The Secretary contends that although Morales’s injury occurred quickly, the failure to wear PPE was present from the time the T pipe was removed at 1:00 p.m., until the time the ambulance was called at 1:53 p.m. Sec’y Br. 34; Ex. S-10. Alcoa notes that Morales was only in the line of fire for a short period of time before being struck by leaking liquor. Resp. Br. 18; Tr.

260, 359. Alvarado testified that he was not aware that Morales was in the line of fire, until the moment Morales was injured, and Alvarado yelled for the workers to stop. Resp. Br. 19, Tr. 432. The short length of time weighs against an unwarrantable failure finding.

b) Extent of Violative Condition

Alcoa notes that only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45. Alcoa argues that this indicates the violative condition was not extensive, and only Morales was in danger, not the other Turner contractors who were all wearing the appropriate PPE. Resp. Br. 19. The extent of violative condition factor does not support an unwarrantable failure finding.

c) Notice

The Secretary contends that an injury occurred during a previous flange break, resulting in a citation being issued to Alcoa, putting Alcoa on notice that greater efforts were needed to comply with the PPE standard. Sec'y Br. 35. Alcoa states that it was not on notice of the condition, regardless of the prior PPE citation, because only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45.

Based on the facts at hand, Alcoa was not on notice of the condition. The previous citation was issued more than a year before, based on another process, and involved a different piece of mine equipment.

d) Failure to Abate

According to Alcoa, it put forth an effort to abate the condition by providing PPE to the Turner contractors. Resp. Br. 32. This factor bears little weight in the present unwarrantable failure analysis.

e) Obviousness and High Degree of Danger

Alcoa does not dispute that the violation presented a high degree of danger, but once again notes that the risk was not obvious, because they could not have anticipated Morales's actions. Resp. Br. 20-21. Morales indicated on the job safety form that he was wearing PPE, and by all accounts Alvarado was not closely watching the contractors. While the condition was dangerous, it was not obvious.

f) Operator's Knowledge

Alcoa also denies that it had knowledge of the violative condition. Alcoa notes that there was no agent present to whom to impute knowledge. Resp. Br. 21. Alcoa maintains that Alvarado was not an agent of the operator, and even if he were, he did not see and could not anticipate Morales walking into the line of fire without adequate protection. Resp. Br. 21-22. The operator did not have sufficient knowledge of the condition to rise to the level of unwarrantable failure.

In sum, the dangerousness of the condition alone, does not justify the unwarrantable failure designation.

4. Gravity

The gravity designations are not in dispute. One miner was seriously injured because he was not wearing the proper PPE. This resulted in the miner being hospitalized, missing work, and requiring surgical procedures.

C. Order No. 8778039, The Safe Access Violation

On September 16, 2014, Barrick issued Order No. 8778039 to the Alcoa's Bayer Alumina Plant because a miner was performing maintenance on a riser drain line while kneeling on a pipe, rather than executing the task from a safer location, in violation of the safe access standard, 30 C.F.R. §56.11001, which requires that the operator provide and maintain a safe means of access to all working places.²⁸

The order alleges:

An accident occurred on September 3, 2014 when the contractor's supervisor was burned by spraying liquor on this job. Safe access was not provided to a 4 inch caustic line on the No. 25 press riser drain on the mud floor of the press building. Miners had been instructed to remove the 4 inch tee from the riser and remove the hydrated scale out the 4 inch opening flange with a 30 lb. [j]ack hammer affixed with a 12 inch bit. A miner gained access to the scaled up line by climbing on top of the No. 27 side of the manifold by setting on top of a 12 inch line. The line is approximately 4 feet from the concrete floor, and is located directly in the line of fire of the 4 inch opening. An Alcoa competent person/agent was present during the de-scaling operation and at no time instructed the miner or the contractor[']s supervisor to get the miner down from the pipe and provide him with a safe means of accessing the work outside of the line of fire. This condition exposes the miner to falling from the pipe to the concrete floor as well as a sudden release of hot liquor from the scaled up line resulting in serious injuries. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that the competent person/agent observed the practice and failed to act. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-20.

²⁸ 30 C.F.R. § 56.11001: "Safe means of access shall be provided and maintained to all working places."

The order was designated as reasonably likely to be permanently disabling to one miner, S&S, and the result of high negligence. *Id.* The order was modified from a 104(d)(2) Order to a 104(d)(1) order. Tr. 8.

The Commission has held that the term “maintain” in Section 56.11001 imputes an ongoing responsibility on the operator to uphold, continue, preserve, or keep up a safe means of access to a working place, and to ensure that the means are utilized, rather than passively supplying the safe access. *Lopke Quarries Inc.*, 23 FMSHRC 705, 708 (July 2001). At a minimum, the standard requires that operators maintain the safe working place and require other miners to do so as well, the operator must take measures to ensure safe access is utilized. *Lopke Quarries Inc.*, 23 FMSHRC 705, 709 (July 2001).

The Secretary argues that Section 56.11001, a mandatory safety standard, requires an operator to provide *and* maintain safe access to working places. Sec’y Br. 36 (emphasis added). A Turner contractor, Cano, was kneeling on a pipe four feet above the ground while jackhammering a pancake on the 25 riser, rather than using a work stand to reach the area to reach the work area. Tr. 273-74, 279. This exposed the miner to the line of fire, the area directly in front of the flange opening. Tr. 274. Barrick issued the citation because Alvarado was nearby but did not stop Cano from unsafely accessing the area. Tr. 275. Alcoa does not dispute the violation or the S&S designation, but contends that the violation was not an unwarrantable failure, and should be modified from “high” to “moderate” negligence. Resp. Br. 26, 32.

1. S&S

Alcoa admits to the violation alleged in Order No. 8778039. Thus, the first step of *Mathies* is satisfied.

The second *Mathies* element is also met, because the hazards Section 56.11001 seeks to prevent were likely to occur. Alcoa was cited for violating the safe access standard because a Turner miner had climbed on a pipe to access a working area, exposing himself to both fall and burn hazards. Sec’y Br. 36-37; Tr. 273-74, 279. The area was four feet above a concrete floor, and the miner could have fallen while either climbing up, or while operating a 30 pound jackhammer. Sec’y Br. 37; Tr. 279. The Secretary also alleges that the miner could have been burned because he put himself in the line of fire in front of a Riser opening while using a pipe, rather than a work stand. Sec’y Br. 37; Tr. 273. A burn injury is reasonably likely, as Morales’s injuries on September 3, 2014 indicate.

A fall or burn would be reasonably likely to injure a miner. Being in the line of fire could put a miner at risk of being burned by liquor. This is reasonably likely to occur, particularly in light of the leak on September 3, 2014, and the injuries Morales sustained. This meets the likelihood test of the third *Mathies* step. The injuries from a burn would be reasonably serious, as liquor burns required Morales to be hospitalized, be out of work for a significant period of time, and undergo skin grafts. A four foot fall onto concrete is likely to cause serious injuries as well, including head injuries and/or broken limbs. The fourth prong of *Mathies* is satisfied.

2. Negligence

The Secretary defends the high negligence classification assigned to Order No. 8778039 because Alvarado knew Cano was working on top of a pipe, rather than from a stand, but Alvarado did not stop him. Sec'y Br. 37; Tr. 429.

Alcoa states that although Alvarado knew Cano was working while kneeling on a pipe, he did not know that Cano was in the line of fire, and that from his vantage point the situation was not unsafe. Resp. Br. 33. Alcoa further contends that Alvarado believed that fall protection would not be required because MSHA's guidance indicates that fall protection be used at six feet and above, and Cano was only four feet from the ground. *Id.* Stands were readily available to Turner employees, and Gaytan, the Turner contractor who took over the job for Cano, used a work stand to perform the task. *Id.*; Tr. 104. Alcoa argues that Cano or his supervisor, Morales were in the best position to set up a stand. Resp. Br. 33.

I find that Alcoa demonstrated moderate, rather than high, negligence. There are several factors that mitigate Alcoa's negligence. The Secretary did not offer evidence that Alvarado was aware that Cano was in the line of fire. While Alvarado admitted to seeing Cano work from a pipe, he believed that the distance from the ground did not pose a hazard. This is reasonable in light of MSHA's guidance regarding fall protection. Cano worked from the pipe for a short period of time. Stands were available to Turner employees. Alcoa, however, could have and should have been more proactive in requiring that contract employees use safe means to access work sites.

3. Unwarrantable Failure

The Secretary alleges that Alcoa's conduct in regards to Order No. 8778039 was aggravated, justifying the unwarrantable failure designation. Sec'y Br. 38.

a) Length of Time

The condition lasted for 20 minutes, as that is the amount of time that Alvarado knew that Cano was working while kneeling on a pipe, instead of a work stand. Barrick testified that the duration of the violation didn't concern him, and that the potential for injury only occurred for a short period of time. Tr. 282. I find, however, that this is a significant period of time, and weighs in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

Only one miner was exposed to the violative condition, as only Cano was kneeling from a pipe to work. Gaytan, who took over the task for him, used a work stand. Cano was the only individual in the line of fire, and the only one exposed to a fall hazard. The violation was not particularly extensive, as one miner in one location was exposed to the hazards alleged.

c) Operator's Notice that Greater Efforts Were Necessary for Compliance

The Secretary also notes that Alcoa had been cited eight times in a 15 month period before the accident for violations of 30 C.F.R. § 56.11001. Sec'y Br. 38; Ex. S-24. Alcoa

counters that that the only citation the Secretary testified about was issued for build up along a walkway, a different condition that cited. Resp. Br. 28. The Secretary failed to show how the past citations for violations of Section 56.11001 put Alcoa on notice regarding Order No. 8778039. While Alcoa had been cited previously for the same standard, the safe access standard covers a multitude of situations. As applied to the unwarrantable failure analysis, Alcoa did not have sufficient notice that greater compliance efforts were necessary.

d) Efforts in Abating the Violative Condition

Alcoa also notes that it took efforts to abate the condition, because it provided platforms to contractors to use while jackhammering, and that only one contractor worked from the pipe. Resp. Br. 28; Tr. 98, 104. Alcoa's routine of providing work stands to contractors is an effort to abate the violative condition. This element will not weigh into the unwarrantable failure analysis

e) Obviousness and High Degree of Danger

Alcoa denies that the violation was extensive, although Alcoa admits it was dangerous, because only one miner was exposed by the violation. Resp. Br. 29, 37. The violative condition was obvious to Alvarado, but he testified that he thought the kneeling was acceptable and was unaware that Cano was in the line of fire. The degree of danger posed by allowing a miner to work while standing or kneeling on a pipe is high. This militates toward an unwarrantable failure finding.

f) Operator's Knowledge

Alcoa concedes that Alvarado was present but contends that he could not have seen that Cano was in the line of fire. Resp. Br. 29. Alvarado also believed that Cano did not need any special equipment because he was not six feet above the ground. Resp. Br. 29. Finally, Alcoa notes that it could not anticipate that Cano would work from a pipe instead of using the work stands provided to the contractors. Turner was the responsible party, namely Morales, who was supervising the task. Alvarado's knowledge that Cano worked from the pipe rather than a stand is not imputable to Alcoa.

Alvarado knew Cano worked from a pipe, but was merely a rank and file miner, who should have said something, but did not believe the condition to be unsafe. The violation posed a high degree of danger and lasted for 20 minutes, but those factors alone do not justify an unwarrantable failure finding.

4. Gravity

I find the gravity designations for Order No. 8778039 are appropriate. It is reasonably likely that one miner could have been seriously injured if he fell from a pipe while jackhammering. The stands would have provided more support and allowed a miner to avoid exposing himself to the line of fire. A fall onto the concrete floor below, or a burn from being in the line of fire while maintaining a pipe, would likely have resulted in hospitalization, time out of work, and could have been disabling. Exposure to the same line of fire resulted in Morales being severely injured, which demonstrates the hazard is likely, and that any resulting injury would be serious.

III. Civil Penalty

The parties stipulated that the Secretary's proposed penalties, if affirmed, would not affect Alcoa's ability to remain in business. Alcoa is large operator, and the Point Comfort Facility is a large plant. The Secretary did not present evidence that Alcoa failed to abate the violations in good faith. The gravity of all three violations was serious as I discussed above. I found that they are all reasonably likely to result in permanent injury to one miner.

Citation No. 8778037

The Secretary proposed a civil penalty of \$8,209 for Citation No. 8778037. I assess a penalty of \$1,112 for the violation because Alcoa's negligence was low and the violation was not an unwarrantable failure.

Order No. 8778038

The Secretary proposed a \$9,122 penalty for Order No. 8778038.

I assess a \$1,112.00 civil penalty for the violation. The negligence was low, rather than high, as the Secretary alleges. I also find that the unwarrantable failure categorization was inappropriate.

Order No. 8778039

The Secretary specially assessed a \$52,500 civil penalty for Order No. 8778039. Tr. 284. Barrick testified that he did not calculate the penalty, but suggested that it be specially assessed. Tr. 284. Barrick testified that he supported the special assessment because he believed two supervisors witnessed the violation, and he wanted to "get Alcoa's attention." Tr. 284. The Secretary argues that special assessment is justified because Alvarado was complicit in watching Cano work, and that Alcoa had eight safe access violations in the 15 months preceding the accident. Sec'y Br. 39. The Secretary asserts that the size of the specially assessed penalty will "serve notice to Alcoa that its efforts to protect miners are lacking." Sec'y Br. 39.

I decline to accept the Secretary's specially assessed penalty, as I find that the negligence was moderate, not high, that the violation was not the result of unwarrantable failure, and that Alvarado was not an Agent of Alcoa. Moreover, the Secretary provided scant support for its assessment. Only one previous safe access violation was mentioned at hearing and entered into evidence, and it involved accumulations rather than the use of work stands. The Secretary argues that the size of the penalty will put Alcoa on notice. Sec'y Br. 39.

I find that Alcoa does have a history of previous violations of Section 56.11001. S. Ex. 24. Additionally, Alcoa demonstrated moderate negligence. For these reasons, I assess a civil penalty of \$4,000.00

Order No. 8856305

At the hearing, the parties agreed to settle Order No. 8856305 for the originally assessed amount of \$4,000.00, without any modifications. I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

IV. ORDER

Order No. 8856305 is **AFFIRMED** as written.

It is **ORDERED** that Citation No. 8778037 be **MODIFIED** to reduce the level of negligence from “high” to “low.”

It is **ORDERED** that Order No. 8778038 be **MODIFIED** to reduce the level of negligence from “high” to “low” and to change the classification from a 104(d)(2)Order to a 104(d)(1)Order.

It is **ORDERED** that Order No. 8778039 be **MODIFIED** to reduce the level of negligence from “high” to “moderate.”

It is **ORDERED** that Citation No. 8778037 and Order Nos. 8778038 and 8778039 be **MODIFIED** to delete the unwarrantable failure designations.

WHEREFORE, it is **ORDERED** that Alcoa pay a penalty of \$10,224.00 within thirty (30) days of the date of this order.²⁹

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

²⁹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2017

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

v.

GABEL STONE COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-0621
A.C. No. 23-02064-387725

Docket No. CENT 2015-0630
A.C. No. 23-02064-390172

Mine: Willow Springs Quarry

DECISION

Appearances: Ms. Susan Willer, Esq., Office of the Solicitor, and Ms. Maria Rich, Mine Safety and Health Administration, for the United States Department of Labor

Mr. Justin Gabel, pro se, for the Respondent

Before: Judge Moran

Introduction

These consolidated dockets involve two notices of alleged violations, issued by MSHA Inspector Keith Markeson at Gabel Stone's Willow Springs Quarry in May and June 2015.¹ Involved in CENT 2015-0630 is Order No. 8778893, issued May 13, 2015, alleging a 30 C.F.R. § 46.8(a)(2) annual refresher training violation. The proposed assessment of civil penalty was \$112.00. The other docket, CENT 2015-0621, involves Citation No. 8865801, issued June 16, 2015, alleging a 30 C.F.R. § 56.14107(a) guarding violation. The proposed assessment of civil penalty was \$100.00. In sum, MSHA's proposed penalties for the two alleged violations totaled \$212.00.

¹ It is determined, per 29 C.F.R. § 2700.2(b)(4), that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance she has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

A hearing was held on November 1, 2016 in West Plains, Missouri, at which MSHA Inspector Keith Markeson testified on behalf of the Secretary and Mr. Gary Gabel, owner of the Willow Springs Quarry, testified on behalf of the Respondent.²

For the reasons which follow, the Court finds that both violations were established and, following the Commission's recent decision in *American Coal*, imposes a civil penalty in the amount of \$20.00 for the violation set forth in Order No. 8778893. *Am. Coal Co.*, 38 FMSHRC 1987 (Aug. 2016). For the violation set forth in Citation No. 8865801, the Court imposes a civil penalty in the amount of \$25.00.

Factual Background

Inspector Markeson has been an MSHA inspector for nine years, and has specialized training in accident investigation and mine emergencies. Tr. 25-26. He has a degree in geology, and worked as a geologist for several years before beginning his training with MSHA. Tr. 26-27. The mine at issue, Willow Springs Quarry is a small, family-owned limestone quarry in Howell County, Missouri that typically employs between five and eight people. Tr. 30; 78.³ Gary Gabel is the owner of the mine, and also does some work there. Gabel has been a miner since 1977.⁴ Tr. 94.

Markeson began conducting a routine 103(e)(1) inspection on May 13, 2015. Tr. 29. He stopped his inspection after issuing Order No. 8778893, alleging a violation of 30 C.F.R. Part 46, which pertains to training and education for miners and other persons.⁵ He returned to complete the inspection on June 16, 2015. Tr. 33; 95. As noted above, Order No. 8778893 was issued on May 13, 2015 for an alleged violation of Section 46.8(a)(2), which states, "You must provide

² As a preliminary matter, the Court notes that the parties chose not to submit post-hearing briefs in this matter.

³ Markeson testified regarding the plant's usual operation, and the Respondent did not dispute his account or offer any contradictory evidence. The mine is an open pit, multi-level quarry with portable equipment set up as an on-site crushing plant. Once rock has been drilled, it is transferred to the plant, where it goes through several stages of crushing and screening and it is then stocked for purchase. Tr. 30-31.

⁴ Hereinafter, "Gabel" refers to the Gary Gabel and not to Gabel Stone Co., the Respondent.

⁵ The education and training standards in Subchapter H are a curiosity in their wording, because the various standards found therein routinely begin with the command "You must." In fact "You" is defined within the subchapter: "*You* means production-operators and independent contractors." 30 C.F.R. §46.2(p).

each miner with no less than 8 hours of annual refresher training... no later than 12 months after the previous annual refresher training was completed.” 30 C.F.R. § 46.8.⁶

Citation No. 8865801, the sole subject of Docket CENT 2015-0621, was issued during the resumption of Markeson’s inspection, on June 16, 2015. It alleges a violation of Section 56.14107(a), a guarding standard. The discussion of Citation No. 8865801 follows the discussion of Order No. 8778893.

Docket No. CENT 2015-0630; Order No. 8778893: Findings of Fact and Discussion

The Secretary’s Evidence

When Markeson arrived at the mine on May 13, he met with Gary Gabel and his wife Joyce Gabel. Tr. 32. The three of them talked briefly about the purpose for Markeson’s presence that day. *Id.* Markeson testified that Gabel is more than an executive — he works as a foreman at the mine, and occasionally operates a front end loader or loads trucks for customers. Tr. 40.

Markeson decided to begin his inspection with the mine’s paperwork, which is stored in an administrative office located about two and a half miles from the quarry itself. Tr. 34. Training records are stored there as well. When Markeson reviewed the Respondent’s records, he found there was no record of annual training for Gabel himself. Tr. 32. Markeson inquired further and Gabel reputedly “mentioned to [Markeson] that he hadn’t been to any refresher in probably eight or nine years, because while his crew does their annual refresher training, he goes to the quarry and loads customer trucks, so that he can keep his customers moving through the quarry.” Tr. 32-33.

Markeson testified that he spoke further with Gabel to determine if he had received the annual refresher training and simply failed to document it. Tr. 33. Upon determining that it was not a recordkeeping omission and that there was an apparent violation of the training requirement, Markeson “went with Mr. Gabel over to the quarry site, so that he could get his crew lined out and assign a lead man so that his crew could keep working. We then went back to his office where [Markeson] typed up the withdrawal order.” Tr. 33. Markeson then delivered the order to Mr. and Mrs. Gabel, along with a brief explanation of its effect. *Id.*

Markeson testified that he found that Gabel “had not received the MSHA required eight-hour annual refresher training within 12 months” of the previous training. Tr. 38. Markeson believed that Gabel should have been aware of the requirement because he had many decades of mining experience. Tr. 39. Because Markeson had learned that Gabel “wasn’t present during annual refresher training and he didn’t teach the annual refresher training,” he “determined that [Gabel] hadn’t had it [i.e. the required training]; and therefore, the withdrawal order was warranted.” Tr. 39-40.

⁶ The parties stipulated that the Respondent has never been cited for a violation of this standard before. Tr. 92-93.

Markeson then testified as to the reasoning behind the gravity and injury designations in the citation. Tr. 41. He selected “fatal” because annual training is required in order “to prevent serious life threatening type injuries at a mine. The other reason is the most — the most injured groups of people at mines are brand new miners and miners with many years of experience, 20, 25 plus years, in which category Mr. Gabel falls.”⁷ Tr. 41-42. The Court asked Markeson why Gabel’s many decades of experience in mining would not undercut the “fatal” designation. Tr. 43. Markeson responded, “Well, 47 years of experience, that’s a group that gets hurt a lot at mines; and being that Mr. Gabel hadn’t had annual training in many years, I think if I looked at it again now, I would still mark it as fatal.” *Id.*

However, inconsistently in the Court’s view, Markeson designated the gravity of the alleged violation as “unlikely” to result in injury, because Gabel “has been running the quarry for many years” and he does some new miner training for his crew. Tr. 41. Markeson then testified that he designated the alleged violation as moderately negligent because,

[Gabel] was aware that annual refresher training had to be done. He was providing it for all of his hourly miners. He just didn’t believe that that training [requirement] applied to him. So while he knew that the training was required he didn’t realize, I guess, that it was — that he was included in that.

Tr. 45.

As noted, Markeson then left the mine site after issuing the withdrawal order, without completing his inspection. Tr. 47. He terminated the violation the following day, after receiving records indicating that Gabel had completed eight hours of annual refresher training. *Id.* In order to remedy the alleged violation, Markeson testified, Gabel “trained himself and his wife assisted in the training.” Tr. 44.

On cross-examination, Markeson agreed that the Respondent’s records reflect Gabel having administered new miner training in the past. Tr. 51-52. Markeson noted, though, that the content of the new and annual trainings is different: for example, annual refresher training covers topics including training on ground conditions and control, high walls, explosives, and mobile equipment. Tr. 52-54.⁸ The Court asked whether this difference doesn’t make the term “annual refresher” slightly misleading, given that new miners are not trained on all of the subjects covered in the annual training. Tr. 59. Markeson answered that while Gabel Stone’s new miner

⁷ When the Court inquired if Markeson always marks violations of this sort as “fatal,” Markeson replied, “if I was writing a training withdrawal order because a miner had missed *the last hour* of annual refresher [training,] I don’t know that I would mark fatal.” Tr. 42 (emphasis added). Therefore, practically speaking, Markeson’s answer to the question was “yes,” as he would only consider a designation other than fatal in extremely rare circumstances. As discussed *infra*, the Court finds the “fatal” designation to be overblown.

⁸ Markeson listed a number of other topics which are included in annual refresher training, but not in new miner training, including fall prevention, working around moving objects, site-specific health and safety risks, and power haulage hazards. Tr. 58.

training plan meets the minimum requirements in federal regulations, the annual training includes *elective topics* that are chosen by the operator. Tr. 60. In theory, identical new and annual training materials could meet the regulatory standard if there were no changes in the mining environment. Tr. 60-61.

The Respondent's Evidence

Gabel testified that he did not feel he had violated the annual training standard. Tr. 77. Gabel gave several examples of how he has prioritized safety by being involved in a number of safety trainings from the 1970s to the present and by encouraging his employees to speak up about potential safety issues at the mine. Tr. 73-76. When the Court asked Gabel to clarify whether he was discussing these topics in order to demonstrate that he is a very safety conscious person, Gabel replied "yes." Tr. 76-77.

Gabel also stated that he receives his annual refresher training piecemeal, by learning about safety standards through independent reading and taking notes on safety requirements. Tr. 79-80. He described it as "a year-long process." Tr. 80. Although Gabel has some involvement in preparing the annual refresher training materials, along with his wife, he stated he doesn't know if he reviews the content of the training materials before they are approved. Tr. 86. The Secretary confirmed, upon the Court's inquiring, that there is no statutory requirement that the eight hours of annual refresher training be completed in one session. Tr. 88.

Gabel Stone employees sometimes receive annual refresher training at the mine site through a state agency, and sometimes they go to another site for the training. Tr. 84-85. When miners at the quarry attend annual refresher training on-site, Gabel informed that he "never never went through a safety training as far as going in these classes... I've sat through some of them at my own quarry, just as a witness. I did not know that I was supposed to keep records on my hours of training." Tr. 82-83. Gabel then testified that in approximately 48 years of mining experience, he has never been asked to show anyone a training certificate for his own training. Tr. 83.

Finally, Gabel confirmed that on May 14, the day after Markeson issued the withdrawal order, he completed eight hours of annual refresher training independently, by watching eight hours of safety-related film. Tr. 84. Gabel said that his wife was present for this self-training.⁹ *Id.* Gabel then sent the record of this training to Markeson so he could resume working at the mine. Tr. 83.

On cross-examination, Gabel admitted that he knows that his business must keep records of annual training for all miners. Tr. 90. He also admitted that he considers himself a miner. *Id.* When asked why he did not feel it was important to have a training record for himself, Gabel responded, "I've never been asked, didn't know I was supposed to. I am very active in the safety part of it. Never crossed my mind and never [been] asked for it until [Markeson] came." Tr. 91. Gabel also agreed that, while he occasionally looks in on annual refresher training when it takes place at the mine, he generally keeps working while the annual training is taking place: "If a

⁹ Joyce Gabel did not testify.

truck comes in, I'll run down and load the truck and come back up [to the training.] I have sat partially in these. I'm not telling you that I've been through these, but I will go in. I've done this a long time." Tr. 89

Discussion

In the Court's estimation, the section 104(g)(1) order, alleging a violation of 30 C.F.R. §46.8(a)(2), was established but, under all the circumstances, the violation in this instance was de minimis in nature. The reasons for this conclusion are twofold.

First, as mentioned above, the education and training standards in Subchapter H are a curiosity in their wording, because the various standards found therein routinely begin with the command "You must." In fact, "You" is defined at 30 C.F.R. §46.2(p) to mean "production operators and independent contractors." Accordingly, the thrust of the Part 46 standards is clearly directed at ensuring that such *operators and contractors* comply with its various provisions including the training plans and their implementation, new miner training and annual refresher training, among other requirements. Each of these standards is focused on providing the various types of training for *miners* with the responsibility resting upon the operator to make sure that its miners are so trained. Accordingly the "You" in the cited standard, applies in this instance to Mr. Gabel. It is therefore understandable that Mr. Gabel thought of himself in his primary role as the mine operator, a view that no one in MSHA had disabused him of in years of previous inspections.

It is true that the term "Miner" is also a defined term within Part 46, where it is there expressed as "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations [and that] [t]his definition includes independent contractors and employees of independent contractors who are engaged in mining operations," and therefore Mr. Gabel fits the broad definition. 30 C.F.R. § 46.2(g)(1)(i). However, at age 71, Gabel's primary role at Gabel Stone is that of the production operator, that is to say, the "You," referred to in the training and retraining requirements.

The second, and independent, basis for concluding that the violation was more of a technical transgression is evidenced by the testimony of Markeson and by Gabel himself. Collectively, their testimony was largely consistent in that both witnesses agreed that Gabel has long been involved in providing training to his employees.

Bordering on a perversity, Gabel complied with his training deficiency by *training himself*. One does not usually think of self-training as the customary or typical method for overcoming a training deficiency.

That said, the Court does not adopt Gabel's contention that he fulfilled the annual refresher training requirement through periodic reading and discussion on safety matters. Accordingly, the Court was not persuaded by Gabel's assertion that he covered the required annual training materials piecemeal, through reading, taking notes, and having discussions about workplace safety throughout the year. Nor is the Court persuaded by the Respondent's suggestion, while cross-examining Markeson, that Gabel satisfied the annual training

requirement by administering initial training to new miners. Although there was some mention of Gabel's role in approving the annual training materials, the Court did not have enough evidence to conclude that Gabel re-trained himself at some point in the 12 months preceding the inspection while reviewing these materials.¹⁰

In this instance, Gabel admitted that he mistakenly believed himself exempt from this requirement. The Court inferred from the testimony that, although Gabel is a miner, it never occurred to him, or to MSHA for that matter, that the annual refresher training standard applies to him, even though he is also the owner of the mine. As noted at hearing, the Court found Gabel's account of how he has prioritized worker safety at his mine to be credible, and it also found that he was truthful in asserting that he is a safety-conscious person. These considerations have relevance in evaluating negligence.

Docket No. CENT 2015-0621; Order No. 8865801: Findings of Fact and Discussion

The Secretary's Evidence

When Inspector Markeson returned to Willow Springs Quarry on June 16, 2015 to continue his inspection, he issued a section 104(a) citation, Citation No. 8865801, for a guarding violation, citing 30 C.F.R. § 56.14107(a). Tr. 95-96, referencing P-2. As pertinent here, the standard cited first provides that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains... flywheels... and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). However the standard also sets forth an exception to the general guarding requirement, stating that "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces. 30 C.F.R. § 56.14107(b).

In this instance a guard was present in front of a portable flywheel, but the inspector measured it as reaching 6 feet and 4 inches above ground level. Therefore, the flywheel was 8 inches short of meeting the "at least 7 feet away walking and working surfaces" requirement. Tr. 102. Additionally the citation stated that "a grease block was 6 ½ inches from the unguarded portion of the flywheel." Ex. P-2.

The Court then inquired about the direction the flywheel would turn when activated, with the inspector advising that it moved counter-clockwise. Tr. 104-05. The importance of this is that there was *no risk* of one's hand getting caught in the flywheel. Markeson acknowledged that was true, but added that applied only to the side of the flywheel that was cited by him. The *other side* of the flywheel would present an entanglement or a pinch point risk, but the inspector admitted that side was *fully guarded*.

In the Court's view, the inspector stretched the rationale he offered about the hazard presented by the insufficient guard. The Court pointed out to the inspector that he used the word "entanglement" in his citation, but he admitted there was no entanglement risk at least in terms

¹⁰ As mentioned previously, Gabel was somewhat unclear on the extent of his involvement in this process. *Supra* at 5; *see also* Tr. 86.

of a pinch point being created. Tr. 111. To justify that claim, Markeson asserted that what he “was talking about was if one of those burrs caught your sleeve or caught your arm.” *Id.* The Court continued, “[y]ou call that entanglement?” *Id.* Markeson still attempted to support his use of that word, saying,

[w]ell, if it grabs your clothes and pulls, that's -- I mean it's not like getting pulled into a turn roller, but it is still entanglement. It's much more minor while the flywheel isn't perfectly smooth, it does have points that could cut you or catch you. It's unlikely that it's going to cause an injury, because it's turning away from you and not toward you. . . the injuries would be minor, possibly broken bones, most likely lacerations, bruising, that type of injury would be if you contacted the flywheel while it was turning.

Tr. 114.

Markeson essentially shifted his account of the citation’s basis away from asserting a risk of entanglement, adding that he “felt that [the flywheel] could grab your sleeve or your arm while you were greasing,” while admitting that the actual pinch point was on the other side of the flywheel, the non-cited side, which side was properly guarded. Tr. 124-25.

In the Court’s estimation it is more likely that Markeson didn’t think about the direction of travel for the flywheel when he issued the citation. For that reason, at the hearing he had to stretch his testimony.¹¹

The Secretary presented photographs of the flywheel, in which Markeson contended that he visualized a small nick in the edge of the flywheel. Tr. 109. He testified that this contributed to his conclusion that there was a hazard of cuts or abrasions without adequate guarding. *Id.* Markeson also stated that there was roughly six and a half inches of space between the flywheel and the grease block where miners do maintenance work. Tr. 110.

There is considerable doubt that the flywheel had nicks or burrs on the surface, as claimed by the inspector. Agreeing that the Respondent’s photographs were of better clarity than the government photo of the flywheel, Markeson admitted on cross examination that he could not see any burrs or nicks in those pictures. Tr. 123.

¹¹ Although the following comment does not alter the Court’s conclusions that both violations were established, the Respondent did raise an issue as to whether Markeson was determined to find violations, if possible. 128-30. The Respondent’s concern stemmed from an earlier incident in 2015 when Markeson issued a citation for failure to notify MSHA that the mine was closed. Tr. 133. The inspector reached an incorrect conclusion– that the mine was in operation – and accordingly that citation had to be withdrawn. Without making an express finding about the Respondent’s concern that the inspector was vexed by that outcome, the Court wishes to stress that all inspections should be fair-minded, focusing on genuine violative conditions and not be animated in any regard by past interactions between inspectors and mine operators. MSHA inspectors are to operate with professionalism and objectivity and approach each new inspection without regard to past conflicts.

Markeson then described the conversation he had with Gabel, who was accompanying him during the inspection. Tr. 112. Gabel told Markeson that greasing is done on the flywheel while the plant is in operation. In Markeson's words, he was told "that the plant is lubricated, that it's greased, while it's in operation." Tr. 113. However, it was not clear whether greasing is done while the flywheel is moving. *Id.* Markeson noted that he was unsure how long this situation had existed, because in his experience plants with multiple portable units occasionally reconfigure their equipment. Tr. 117. Markeson remarked that Gabel said that the flywheel had been in place for 14 years: "according to my notes, he told me it had existed for 14 years." Tr. 117.

Based on this information, Markeson concluded that the hazard would likely result in lost workdays, but that such an injury was unlikely, saying,

The main reason was because that flywheel turns away from the side that the miner is greasing it, while the flywheel isn't perfectly smooth, it does have points that could cut you or catch you. It's unlikely that it's going to cause an injury, because it's turning away from you and not towards you.

Tr. 114.

He also marked the violation as affecting one person, because only one person is required to do the maintenance at the grease point. Markeson designated the negligence as low because,

Mr. Gabel indicated to me that this condition had existed for a long period of time. And from the appearance of the guard, that appeared to be true. The other reason was, as I went through the plant, and Mr. Gabel's plants are older equipment, much of which probably wasn't factory guarded. His plant has lots of moving parts, lots of belts, and it's all very well guarded, and I felt that if Mr. Gabel had noticed this point, he would have guarded it. So I felt it was low negligence on Mr. Gabel's part, based on how good a job he does everywhere else. He just missed this one.

Tr. 115.

Markeson testified that the Respondent abated the condition by installing additional guarding almost immediately, the same day that the inspection took place. Tr. 90.

The Respondent's Evidence

The Respondent introduced additional photos of the flywheel, and Markeson admitted that he could not see any nicks in those pictures. Tr. 123. Markeson agreed that the Respondent's photographs of the flywheel were of better quality than those introduced by the Secretary. *Id.* Markeson also admitted that the back side of the flywheel, where there is a pinch point, is guarded to a height of seven feet or more. Tr. 124-25. Importantly, there was no guarding violation on that other side, where a pinch point existed.

Putting aside the misuse of the term “entanglement,” the Court finds the Respondent’s evidence regarding any potential injury from contact with the flywheel to be much more credible. Gabel testified that given the 6 foot and 4 inch distance from ground level, one couldn’t have an elbow contact the flywheel while greasing the nearby grease block. As Gabel convincingly explained, at the flywheel’s slow speed, one could lay one’s hand on it and also that the flywheel’s surface was smooth, without burrs or nicks. Tr. 147. The Secretary did not counter Gabel’s assertion that one could place a hand on the moving flywheel without being injured, and the Respondent’s photos certainly support the latter claim that the flywheel’s surface was smooth and free of burrs.

At the close of the hearing, the Secretary agreed to stipulate that aside from the flywheel, there were no other moving machine parts with inadequate guarding. Tr. 143. As noted above, the inspector himself concluded that the “plant has lots of moving parts, lots of belts, and it’s all very well guarded.” *Id.* Gabel testified that he believed there was no hazard, because the flywheel moves relatively slowly, at 225 rotations per minute. Tr. 145-47. Gabel also argued that there was little or no risk of a miner bumping the flywheel while greasing, because there is a distance of six inches or more from the grease block to the flywheel. Tr. 147. Gabel re-emphasized that he is very committed to running a safe operation and taking proactive steps to ensure the safety of his employees. Tr. 157-58.

Discussion

In light of the evidence presented, upon applying the burden of proof¹² the Secretary must meet, the Court concludes that both alleged violations were established. For the reasons which follow, the Court finds that the guarding violation was established, but that both the gravity and negligence attendant to that violation were very low. While the violation was established, there was a fundamental flaw in the inspector’s understanding of the hazard presented because he stated in the citation “[t]his condition creates an entanglement hazard to the miner.” Ex. P-2. The inspector was completely wrong about his claim of an entanglement hazard.

As noted, the Court finds that the Secretary proved that this standard was violated. Both parties stipulated that the flywheel in question is a moving machine part, and “the height of the guard in question measured six feet, four inches.” Jt. Ex. 1.

At the time of the inspection, miners would routinely put their hands about six inches away from the flywheel to perform maintenance while the plant was in operation. Neither party presented evidence to show whether the flywheel was typically in motion while this took place. Because of the direction in which the flywheel rotates, there was no risk of clothing or limbs

¹² The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (internal citations omitted).

becoming pinched or entangled in the machine.¹³ Both parties agreed that the back side of the flywheel, where there would hypothetically be a risk of entanglement, such as a hand being pulled in, was adequately guarded. It seems that this guarding issue existed for several years, and went unnoticed by examiners both from the mine and from MSHA.

At hearing, the Secretary argued that the violation presented a hazard of cutting or abrasion, and to this end presented evidence of a nick in the edge of the flywheel. Tr.109, referencing Ex. P-3-2. The Respondent disputed this evidence, and presented evidence that the flywheel rotates at a relatively slow speed, and would therefore be unlikely to cause abrasions if a miner accidentally came into contact with it. Tr. 123, 147. The Court agrees with the Respondent's view that the risk of injuries from cuts or abrasions was low.

Penalty Determinations for Order No. 8778893 and Citation No. 8865801¹⁴

Section 110(i) of the Mine Act confers authority upon the Commission to assess civil penalties. It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1288-89 (Oct. 2010) (citing *Cantera Green*, 22 FMSHRC 616, 620 (May 2000)). In assessing civil monetary penalties, Section 110(i) requires that the Court consider: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) the operator's negligence, (4) the gravity of the violation, (5) the operator's ability to continue in business, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Penalty assessments must reflect proper consideration of the abovementioned penalty criteria. In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the *Secretary*. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

That said, the Secretary's proposed penalty cannot be glided over, as the Commission also stated that judges "must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Am. Coal Co.*, 38 FMSHRC 1987, 1994 (Aug. 26, 2016) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The Commission requires a duality in judge's penalty

¹³ The text of the citation is somewhat misleading on this point. Markeson wrote, "This condition creates an entanglement hazard to the miner." Ex. P-2-7. Markeson later testified, "rather than a pinching hazard, it was more of a laceration/striking hazard." Tr. 108. The Secretary presented no evidence suggesting a risk of entanglement.

¹⁴ As noted above, Order. No. 8778893, the annual refresher training violation, was initially assessed for a \$112.00 penalty. Citation No. 8865801, the guarding violation, was initially assessed for a \$100.00 penalty.

analysis, stating on the one hand, that, essentially, it was “[re]affirming the right and duty of Commission Judges to make assessments independently,” while, on the other hand, simultaneously requiring an “explan[ation] [for] any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. *Id.* at 1997. (citing Westmoreland Coal Co., 8 FMSHRC 491, 492 (Apr. 1986).

As this Court reads the Commission’s decision in *American Coal*, a judge must, on one hand, consider the Section 110(i) penalty criteria in making a de novo penalty assessment, but in doing so a judge must also explain the basis for agreement with, or any substantial divergence from, the Secretary’s proposed penalty.

Penalty Determination for Order No. 8778893: The Training Violation

As discussed above, Gabel’s failure to fulfill the annual training requirement appears to have been the result of a misunderstanding. The Court adopts Gabel’s contention that if he had received information and guidance on the scope of this standard, he would have promptly fulfilled the obligation for his own annual training.

Following these precepts, and viewing the evidence in its totality, the Court finds that the operator’s oversight with regard to annual refresher training was the result of very low negligence. The gravity is similarly on the very low end of that criterion. Upon considering the evidence regarding negligence, gravity, the operator’s virtually non-existent history of violations,¹⁵ its small size, and its good faith in achieving very rapid compliance after being cited for the training infraction, the Court has concluded that a penalty amount of **\$20.00 is appropriate and that a larger penalty is not warranted.**¹⁶

Penalty Determination for Citation No. 8865801: The Guarding Violation

The Court finds that the condition involving the flywheel guarding was not likely to lead to lost workdays or restricted duty in the event of an injury. Given the evidence presented regarding the condition and operation of the flywheel, and the distance between the flywheel and the grease point accessed by miners, the Court finds that the gravity of the violation was less than that alleged by the Secretary. As with the training violation, upon consideration of the entire evidentiary record, and the Court’s consideration of each statutory criterion, with an emphasis on the very low gravity involved and the rapid installation of additional guarding, the Court determines that **a penalty amount of \$25.00 is appropriate.**

¹⁵ The Secretary admitted that Gabel Stone has no history of non-compliance issues regarding miner training standards. Tr. 93.

¹⁶ The criterion of the effect on the ability to continue in business is a non-factor under the Secretary’s proposed penalty and therefore under the Court’s assessment as well.

Wherefore, it is ORDERED that Citation No. 8865801 be MODIFIED from “lost workdays or restricted duty” to “no lost workdays.”

It is further **ORDERED** that Gabel Stone Company pay the Secretary of Labor a civil penalty in the total amount of \$45.00.

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

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 13, 2017

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

v.

SIMS CRANE,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2016-0081
A.C. No. 08-00981-397299

Mine: Wingate Creek Mine

DECISION AND ORDER

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

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

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Mine Act” or “the Act”). This docket involves a single 104(a) citation charging Respondent, contractor Sims Crane (“Respondent”), with an alleged violation of 30 C.F.R. § 56.15005 at mine operator Mosaic Company’s (“Mosaic”) Wingate Creek Mine.

A hearing was held in St. Petersburg, Florida, on November 14, 2016. During the hearing, the parties offered testimony and documentary evidence.¹ Pursuant to the Commission’s procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e).

The issues presented are whether Respondent violated the cited standard, and if so, whether the S&S, gravity, and negligence designations were appropriate, and what civil penalty should be assessed. For the reasons discussed below, I modify Citation No. 8823573 to reduce the likelihood of injury or illness from “reasonably likely” to “unlikely,” to delete the significant

¹ In this decision, “Tr. #” refers to the hearing transcript, “Jt. Ex. #” refers to joint exhibits, “P. Ex. #” refers to the Petitioner’s exhibits, and “R. Ex. #” refers to the Respondent’s exhibits. Jt. Ex. 1, P. Exs. 1-10, and R. Exs. 1-14 were received into evidence at the hearing.

and substantial designation, and to reduce the level of negligence from “moderate” to “low.” I assess a penalty of \$100.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). By contrast, the gravity of a violation “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that “the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury... but rather on the effect of the hazard if it occurs”). A violation is S&S if, “based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).² The S&S determination should be made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation also considers the length of time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).³

² The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts’ uniform adoption of *Mathies* test and parties’ recognition of authority of the test); *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

³ *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission’s rejection of “snapshot” approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that “[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Criteria

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator’s history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator’s negligence; 4) the operator’s ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g., Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria. *Spartan Mining*, 30 FMSHRC at 723. My independent penalty assessment for Citation No. 8823573 is set forth below.

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Sims Crane is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.
3. The citation and imminent danger order at issue in this proceeding were properly served upon Sims Crane as required by the Mine Act.⁴
4. The citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.
5. Sims demonstrated good faith in abating the violation.
6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.

⁴ Order No. 8823572 was issued by MSHA inspector Robert Peters under section 107(a) of the Act, in conjunction with Citation No. 8823573, the single citation at issue in this proceeding. Although the parties' stipulations reference this Court's jurisdiction over Order No. 8823572, the Commission's records contain no indication that Respondent timely filed its Notice of Contest within 30 days of the receipt of Order No. 8823572, as required under the Commission's procedural rules. *See* Commission Procedural Rule 22, *Notice of contest of imminent danger withdrawal orders under section 107 of the Act*, 29 C.F.R. § 2700.22. The record was left open after hearing to permit Respondent to submit such evidence. Tr. 57, 154-55. In an e-mail to my attorney advisor on November 28, 2016, Respondent argued that it had contested Order No. 8823572 at the same time it contested the proposed penalty assessment for Citation No. 8823573 because the Order was referenced by number in the text of the Citation. However, the Commission's procedural rules provide that Notices of Contest regarding imminent danger orders must be filed with the Commission within 30 days of the termination of the order. *Id.* Even assuming that contesting the Petition for the Assessment of Civil Penalty for Citation No. 8823573 was sufficient to also contest Order No. 8823572, MSHA did not receive Respondent's Notice of Contest regarding the proposed penalties for Citation No. 8823573 until December 23, 2015. *See* Ex. A, *Sec'y of Labor's Petition for the Assessment of Civil Penalty*, Docket No. SE 2016-0081. Since Order No. 8823572 was terminated on September 23, 2015, Respondent should have filed its Notice of Contest by October 23, 2015. P. Ex. 6. Despite the parties' stipulations to the contrary, I find that Respondent never timely filed its Notice of Contest regarding Order No. 8823572, and I consequently lack jurisdiction over that Order. I therefore decline to address Order No. 8823572 in this Decision and Order.

7. Sims was at all time relevant to this proceeding engaged in mining activities at the Wingate Creek Mine located in or near Myakka City, Manatee County, Florida.

8. Sims' mining operations affect interstate commerce.

9. Sims is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Wingate Creek Mine (Federal Mine I.D. No. 08-00981) where the contested citation and imminent danger order in this proceeding were issued.

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

Jt. Ex. 1.

B. Citation No. 8823573

Citation No. 8823573 was issued on September 23, 2015 by MSHA inspector Robert Peters, who observed the allegedly violative practice as he was driving to the mine site to conduct an inspection. Tr. 33. Peters arrived at the Wingate Creek Mine around 8:20 a.m. Tr. 33. As he drove toward the mine's administrative offices, he observed truck driver William Nasrallah loading a Tadano crane onto a lowboy used to remove the crane from the mine site. Tr. 33, 122. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then saw Nasrallah walk from the cab area forward across the left front fender of the crane. Tr. 33, 35; P. Ex. 5 at 4.

Peters pulled his vehicle over to the side of the road, parked, exited his vehicle, and approached Nasrallah at the crane. Tr. 38. As Peters was parking, Nasrallah descended from the front of the crane to the ground using the stepped ladder at the front left side of the crane. Tr. 114; R. Ex. 8. Although Peters did not see Nasrallah's descent to the ground, Nasrallah testified that his normal procedure for exiting the crane involved crossing over the left front fender and descending via the stepped ladder at the front of the crane, rather than using the rung ladder immediately below the cab. Tr. 38, 114; *see also* P. Ex. 5 at 3, 4; R. Ex. 11.

Based on his observation of Nasrallah walking from the cab area of the crane over the front fender to the front of the crane, Peters issued Citation No. 8823573 alleging a violation of 30 C.F.R. § 56.15005, based on the following practice:

Truck driver, William Nasrallah, was observed by this Inspector working where there was a danger of falling. He was not using any fall protection. The RT 481 crane had been loaded on a low-boy trailer for transport. The truck driver was observed leaving the cab of the crane and walking across the top of the wheel fender of the crane. He was not using any hand-holds or other type of fall protection. There was a danger of falling 7 feet to the paved road. The truck driver

exited the crane to the ground. There was an exit/access ladder provided at the crane cab area which the driver could have used to exit the crane to the ground. Distance walked without fall protection was 7 to 8 feet in length. This condition was a factor that contributed to the issuance of imminent danger order 8823572. Therefore no abatement time was set.⁵

P. Ex. 3.

The citation was terminated when the Wingate Creek Mine safety representative informed Peters that Nasrallah had been “instructed on the use of fall protection on mobile equipment when required.” P. Ex. 3; Tr. 61. The Secretary alleges that the violation was S&S, highly likely to cause permanently disabling injuries to one person, and the result of Respondent’s moderate negligence. P. Ex. 3. The Secretary proposed a penalty of \$270. P. Ex. 2.

1. The Technical Violation in Citation No. 8823573 Was Not S&S and Was Unlikely to Cause Permanently Disabling Injuries to One Miner.

The Secretary requests that I affirm Citation No. 8823573, as written, and assess the Secretary’s proposed penalty of \$270. Tr. 26-27. Respondent disputes the fact of the alleged violation and requests that I vacate the citation. Tr. 27. In the alternative, Respondent challenges the Secretary’s gravity and negligence designations. Resp’t Pre-hearing Rpt. 2.

In Commission proceedings, the Secretary must prove his allegations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001). The Commission has explained that “[t]he burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.”” *Id.* (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), quoting *Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993)).

In applying the Commission’s *Mathies* factors, I must first determine whether the practice cited by Peters constitutes a violation of 30 C.F.R. § 56.15005. Section 56.15005 provides that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.” 30 C.F.R. § 56.15005.

Peters testified that he observed Nasrallah walk from the cab of the crane across the left front wheel well fender towards the crane’s valve bank, a distance of between six and seven feet.

⁵ Nasrallah’s undisputed testimony indicates that the crane was manufactured by Tadano. Tr. 122. Although the text of Citation No. 8823573 indicates that the crane was an “RT 481,” that particular model number does not correspond with any of the current production models nor the discontinued production models listed on Tadano’s website. See <https://tadanoamerica.com/> (last accessed Jan. 13, 2017).

Tr. 36, 39, 51; P. Ex. 5 at 1. The top of the fender wheel well where Nasrallah crossed was seven feet above the ground, which included the height of the lowboy. Tr. 43; *see also* R. Ex. 3 (MSHA Program Policy Letter indicating that compliance with OSHA’s standard requiring fall protection for work surfaces 6 feet or more above a lower level may also satisfy the requirements of section 56.15005). Nasrallah’s undisputed testimony indicates that he was not using fall protection. Tr. 120. While Peters testified that he would not have issued a citation had he observed Nasrallah maintaining three points of contact with the crane as he crossed over the fender, there were no handholds available for Nasrallah’s use while he moved across the fender between the cab and the valve area. Tr. 42, 49-50, 63; P. Ex. 5 at 1; R. Ex. 12; *see also* R. Ex. 1 (Mosaic’s Mobile Crane Program requiring that personnel maintain three points of contact when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic’s Mobile Crane Policy requiring “access and egress at the designated access points while maintaining [three] points of contact”). Nasrallah confirmed that the configuration of the handrails on the crane did not allow him to hold onto the handrails during a portion of his travel across the fender wheel well. Tr. 133, 136. The Secretary thus argues that Nasrallah’s travel across the fender wheel well without maintaining three points of contact constitutes a violation of section 56.15005.

Respondent argues that Nasrallah’s egress procedure was in compliance with both MSHA’s requirements and with the manufacturer’s recommended egress methods. Tr. 28. Robert Berry, Respondent’s safety director and the supervisor responsible for Respondent’s fall protection training and evaluation, testified that Sims Crane employees are trained to access and egress mobile equipment, including cranes, using at least three points of contact. Tr. 97-100; *see also* R. Ex. 1 (Mosaic’s Mobile Crane Program requiring that personnel maintain three points of contact when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic’s Mobile Crane Policy requiring “access and egress at the designated access points while maintaining [three] points of contact”). Berry testified that Respondent’s training program relies, in part, on MSHA’s Policy Information Bulletin No. P10-04 (“PIB No. 10-04”), which “provides information on providing safe means of access, fall prevention, and fall protection to miners operating, conducting maintenance or service activities, or accessing work platforms of self-propelled mobile equipment,” such as the Tadano crane at issue here. Tr. 122; R. Ex. 2. MSHA published PIB No. 10-04 on June 16, 2010, in response to equipment manufacturers’ request for “clarification of MSHA’s requirement for fall protection on mobile equipment.” *Id.* at 2. It was distributed to MSHA program policy holders, mine operators, independent contractors, special interest groups, and miners’ representatives. In addition to providing specific examples of precautions that may reduce the potential for slip and fall accidents on mobile equipment, PIB No. 10-04 notes that “equipment manufacturers may be providing safe access, fall prevention, and fall protection by complying with ISO 2867, “Earthmoving Machinery—Access Systems. . . .”⁶ Inspectors are permitted to use equipment-specific documentation of ISO certification in considering whether operators are providing safe access, fall prevention, and fall protection.

⁶ The International Standards Organization (“ISO”) is an “independent, non-governmental international organization” that “develop[s] voluntary, consensus-based, market relevant International Standards.” International Standards Organization, <http://www.iso.org/iso/home/about.htm> (last accessed Jan. 13, 2017).

ISO 2867, referenced in PIB No. 10-04, specifies criteria for “access systems” on mobile earth-moving equipment. R. Ex. 5. An access system is a “system provided on a machine for entrance to and exit from an operator, inspections, or routine maintenance platform from and to the ground.” *Id.* at 1.⁷ Although ISO 2867 generally requires three points of contact for primary access systems, it permits two points of contact for certain types of systems:

[p]roper placement of components of the access system shall permit and encourage a person to use three-point support while ascending, descending, or moving about the access system, when more than 1 m above the ground. *Two-point support is acceptable for stairs, stairways, walkways, and platforms.* Three-point support should be used for all ladder systems. Track shoe and track pad surfaces are accepted as access steps if the three-point support is provided.

Id. at 4 (emphasis added).

A walkway is any “part of an access system that permits walking or moving between locations on the machine.” *Id.* at 3. Respondent argues that the fender wheel well was intended to serve as a walkway to move from the crane’s cab to the front of the vehicle, consistent with the requirements of ISO 2867. The top of the fender is three feet wide and also coated with an anti-skid material to prevent slipping, thus suggesting that the manufacturer intended it to be used as a walkway. Tr. 124; *see also* R. Ex. 10 (MSHA Program Policy Letter indicating that slip-resistant surfaces can reduce mobile equipment slip and fall accidents).⁸

Berry also testified that Mosaic’s training program relies, in part, on the requirements of the ISO general standards for cranes, ISO 11660, which have been incorporated by reference into the Occupational Health and Safety Administration’s (“OSHA”) regulations. Tr. 102-103; R. Ex. 7 (ISO 11660-1:2008(E): Cranes: Access, Guards, and Restraints, Pt. 1); *see also* 29 C.F.R. § 1926.1423 (OSHA regulation governing fall protection, promulgated under Subpart CC: Cranes and Derricks in Construction). ISO 11660 divides crane access systems into two categories: Type 1 and Type 2. Type 1 access is “designed for use without personal protective equipment.” Type 2 access is “access for which some characteristics of Type 1 access are not provided . . . [and] *may* require the use of personal protective equipment. R. Ex. 7, at § 4.1(a)-(b)

⁷ I interpret this definition as encompassing systems providing access to or egress from the machine for the purposes of operation, inspection, and maintenance.

⁸ Although Peters estimated that the fender was 20 inches wide, he admitted he did not take a measurement. Tr. 75. Both Berry and Nasrallah testified that the fender is approximately three to three-and-a-half feet wide. Tr. 99, 125. I credit the testimony of Berry and Nasrallah, particularly because they are more familiar with the surface and because Peters gave an estimate and did not take a measurement.

(emphasis added). Berry testified that after receiving citations for employees walking on the deck of earth-moving equipment without fall protection,

[Mosaic] took the ISO standard to MSHA and said earthmoving equipment[,] if you're going to access from the ground to the crane, from the controls to the ground, Type 1 access is all you have to use . . . [I]n [section] 4.2 [of ISO 11660] . . . they talk about access and egress and you have to use three points of contact when you're climbing on and off the crane but when you're walking across the deck of the crane, you don't have to have—it's impossible to have three points of contact when you're walking across the deck of the crane. So the manufacturer said, okay. We got to make a nonskid surface so that we can prevent you from slipping while you're going from point A to point B to get off the crane.

Tr. 102-103; R. Ex. 7 at § 4.2.2; *see also* R. Ex. 5 at 4 (“All surfaces of the access system used for walking, stepping, or crawling (including any device or structural component thereof used as part of an access system) shall be slip-resistant.”). ISO 11660 allows Type 1 access to control stations and starting equipment, and for maintenance more frequent than once per month. R. Ex. 7 at § 4.2.2. Thus, Respondent argues that the method by which Nasrallah dismantled the crane was an ISO 11660 permissible Type 1 access system that did not require three points of contact. Tr. 101, 103.

I find persuasive Respondent's argument that Nasrallah's egress procedure complied with the requirements of ISO 2867, which allows two points of contact on walkways, and with ISO 11660, which permits access designed for use without personal protective equipment. Respondent, however, has offered no evidence suggesting that MSHA has ever referenced ISO 11660 in its regulations or policy interpretations. Tr. 105. Accordingly, I cannot conclude that compliance with ISO 11660 has any bearing on the fact of the violation alleged in Citation No. 8823573. Moreover, while PIB No. 10-04 allows inspectors to use documentation of ISO 2867 compliance in considering whether operators are providing safe access, the PIB also explicitly requires *operators* to provide the required documentation to verify that their mobile equipment complies with ISO 2867. R. Ex. 2 at 2. Although Berry credibly testified that ISO 2867's requirements allow non-skid or anti-slip surfaces on walkways where three-point contact is not possible, Respondent has provided no documentation to show that the Tadano crane at issue in Citation No. 8823573 has been certified as complying with ISO 2867. Tr. 103. As indicated by Berry's testimony regarding the incorporation of PIB No. 10-04 and ISO 2867 into Respondent's training policies, Respondent is familiar with and relies on both of those documents to provide a safe working environment for its miners. Notwithstanding Respondent's familiarity with these documents, Respondent failed to produce evidence of certification at the hearing, despite MSHA's clear statement that operators must provide “documentation to verify that their

equipment is ISO 2867 certified.”⁹ R. Ex. 2, at 2. In the absence of such certifying documentation, I reject Respondent’s argument that Nasrallah’s egress procedure complied with MSHA’s recommendations in PIB No. 10-04. I therefore find that a technical violation occurred, as alleged, in Citation No. 8823573.

Step two of the *Mathies* analysis focuses on “the extent to which the violation contributes to a particular hazard.” The Commission has recently clarified that this step is “primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (citing *Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) “a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy*, 38 FMSHRC at 2038.

The first part of step two of the clarified *Mathies* test requires identifying the hazard. *Id.* As the Commission explained, “a clear description of the hazard at issue places the analysis of the violation’s potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations.” *Id.* Under *Mathies*, the hazard contributed to by the violation is defined “in terms of the prospective danger the cited safety standard is intended to prevent,” and therefore “the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations].” *Id.* The clear purpose of section 56.15005 is to prevent falls. I therefore define the hazard contributed to by the violation as miners falling as they walk across the wheel well from the cab to descend to the ground. Tr. 42, 52.

Having determined that Nasrallah’s failure to use fall protection to cross the left front fender of the crane presents a falling hazard, I now consider whether “there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed.” *Newtown Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8823573, I must determine whether Nasrallah’s failure to use fall protection or handholds is reasonably likely to lead to a fall. I note that, under Commission precedent, “[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations.” *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm’rs Holden and Riley, plurality) (citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co.*, 7 FMRHC 11125, 1130 (Aug. 1985). I also consider conditions on a mine-wide basis. *Id.* (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (Aug. 1994)).

⁹ I also note that the Commission has concluded that the regulatory interpretations set forth in Program Information Bulletins represent the “considered exercise of the Secretary’s policy making authority” and have therefore granted them *Auer* deference. *Small Mine Development*, 37 FMSHRC 1892, 1899 (Sept. 2015) (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deference to an agency interpretation of an ambiguous regulation is warranted when it “reflect[s] the agency’s fair and considered judgment”).

Considering the totality of circumstances surrounding the technical violation in Citation No. 8823573, I do not find that Nasrallah was reasonably likely to fall from the fender above the left wheel well. Although Nasrallah admitted that he did not have access to a handrail when crossing over the front left fender, the fender's estimated length of six or seven feet indicates that he only took two or three steps without three points of contact. Tr. 114, 124. As noted previously, the top of the fender (where Nasrallah did not have three points of contact) is three feet wide and covered with anti-skid material. Tr. 124; *see also* R. Ex. 10 (MSHA Program Policy Letter indicating that slip-resistant surfaces can reduce mobile equipment slip and fall accidents). Although Peters opined that a person readying a crane for transport could stumble at any time, the Secretary presented no testimony or evidence regarding wet weather conditions or likely tripping hazards. Tr. 44. I therefore find that the Secretary did not establish by a preponderance of the evidence that there was a reasonable likelihood that Nasrallah would fall from the crane as he briefly took three steps while passing over the three-foot wide fender on a slip-resistant surface.

In conclusion, I have found that a technical violation of section 56.15005 occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. While that violation did contribute to a discrete safety hazard of falling, I have found that the Secretary did not establish by a preponderance of the evidence that the fall hazard created by the violation was reasonably likely to occur. I therefore find that the violation of section 56.15005 in Citation No. 8823573 was not S&S, and was unlikely to result in permanently disabling injuries to one person.

2. The Technical Violation in Citation No. 8823573 was not the Result of Respondent's Negligence.

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Although the Secretary originally alleged that the violation in Citation No. 8823573 was the result of Respondent's moderate negligence, after the presentation of Respondent's case in chief, the Secretary suggested in his closing argument that the violation was the result of the Respondent's high negligence. Tr. 149-50. Respondent disputes the Secretary's negligence designation. Resp't Prehearing Rpt. 2.

Peters testified that he designated the violation of section 56.15005 as moderate negligence because Nasrallah was not a supervisor and was working alone without direct supervision. Tr. 53. The Secretary failed to establish that Respondent knew of or should have known of the violation by Nasrallah. Berry testified that Sims Crane employees are trained to access and egress mobile equipment, including cranes, using at least three points of contact. Tr. 97-100; *see also* R. Ex. 1 (Mosaic's Mobile Crane Program requiring that personnel maintain three points of contact when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic's Mobile Crane Policy requiring "access and egress at the designated access points while maintaining [three] points of contact"). Berry also testified that Respondent's training program includes MSHA's PIB No. 10-04, which references ISO 2867. R. Ex. 2 at 2. ISO 2876, in turn, explicitly allows the use of two-point support on walkways. R. Ex. 5 at 4. I therefore find that the

Secretary failed to establish that the violation was the result of any negligence on the part of the Respondent. In fact, had Respondent produced the required documentation that the crane was ISO certified, I would not have found any violation under MSHA's own guidance, and this litigation may have been avoided.

3. Penalty Assessment

The Secretary proposed a penalty of \$270 for Citation No. 8823573. The parties have stipulated that the penalty proposed by the Secretary in this case will not affect the ability of Respondent to continue in business, and that Respondent abated the violation in good faith. *Jt. Ex. 1, Stips. Nos. 5 & 6.* Respondent is a small, independent contractor. *See Ex. A, Sec'y of Labor's Petition for the Assessment of Civil Penalty, Docket No. SE 2016-0081.* I have deleted the S&S designation and determined that the violation was unlikely to cause injury, and was not the result of Respondent's negligence. Section 56.15005 was not cited in either of the two citations Respondent received in the fifteen months prior to the issuance. Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of \$100.

IV. ORDER

For the reasons set forth above, Citation No. 8823573 is **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "unlikely," to delete the significant and substantial designation, and to reduce the level of negligence from "moderate" to "no negligence."

Respondent, Sims Crane, is **ORDERED** to pay a total civil penalty of \$100 within thirty days of the date of this Decision and Order.¹⁰

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

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/ccc

¹⁰ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 18, 2017

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

v.

ALCOA WORLD ALUMINA, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-0128
A.C. No. 41-00320-366885

Docket No. CENT 2015-0365
A.C. No. 41-00320-377526

Docket No. CENT 2015-0401
A.C. No. 41-00320-378824

Mine: Bayer Alumina Plant

AMENDED DECISION AND ORDER

Appearances: Lindsay Wofford, Esq., U.S. Department of Labor, Office of the Solicitor,
Dallas, Texas and

Maria C. Rich, CLR, U.S. Department of Labor, MSHA, Dallas, Texas for
Petitioner

Christopher Bacon, Esq., Vinson & Elkins L.L.P., Houston, Texas, for
Respondent

Before: Judge L. Zane Gill

The decision that issued January 10, 2017, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c), to read as set forth below.

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a citation and two orders issued to Alcoa World Alumina, LLC (“Alcoa”), which were litigated at a hearing on January 12 and 13, 2016, in Victoria, Texas.¹ The parties presented testimonial and documentary evidence and filed post hearing and reply briefs.

¹ Citation No. 8778037 and Order No. 8856305 were assigned to Docket No. CENT 2015-0401. Order No. 8778039 was assigned to Docket No. CENT 2015-0365. Order No. 8778038 was assigned to Docket No. CENT 2015-0128. The parties requested that Order No. 8778038 be modified from a 104(d)(2) to a 104(d)(1) order. Tr. 8. The parties settled Order No. 8856305 in Docket No. CENT 2015-0401 prior to hearing. Tr. 8; J. Prehearing Rep. 2.

The relevant citation and orders (hereinafter “citations”) were issued as a result of MSHA’s investigation into an accident that occurred at Alcoa’s Point Comfort, Texas plant,² on September 3, 2014, that resulted in serious injury to a contract miner from an on-site contract maintenance company, Turner Industries (“Turner”). Tr. 34, 112-13. The citations allege that Alcoa failed to protect miners from the hazardous motion of a caustic liquid, that Alcoa did not require miners to wear necessary personal protective equipment (“PPE”) while exposed to dangerous chemicals, and that Alcoa allowed a miner to unsafely access a work area. Ex. S-18, S-19, S-20. The violations were all designated as significant and substantial (“S&S”) , unwarrantable failures to comply with mandatory standards, and allegedly the result of Alcoa’s high negligence. *Id.*

Alcoa does not contest the fact of the violations or the S&S designations, rather, Alcoa disputes the unwarrantable failure and high negligence levels assigned to the three citations. Resp. Br. 2-3; Resp. Reply at 7. In support of the unwarrantable failure and negligence designations, the Secretary asserts that Steven Alvarado, an Alcoa employee who was present at the scene of the accident, was an agent of Alcoa tasked with supervising the contractors, and that he failed to take reasonable steps to prevent the accident and keep the contract miners safe. Sec’y Br. 4. Alcoa contends that Alvarado did not have the requisite authority to be considered a “supervisor,” and was merely a rank and file miner present at the scene, and as such the negligence levels of each citation should be reduced, and the unwarrantable failure designations deleted. Resp. Br. 2. Alcoa also argues that even if Alvarado is found to be a supervisor, the negligence and unwarrantable failure categorizations are in error because Alvarado and Morales did not step into an area that would require wearing PPE until the moment of the accident, that Alcoa verified the system being maintained was free of harmful liquid, and that Alvarado reasonably believed that a Turner employee cited for kneeling/sitting on a pipe while working did not need fall protection and was safe. Resp. Br. 2.

Prior to the hearing the parties made the following stipulations:

1. At all relevant times, Alcoa’s Bayer Alumina Plant was a “coal or other mine” as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802.
2. At all relevant times, Respondent was operator of the Bayer Alumina Plant, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802. The products of Bayer Alumina Plant, MSHA ID No. 41-00320, entered the stream of commerce and/or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
3. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”);
4. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter.

² MSHA issued several identical citations to Turner Industries, which were settled without a hearing. Tr. 13; Resp. Br. 1. Citations were also issued to Alcoa, because Steven Alvarado, an Alcoa employee, was present at the time accident. Tr.13.

5. The Administrative Law Judge has jurisdiction over this matter.
6. The subject citations were served by a duly authorized representative of the Secretary on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance, but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The assessed penalties, if affirmed, will not impair the Respondent's ability to remain in business.
8. The parties have settled Citation No. 8856305 in Docket No. CENT 2015-401 and only Citation Nos. 8778037, 8778038 and 8778039 remain at issue.

J. Prehearing Rep. 1-2.

For the reasons that follow I conclude that Order Nos. 8778037, 8778039, and Citation No. 8778038, were all violations of the respective cited standards, properly designated as S&S, and that the gravity designations for each violation were appropriate. I conclude, however, that Alcoa exhibited low and moderate, rather than high negligence and that none of the violations were the result of unwarrantable failure.

This decision will begin with an overview of the relevant legal standards. Next, a factual background of the mine and the accident that gave rise to the citations will be given, followed by an analysis and the disposition of each alleged violation, and finally my assessment of civil penalties and order.

I. Basic Legal Principles

Significant and Substantial

All of the citations in dispute were designated by the Secretary as significant and substantial ("S&S"). The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission has held that a violation is properly designated S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

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

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

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

Generally, the Commission considered the third step of the *Mathies* test to ask both whether there was a reasonable likelihood that a hazard contributed to by the violation would occur *and* whether there was a reasonable likelihood that the occurrence would result in injury. See *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). As a result of this paradigm, the second step was often a given in S&S analysis, with the third prong traditionally being the most contended and discussed aspect the evaluation.³ The Commission recently revisited the S&S analysis to clarify the interplay between the second and third prongs of the *Mathies* test. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).

The Commission explained in *Newtown* that the ultimate inquiry at the heart of the *Mathies* test has not changed but now “the proper focus of the second step of the *Mathies* test is the likelihood of the occurrence of the hazard the cited standard is designed to prevent.” *Newtown Energy*, 38 FMSHRC at 3307, n. 8. The third step focuses primarily on gravity, and the focus shifts from the violation to the hazard (which is established in stage two), and whether the hazard would be reasonably likely to result in injury. *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016). Essentially whether the hazard was reasonably likely to occur is moved to the second step and the consideration of whether an injury was reasonably likely in the event of that occurrence remains in the third step. *Id.* The second step “likelihood” analysis and third step “gravity” analysis are tied together by the “hazard” at issue. *Newtown Energy*, 38 FMSHRC at 2038.

³ In *U.S. Steel Mining*, the Commission provided additional guidance regarding the third step: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*; *PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)).

The *Mathies* test now requires that the judge adequately define the particular hazard to which the violation contributes in the second step of the test. The starting point of determining the hazard is the cited C.F.R. section, as the Commission defines “hazard” in terms of the prospective danger the cited safety standard is intended to prevent. *Id.* After a hazard is clearly identified and defined the judge must then determine whether the alleged violation sufficiently contributed to that hazard.⁴ This requires a determination of whether, in light of the facts surrounding the violation, there is a reasonable likelihood of the occurrence of the hazard the standard addresses. *Id.*

If a Judge concludes that based on the evidence the violation sufficiently contributes to the defined hazard, the occurrence is assumed, and he must move on to the third step of *Mathies*. *Id.* The third step then requires the judge to determine whether based on the particular facts, the occurrence of the hazard would be reasonably likely to result in an injury. *Id.* The Commission recognized that “reasonable likelihood” is not an exact standard and the degree of risk of injury cannot be quantified into precise percentage, but it is a matter of degree evaluation, requiring a judge to apply experience and discretion to resolve fact intensive questions. *Id.* at 2039. The fourth and final step in the analysis is to determine whether a resulting injury would be reasonably likely to be reasonably serious. *Id.*

Unwarrantable Failure

The three citations at issue were also designated as “unwarrantable failures” to comply with the cited standards. A violation of a standard is the result of an operator’s unwarrantable failure if it demonstrates “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). A violation is also an unwarrantable failure if it demonstrates the operator’s “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). A court must examine all relevant facts and circumstances to determine whether an operator’s conduct is aggravated or whether mitigation is present. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Specific factors to consider to determine whether a violation constitutes an unwarrantable failure include: 1) the length of time that the violation has existed, 2) the extent of the violative condition, 3) whether the operator has been placed on notice that greater efforts were necessary for compliance, 4) the operator’s efforts in abating the violative condition, 5) whether the violation was obvious or posed a high degree of danger and 6) the operator’s knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). All the factors must be considered, although the court may find some factors are not relevant or are more or less important than the others under the circumstances. *IO Coal*, 31 FMSHRC at 1351.

In addition to these six unwarrantable failure factors, other circumstances must be considered in the analysis. The Commission has held that the dangerousness of a violative condition in itself may be so severe as to warrant an unwarrantable failure finding. *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Additionally, the conduct of mine management

⁴ The “revised” *Mathies* test now requires two tasks, or sub steps, within the second step.

must be considered in an unwarrantable failure analysis. When a supervisor, within the scope of his employment, violates a standard, the supervisor's misconduct is imputed on the operator and should be "considered in conjunction with the traditional unwarrantable failure factors." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2046 (Aug. 2016).

Negligence

The Secretary designated the three citations to be the result of "high" negligence on the part of the operator. The Mine Act creates a strict liability enforcement model³, and as result negligence is not an essential part of the calculus to determine an operator's fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required; irrespective of fault.⁴ Negligence, however, is central to the assessment of civil penalties⁵ and to the evaluation of the enhanced enforcement elements of S&S, unwarrantable failure, and flagrant violation.⁶

Negligence is considered in light of the action that would have been taken under the same circumstances by a "reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Id.* Considerations

³ "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C.A. § 814(a) (emphasis added). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). See also, *A.G. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that each mandatory standard has an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet that duty can lead to a finding of negligence if a violation occurs).

⁵ Section 110(i) of the Mine Act requires that in assessing penalties, one criterion that must be taken in account is "whether the operator was negligent." 30 U.S.C. § 820(i). *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989) ("the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.").

⁶ Although the same or similar factual circumstances may be included in the Commission's consideration of an operator's misconduct with regard to an unwarrantable failure finding and the Commission's evaluation of an operator's negligence for purposes of assessing a civil penalty, the concepts are distinct and subject to separate analysis. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

regarding negligence include “the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.” *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The operator may be charged with varying degrees or levels of negligence, which becomes an important consideration during the penalty assessment. The Commission has described that ordinary negligence may be characterized by “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987). A finding of high negligence, however, “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (1998); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator’s intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992). Also, actual knowledge of violative conditions and the failure to act in light of that knowledge amount to high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Moreover, mine management is held to a higher standard of care, because they are tasked with the safety of their miners and must also set an example for miners under their direction. *Midwest Materials Co.*, 19 FMSHRC 30, 35 (Jan. 1997); *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).⁷

MSHA’s definition of negligence and corresponding degrees in part 100 are not binding on Commission judges, but are helpful in evaluating culpability. *Brody Mining LLC*, 37 FMSHRC at 1701-03 (holding that Commission judges are not bound to apply MSHA’s negligence definitions in 30 C.F.R. Part 100.). Negligence is defined in Part 100 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).⁸ MSHA’s Part 100 also takes into account mitigation, stating that “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” 30 C.F.R. § 100.3(d). Accordingly, reckless negligence is present if “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is properly attributed to the operator if “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is appropriate when “[t]he operator knew

⁷ There is an exception to this principle that applies in limited circumstances. The Commission has held that where an operator takes reasonable steps to prevent accidents and the “erring supervisor unforeseeably exposes only himself to risk,” a finding of no negligence will be upheld, but if an operator was blameworthy in respect to hiring, training, safety procedures or the accident itself, there may be a negligence finding. *NACCO Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). Notably, the Commission has never applied the *Nacco* exception to preclude a finding of unwarrantable failure or to mitigate the civil penalty assessment for an unwarrantable failure violation.

⁸ “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d).

or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is appropriate if “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

Mitigation becomes an important consideration when analyzing the level of negligence attributable to the operator. Essentially, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. While mitigation is an important consideration, an ALJ is not constrained to an evaluation of “mitigating” circumstances, but is charged to consider the “totality of the circumstances holistically.” *Brody Mining LLC*, 37 FMSHRC at 1702; *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

Agency

As noted in the negligence and unwarrantable failure summaries above, the Commission has recognized that the negligence of an operator's “agent” is imputable to the operator for both penalty assessment and unwarrantable failure purposes. *Wayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) (“*R&P*”); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Wayne*, 19 FMSHRC 447 at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995).

The question of whether a miner is an agent is often contested, and demands an intensive factual analysis. The Mine Act gives a starting point for the inquiry. Section 3(e) of the Mine Act defines an “agent” as “any person charged with responsibility for the operation of all or part of a ... mine or the supervision of the miners in a ... mine.” 30 U.S.C. § 802(e). Next, the miner’s function, responsibilities, authority, and representations to MSHA must be taken into account. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (“We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine.”).

The Commission looks at the particular miner’s function, rather than solely his job title to determine whether a miner had supervisory or managerial duties. *REB Enters.*, 20 FMSHRC 203, 211 (Mar. 1998). It is important to examine the responsibilities of the miner at the time of the alleged negligent conduct, and whether they were those that would normally be delegated to management, or were crucial to the mine’s operation. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328–31, (Mar. 2009); *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the Commission has concluded that in carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95

(4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of *respondeat superior*); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant to the agency determination that an employee made required daily examinations and entered findings in an examination book).

In the same vein, a miner's authority is also important in an agency analysis. There are no hard and fast rules as to what authority a miner must have to be considered an agent of the operator. The authority to hire, fire, or discipline other employees in and of itself is not a prerequisite to a finding of agency, especially in light of other circumstances that indicate an agency relationship, because such authority often rests at a higher level due to the impact of these decisions. *Nelson Quarries, Inc.*, 31 FMSHRC 331-32. *Cf. e.g., REB Enters.*, 20 FMSHRC at 211-12 (holding that highwall leadman was not an agent because he did not have authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding discipline of employees).

Apparent authority, or how a miner is treated by co-workers, must also be taken into consideration. A miner is more likely to be considered an agent of the operator if other employees treated them as a supervisor. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-31 (2009). *See also All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). Representations made to MSHA regarding authority are also relevant in an analysis of agency. *Ambrosia*, 18 FMSHRC at 1561 n.12 (finding relevant, based on analogy to common law agency principles, that employee held himself out as the employee in charge at the mine and signed MSHA documents as mine foreman); *Nelson Quarries, Inc.*, 31 FMSHRC 318, 331-32. On the other hand, the authority of a rank and file miner to tell other miners what to do on the job, does not on its own, make a miner an agent of the operator. The intrinsic nature of on the job training by fellow miners requires that more experienced miners give guidance to new miners on how to safely perform a job and to imply agency in such a situation would create an "every man for himself" atmosphere, detrimental to health and safety. *Martin Marietta Aggregates*, 22 FMSHRC 633, 640 (May 2000). Likewise, the Commission has held that the authority of a miner to tell miners to stop working on dangerous machinery and to remove it from service does not create an agency relationship. *U.S. Coal*, 17 FMSHRC at 1688. Also, a miner's independence is not dispositive in an agency determination. *See e.g., Whyne*, 19 FMSHRC at 451-52 (finding that an experienced miner who needs little supervision and assists less experienced miners is not necessarily a supervisor).

Gravity

In order to properly assess a civil penalty, a determination regarding gravity must be made. The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct

with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)(ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be assessed assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Burden of Proof

The Secretary bears the burden of proving all elements of a citation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence."). *See also, Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976-1977 (Aug. 2014) (holding that to prove his imputed negligence is proper, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care). In general, this preponderance standard "means proof that something is more likely so than not so." *In re: Contest of Respirable Dust Sample Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995).

Penalty

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

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

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g*, 32 FMSHRC 1257, 1289 (Oct. 2010)(holding that the judge was justified in relying on utmost gravity and gross negligence in imposing a penalty substantially higher than that proposed by the Secretary); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (finding it appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that the judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592-01, 13,621(Mar. 22, 2007)(codified at 30 C.F.R. pt. 100).

In addition, Commission judges are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone*:

When it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Sellersburg Stone, 5 FMSHRC at 293.

Special Assessment

Through notice and comment rule making, the Secretary promulgated regulations specifying the “Criteria and Procedures for Proposed Assessment of Civil Penalties.” 30

C.F.R. Pt. 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the “regular assessment” process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.⁹ Nor do they identify how the amount of a special assessment will be determined, other than to state that “the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form.” *Id.* The narrative findings for special assessments are typically brief and conclusory. The Secretary’s proposed special assessment is not binding on the Commission; the Commission imposes civil penalties *de novo*.

II. Factual Background

The Mine and the Alumina Refining Process

Alcoa’s Bayer Alumina Plant in Point Comfort, Texas processes alumina, which is used to produce aluminum metal. Tr. 38-44; Ex. S-1. Alcoa extracts alumina from bauxite in a four step process referred to as the Bayer Refining Process. Tr. 15, 52, 55, 210; Ex. S-1. The accident giving rise to the citations at issue occurred during the second step, the clarification process. Ex. S-1; Tr. 41, 46.

⁹ In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. Criteria and Procedure for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 at 13,621 (Mar. 22, 2007).

During the clarification process liquid bauxite, which is referred to as “liquor”¹⁰ due to its reddish-brown color, is pumped from the digestion process area, to the clarification department, where it is passed through presses that remove impurities to refine or clarify it for the next step in the process. Tr. 45-46. The liquor is then moved via pipes to the precipitation department for the third step, and then to calcination for the fourth and final step. Tr. 42-46. The final product is alumina, a white powder composed of half aluminum and half oxygen. Ex. S-1.

The refining or clarifying process takes place in the clarification department. Tr. 47; Ex. S-3. The clarification department contains a press building, with three stories. Tr. 46. The bottom or first floor is the mud floor and contains drains to catch material or liquor that spills during clarification. Tr. 18, 26, 47. It also contains pump headers and pipes which push the liquor vertically up through the second floor valves and pipes, and then up to the presses on the top floor. Tr. 47-48, 73-74, 224.¹¹ The pipes that feed the presses are called risers, and are referred to by the press to which they connect. Tr. 50.

System Maintenance and the Flange Break Procedure

As the liquor cools and hardens when travelling through the piping system, scale, a rock-like substance, builds up along the walls within the risers. Tr. 56-57, 62, 66, 70, 403. This scale, often called “pancake,” can be removed either by hydro blasting, jackhammering, or a caustic solution wash. Tr. 62, 64, 70.¹² Cleaning by these methods is scheduled periodically to remove buildup. Tr. 403. In order to remove scale with caustic solution (“caustic”), pipes are removed from the production process, liquor is drained from the risers and a caustic is introduced into the risers through

¹⁰ In the first step of the Bayer Refining Process, called digestion, raw bauxite is pulverized and mixed with sodium hydroxide in large pressure tanks, creating a caustic solution. Ex. S-1; Tr. 56. The alumina in the bauxite is dissolved and forms sodium aluminate, which is referred to as “liquor.” Tr. 40, 56, 61. The name is derived from the reddish brown color of the liquid. Tr. 60-61.

The Material Safety Data Sheet (“MSDS”) for sodium aluminate, or liquor, refers to the solution as “Bayer Liquor,” “Caustic Liquor,” “Alumina Refining Process Liquor,” or “Alumina Refining Process Liquor.” Ex. S-5 at 1. The MSDS for liquor describes it as caustic and corrosive. Ex. S-5 at 1. Additionally, the thermal temperature of liquor during the alumina refining process is about 220 degrees Fahrenheit. The MSDS warns that direct contact with liquor can cause “severe irritation, corrosive burns and permanent injury to eyes, skin and gastrointestinal tract,” and that liquor mists can seriously irritate or damage the respiratory tract. *Id.* The MSDS states that PPE should be worn when handling liquor, and safety goggles, a face shield, gloves, and protective clothing should be worn when exposed to liquor. *Id.* at 3.

¹¹ Presses are long tube-shaped devices with a series of screens that capture and filter solid materials like sand and mud from the slurry. Tr. 45-46; Ex. S-1.

¹² The caustic solution (“Caustic”) is sodium hydroxide, or NaSO₄, a corrosive base material that Alcoa uses to break down built up scale in pipes. Tr. 51, 54. When a caustic solution is sent through the pipes, the system is “on caustic.”

ancillary lines. Tr. 51, 54, 320. One riser at a time is removed from the pumping process and drained before caustic is introduced through the ancillary lines. Tr. 54, 55, 320, 492.

The ancillary lines serve two risers and connect the pairs with a “T” pipe, which allows the caustic to flow into both risers. Tr. 51, 54, 215, 320. To isolate one pipe for cleaning and keep the other in production, a round flat metal plate, or blind, is placed between the joint of the T pipe to prevent flow of caustic between the risers. Tr. 68, 69. Another metal plate with a hole in the center, a dutchman, is placed on the other side of the T pipe to allow flow into that riser. Tr. 55, 68, 69. In order to remove the caustic from one pipe, or take it “off caustic,” and begin using caustic on another (putting that pipe “on caustic”), the blind must be relocated and swapped with the dutchman, in a process called a blind swap. Tr. 403. The blind swap requires that the pipes be empty, and that the T pipe connecting the risers be removed by unbolting the flanges, referred to as a flange break. Tr. 118, 141, 356, 427, 441.

The flange break portion of the blind swap presents a danger because miners are opening the piping system, which might contain residual caustic liquid which can spray or leak out of the pipe. Ex. S-12. Miners are at risk of contact with a hazardous material if the riser is charged, containing liquid that can escape. Tr. 30-31. For this reason, Alcoa created a Standard Work Instruction (“SWI”) which outlines safety measures necessary for the task. Ex. S-12.

Alcoa’s flange break SWI requires miners to perform a lockout/tagout procedure on the piping system to isolate the flow of any liquid. Ex. S-12. Miners must then verify that the system is isolated by draining the pipes and then flushing them with water (conducting a “flush verification”), which should run clear. Tr. 32, 61, 505, 506; Ex. S-12.¹³ During the flange break miners are required to wear standard personal protective equipment (“PPE”) to avoid chemical or thermal burns, including a hardhat, goggles, long sleeve shirt, and hearing protection. Ex. S-12. Additional PPE, including a chemical suit, face shield, and rubber boots is required if verification is not performed before the flange break, or if a miner cannot place himself in a position above the flange being broken. Ex. S-12. Miners are also instructed to attempt to work from above the flange being unbolted, and to avoid putting body parts underneath the flange, in the area known as the “line of fire”. Ex. S-12. The area where the flange break is being performed should be barricaded and barricading should be maintained if working above ground level to protect anyone who walks under the flange break from dripping liquid. Ex. S-12.

¹³ Alcoa’s Tagout/Lockout Verification Program defines verification as “the inquiry, observation and testing methods” used to ensure energy sources are isolated and secured in a safe position and that any “equipment, process or system is in a zero or controlled energy state” necessary for the task being performed. Ex. S-25. Flush verification is defined by Alcoa’s SWI as “the witnessing of water being flushed through piping, vessels, tanks, pumps and valves.” Ex. S-12. An observer is looking for the water to run clear, absent of color or material. Tr. 505-06. Additionally, the temperature of the pipe after flush verification may indicate whether liquor is drained, as a properly drained pipe will cool upon the introduction of water. Tr. 233-34.

The SWI states that if verification cannot be performed additional PPE must be worn and a “Flange Break Permit” must be completed and authorized by a superintendent or his designee before the flange break begins. Ex. S-12.

The Flange Break on September 3, 2014

On September 3, 2014, Turner contractors were tasked with performing a blind swap of risers 25 and 27, a pair of risers that shared a T pipe. Tr. 318, 403, 406. Riser 27 was to come off caustic and be put back into the clarification process (“on liquor”), requiring the blind swap. Tr. 403-04. At the time the task was assigned, a dutchman was in place allowing flow into Riser 27, but the caustic wash was removed. Tr. 403-04.

On the morning of September 3, before the blind swap was to start, Jeff McCaskill, an area supervisor for Alcoa, had a safety meeting with Turner employees, including their supervisor Rusty Morales, to discuss the hazards presented by the task. Tr. 167, 405-06. Morales then held a meeting with his team and went through a Job Safety Analysis (“JSA”) for the blind swap, and reviewed the safety measures the miners should take. Tr. 168-70; Ex. S-14, S-15.

Before the blind swap, Alcoa was to isolate the system, drain the 25 riser, verify the piping was empty, and perform the lockout /tagout, as Turner contractors were not authorized to lock out the system. Tr. 130. Alcoa has lockout/tagout procedures in place for flange breaks, along with an SWI that outlines the procedures necessary when a flush verification is not performed. Ex. S-12; Tr. 453. The Flange Break SWI states that verification must be performed before starting the task of unbolting “any flange associated with piping, vessels, tanks, pumps and valves.” Ex. S-12. The instruction explains that the individual performing the flange break “must personally observe the flushing of water across the flange being unbolted.” *Id.* The General Instructions in the SWI advise that proper lockout / tagout and verifications procedures should be followed before starting work, and that an individual must verify that a system has been flushed with water by witnessing the flushing and draining. Ex. S-12. If verification cannot be performed additional PPE must be worn and a “Flange Break Permit” must be completed and authorized by a designated individual before the task begins. Ex. S-12.

At around 8:00 a.m. Alcoa began the process of stopping the flow to Riser 25. Tr. 410. This required closing and tagging out Mud Floor Valve 30 between the pump and riser 25, to prevent flow to the riser, and to ensure that Valve 28 leading to riser 27 was closed. Tr. 417.¹⁴ When McCaskill believed the valve was closed, he hung a green tag on the valve to indicate the closure. Tr. 410-11. Liquor was then drained from the line and a white work permit was placed on the press floor control room to indicate that the lockout / tagout was complete, the system was isolated, and that work could commence. Tr. 413-14, 421-22. Alvarado testified that the 25 riser was not flush verified, despite the SWI requirement, because there was a blind between the 27 and 25 risers, and the riser was “on caustic.” Tr. 453-54. Alvarado admitted that a flush verification could have been performed regardless of the blind. Tr. 454-55.

¹⁴ Alcoa employees closed the mud floor valve with a sledgehammer. Tr. 412. During this process Alvarado broke the siphon on the line to facilitate draining. Tr. 416-17. Rudy Peña, an Alcoa employee, then began to “rod out” or drill a line into the ball valve between riser 25 and valve 30 to remove scale build up. Tr. 414, 415. When Peña attempted to attach a hose to the ball valve to drain the line, liquor from the pipe sprayed him. Tr. 414. Peña received first aid to treat the skin that was exposed to liquor. Tr. 413.

Morales and McCaskill then “walked out the job,” so McCaskill could show Morales that the tag-out process was done and to verify that the drain hose had no flow. Tr. 119, 174, 421.¹⁵ McCaskill informed Morales that he would be leaving the facility, and then left for the day around lunchtime. Tr. 158, 422. At around 1:00 p.m., Turner employees Morales, Dominic Cano, and Leo Gaytan arrived at the Press Building to begin the blind swap. Tr. 14, 360, 361. Morales and Alvarado went over the isolation points once more. Tr. 133, 144, 176, 426.

Turner employees Gaytan and Cano removed the T pipe connecting Risers 25 and 27 and the blind that was on Riser 25. Tr. 356. At this time they discovered a chunk of hardened scale, referred to as “pancake,” on the opening of the pipe behind the blind blocking the opening to Riser 25, which needed to be removed so caustic could be forced into the line. Tr. 356, 428.¹⁶ Gaytan testified that he saw liquor coming out of the drain hose at around 1:00 p.m., before he started breaking the flange. Tr. 360-61. Gaytan informed Morales, who then told Gaytan that the job was ready to go and that there was only a little liquid leaking. Tr. 360-61, 395. Gaytan said that Alvarado was nearby, about three or four feet away, when he told Morales about the liquid. Tr. 360-61, 396-97. Gaytan also stated that liquid was coming out of the hose while he was working. Tr. 378, 380-83.

Cano initially kneeled onto the pipe, about four feet from the ground and began jack hammering for twenty minutes until Gaytan took over. Tr. 273-74, 357. Gaytan jackhammered from a stand he had pulled over to the area. Tr. 104, 198, 316. The jackhammer broke through the scale and Alvarado, who was standing nearby noticed liquor coming out of a hole in the pancake, and began shouting for the miners to stop jackhammering. Tr. 431-32. Morales, who had been standing 8 to 10 feet away, walked up at this time and was struck in the back by the liquor spewing heavily from the riser. Tr. 431-32. Morales was not wearing the proper PPE for exposure to liquor when he was struck. Tr. 75, 432.

Alvarado pulled Morales into the chemical safety shower about ten feet away, where Morales rinsed himself under the solution for several minutes. Tr. 161-62, 433. Emergency medical personnel arrived thereafter. Morales suffered third degree burns from his elbow to shoulder, requiring skins grafts. Tr. 163. Morales’s tongue, ear and face were also burned. Tr. 162.

¹⁵ Alcoa did not flush verify the isolation of Riser 25, as mandated by the SWI. Tr. 453-54. The policy generally requires that the individuals performing the flange break observe the flushing of water across to the flange to be unbolted. Ex. S-12.

¹⁶ The pancakes are hard, like concrete, and are typically removed by jackhammering. Tr. 64, 70, 428.

MSHA Inspector Brett Barrick was assigned to conduct an investigation of the accident. Tr. 81-82.¹⁷ After investigating and questioning various Turner and Alcoa employees, he issued the disputed citation and orders.

III. Analysis

The parties agree that the three cited standards were violated, that the violations are properly categorized as S&S, and that the gravity designations are appropriate. However, Alcoa challenges the negligence levels and unwarrantable failure charges of each citation.

The Secretary supports his negligence and unwarrantable failure classifications in large part by arguing that during the violative conduct, Alvarado was Alcoa's agent, particularly, an acting supervisor, tasked with ensuring the safety of the Turner contractors in McCaskill's absence. Sec'y Br. 9, Tr. 404, 406, 410, 423. Conversely, Alcoa contends that Alvarado was simply a bystander and a mere rank and file miner who was present during the flange break because he needed to perform a task after the Turner employees were finished. Resp. Br. 8, Tr. 301-05. Before the citations are discussed, it is necessary to define Alvarado's role at the time of the incident, as it ultimately shapes the disposition of the violations.¹⁸

Agency Analysis

The dispute regarding both negligence and unwarrantable failure hinges largely on whether, at the time of the violations, Alvarado was charged with supervising other miners, and as such was Alcoa's agent.¹⁹ This will be determined by examining Alvarado's title, function, responsibility, authority, and representations to MSHA regarding the flange break procedure on September 3, 2014.

Alcoa argues that Alvarado had not been designated as a supervisor on September 3, 2014, and as such, Alvarado was not responsible for the activities of Turner contractors. Resp. Br. 7. The

¹⁷ Brett Barrick was an MSHA Inspector at the time the citations were issued, but is now a Conference Litigation Representative ("CLR"). Tr. 23. Barrick was an inspector for four years, and conducted about 30 inspections of alumina facilities, including Alcoa plants. Tr. 24, 26. Barrick worked for companies that performed contract work for Alcoa for 19 years before becoming an MSHA Inspector, including 17 years working as the Safety and Health Manager for Rexco, a contract company imbedded at Alcoa. Tr. 27-29. While at Rexco, Barrick supervised flange breaks. Tr. 29-30.

¹⁸ The Secretary also alleges that Alcoa was highly negligent because it violated its own safety policies in favor of saving time by not requiring PPE for the flange break, not establishing a barricade, failing to flush verifying the piping, by failing to properly maintain the pipe system, and not requiring contractors to safe use safe means of access while working. Sec'y Br. 24-28, 34-36. Since the Secretary's negligence and unwarrantable failure arguments are specific to each citation, they will be addressed separately. Alvarado's role will be discussed first, as the dispute regarding his level of responsibility is common to all three violations.

¹⁹ The Mine Act defines an agent as any person charged with the operation of all or part of a mine, or the supervision of the miners. 30 U.S.C. § 802 (e).

Secretary asserts that Alcoa's failure to formally designate Alvarado as a supervisor is not determinative of Alvarado's role on the day of the violation. Sec'y Br. 20. On at least ten previous occasions, Alcoa management designated Alvarado as a Temporary Acting Supervisor ("TAS") for a shift. Tr. 449-51. This designation is given to an hourly employee before a full shift, when a regular supervisor is not available, and requires paperwork be filled out. Tr. 449. Alvarado receives a pay increase when he serves as TAS. Tr. 451. Alvarado had never been designated as a TAS for a partial shift before, and on September 3, 2014, he was the only Alcoa employee on the crew who had acted as a TAS. Tr. 449, 451. Barrick testified that he had no evidence that Alvarado was acting as a TAS on the day of the accident. Tr. 305-06. By all accounts, Alvarado was not named a supervisor after McCaskill left for the day.

The Commission looks to the miner's function to determine agency status, regardless of formal title or lack thereof. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Martin Marietta*, 22 FMSHRC 633, 637-38 (May 2000). The Commission examines whether the miner's function involved responsibilities normally delegated to management. *REB Enters.*, 20 FMSHRC 203, 211 (Mar. 1998). The Secretary alleges that Alvarado's function was to supervise Turner contractors during the blind swap, in McCaskill's absence. Sec'y Br. 19.²⁰ Alvarado told Barrick during the investigation, that he was asked to "keep an eye" on the Turner contractors. Tr. 309. Barrick conceded that it would not be unusual for an operator to ask its hourly employees to keep an eye on contractors. Tr. 337-40. Further, Barrick testified that all miners have the obligation to stop others from doing something unsafe, even without reaching the threshold of being a supervisor or an agent. Tr. 311. Alvarado testified that he was present during the flange break because he had to do a task once the blind swap was complete. Alcoa maintains that there would have been no need to designate Alvarado as a supervisor. Resp. Br. 8. Maly testified that Alcoa did not normally directly supervise contractors, contractors generally supervise their own work crews. Tr. 486-87. Maly also testified that Alvarado reported to Robert Clark in McCaskill's absence, and that in addition to Robert Clark, two other supervisors were present in the clarification department during the blind swap. Tr. 485-87.

Next, Alvarado's responsibilities will be analyzed, including whether Alvarado exercised managerial responsibilities at the time of his alleged negligent conduct. *Martin Marietta Aggregates Inc.*, 22 FMSHRC 633, 638 (May 2000). The Secretary notes that Alvarado had "tagging authority" over the blind swap and flange break, and that this authority militates towards Alvarado being a

²⁰ The Secretary states that Alvarado admitted he was responsible for overseeing another Turner crew working on the top floor of the Press Building. Tr. 462-63. The Secretary's argument is misplaced, as Alvarado admits that he was assigned to "lock out" a job for Turner contractors, not that he was assigned to direct them or supervise them. Tr. 462-63.

supervisor. S. Br. 20, Tr. 401, 443.²¹ Turner contractors did not have the authority to conduct a lockout/tagout on Alcoa equipment. Tr. 130. Alvarado had Level 2 tagout authority, which allowed him to lock out certain equipment and hang work permits. Tr. 402. The Secretary failed to show how this authority differed from that of other rank and file miners, or that only supervisory personnel had tagout authority.

In the absence of actual authority, the Commission also looks to apparent authority, or how a miner was treated by those with whom he worked, to determine whether a miner was an agent of the operator for negligence and unwarrantable failure purposes. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 (Sept. 1996). The Secretary alleges that Turner contractors reasonably believed Alvarado was an Alcoa supervisor for purposes of the flange break and blind swap. Sec’y Br. 19-21.

Morales testified that during the job walkout McCaskill informed him (Morales) that Alvarado would oversee the remainder of the job that day. Tr. 158.

Q. [Lindsay Wofford] And how did you get that understanding that his [Alvarado’s]—his role was to supervise the work being conducted?

A. [Rusty Morales] Jeff McCaskill told me that he would be over the job that we would be doing and that he would be there.

Tr. 158.

Morales also testified that he knew Alvarado “was in charge of the press building.” Tr. 160. Alcoa notes that Morales was likely being untruthful in his testimony regarding Alvarado being in charge of the job. Resp. Br. 9. Alcoa points out that Morales has filed a lawsuit against Alcoa and Alvarado for the injuries he sustained. Resp. Br. 9; Tr. 164. Barrick testified that he did not think Morales was credible. Tr. 294. Barrick was unable to interview Morales during his investigation, but witnessed his testimony at a deposition and then at trial. Tr. 294. Barrick said that Morales’s statements were contrary to those of three other witnesses- two Turner miners and Alvarado. Tr. 294. Morales’s testimony that he believed Alvarado to be in charge is not credible, based on Barrick’s observation on the inconsistencies among witnesses and Morales’s possible motivation to place blame on Alvarado for his injuries. Barrick testified that the documentation that Turner gave him after the incident seemed suspect and inconsistent. Tr. 298-99. In the past when Barrick dealt with Turner, he “found them at times to not be very credible.” Tr. 298.

²¹ Alcoa has a lockout/tagout policy that dictates what needs to be done to isolate a system before maintenance is performed. Tr. 31. With tagging, after a system is mechanically closed and isolated, a “tag” is hung on a valve or section of piping as a visual aid to show it has been properly isolated and to indicate that individuals are working on the system. Tr. 86, 210. An individual with tagging authority has the authority to isolate a system, to identify which components in the system need to be closed off. Tr. 31. Alcoa has various levels of “tagging authority” to indicate what each employee is permitted to do in the tagging process. Tr. 401-02. These levels are achieved through training and certification. Tr. 401. For example, a Level 2 tagout authority would allow someone to lock out equipment for general mechanical work. Tr. 401. A Level 3 authority would allow an individual to have the same duties as Level 2, in addition to being allowed to perform a confined space lockout. Tr. 401.

Leo Gaytan, one of the Turner contractors present during the incident, testified that he believed Alvarado was in charge because Alvarado was tagging the job with Morales. Tr. 355. Gaytan testified that a supervisor from Alcoa generally watched the flange break. Tr. 363. Gaytan also noted that Alvarado told him to clean the scale and reassemble the system. Tr. 384-85. It is important to note that this is the only thing Alvarado said to Gaytan, and Gaytan already knew he was going to be jackhammering the scale. Tr. 384-85. Gaytan admittedly knew what his tasks would be before Alvarado's alleged statements. This testimony does not weigh in favor of Alvarado being classified a supervisor.

Finally, neither Alcoa nor Alvarado ever made any representations to MSHA that Alvarado was a supervisor during the flange break. Tr. 302, 305. During the investigation Alvarado told Barrick that on the day of the incident he was "on tools," and that he was "[w]atching Turner to assist." Tr. 248. Barrick testified that Kelly Grones, Alcoa's health and safety manager, gave him the investigation report Alcoa compiled after the incident. Tr. 82, 296. Barrick believed it was very candid, although he disagreed with Alcoa's belief that the maintenance was done properly. Tr. 296-97.

Alvarado's tagging authority and assignment to "keep an eye" on Turner contractors are not sufficient to find that he was a supervisor or an agent of Alcoa on September 3, 2014. The unwarrantable failure and negligence classifications of the individual citations will be discussed, with Alvarado's role in each being that of a rank and file miner.

A. Citation No. 8778037, Blocking Against Hazardous Motion (Lock Out/ Tag Out)

On September 16, 2014, Barrick issued Citation No. 8778037 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.14105, a mandatory standard requiring that machinery or equipment must be powered off and blocked against hazardous motion before repairs on machinery are conducted.²²

The Citation alleges:

An accident occurred on September 3, 2014, when a contractor's supervisor working on the 25 press riser was struck in the back and upper arm by approximately 220 degree caustic liquor. Two contract employees had removed a 4 inch tee off of the riser and observed scale buildup. They then began chipping at the hydrated scale buildup

²² The standards states:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

in the 4 inch opening with a 30 lb. jackhammer. When the bit was removed from the hydrated scale hot liquor sprayed out of a hole. The contractor's supervisor was standing near the miner that was scaling the opening. It has been determined that the No. 30 Mud Floor Valve which is a part of the mechanical means of blocking the liquor[']s] movement was not seated completely and allowed liquor to re-enter the riser from below the drain filling the riser back up after it had been drained. The one inch drain line failed to show any drainage at the time indicating that it had scaled up. Failure to stop all motion of hot liquor in this equipment resulted in the contractor's supervisor receiving second and third degree burns to his back resulting in lost work days. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that they did not verify that the system was completely blocked against movement of liquor. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-18.

The citation was designated as reasonably likely to be permanently disabling, with one person affected, S&S, and the result of Alcoa's high negligence. *Id.*

The Secretary alleges that Alcoa violated 30 C.F.R. § 56.14105 because the flange break was "maintenance" as anticipated by the standard, the liquor was not completely removed or blocked from moving through the piping, and it subsequently sprayed out, injuring a miner. Sec'y Br. 22-23. Alcoa does not contest the fact of the violation.

1. S&S

Although Alcoa does not dispute the S&S designation, the S&S nature of the citation will be discussed briefly. The first prong of *Mathies* is satisfied because Alcoa failed to properly drain the pipes, thus the liquor was not blocked from moving through the pipes during maintenance, in violation of Section 56.14105.

Next, the second step of *Mathies* requires me to determine whether the hazard the cited standard was designed to prevent was reasonably likely to occur. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). Section 56.14105 requires that equipment be blocked against hazardous motion. 30 C.F.R. § 56.14105. As applied to this violation, the pipes should have been drained or blocked to prevent the corrosive and heated liquor from moving through the pipes and potentially escaping while maintenance (i.e. the flange break) was performed. Tr. 203. The failure to drain the lines resulted in the liquor escaping and burning a miner. The second step of *Mathies* is satisfied. Tr. 203.

The third *Mathies* criterion focuses on gravity. Generally a judge is to assume the hazard has been realized and then consider whether it is reasonably likely to result in injury. Once again, an injury occurred in this case, as Morales was burned by the spewing liquor during the flange break process. The fourth step of *Mathies* looks to whether there is a reasonable likelihood that the injury in question would be of a reasonably serious nature. Morales sustained severe burns on his back, arm, and face from contact with the liquor. Tr. 162. These burns required hospitalization and skin

grafts, and have kept Morales out of work. Tr. 115-16, 162. Based on these facts, the resulting injury was serious in nature. The citation was properly designated S&S.

2. Negligence

The Secretary argues that the high negligence level for Citation No. 8778037 is appropriate because Alcoa failed to follow its own lockout/tagout procedures and work instructions by omitting a flush verification and not isolating the pump system before performing a flange break, in an effort to save time. Sec’y Br. 25. According to the Secretary, flush verification was critical in this case because the drain lines were not properly maintained and thus clogged with scale. Sec’y Br. 26-27; Tr. 79-81. Alcoa counters that a classification of “no negligence” is appropriate for the citation because the accident was unforeseeable, the operator was diligent in ensuring that the 30 valve that allegedly caused the leak was completely sealed, and the omission of flush verification is irrelevant because it would have been futile. Resp. Br. 32-33.

The Secretary alleges that the flush verification was omitted only because Alcoa was in a rush to get the system back on line. Sec’y Br. 28. Flush verification can take quite a bit of time: 45 minutes to fill the system with water, and another 45 to allow it to drain. Tr. 496. The job was a top priority, but McCaskill was leaving early that day. Tr. 106, 361, 422. Moreover, the Secretary alleges that the accident was caused by Alcoa’s improper maintenance of the drain line. Alcoa designed three-inch by two-inch (“3x2”) drain lines to be installed on risers. Tr. 79-80. These large diameter drains are angled in such a way as to allow discharge to flow away from the miner and are less susceptible to plugging, clogging, and scaling than a 1-inch drain line opening. Tr. 80. At the time of the accident Alcoa was using 1-inch ball valves hooked to a hose to drain the lines rather than maintain the 3x2 drain lines. Tr. 80-81. The 1-inch valve can clog and prevent liquor from draining. This means that when liquor stops draining from the system, it may be due to a clog, not an empty system. Flush verification then becomes more important. Sec’y Br. 27.

Alcoa maintains that there were no aggravating factors to support a negligence finding. Resp. Br. 24. Alcoa contends that the Alcoa never communicated that the job was to be rushed; rather Morales told his crew that the job needed to be completed promptly. Tr. 379-80.²³ Gaytan said that the job was a priority because Alcoa wanted the system back in service, but did not testify that anyone from Alcoa specifically told him to rush the job. Tr. 364.

Q. [Maria Rich] Could you describe this job in terms of priority?

A. [Leo Gaytan] Yes, ma’am.

Q. Okay. Could you describe it for me? What priority was this job?

A. Because they want the unit back in service, that’s the priority.

Q. Is it important to get these pipes back in production?

A. Yes, ma’am.

Tr. 364.

Later, Gaytan testified that Morales told him to jackhammer despite seeing liquor leaking because the job needed to be done. Tr. 379-80.

Q. [Christopher Bacon] Okay. And you told Mr. Morales "there's liquor coming out of that?"

A. [Gaytan] We told Mr. Morales and Mr. Alvarado knew about it.

Q. You said Mr. Alvarado knew but you didn't tell Mr. Alvarado; he was standing off to the side?

A. He was on the side.

Q. Yeah. And you were jackhammering?

A. I told Mr. Morales that and Mr. Morales

Q. He said, "It doesn't matter, keep doing it"?

A. He said, "The job needs to be done," he said, "They want it done, Alcoa wants it done."

Q. Okay. So Mr. Morales said, "Just keep the job -- just do the job even though that's coming out"?

A. Mr. Morales and Mr. Alvarado was rushing it.

Q. Mr. Alvarado was rushing you?

A. Yeah, it needs to be done.

Q. Okay. But Mr. Alvarado didn't tell you? He -- he didn't say anything?

A. Not that I know of.

Q. Okay. So how -- why do you say -- if you don't know he say anything, then what makes you say that --

A. Because Mr. Morales -- is what he told me, "the job needs to be done."

Q. Okay. So the person who told you that the job needed to be done, the person who communicated that there was a rush was Mr. Morales?

A. I don't know about that one.

Q. Okay. But the person who was talking -- you-- you spoke to Mr. Morales about the liquor; you saw the liquor; am I right?

A. Yes, sir.

Tr. 379-80.

In sum, Gaytan did not testify that Alvarado knew there was a leak in the line; he only stated that Alvarado was nearby.

In response to the Secretary's allegations that Alcoa did not verify isolation, Alcoa argues that it did verify that the system was completely blocked against the hazardous movement of liquor because it closed the 30 valve and verified that the system was completely drained. Resp. Br. 22; Tr. 420-21. Alcoa contends that flush verification was not necessary because the flush verification process is meant to ensure that caustic does not remain in the pipe after a caustic wash, and in this case liquor was in the pipe. Resp. Br. 23; Tr. 454-55, 474. Alcoa also posits that flush verification is generally used for horizontal piping, which is more likely to contain residue after a caustic wash, and the piping at issue was vertical. Tr. 454-55, 474.

Alcoa claims that the cause of the incident was likely the failure of valve 30 during jackhammering, and as such performing a flush verification would not have indicated a problem. Resp. Br. 23. Dwayne Maly, the training superintendent at Alcoa, testified that the spraying liquor was caused by the 30 valve. Tr. 477-79.²⁴

Barrick testified that he could not be sure of what caused the leak, but testified, "I truly believe in my heart of hearts flush verification may not have solved this..." Tr. 505. When Barrick began his investigation, Grones gave Barrick an email that the plant manager, Ben Kahrs, had sent out to many people at Alcoa the day after the incident, stating that "flush verification was not done correctly." Tr. 296; Ex. S-11. Barrick agreed that one of the reasons he issued the lockout/tagout citation was this e-mail. Tr. 301. Maly stated that he did not agree with Kahrs' email, because he did not believe flush verification would have made a difference. Tr. 499, 500. This assertion, coupled with Barrick's admission regarding flush verification, indicated that it is objectively reasonable to believe flush verification was not necessary, and may not have prevented the liquor leak.

Low negligence is the appropriate designation for the citation. There was negligence on the part of Alcoa, because the lines were not adequately maintained. The testimony indicates that Alcoa

²⁴ Dwayne Maly has been the training superintendent at Alcoa for about six years. Tr. 471. His responsibilities include recording and directing employee MSHA training and reviewing SWI's. Tr. 471. Before this he spent 22 years in various roles at Alcoa, including serving as the superintendent in the clarification, digestion and precipitation areas and as a process engineer in digestion. Tr. 471. Maly assisted in drafting Alcoa's flange break SWI. Tr. 472. Maly has a bachelor's degree in Chemical Engineering from Texas A&M University. Tr. 472.

could have used the specially designed 3x2 lines, which may have prevented the scaling, and that the 1-inch drain lines were more likely to give a false indication of a de-energized system. Moreover, flush verification could have been performed as an additional step, even if it was not deemed necessary.

Likewise, there were no aggravating factors to support a high negligence finding. The flush verification would likely not have prevented this issue, and Alcoa's decision not to perform one does not rise to the level of high negligence. Alcoa bypassed the flush verification because it reasonably believed that flush verification was not necessary. There is no indication that Alcoa was rushed and omitted flush verification to save time. Morales and Gaytan indicated that the job was a priority, but did not credibly testify that they were told by Alcoa to rush the maintenance.

3. Unwarrantable Failure

The Secretary alleges that the unwarrantable failure designation is proper for Citation No. 8778037 because the facts demonstrate aggravated conduct on the part of Alcoa. Sec'y Br. 29-30. Alcoa disputes the designation and asserts that the Secretary did not establish aggravated conduct on the part of any Alcoa employee. Resp. Br. 2.

a) Length of Time

The Secretary alleges that the violative condition existed for an hour because Gaytan testified that he saw liquor coming from the hose before the blind swap started. Sec'y Br. 29; Tr. 361, 388, 390.²⁵ In response, Alcoa notes that work ceased as soon as Alvarado saw liquor seeping through the pancake, and that the valve believed to have become unseated, causing the leak, only became unseated after jackhammering began, lessening the amount of time the condition existed. Resp. Br. 24.

Gaytan did not credibly testify that Alvarado, an Alcoa employee, knew that a persistent leak existed during the jackhammering. Gaytan testified that Alvarado was three or four feet away when Gaytan told Morales about the leak, but did not offer testimony that Alvarado heard the statement or acknowledged it in any way. Tr. 396. Moreover, Alvarado testified that he called on the Turner contractors to stop work the moment that he witnessed liquor seeping from system, which was almost the same time that Morales was struck by the liquor. Tr. 431. The length of time that the condition existed was brief, and as such does not weigh in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

The Secretary believes the violation's extensiveness is supported by Alcoa's failure to follow its own flush verification guidelines. Sec'y Br. 30. Alcoa notes that it verified the system twice, so the extent of the condition does not justify an unwarrantable failure finding. Resp. Br. 24.

²⁵ Gaytan testified that he saw the hose draining, and reported to Morales that he saw the hose was still draining. Tr. 388-90. Barrick testified that Gaytan told him [Barrick] during the investigation that Gaytan saw fluid leaking from the drain line. Tr. 332. At another point during Gaytan's testimony he states that he never looked at the hose, but then states he saw the hose draining before he began working. Tr. 388. Maly stated that Gaytan has a "safety conscious" attitude, and it seems unlikely he would see a leak without speaking up about it. Tr. 483-85.

The extensiveness of the condition does not support unwarrantable failure, as this leak existed in one area of the facility, for one task, and exposed the only the miners working in the area at the time.

c) Notice

The Secretary alleges that Alcoa had notice that greater efforts were needed to comply with Section 56.14105, because MSHA cited Alcoa for an injury sustained during a flange break a year prior to this incident. Tr. 343; Ex. S-23. Alcoa alleges that there was insufficient evidence that the prior citation was similar in nature to the citation at hand. Resp. Br. 25. Alcoa notes that the prior citation involved a high pressure screen, unlike the machinery at issue here, and that it was located in the clarification department. Tr. 343-44.

Without additional testimony regarding the previous violations, it is difficult to determine whether the prior citations were sufficient to put Alcoa on notice of the violative condition. On balance, the evidence that the prior citation involved a different piece of machinery is stronger. There is insufficient evidence to find that Alcoa was on notice for unwarrantable failure purposes.

d) Failure to Abate

The Secretary states that the disregard of the flush verification step before the flange break, and permitting it to be ignored, demonstrated Alcoa's failure to abate the violative condition. Sec'y Br. 30. Alcoa counters that it did all it could to reasonably abate the violation because Alvarado called the Turner contractors to stop working immediately upon seeing liquor seeping through the pancake. Resp. Br. 25; Tr. 360.

The Secretary does not meet his burden of showing that Alcoa's decision to omit flush verification amounted to a failure to abate. Additionally, by all accounts, the work ceased when Alvarado witnessed liquor seeping through the pancake. This does element does not support a finding of unwarrantable failure.

e) Obviousness and High Degree of Danger

Alcoa admits that the conditions leading to the accident posed a high degree of danger, but argues that the condition was not obvious because there was no way to tell that the 30 valve would fail after having been verified to be closed twice. Resp. Br. 25. Alcoa disputes the obviousness of the condition by noting that Barrick testified, "if I walked up on it, would I say it was obvious that something bad's going to happen here? No, it's not – it's not going to be obvious in that manner." Tr. 251. According to Alcoa, any problem with scale breaking loose would be undetectable until jackhammering started. Tr. 479.

The corrosiveness of the liquor and possibility of a leak did present a high degree of danger, albeit not an obvious one.

f) Operator's Knowledge

Similarly, the Secretary contends that Alcoa had knowledge that liquor was flowing from the line because Gaytan mentioned it, and Alvarado was nearby when he did so. Tr. 361, 390, 396-97.

McCaskill also had difficulty seating the 30 valve before he left for the day and Peña had been injured at one point already. Tr. 412, 414.

Alcoa did not have sufficient knowledge of the violative condition to warrant a finding of unwarrantable failure. The failure to flush verify alone does not rise to the level of reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Brody Mining*, 37 FMSHRC 1687, 1691 (Aug. 2015). The leak did not exist for a significant amount of time; by all accounts the flow of liquid from the pipe was sudden. Tr. 182, 431. It was not established that Alvarado knew that the system was not properly verified. Gaytan vacillated when asked about observing the pipe leak, so it is difficult to say with certainty whether Alcoa had knowledge of the leaking pipe.

In sum, the high degree of danger of leaking liquor, alone, does not support an unwarrantable failure finding. There is insufficient evidence to show that Alcoa was on notice, had knowledge that the system was not properly isolated, that the condition was obvious, or that Alcoa did not attempt to abate the violative condition.

4. Gravity

Alcoa does not dispute the gravity of the violation. The condition was dangerous, as Alcoa concedes, and the fact of the accident and extent of injuries are undisputed. One person, Morales, was injured severely, justifying the gravity designations.

B. Order No. 8778038, The PPE Violation

On September 16, 2014, Barrick issued Order No. 8778038 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.15006, a standard that requires that special protective equipment and clothing be worn by miners whenever a hazardous condition is encountered.²⁶ The order alleges:

An accident occurred on September 3, 2014 when the contractor's area supervisor failed to use special protective equipment provided by the contractor to protect him from known chemical and thermal hazards in the area in which he was working. The supervisor was providing oversight for two contract miners on the No. 25 riser drain located on the mud floor of the press building. The two miners were de-scaling the riser with a 30 lb. jack hammer at a 4 inch flange opening. Personal protective equipment (PPE) had been established by the contractor in their job safety analysis review and is described in the mine operator's safe work instruction procedure[s] which was

²⁶ 30 C.F.R. § 56.15006 reads:

Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.

provided to the contractor prior to the work being done. The PPE required to be worn for the work is a chemical suit, face shield, chemical gloves, and rubber boots. The contractor[’s] supervisor was working in the area wearing a hard hat, monogoggles, hearing protection and leather work boots. During the maintenance on the line the miners knocked an approximately 1.25 inch hole into the hydrated scale buildup. The approximately 220 degree liquor contained in the line shot out of the hole striking the supervisor in the back and upper right arm about 8 feet away resulting in second and third degree burns to the areas affected. Alcoa’s management engaged in aggravated conduct constituting more than ordinary negligence in that a competent person/agent was present during the work and observed the supervisor not wearing the proper equipment. The competent person/agent failed to wear the required PPE as well and was in the immediate area of the release. Failure to use PPE that has been prescribed through job analysis and historical injury information in the mine increases the potential for miners being severely burned. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-19.

The Order was designated as reasonably likely to be permanently disabling, a significant and substantial (“S&S”) violation, with one person affected as a result of “high” negligence. *Id.* The Order was later modified to a 104(d)(1) Order. Tr. 8.

Section 56.15006 requires that special protective equipment and clothing shall be provided, maintained and used if chemical or other hazards that could cause injury are encountered. 30 C.F.R. § 56.15006. The Secretary does not alleged that PPE was not provided or maintained, but rather that on the date of the accident it was not being used by a Turner employee and an Alcoa employee. Ex. S-19; Tr. 256. Barrick testified that he issued the PPE citation because Alcoa permitted Morales to enter the “line of fire,” or area where a caustic spray could occur, without adequate protective equipment. Tr. 256. Morales admitted that he was not wearing the PPE required for a flange break, as outlined in Alcoa’s SWI. Tr. 135.²⁷ The Secretary further alleges that Alcoa did not establish a barricade to protect miners from possible caustic spray, as required by Alcoa’s own SWI. Sec’y Br. 32-33; Ex. S-12.

1. S&S

The S&S nature of the citation is not in dispute, but will be addressed briefly. The fact of the violation was established, satisfying the first prong of the *Mathies* test. Alcoa does not dispute the

²⁷ Alcoa’s Standard Work Instruction for a flange break outlined the PPE required to complete the task. In addition to the hardhat, google, long sleeve shirt, and hearing protection, the SWI requires the wearing of a chemical suit, face shield, chemical gloves and rubber boots. Ex. S-12. The SWI also instructs that the area of the flange break be barricaded. Ex. S-12.

fact of the violation. Morales admits that he was not wearing the PPE required for a flange break at the time of his injury. Tr. 135.

The hazard contributed to by the violation (i.e. the failure of miners to wear required PPE and establish a barricade) was a miner being struck by the corrosive 220 degree Fahrenheit liquor. Tr. 34, 112-13; Ex. S-20. Section 56.15006 seeks to protect miners from being injured by various aspects of a process or system, in this case contact with heated, corrosive liquor. It is likely that a miner in the line of fire without protective equipment would be injured if he came into contact with a dangerous substance. The third *Mathies* criterion is satisfied because the liquor, and the failure to wear protective clothing to protect his skin, caused Morales to be injured. Tr. 116, 162. These injuries were serious as they required a miner to undergo extensive hospitalization, skin graft procedures, and time out of work, satisfying the fourth prong of the *Mathies* test. Tr. 116, 162.

2. Negligence

Alcoa argues that the PPE citation should be modified from “high” negligence to “low” negligence, because it could not have predicted Morales would walk into the line of fire or would forego donning the PPE. Resp. Br. 32. The Secretary contends that there are no mitigating factors to justify reducing the level of negligence, and that Alvarado had the authority to require PPE, establish a barricade, and prevent Morales from entering the line of fire, but failed to do so. Sec’y Br. 33.

The Secretary alleges that Alvarado ordered the Turner miners to remove the pancake in Riser 25 and observed the subsequent jackhammering, but did not verbally stop Morales from entering the line of fire without PPE. Sec’y Br. 33; Tr. 356, 362-63, 432. Barrick testified that Alvarado was in close proximity to the jackhammering, although Barrick did not know exactly where. Tr. 269. Alvarado conceded that if he saw any unsafe behavior or conditions, he would be able to call it out and stop work. Tr. 452. There is no proof that Alvarado saw and condoned Morales’s lack of PPE. Morales should have worn the extra PPE as a safe measure, since he had the potential to walk into the line of fire (and ultimately did).

The Secretary notes that Alvarado did not establish a barricade, although that step is outlined in the flange break SWI. Sec’y Br. 33; Ex. S-12. Alvarado testified that a barricade should have been put up, but he did not put one up because he did not start the work, and he thought Turner contractors should have done it. Tr. 453.

Alcoa argues that the negligence should be modified to low because Morales signed off on the job safety sheet that required PPE, but did not wear it, so he was ultimately responsible. Resp. Br. 32. Moreover, the violation occurred in a short period of time, and Alcoa had no way of knowing that Morales would walk into the line of fire without PPE. Resp. Br. 32.

Alcoa’s culpability should be modified to “low” negligence, as Morales was supervisor and contract miner, who knew he should have worn PPE, but did not. There is insufficient evidence to indicate that Alvarado was aware of the failure. Additionally, the standard for setting up a barricade for a flange break was not cited, and seems to be the result of a misunderstanding of the need for a barricade, and which individuals were tasked with setting it up.

3. Unwarrantable Failure

The Secretary alleges that the facts surrounding the PPE violation support a finding of aggravated conduct sufficient to justify an unwarrantable failure finding. According to the Secretary, the violative condition existed for a significant period of time, Alcoa was aware of the condition, did not mitigate the hazard, knew greater efforts were needed to comply with the PPE standard, and that the condition posed a high degree of danger. Sec'y Br. 32. Alcoa notes that Morales's decision to walk into the line of fire without proper PPE cannot be imputed on the operator because Morales was a supervisor who knew of the risk, was responsible for his safety, and that of his crew, but chose to forego donning additional PPE, and that Alcoa could not have stopped him. Resp. Br. 18. These arguments are discussed further below.

a) Length of Time

The Secretary contends that although Morales's injury occurred quickly, the failure to wear PPE was present from the time the T pipe was removed at 1:00 p.m., until the time the ambulance was called at 1:53 p.m. Sec'y Br. 34; Ex. S-10. Alcoa notes that Morales was only in the line of fire for a short period of time before being struck by leaking liquor. Resp. Br. 18; Tr. 260, 359. Alvarado testified that he was not aware that Morales was in the line of fire, until the moment Morales was injured, and Alvarado yelled for the workers to stop. Resp. Br. 19, Tr. 432. The short length of time weighs against an unwarrantable failure finding.

b) Extent of Violative Condition

Alcoa notes that only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45. Alcoa argues that this indicates the violative condition was not extensive, and only Morales was in danger, not the other Turner contractors who were all wearing the appropriate PPE. Resp. Br. 19. The extent of violative condition factor does not support an unwarrantable failure finding.

c) Notice

The Secretary contends that an injury occurred during a previous flange break, resulting in a citation being issued to Alcoa, putting Alcoa on notice that greater efforts were needed to comply with the PPE standard. Sec'y Br. 35. Alcoa states that it was not on notice of the condition, regardless of the prior PPE citation, because only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45.

Based on the facts at hand, Alcoa was not on notice of the condition. The previous citation was issued more than a year before, based on another process, and involved a different piece of mine equipment.

d) Failure to Abate

According to Alcoa, it put forth an effort to abate the condition by providing PPE to the Turner contractors. Resp. Br. 32. This factor bears little weight in the present unwarrantable failure analysis.

e) Obviousness and High Degree of Danger

Alcoa does not dispute that the violation presented a high degree of danger, but once again notes that the risk was not obvious, because they could not have anticipated Morales's actions. Resp. Br. 20-21. Morales indicated on the job safety form that he was wearing PPE, and by all accounts Alvarado was not closely watching the contractors. While the condition was dangerous, it was not obvious.

f) Operator's Knowledge

Alcoa also denies that it had knowledge of the violative condition. Alcoa notes that there was no agent present to whom to impute knowledge. Resp. Br. 21. Alcoa maintains that Alvarado was not an agent of the operator, and even if he were, he did not see and could not anticipate Morales walking into the line of fire without adequate protection. Resp. Br. 21-22. The operator did not have sufficient knowledge of the condition to rise to the level of unwarrantable failure.

In sum, the dangerousness of the condition alone, does not justify the unwarrantable failure designation.

4. Gravity

The gravity designations are not in dispute. One miner was seriously injured because he was not wearing the proper PPE. This resulted in the miner being hospitalized, missing work, and requiring surgical procedures.

C. Order No. 8778039, The Safe Access Violation

On September 16, 2014, Barrick issued Order No. 8778039 to the Alcoa's Bayer Alumina Plant because a miner was performing maintenance on a riser drain line while kneeling on a pipe, rather than executing the task from a safer location, in violation of the safe access standard, 30 C.F.R. §56.11001, which requires that the operator provide and maintain a safe means of access to all working places.²⁸

The order alleges:

An accident occurred on September 3, 2014 when the contractor's supervisor was burned by spraying liquor on this job. Safe access was not provided to a 4 inch caustic line on the No. 25 press riser drain on the mud floor of the press building. Miners had been instructed to remove the 4 inch tee from the riser and remove the hydrated scale out the 4 inch opening flange with a 30 lb. [j]ack hammer affixed with a 12 inch bit. A miner gained access to the scaled up line by climbing on top of the No. 27 side of the manifold by setting on top of a 12 inch line. The line is approximately 4 feet from the concrete floor, and is located directly in the line of fire of the 4 inch opening. An Alcoa competent person/agent was present during the de-scaling operation

²⁸ 30 C.F.R. § 56.11001: "Safe means of access shall be provided and maintained to all working places."

and at no time instructed the miner or the contractor[']s supervisor to get the miner down from the pipe and provide him with a safe means of accessing the work outside of the line of fire. This condition exposes the miner to falling from the pipe to the concrete floor as well as a sudden release of hot liquor from the scaled up line resulting in serious injuries. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that the competent person/agent observed the practice and failed to act. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-20.

The order was designated as reasonably likely to be permanently disabling to one miner, S&S, and the result of high negligence. *Id.* The order was modified from a 104(d)(2) Order to a 104(d)(1) order. Tr. 8.

The Commission has held that the term "maintain" in Section 56.11001 imputes an ongoing responsibility on the operator to uphold, continue, preserve, or keep up a safe means of access to a working place, and to ensure that the means are utilized, rather than passively supplying the safe access. *Lopke Quarries Inc.*, 23 FMSHRC 705, 708 (July 2001). At a minimum, the standard requires that operators maintain the safe working place and require other miners to do so as well, the operator must take measures to ensure safe access is utilized. *Lopke Quarries Inc.*, 23 FMSHRC 705, 709 (July 2001).

The Secretary argues that Section 56.11001, a mandatory safety standard, requires an operator to provide *and* maintain safe access to working places. Sec'y Br. 36 (emphasis added). A Turner contractor, Cano, was kneeling on a pipe four feet above the ground while jackhammering a pancake on the 25 riser, rather than using a work stand to reach the area to reach the work area. Tr. 273-74, 279. This exposed the miner to the line of fire, the area directly in front of the flange opening. Tr. 274. Barrick issued the citation because Alvarado was nearby but did not stop Cano from unsafely accessing the area. Tr. 275. Alcoa does not dispute the violation or the S&S designation, but contends that the violation was not an unwarrantable failure, and should be modified from "high" to "moderate" negligence. Resp. Br. 26, 32.

1. S&S

Alcoa admits to the violation alleged in Order No. 8778039. Thus, the first step of *Mathies* is satisfied.

The second *Mathies* element is also met, because the hazards Section 56.11001 seeks to prevent were likely to occur. Alcoa was cited for violating the safe access standard because a Turner miner had climbed on a pipe to access a working area, exposing himself to both fall and burn hazards. Sec'y Br. 36-37; Tr. 273-74, 279. The area was four feet above a concrete floor, and the miner could have fallen while either climbing up, or while operating a 30 pound jackhammer. Sec'y Br. 37; Tr. 279. The Secretary also alleges that the miner could have been burned because he put himself in the line of fire in front of a Riser opening while using a pipe, rather than a work stand. Sec'y Br. 37; Tr. 273. A burn injury is reasonably likely, as Morales's injuries on September 3, 2014 indicate.

A fall or burn would be reasonably likely to injure a miner. Being in the line of fire could put a miner at risk of being burned by liquor. This is reasonably likely to occur, particularly in light of the leak on September 3, 2014, and the injuries Morales sustained. This meets the likelihood test of the third *Mathies* step. The injuries from a burn would be reasonably serious, as liquor burns required Morales to be hospitalized, be out of work for a significant period of time, and undergo skin grafts. A four foot fall onto concrete is likely to cause serious injuries as well, including head injuries and/or broken limbs. The fourth prong of *Mathies* is satisfied.

2. Negligence

The Secretary defends the high negligence classification assigned to Order No. 8778039 because Alvarado knew Cano was working on top of a pipe, rather than from a stand, but Alvarado did not stop him. Sec’y Br. 37; Tr. 429.

Alcoa states that although Alvarado knew Cano was working while kneeling on a pipe, he did not know that Cano was in the line of fire, and that from his vantage point the situation was not unsafe. Resp. Br. 33. Alcoa further contends that Alvarado believed that fall protection would not be required because MSHA’s guidance indicates that fall protection be used at six feet and above, and Cano was only four feet from the ground. *Id.* Stands were readily available to Turner employees, and Gaytan, the Turner contractor who took over the job for Cano, used a work stand to perform the task. *Id.*; Tr. 104. Alcoa argues that Cano or his supervisor, Morales were in the best position to set up a stand. Resp. Br. 33.

I find that Alcoa demonstrated moderate, rather than high, negligence. There are several factors that mitigate Alcoa’s negligence. The Secretary did not offer evidence that Alvarado was aware that Cano was in the line of fire. While Alvarado admitted to seeing Cano work from a pipe, he believed that the distance from the ground did not pose a hazard. This is reasonable in light of MSHA’s guidance regarding fall protection. Cano worked from the pipe for a short period of time. Stands were available to Turner employees. Alcoa, however, could have and should have been more proactive in requiring that contract employees use safe means to access work sites.

3. Unwarrantable Failure

The Secretary alleges that Alcoa’s conduct in regards to Order No. 8778039 was aggravated, justifying the unwarrantable failure designation. Sec’y Br. 38.

a) Length of Time

The condition lasted for 20 minutes, as that is the amount of time that Alvarado knew that Cano was working while kneeling on a pipe, instead of a work stand. Barrick testified that the duration of the violation didn’t concern him, and that the potential for injury only occurred for a short period of time. Tr. 282. I find, however, that this is a significant period of time, and weighs in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

Only one miner was exposed to the violative condition, as only Cano was kneeling from a pipe to work. Gaytan, who took over the task for him, used a work stand. Cano was the only individual in the line of fire, and the only one exposed to a fall hazard. The violation was not particularly extensive, as one miner in one location was exposed to the hazards alleged.

c) Operator's Notice that Greater Efforts Were Necessary for Compliance

The Secretary also notes that Alcoa had been cited eight times in a 15 month period before the accident for violations of 30 C.F.R. § 56.11001. Sec'y Br. 38; Ex. S-24. Alcoa counters that that the only citation the Secretary testified about was issued for build up along a walkway, a different condition that cited. Resp. Br. 28. The Secretary failed to show how the past citations for violations of Section 56.11001 put Alcoa on notice regarding Order No. 8778039. While Alcoa had been cited previously for the same standard, the safe access standard covers a multitude of situations. As applied to the unwarrantable failure analysis, Alcoa did not have sufficient notice that greater compliance efforts were necessary.

d) Efforts in Abating the Violative Condition

Alcoa also notes that it took efforts to abate the condition, because it provided platforms to contractors to use while jackhammering, and that only one contractor worked from the pipe. Resp. Br. 28; Tr. 98, 104. Alcoa's routine of providing work stands to contractors is an effort to abate the violative condition. This element will not weigh into the unwarrantable failure analysis

e) Obviousness and High Degree of Danger

Alcoa denies that the violation was extensive, although Alcoa admits it was dangerous, because only one miner was exposed by the violation. Resp. Br. 29, 37. The violative condition was obvious to Alvarado, but he testified that he thought the kneeling was acceptable and was unaware that Cano was in the line of fire. The degree of danger posed by allowing a miner to work while standing or kneeling on a pipe is high. This militates toward an unwarrantable failure finding.

f) Operator's Knowledge

Alcoa concedes that Alvarado was present but contends that he could not have seen that Cano was in the line of fire. Resp. Br. 29. Alvarado also believed that Cano did not need any special equipment because he was not six feet above the ground. Resp. Br. 29. Finally, Alcoa notes that it could not anticipate that Cano would work from a pipe instead of using the work stands provided to the contractors. Turner was the responsible party, namely Morales, who was supervising the task. Alvarado's knowledge that Cano worked from the pipe rather than a stand is not imputable to Alcoa.

Alvarado knew Cano worked from a pipe, but was merely a rank and file miner, who should have said something, but did not believe the condition to be unsafe. The violation posed a high degree of danger and lasted for 20 minutes, but those factors alone do not justify an unwarrantable failure finding.

4. Gravity

I find the gravity designations for Order No. 8778039 are appropriate. It is reasonably likely that one miner could have been seriously injured if he fell from a pipe while jackhammering. The stands would have provided more support and allowed a miner to avoid exposing himself to the line of fire. A fall onto the concrete floor below, or a burn from being in the line of fire while maintaining a pipe, would likely have resulted in hospitalization, time out of work, and could have been disabling. Exposure to the same line of fire resulted in Morales being severely injured, which demonstrates the hazard is likely, and that any resulting injury would be serious.

III. Civil Penalty

The parties stipulated that the Secretary's proposed penalties, if affirmed, would not affect Alcoa's ability to remain in business. Alcoa is large operator, and the Point Comfort Facility is a large plant. The Secretary did not present evidence that Alcoa failed to abate the violations in good faith. The gravity of all three violations was serious as I discussed above. I found that they are all reasonably likely to result in permanent injury to one miner.

Citation No. 8778037

The Secretary proposed a civil penalty of \$8,209 for Citation No. 8778037. I assess a penalty of \$1,112 for the violation because Alcoa's negligence was low and the violation was not an unwarrantable failure.

Order No. 8778038

The Secretary proposed a \$9,122 penalty for Order No. 8778038.

I assess a \$1,112.00 civil penalty for the violation. The negligence was low, rather than high, as the Secretary alleges. I also find that the unwarrantable failure categorization was inappropriate.

Order No. 8778039

The Secretary specially assessed a \$52,500 civil penalty for Order No. 8778039. Tr. 284. Barrick testified that he did not calculate the penalty, but suggested that it be specially assessed. Tr. 284. Barrick testified that he supported the special assessment because he believed two supervisors witnessed the violation, and he wanted to "get Alcoa's attention." Tr. 284. The Secretary argues that special assessment is justified because Alvarado was complicit in watching Cano work, and that Alcoa had eight safe access violations in the 15 months preceding the accident. Sec'y Br. 39. The Secretary asserts that the size of the specially assessed penalty will "serve notice to Alcoa that its efforts to protect miners are lacking." Sec'y Br. 39.

I decline to accept the Secretary's specially assessed penalty, as I find that the negligence was moderate, not high, that the violation was not the result of unwarrantable failure, and that Alvarado was not an Agent of Alcoa. Moreover, the Secretary provided scant support for its assessment. Only one previous safe access violation was mentioned at hearing and entered into evidence, and it involved accumulations rather than the use of work stands. The Secretary argues that the size of the penalty will put Alcoa on notice. Sec'y Br. 39.

I find that Alcoa does have a history of previous violations of Section 56.11001. S. Ex. 24. Additionally, Alcoa demonstrated moderate negligence. For these reasons, I assess a civil penalty of \$4,000.00

Order No. 8856305

At the hearing, the parties indicated that they agreed to settle Order No. 8856305. Tr. 8. On January 13, 2017, the parties submitted a Joint Motion to Amend Decision and Order outlining the terms of their settlement agreement, which I construe as a Motion to Approve Settlement. J. Mot. to Amend Dec and Order.

The parties request that the Order be modified from a 104(d)(2) Order to a 104(a) Citation, and to delete the unwarrantable failure classification. *Id.* The parties also agreed to reduction in penalty from \$4,000.00 to \$1,337.00. *Id.* I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

IV. ORDER

It is **ORDERED** that Order No. 8856305 be **MODIFIED** to change the classification from a 104(d)(2) Order to a 104(a) citation and to delete the unwarrantable failure designation.

It is **ORDERED** that Citation No. 8778037 be **MODIFIED** to reduce the level of negligence from "high" to "low."

It is **ORDERED** that Order No. 8778038 be **MODIFIED** to reduce the level of negligence from "high" to "low" and to change the classification from a 104(d)(2)Order to a 104(d)(1)Order.

It is **ORDERED** that Order No. 8778039 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8778037 and Order Nos. 8778038 and 8778039 be **MODIFIED** to delete the unwarrantable failure designations.

WHEREFORE, it is further **ORDERED** that Alcoa pay a penalty of \$7,561.00 within thirty (30) days of the date of this order.²⁹

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

Distribution:

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²⁹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 19, 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of AARON LEE ANDERSON,
Complainant,

v.

A&G COAL CORPORATION and
CHESTNUT LAND HOLDINGS, LLC,¹
Respondents.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. VA 2017-69-D
MSHA Case No.: NORT-CD-2017-02

Mine: Strip #12
Mine ID: 44-06992

DECISION AND ORDER
REINSTATING AARON LEE ANDERSON

Appearances: Ali Beydoun, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, VA, Representing the Secretary of Labor

Wes Addington, Esq., Appalachian Citizens' Law Center, Whitesburg,
KY, Representing the Complainant

Billy R. Shelton, Esq., Shelton, Branham & Halbert PLLC, Lexington,
KY, Representing Respondent

Before: Judge Andrews

On January 3, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. ' 801, *et. seq.*, and 29 C.F.R. ' 2700.45, the Secretary of Labor (ASecretary") filed an Application for Temporary Reinstatement of miner Aaron Lee Anderson. ("Complainant" or "Anderson") to his former position with A&G Coal Corporation, (AA&G@ or ARespondent@) at Strip #12 Mine pending final hearing and disposition of the case.

¹ Pursuant to the Secretary's Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, as a Party, the arguments at hearing, and the ruling *infra*, Chestnut Land Holdings, LLC, is added as a Respondent in this case.

The application followed a Discrimination Complaint filed by Anderson on November 29, 2016, that alleged, in effect, his termination was motivated because of his protected activities. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Anderson to his former position or a comparable position, within the same commuting area and with the same rate of pay and benefits he received prior to his discharge.

Respondent filed a timely motion requesting a hearing regarding this application on January 06, 2017. A hearing was held in Pikeville, KY, on January 12, 2017, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.²

For the reasons set forth below, I grant the application and order A&G Coal Corporation, or Chestnut Land Holdings, LLC, to temporarily reinstate Aaron Lee Anderson.

Discussion of Relevant Law

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

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

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.³ *Secretary 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

² Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator’s request. 29 C.F.R. §2700.45(c).

³ A 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)).

purpose of determining whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. @ *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

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 federal circuit 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 there was an adverse action, which 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).

In the instant matter, the Secretary and Anderson 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 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 Petition for Temporary Reinstatement

On November 29, 2016, Anderson executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

On November 18 at approximately 6:05 PM U [sic] reported to the foreman that they needed to deploy dust control measures due to limited visibility. They failed to do so and an accident resulted. I was fired because of the accident.

I want my job back with back pay and all my benefits restored. I want temporary reinstatement.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the January 03, 2017, Declaration of Michael Hughes, a Special Investigator employed by the Mine Safety and Health Administration (“MSHA”). Hughes made the following findings and conclusions:

- 2) As part of my responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). In this capacity, I have initiated an investigation into the discrimination claim filed by Aaron Lee Anderson (the “Complainant”) on November 29, 2016. My investigation to date has revealed the following facts:
 - A. On November 29, 2016 Complainant filed a complaint alleging discrimination that occurred on November 18, 2016 and resulted in his firing on November 21, 2016, after he had exercised his [sic]. Exhibit B
 - B. The Complainant worked at the mine since August 26, 2016. He has approximately 14 years of coal mining experience.
 - C. The Complainant was working on the evening shift of November 18, 2016. He was operating a haul truck which was being used to haul coal from the Pit area of the mine to stockpile.
 - D. The Complainant complained to his supervisor, Foreman Danny Orrick, over the cb radio that the pit area was dusty causing compromised visibility and requested that dust control measures be dispatched. Two other truck drivers also complained about the conditions and requested dust control measures. Foreman Orrick responded that a water truck would be sent to the pit area and instructed the drivers to continue doing their jobs. This conversation took place at approximately 6:05 pm.
 - E. By approximately 7:10 pm no measures had been taken to address the dusty conditions in the pit area and Foreman Orrick had not come to the area. Complainant was waiting to back his truck up to a loader to be loaded with coal. Complainant saw a truck pull out of the pit and thought it was clear to back up to the loader to be loaded. However, because of the dust and compromised visibility,

Complainant was unable to see that another truck was still being loaded and backed into that truck.

- F. According to A&G, the above incident resulted in over \$50,000 in damages to the truck that was backed into.
 - G. A&G notified the Complainant that he was being terminated on November 21, 2016. He was told that he was being terminated due to the accident.
- 3) Based on my investigation to this date, I have concluded that there is reasonable cause to believe that the Complainant was discharged because he engaged in the protected activity when he complained about hazardous work conditions on November 18, 2016. The Complainant engaged in protected activity when he complained to his superior about the dusty conditions and compromised visibility in the pit area. The Complaint [sic] suffered an adverse action when his employment was terminated. There is reason to believe that the decision to discharge the Complainant was at least in part based upon his protected activity due to employer knowledge of the protected activity, coincidence in time between the protected activity and the adverse action and the close nexus between the protected activity and the proffered justification for the adverse action.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

Preliminary Motions:

Prior to the hearing, on January 11, 2017, the Respondent filed a Motion to Toll Potential Reinstatement Order, wherein it stated that, subsequent to Anderson's termination, A&G Strip No. 12 mine was idled with no immediate plans for future operations at the mine. *Resp. Mot. to Toll*, 1. It further states that "some of the laid off employees at A&G were offered an opportunity to transfer to a mine owned by a sister company at Bishop Coal." *Id.* at 2. However, it states that "Anderson would not have been offered a transfer to Bishop Coal as all persons who accepted transfers to Bishop Coal had more seniority than [sic] Anderson and filled other jobs for which Anderson was not qualified to perform." *Id.* In support of its Motion, the Respondent attached as Exhibit A "a list of the former A&G employees, at the time of the lay-off, who were offered the opportunity to transfer to Bishop Coal."

In response, the Secretary filed on January 11, 2017, a Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, as a Party. Chestnut Land Holdings, LLC, is the operator of the Bishop Impoundment Area Mine, which the Respondent referred to as the "sister mine" in its motion. *Secy. Mot. to Amend*, 2. According to Mine Data Retrieval System reports attached to the Motion, the Controller for both A&G Coal Corporation and Chestnut Land Holdings is James C. Justice II. *Id.* Additionally, the Secretary argues that this Court should not consider on an expedited basis Respondent's Motion to Toll Temporary Reinstatement. *Id.*

Both parties were provided an opportunity to argue their motions at the hearing. Further, both parties were offered the opportunity to submit written replies within 24 hours following the close of the hearing, and both declined to do so.

I permitted evidence of tolling to be admitted at hearing. The ruling on both of these motions is provided, infra.

Summary of Testimony:

At the time of hearing, Complainant Aaron Lee Anderson had been a heavy equipment operator for 14 years. Tr. 23. Equipment operators at A&G Coal Corporation would usually work at the pit, but once or twice a week they would work at the tipple to help load the train or feed the hopper.⁴ Tr. 36-37. On November 18, 2016, Anderson was working as a rock truck driver for A&G Coal Corporation, which is a subsidiary of Southern Coal Corporation. Tr. 23-24. Anderson also operated other pieces of equipment, including a drill, a 980 frontend loader, a 988 frontend loader, a grease truck, and the mechanics truck. Tr. 24, 35. He was paid the truck driver's rate at \$16.50 per hour, rather than the operator pay of \$18.50 per hour.⁵ Tr. 35. Anderson worked a split shift, which consisted of two night shifts and two day shifts each week. Tr. 41-42.

On November 18, 2016, Anderson was working the night shift, which started at 5:45 pm and was scheduled to end at 5:45 am. Tr. 42. The first thing he typically did when he arrived was perform a preshift checklist, which would last approximately 5-10 minutes, and involved him checking his equipment for safety defects. Tr. 43.

On that date, Anderson was running a 777F truck, hauling rock from the pit to the dump area to put it in the spoil pile. Tr. 24. His supervisor was foreman Danny Orrick.⁶ Tr. 24, 30. Anderson's truck was the third piece of equipment at the pit, behind two loaders. Tr. 25, 44. The conditions at the pit were "extremely dusty" and it was starting to get dark outside, all of which affected visibility. Tr. 24.

⁴ The tipple was located approximately four miles from the pit, and was called either Paragon or Kelly Loadout. Tr. 37.

⁵ Anderson did not know why he was paid at the reduced rate, and spoke with Superintendent Tim Fugate, Foreman Orrick, and the Safety Director on several occasions about the issue. Tr. 36. They said that they would talk to the front office and try to increase Anderson's pay. Tr. 36. Fugate approached Anderson in early November and said that he was going to approve the increased pay. Tr. 36.

⁶ Danny Wayne Orrick testified at hearing on behalf of the Respondent. Orrick has worked in coal mines since 1978. Tr. 61. At the time of hearing, he was an equipment operator for A&G Coal Corporation at the Bishop Mine. Tr. 61. At the time of the incident at issue, he was a C Crew Foreman. Tr. 61. He is certified as a surface mine foreman in Kentucky, Virginia, Tennessee, and West Virginia. Tr. 61-62. Part of Orrick's duties as a foreman included performing the pre-shift examination at the pit. Tr. 63-64.

Anderson testified that at 6:05 pm, he called Orrick on the CB radio and told him about the condition.⁷ Tr. 25. Anderson testified that Orrick responded that he would get the water truck out to the pit as soon as he could, and that it had to first be loaded with water. Tr. 25-27, 46. Anderson continued with his work, because he was afraid of losing his job if he stopped.⁸ Tr. 27. Anderson testified that at the time he was not aware of his rights under the Act to refuse to perform unsafe work. Tr. 38-39, 49.

Anderson testified that when he was getting his second load, he called again over the CB radio, and stated that there was too much dust in the pit, resulting in him not being able to see. Tr. 28. He said that others needed to be careful, and they needed the water truck quickly because the dust was getting to the point where they couldn't see anything.⁹ Tr. 28. He described the conditions as "when something moved in that pit, it was like a cloud that covered everything." Tr. 28. The visibility was made worse through the large headlights of the equipment in the pit, creating what Anderson described as a "wall." Tr. 29. Anderson received no response to this second comment on the CB radio. Tr. 29. At least two other truck operators, Buddy Dotson and David Gent, also made complaints over the radio concerning the dust. Tr. 31, 37.

At hearing, Orrick denied that Anderson had communicated his concerns about the dust to him. Tr. 64. He stated that Anderson may have made comments over the radio, but nothing that was addressed to him.¹⁰ Tr. 66-67. Similarly, Orrick testified that he did not hear anyone raising safety concerns about the dust on November 18.¹¹ Tr. 67. Orrick testified that the first time he heard about the dust was after the accident when the loader operator called for him on the CB radio to come to the pit.¹² Tr. 64-65, 67-68, 76-77.

⁷ Employees used a designated channel on the CB radio to communicate. Tr. 25. All employees could hear what was said on the channel used. Tr. 25.

⁸ Anderson based this belief on his experience in the mining industry and being told that "if you don't do what they want, that there's another guy to put in your seat." Tr. 49, 51.

⁹ In addition to being responsible for watering the pit, the water truck also is responsible for watering any part of the job where people are working. Tr. 83.

¹⁰ The CB radios were mounted in the trucks and equipment, and Orrick did not carry a radio on his person. Tr. 71.

¹¹ Orrick also denied hearing any complaints on November 18 about lighting in the pit. Tr. 69.

¹² Orrick testified that shortly after 6 pm on November 18, the water truck had left the parking area and had gone to the loading area to get a load of water. Tr. 70. Orrick described the use of the water truck as a "normal thing we do...especially if it's dry, because over the course of the shift there will be some dust created as the roads dry up." Tr. 71. Anderson never saw a water truck come into the pit. Tr. 30.

Anderson then returned to get his third load, and the maintenance foreman asked him if there was an issue with one of his handrails on the truck because it had been broken and unrepaired for approximately 10 days. Tr. 29, 56. Anderson testified that the handrail was repeatedly fixed, at least eight or nine times, and it repeatedly broke again. Tr. 29, 56. Each day that it was broken, he wrote it in the shift book. Tr. 57-58.

As soon as Anderson ended his conversation with the maintenance foreman, another operator that was running the 777D truck asked Anderson if he was going to proceed to the larger of the two loaders in the pit, the 993 loader. Tr. 29-30. Anderson responded that he would. Tr. 30. A truck got loaded between Anderson and the other staged truck, which left a cloud of dust. Tr. 30. Anderson saw the 993 loader bring his bucket up like he was staging for a truck to come back to him. Tr. 30, 52. The bucket lifts approximately 24 feet in the air, and a lot of loader men will raise their bucket high up in the air in order to let the trucks under them, before lowering the buckets. Tr. 53-54. Anderson saw the bucket above the dust cloud. Tr. 53. Anderson then proceeded. Tr. 30. Anderson struck a 789 rock truck with his 777 truck.¹³ Tr. 48.

After the accident, Anderson returned his truck to the parking lot and then went with Mr. Henry to take a drug test. Tr. 31. Anderson was asked what happened, and he said there was no visibility because the dust was not addressed. Tr. 31. Anderson was told that he and the other operators were on the radio too much. Tr. 31. At the time of the accident, the conversation on the radio concerned defective equipment and safety issues that needed to be corrected. Tr. 31-32. The workers had to sign a document that said that if they used the radio for anything other than business issues, they would be automatically terminated. Tr. 32. Anderson understood this to mean that he and the other operators were not to use the radios. Tr. 32.

Anderson was sent home at 10:30 pm on November 18, and never returned to work. Tr. 32-33. He repeatedly called Southern Coal's main office to check on his employment, and spoke to both Orrick and Superintendent Tim Fugate. Tr. 33. Anderson was told that they were awaiting the results of his secondary drug test to be returned. Tr. 33. On Thanksgiving Day, Anderson received a letter from the drug testing facility with the results, which were negative. Tr. 33. He received a certified letter on November 28, saying that he was terminated effective November 21. Tr. 33.

Prior to the November 18 complaint, Anderson had made three complaints to Orrick concerning the berm height, and how they needed to be raised. Tr. 39. Orrick would become agitated at these complaints, and in one instance Orrick responded that Anderson should do his job and Orrick would do his. Tr. 39.

Senior Vice President of Southern Coal Corporation Patrick Graham testified on behalf of the Respondent.¹⁴ Graham testified that at some point Mine No. 12 was idled, and though there

¹³ The 777 rock truck is a 100-ton truck, and the 789 truck is a 200-ton truck. Tr. 48.

¹⁴ Graham had worked in the mining industry since 1969. Tr. 87. He has operated equipment, operated the shuttle car, and worked as a foreman. Tr. 87. He has worked internationally, and in mine rescue. Tr. 87-88.

are no immediate plans to reopen the mine, it remained a possibility. Tr. 90-91. Therefore, in order “to keep as many of the A&G employees working as possible, we transferred those that would take positions at another mine in West Virginia. We call it Bishop Mine.” Tr. 91. Graham testified that three factors were used to fill positions at Bishop Mine: the employee’s skill set, the employee’s seniority, and the employee’s willingness to transfer. Tr. 91, 96. Graham stated that length of service was the primary factor. Tr. 91-92. Graham testified that no employee that was transferred to Bishop Mine had less seniority than Anderson. Tr. 92. Further, no currently operating A&G operation had a haul truck driver position open. Tr. 93.

Graham reviewed a press release that the Chief Operating Officer of A&G Coal sent out on December 29, 2016. Tr. 97-104; CX-A.¹⁵ The press release stated in relevant part, “A&G Coal Corporation has temporarily idled its mining operations to conduct routine maintenance on its heavy machinery...A&G will continue to conduct all of its reclamation obligations during this temporary idling and anticipates being able to restart the active mining operations in the near future.” CX-A. Graham testified at hearing that he did not disagree with any of the contents of the press release. Tr. 99.

Findings and conclusions

The Secretary argues that Anderson engaged in protected activity when he complained about the dust in the pit, and that this protected activity contributed to the company’s decision to terminate him. The Respondent maintains that Anderson did not make any complaints about the dust, and therefore never engaged in any protected activities. The Respondent further argues that if this court finds that Anderson’s complaint was not frivolously brought, it should toll his temporary reinstatement because the Strip #12 mine has been idled, and Anderson would not have been offered a transfer to any affiliated mines. The Secretary maintains that this court should not consider evidence of tolling at this preliminary stage on an expedited basis.

For the reasons that follow, I find that Anderson’s complaint was not frivolously brought.

Anderson Engaged in Protected Activity and Suffered an Adverse Employment Action

The Complainant engaged in protected activity when he complained to Orrick over the CB radio about the dust and visibility issues in the pit. Tr. 25-27. Anderson testified that at 6:05 pm, he called Orrick over the CB radio and told him that the dust at the pit was problematic. Tr. 25. Anderson testified that Orrick responded to his complaint by saying that he would dispatch a water truck to the pit. Tr. 25-27. Orrick instructed the drivers to continue doing their jobs. *Aff. Of Michael Hughes*, 2. Anderson then made a second call over the CB radio, complaining about the dust, and requesting that the water truck be expedited. Tr. 28. Orrick never responded to this second call. Tr. 29. Anderson further testified that two other truck operators, Buddy Dotson and David Gent also made complaints over the radio concerning the dust.

¹⁵ The press release and an article on the press release were admitted into evidence as Complainant’s Exhibit CX-A.

Orrick testified that no miners communicated their concerns about the dust prior to the accident. Tr. 64. However, in the context of a Temporary Reinstatement, neither the judge nor the Commission is to resolve conflicts in testimony. *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). Therefore, I find that Anderson has presented substantial evidence that he engaged in protected activity prior to his termination.¹⁶

Further, Anderson suffered an adverse employment action when he was terminated on November 21, 2016. Tr. 33. He had been sent home at 10:30 pm on November 18, before the shift ended at 5:45 am. He was not recalled to work.

A Nexus Existed Between the Protected Activity and the Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action.

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

Knowledge of the protected activity

According to 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. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. Employees all used a designated channel on the CB radio to communicate, so everyone was able to hear statements made over the CB radio. Tr. 25. Following Anderson’s first complaint about dust over the CB radio, Orrick responded by saying that he was sending the water truck and that the drivers should continue their work. Tr. Tr. 25-

¹⁶ In addition to complaints about the dust, Anderson also presented evidence that he had made numerous complaints about the truck handrail, as well as raising the berm height. Tr. 29, 39, 56.

27; *Aff. Of Michael Hughes*, 2. Orrick never responded to Anderson’s second complaint, so there is no evidence that he was aware of it. Tr. 28-29. However, the response to the first complaint of dust is sufficient evidence to show that Orrick, who was the crew foreman, had knowledge 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 the adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Secretary 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 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant matter, Anderson made the safety complaints concerning the dust in the pit on the evening of November 18, 2016. Tr. 25-28. He was sent home at 10:30 pm on the same date and never recalled to work. Tr. 32-33. On November 28, Anderson received a certified letter stating that he was terminated effective November 21. Tr. 29. The time span between Anderson’s protected activity and his termination was therefore three days. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

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*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

In the instant case, the Respondent evinced animus towards the protected activity at issue, as well as previous protected activities. Anderson testified that he had made three complaints to Orrick concerning the berm heights, and how they needed to be raised. Tr. 39. He described how Orrick grew agitated at his complaints, and in one instance responded that Anderson should do his job and Orrick would do his. Tr. 39. Furthermore, Anderson had complained many times about the handrail on his truck being broken. Tr. 29. The company repeatedly fixed the handrail, but never in a manner that prevented it from breaking again. Tr. 29, 56. Indeed, on the date of the accident, the handrail had remained unrepaired for approximately 10 days. Tr. 29, 56. Such responses to complaints—from inaction to outright hostility—would lead to a reasonable miner concluding that his safety complaints were unwelcome.

The Respondent also displayed animus towards Anderson's protected activity of making safety complaints about the dust over the CB radio. On the evening of the accident, after making his safety complaints over the CB radio, Anderson was told that he and other operators were on the radio too much. Tr. 31. He was told to sign a document that stated that if he used the radio for anything other than business issues, he would face immediate termination. Tr. 32. The timing of these statements and the document evinces animus. All indications are that Anderson and others were using the CB radio only for safety and other related issues on November 18. Therefore, there appeared to be no reason for emphasizing that Anderson was not permitted to use the radio for non-business purposes, replete with the threat of termination, immediately following his use of the radio for safety complaints.

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). 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.

In the instant matter, neither party made an argument concerning disparate treatment.

Anderson's Temporary Reinstatement Should Not be Tolled

The Respondent argued that should this Court grant the Secretary's Application for Temporary Reinstatement, it should be tolled. In support of its request, Respondent states that the Strip No. 12 mine has been idled, and all employees of that mine were either laid off or transferred to the Bishop Mine. It argues that even if Anderson had not been terminated following the accident, he would not have been offered a transfer to Bishop Mine.

Respondent submitted into evidence a chart containing the names, dates of hire, wages, addresses, phone numbers, and whether each listed employee was laid off, transferred to Bishop, or refused transfer. RX-A. At hearing, Respondent put on Senior Vice President of Southern Coal, Patrick Graham, as a witness. Graham testified that three factors were used to fill the positions at Bishop Mine: the employee's skill set, the employee's seniority, and the employee's willingness to transfer. Tr. 91-92. Graham did not testify as to how these three factors were weighted, but stated that seniority was the primary factor. Tr. 91-92.

“The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.” *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). This “limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous,” must be consistent with

the “narrow scope of temporary reinstatement proceedings.” *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin*, 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC, 2013 WL 865606, *4 (Feb. 2013). “In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous.” *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

Respondent has failed to provide sufficient evidence to support tolling Anderson’s temporary reinstatement. Graham testified that three factors were used to determine whether a miner would be laid off or transferred to Bishop Mine. Considering the evidence in light of each of these factors presents a problem. First, Respondent argues that seniority was the primary factor; however the chart shows that a miner that was hired the same month as Anderson was transferred to Bishop, whereas another miner who had a decade more seniority was laid off. One can only conclude that if seniority was actually a factor used by A&G, it did not hold the weight that Respondent states. Second, the chart supplied by Respondent does not list the skill sets or certifications of employees, making it impossible to determine if Anderson’s skills would have qualified him for a transfer. The chart only presents hourly wage, which is not a suitable proxy for presenting evidence of employee skills. Lastly, because Anderson was not an employee of A&G Coal at the time miners were offered transfer, his willingness to transfer was not considered. The evidence presented by Respondent in no way shows that Anderson would not have been transferred to Bishop Coal had he not been terminated following the accident. Therefore the Motion to Toll is denied.¹⁷

¹⁷ In his closing argument, Mr. Shelton made an argument that this Court finds quite troublesome. In the context of arguing that the company should not have to reinstate Anderson, Mr. Shelton stated:

If you look at the other person, there’s another person on 12/20/2015, Kevin Collins, who was a \$16.50 an hour person who, again, was there, you know, six or eight months prior to Mr. Anderson. Who’s going to explain to Kevin Collins, that he’s a more senior employee with the same skills as Mr. Anderson and he has to be laid off so [Anderson] can be reinstated?

Tr. 121. If Mr. Shelton was arguing that the Respondent would lay off other miners as a response to Anderson’s discrimination complaint and temporary reinstatement, he should be aware that such actions may constitute discrimination or interference. Anderson’s actions of voicing safety
(continued...)

Chestnut Land Holdings Should be Added as a Party

The Secretary filed a Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, which operates the Bishop Mine, as a party. The Respondent opposed this Motion, stating that Chestnut Land Holdings is a separate entity in a separate state. Tr. 14.

Federal Rule of Civil Procedure 15 provides that leave to amend pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). In the instant case, Chestnut Land Holdings and A&G have the same Controller, James C. Justice II. Employees at A&G were transferred to Bishop Mine freely, and according to the press release issued by A&G, there is an intent to transfer these employees back to A&G in the future. CX-A. In the Respondent’s pleadings, it referred to Bishop Mine as a “mine owned by a sister company,” and in the press release it referred to it as an “affiliate entit[y].” Resp. Mot. to Toll, 2; CX-A. The Strip No. 12 mine is currently idle, so justice requires that Anderson be temporarily reinstated to the same mine where other employees were transferred.

Conclusion

In concluding that Anderson’s complaint herein was not frivolously brought, I find that there is reason to believe that Anderson engaged in protected activity. I further conclude that the Secretary has met its burden in showing that there was a nexus between Anderson’s protected activities and his termination.

ORDER

For the reasons set forth above, it is **ORDERED** that Chestnut Land Holdings, LLC, is added as a party to these proceedings. It is further **ORDERED** that Complainant Aaron Lee Anderson be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision. The Respondent’s Motion to Toll Temporary Reinstatement is **DENIED**.

¹⁷ (...continued)

complaints and filing a discrimination complaint are protected activities, and the company may not threaten or terminate other miners as a result of those actions.

Further, Mr. Shelton’s singling out a miner by name at hearing that would be targeted for layoff as a result of Anderson’s discrimination complaint and temporary reinstatement was highly inappropriate, and wholly unnecessary to the proceedings. The transcript of a hearing is a public document, and Mr. Shelton’s comments serve no purpose, and may result in miners’ speech being chilled for fear that one of their coworkers will suffer.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.*

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

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January 25, 2017

MANUEL P. RUIZ,
Complainant,

v.

PINTO VALLEY MINING
CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-0407-DM

MSHA Case No. RM-MD-16-10

Mine: Pinto Valley
Mine ID: 02-01049

DECISION AND ORDER

Appearances: Kevin Harper, Esq. for Complainant, Manuel P. Ruiz
Michael Moberly, Esq. for Respondent, Pinto Valley Mining Corporation

Before: Judge Moran

Introduction

In this discrimination proceeding under section 105(c) of the Mine Act, Complainant Manuel P. Ruiz raised legitimate safety concerns regarding his ability to safely operate cranes at Respondent's mine, concerns which the mine operator tacitly agreed were valid. 30 U.S.C. § 815(c)(2) ("the Act"). Shortly thereafter, Respondent claimed that the Complainant was insubordinate during a line-out meeting in which he was again assigned to operate a crane. The Court finds that this alleged insubordinate behavior did not occur. Even assuming, for the sake of argument, that Ruiz acted as the Respondent claimed, for the reasons which follow, the Court finds that Ruiz's alleged behavior was merely a pretext for his termination and that Respondent's actions were motivated solely by the Complainant's valid safety concerns.

Findings of Fact

A hearing in this matter was held on Tuesday, September 13, 2016 in Globe, Arizona. Testimony began with Complainant Manuel Pena Ruiz.

Testimony of Manuel Pena Ruiz

Ruiz stated that he began working for Pinto Valley Mine (hereinafter "Pinto" or "Respondent") in 2012. At that time, he was hired for the construction crew. He had worked on the tailings dam and then was promoted to the road crew. Tr. 28. He described the change as a

“flow line.” *Id.* It meant more money under the union agreement and Ruiz was, and is, a union member. Not long after he started at Pinto, he became a union steward. In August, 2013, Ruiz was on the tailings dam crew. At that time he received some training on operating cranes and similar equipment, obtaining “NCCCO” certification.¹ Tr. 28-29. The particulars of that training, which are important to understand, were explained by the Complainant:

Most of the people who have -- who took the class have already run the boom trucks and cranes in their previous life. I never had. My supervisor asked that -- he encouraged me . . . that this would be good, you know, something to have under your belt in case Pinto Valley shuts down again. . . . So I said, okay, I'll try it. [However] [w]hen you get there [for the training] your boom truck is already set up for you. Your crane is already set up for you. The instructor -- you have one week in the classroom and then you have three or four days in the field and one day is for training.

Tr. 29.

Ruiz, in further describing the training he received, noted its shortcomings, “[y]ou never actually operate the machinery. You don’t move it. You don’t do lifts.” Tr. 31. Nor, he informed, does one move the boom truck from one location to another location, stating, “[n]o. You don’t drive them. You don’t do any -- any type of lifts with them.” Tr. 31. The training, he asserted, was all geared toward passing the test. Ruiz agreed that he did “good” in the training, as he passed and received the certification. Tr. 32. Unlike some of the other miners who received the boom truck training and had previous experience using that equipment, the Complainant had none of that work history, and while he had the certification training card, he did not feel comfortable operating the equipment. *Id.*

In any event, following his 2013 training and certification, Ruiz was never asked to operate a boom truck or a crane² again until December 2015. Tr. 33. Instead, he went to the road crew. Tr. 37. None of the road crew workers operated cranes or boom trucks. When he transferred to the road crew, he began working for Dallas (“Doc”) Hunnicutt, the crew supervisor. *Id.* Ruiz did know Hunnicutt before that transfer, as the road crew and tailings crew are “kind of like” in the same department and there were occasions when Hunnicutt directed the tailings crew when the usual road crew supervisor was off for some reason. Tr. 37.

¹ “NCCCO” stands for National Commission for the Certification of Crane Operators. Tr. 17, 28-29, Ex. R-9.

² Ruiz stated that the difference between a boom truck and a crane is that the latter is a much larger piece of equipment. As the name implies a “boom truck” is a truck with a boom. Tr. 33-34.

Though Ruiz did not feel that he knew Hunnicutt well from those brief periods of supervision, he asserted that he did have problems with Hunnicutt. Ruiz described the problems as “union issues,” elaborating that,

[a]nytime [he, Ruiz] had a union issue or [he, Ruiz] had some of [Hunnicutt’s] guys come to [him, Ruiz] for different things or them [sic] doing tailings crew work, [he, Ruiz] would go talk to Dallas [Hunnicutt]. Anytime it was a union issue, [Hunnicutt] was never happy about it.

Tr. 38.

These interactions occurred because the Complainant was the union steward and members of Hunnicutt’s crew would come to him with complaints. Tr. 39. When issues of that nature would arise and be brought before Ruiz as the union steward, his first step would be to talk with Hunnicutt. As he expressed it, “It was always a fight with Dallas [Hunnicutt] anytime there was a union issue. There was always an argument.” *Id.* However, such issues were always resolved and Ruiz never had to escalate the issue to upper management.

Ruiz described his move from the tailings crew to the road crew, and therefore working directly for Hunnicutt, as a “big decision,” since he had concerns about working for him. Tr. 40. However, he expressed that the two seemed to put the contentious past behind them when Ruiz joined the road crew. Tr. 41. As best he could recall, this was during the spring of 2015.

Ruiz had a practice of recording issues in a journal.³ Directed to his journal entry for December 10, 2015, Ruiz stated that at the line-out meeting⁴ Mark Chism was filling in for Hunnicutt. Tr. 45. On that date, December 10th, both the tailings and road crew participated in the line-out meeting. Chism assigned (i.e. “lined out”) Ruiz to run a crane that day, but Ruiz informed him that he didn’t “feel comfortable for the safety of myself and others [and that he had] not never, ever run a crane other than in [his] training.” Chism responded that Ruiz was NCCCO qualified, but Ruiz, acknowledging that was correct, added that he had “never run one, and [didn’t] feel comfortable doing it.” Tr. 47. Ruiz stated that, prior to that event, he had never refused any work. Tr. 50. Chism and Hunnicutt’s boss, Tim Pearson, relented to his objections and he was then assigned a different task for that day. Tr. 51.

The Court, in an effort to make the record clear, asked questions of Ruiz in order to sum up the situation. Ruiz confirmed that around April or May 2015, he began working on the road crew and from that time until December 10, 2015, when he was told to operate the crane, he had

³ Shown Ex. C 9, Ruiz identified it as part of the journal he kept. The first page of that exhibit is dated April 24, 2013. The exhibit ends with the date of January 15, 2016. Generally, Ruiz would note in his journal issues that had arisen. Many of these, he stated, were union issues “and issues with [Hunnicutt], some favoritism [Hunnicutt] did with other employees.” Tr. 44. His entries were made as soon as the issues happened or, if not possible, soon thereafter. All entries were noted in less than 24 hours.

⁴ The line-out meeting informs the crew of the job they will be performing that day; safety and other issues are also discussed during that time.

never been asked to operate either the crane or a boom truck. Tr. 48. In addition, Ruiz informed that the assignment was to work with the pipe fitter crew, which is the crew that typically operated the booms and cranes. Tr. 49.

On December 14th, Hunnicutt lined-out Ruiz to run an articulator truck. Ruiz explained that this truck is similar to a dump truck but it articulates in the middle. This is part of the road crew equipment and Ruiz operated it without any issue. Ruiz informed that he regularly operated various pieces of heavy equipment, such as “loaders, backhoes, articulator trucks, blades, dozers, excavators, a couple of small ten-wheel dumb trucks [and] a water truck.” Tr. 54. He had no issues or complaints with running any of these pieces of heavy equipment, and he felt both safe and competent to run them. Tr. 54-55. Thus, Ruiz balked only at running the boom truck and crane, with both objections based upon safety concerns.

That same day, December 14th, weather conditions caused Hunnicutt to tell the miners to stop their work. Ruiz was directed to go to the north barn and to meet with Ronnie Gray, who would give Ruiz a refresher on the boom truck operation. Tr. 57. Three other employees, Jay Shoemaker, Bain Grantham, and Brock Cargill, joined them there. Those individuals were the same three who were trained, with Ruiz, during 2013, on the operation of the boom truck. *Id.* Counting Ruiz, they comprised the four individuals who were NCCCO qualified from that earlier training, and all of them had switched from the tailings crew to the road crew.

The training began that afternoon, as they reviewed load charts. This is important to understand the safe operation of the loads that one may lift. Following those, essentially math exercises, a boom truck was located and moved to the Empire build yard for the purpose of practicing the truck’s operation. Gray then went over the machine’s levers and they proceeded to perform training similar to that which Ruiz had done in 2013. Tr. 60. Ruiz participated in the boom truck refresher training. Following that, because the 120 ton crane happened to be at that location, it was decided to operate that crane. However, Ruiz, fearful of the equipment and, as the crane was twice as large as any crane he had ever practiced on, expressed his worry to Gray, advising him, “I don't feel comfortable. I'm scared of that thing. I don't want to train on that thing.” Tr. 61. Gray responded that Ruiz need not worry about it and that he didn’t have to operate the large crane. *Id.* Ruiz confirmed to the Court that he had never been trained on a 120 ton crane. *Id.* Ruiz distinguished training from operation of the crane, explaining that he had never *operated* a crane in his life, and that he had never driven one at all. Tr. 62. By comparison, Ruiz stated that he had driven a boom truck. This occurred back in 2012 and although Ruiz *drove* a boom truck to a given location, he never set it up or used it for its designated purpose. Tr. 62-63.

The Court inquired about the makeup of the road crew on which Ruiz was employed. Ruiz stated that the crew consisted of 10 employees and that they worked together as a group during April and May 2015. Within that group of 10, Ruiz stated that three of them were competent to run the boom truck and crane and not afraid to operate that machinery and he identified them by name. Tr. 64-65. The remaining six miners, not counting Ruiz, operated the other pieces of heavy equipment. Further, not one of those other six miners was ever assigned to operate a boom truck or crane. Tr. 65. In fact, as Ruiz expressed, “Up until December 10th nobody was ever required to run a boom truck or crane. *It wasn't part of our job.* [Up until the

day he was fired] [w]e just ran the heavy equipment we discussed earl[ier].” Tr. 65-66. Ruiz noted these events in his journal entry for December 10th. Tr. 67.

Asked about his journal entry for December 14, 2015, Ruiz made the entry when he refused to operate the crane on December 10th and he then returned to work next on December 14th. Hunnicutt then again asked Ruiz and others to train on the boom truck and this made Ruiz wary, afraid that something was up. As noted, Ruiz stated that there was a history between Hunnicutt and him as well, which existed prior to the time that Ruiz actually worked under him. Ruiz had heard that Hunnicutt remarked to others that he would find a way to fire him. Ruiz believed this stemmed from union issues, asserting that Hunnicutt did not like dealing with unions, and that he didn’t like Ruiz’s “union bullshit.” Tr. 68. Ruiz stated that such issues included seniority and safety and generally that anything involving a union issue would bring on a dispute with Hunnicutt.⁵ *Id.*

In Ruiz’s December 14th journal entry, he recorded that Sam Clark, a supervisor two levels above Hunnicutt, wanted the third party contractor [Ronnie Gray] to give a refresher course on the boom truck. The contractor was doing rigging training that week, but had no class scheduled that day. Therefore the contractor was asked to do the boom truck refresher training and did so and he then proceeded to include the crane operation in that training. As before, Ruiz expressed that he was afraid to operate it, and that Gray accepted his declining to participate in the crane operation part. Tr. 74. Two significant points were made by Ruiz during this exchange. First, he asserted that the mine’s practice was to have permission before operating the crane, and no permission was sought to use the crane. By contrast, permission was obtained to use the boom truck. Second, and of more importance, Ruiz stated that the road crew on which he served has neither a boom truck nor a crane, at least that crew did not have either piece of equipment at the

⁵ Representative of Ruiz’s candor and credibility, both of which the Court ranked highly, when asked if Hunnicutt ever made any specific anti-union statements, Ruiz responded that he had not done so *directly to him*, but that he “did tell an employee that if it was up to him he would -- if he was in charge, he would get rid of the union and only have nonunion employees.” Tr. 69. Similarly, regarding Ruiz’s raising safety issues, while Hunnicutt would not make specific comments, his face would redden and he would be angry in such matters. *Id.* Ruiz recalled one example where a loader’s e-brake (emergency brake) had to be checked to make sure it was functioning properly before operating it. Ruiz pointed out that it had to be tested on a downhill. The brake would not hold when facing the incline, yet Hunnicutt told the employees that was the way it was designed. Ruiz spoke up, asserting that the claim defied common sense. Hunnicutt rejected the remark, retorting that it was so designed and that it was going to be run and not be removed from service. Ruiz then checked with a mine mechanic who advised that the brake must hold in both directions. This dust up occurred close to the end of 2015, not long before Ruiz was fired. Tr. 69-70. The upshot was that Ruiz had to insist upon the loader being fixed *or he would call MSHA*. Tr. 72. That brought about action, as the loader was taken out of service and red tagged. It was still out of service when Ruiz was terminated. *Id.* Ruiz, under cross-examination, later reaffirmed that the dispute about the truck with the faulty e-brake occurred shortly before the boom truck issue came up. Tr. 133-34. This event, *including Ruiz’s warning that he would call MSHA*, is one close-in-time example in support of the conclusion that Hunnicutt had contentious feelings towards Ruiz.

time he was fired. Ruiz added that *now* (i.e. post Ruiz's discharge) the road crew does utilize a boom truck or crane. Tr. 75, 76.

As before, Ruiz felt that the training was inadequate, describing it as a "joke." Tr. 77. Although Ruiz was comfortable *driving* a boom truck, he felt he had insufficient training to *perform a lift*, as this is very different from simply driving that equipment. For example, Ruiz stated that there was no "seat time" doing a lift – only the outriggers were deployed with the boom moved in and out. The following day, Hunnicutt informed Ruiz and the other three NCCCO qualified persons that they were going to a rigging training class. Ruiz went to the class and had no problems or issues with that training. Tr. 78.

On December 16th Ruiz returned to work and Hunnicutt informed that he would be running a boom truck that day. Ruiz had been on the road crew for nearly a year at that point and never before been assigned to run a boom truck. *Id.* The circumstances of the event, according to Ruiz, were that on that day the others had been given their assignments and he was *the last person* to be assigned a job. Ruiz again reminded Hunnicutt that he did not feel comfortable operating a boom truck, both for his own safety and that of others. Tr. 79. Ruiz also noted that Hunnicutt had three other workers who were NCCCO qualified, had less seniority than him, and liked running that equipment. According to Ruiz, Hunnicutt became quite angry and the two argued. Tr. 81.

The mine operator contends that the contents of this line-out argument are significant. Ruiz's version of the events was that while arguing Hunnicutt then told Ruiz, "Just shut up. I've had enough. Go to my office." Tr. 81. Ruiz responded, "Come on, Doc [Hunnicutt]. This isn't high school where you send people to the office. We'll just talk after," and Hunnicutt agreed, responding, "Okay. We'll talk after." Tr. 80-81. Ruiz was clear about that exchange, reaffirming that the matter between them had settled down, and that Hunnicutt said "okay." Tr. 85. Ruiz stated that, during the disagreement with Hunnicutt, he (Ruiz) never stood up, standing only after the meeting had ended. Tr. 81. Following the meeting, Ruiz called his union chief steward, Sam Bell, to meet with him and Hunnicutt. When the chief steward arrived, Hunnicutt informed that they were going to Tim Pearson and Kathy Binegar's⁶ offices. *Id.*

Ruiz contended that raising the issue of seniority was reasonable and justified, explaining, he "mentioned seniority because these three -- they're junior to me. Like I said, if you're going -- usually to go do a job *somewhere else outside of our classification*, if they're going to force somebody or whatever, you can usually pull seniority and send the junior guy there. So that was my point." Tr. 82. *Ruiz confirmed to the Court that the order of his objections was first safety*, and then pointing out that others were comfortable operating a boom truck and only then, last, did he raise seniority. *Id.* Ruiz asserted that the others he named who could operate the boom truck did not object either. Tr. 83. Therefore, not only did the other three miners not object to running the boom truck, but also all had more experience with the truck than Ruiz. Tr. 84.

A meeting then ensued with Hunnicutt, Sam Bell, Kathy Binegar, Tim Pearson, Steve Pena and Bob Jordan, the safety man for the company. Ruiz testified that before it began, he

⁶ Ms. Binegar is the mine's HR representative. Tr. 229.

informed Jordan about his refusal to operate the boom truck for safety reasons. Jordan had to leave for other business, but reassured Ruiz that if they gave him trouble, he would take care of it. The meeting then began and Ruiz stated his safety concerns arising from the equipment he was asked to run. Referring back to the confrontation between Ruiz and Hunnicutt, Ruiz maintained that Hunnicutt initiated it, by yelling and by embarrassing him at that meeting. Tr. 89. For perspective, Ruiz stated that he had observed, in prior meetings, employees “go at” Hunnicutt, yet no discipline followed. *Id.*

After Ruiz explained his position at the meeting, and asserted that Hunnicutt had it out for him and was picking on him, Binegar denied that was the case. For nearly all of the time prior to this dispute, Ruiz had been the only union steward on his crew. Jeremiah Foster had become a union steward only a few weeks prior to the line-out event. Tr. 90-91.

According to Ruiz, Binegar’s position was that management could assign whichever individual it preferred and that it was “none of [Ruiz’s] business” as to the reason for picking him to run the boom truck. Tr. 91. Binegar also pressed Ruiz, wanting him to name how much time he would need before he would be comfortable using the boom truck. Pearson voiced that they would give Ruiz more time and put him in a location where he couldn’t hurt anyone and that they would add a qualified person to help and watch over him. Significantly, in the Court’s view, Ruiz responded that he was “good with that [arrangement].” Tr. 92. Ruiz later reaffirmed that he was willing to learn how to run the equipment until he became comfortable doing so. Tr. 96. The issue apparently resolved, Ruiz then went to work, running a dozer in the fine ore bins.

According to Ruiz, there was *no* discussion at the meeting relating to the claim that he stood up at the line-out meeting and challenged Hunnicutt, nor was there any claim of, or discussion about, insubordination. Tr. 93. Consistent with that recounting, Ruiz stated that Hunnicutt did not raise the issue either. Thus, no one suggested during the meeting that Ruiz might be disciplined because of his interaction with Hunnicutt. Tr. 93-94.

Another person alleged to have been involved was Sam Clark. Ruiz stated that Clark was also targeting or harassing him. It is fair to state that Ruiz was not reticent to insist upon the union’s rights vis-à-vis Pinto Valley.

As Ruiz expressed it, he

brought issues to Sam Clark before, union issues. He -- I brought to him that there's a few guys that are nonunion on the crew, and they're badmouthing the union and that he needed to do something about it. He never did anything about it. . . . jobs that they were doing that was against contract, I would stop. Of course, all the feedback came back to Sam [Clark]. Doc [Hunnicutt] would run and tell Sam. Tim [Pearson] would run and tell Sam.

Tr. 92-93.

Later that same day, in the afternoon, Hunnicutt told Ruiz to come out from his work, stating he needed to trade him out. Hunnicutt then took Ruiz to Binegar’s office. Sam Bell was

also present. Binegar then announced that there would be no discussion about anything. Instead she handed Ruiz a paper informing that he was suspended with pay. Ruiz insisted that he was at least entitled know the reason for the suspension. *Binegar responded that the suspension was for refusing to run the boom truck.* Tr. 97.

Ruiz was called back by Binegar around the holidays, sometime during December, and a meeting ensued. Ruiz, his chief steward, Hunnicutt, and Bell were in attendance. Oddly, in the Court's view, management first asked Ruiz for assurance that he was not recording the meeting, then asked why he refused to train on the crane and why he refused to run the boom truck. Tr. 99. He elaborated his reasons to Binegar, informing,

that [he] didn't feel comfortable for the safety of [himself] and others. I said Kathy [Binegar] -- I can still remember this so clear. I said, 'Kathy, I've never run a crane in my life.' She goes, 'You've never run a crane'? I says, 'Never in my life other than the NCCCO class where we get to move the levers. We didn't operate it. We didn't do lifts.' Her exact words were, 'That would be kind of like them putting me on a haul truck and say run that haul truck today. I would tell them they're crazy.' I go, 'Thank you. That's exactly where I'm at.'

Tr. 100.

The Court inquired, "You remember that conversation?" Ruiz reaffirmed it had occurred, responding, "Yes." Tr. 101. The Court then asked, "And you remember she said the haul truck analogy?" Again, Ruiz affirmed, "Yes," Binegar was the one who made the haul truck analogy. Tr. 101. Ruiz also referred to his journal entry for December 22, 2015, where he noted the interview above, confirming that Binegar offered the analogy. Tr. 102.

Thereafter, on January 5th, Binegar contacted Ruiz again, in need of another call. When the call occurred, Bell and Clark were present and Clark read Ruiz his termination letter, effective that day, and stating that it was for refusing to run the boom truck and crane. Tr. 103.

Exhibit R 10 is the Complainant's letter of termination. Referring to that letter, Ruiz stated that during his interview with Binegar a week or so earlier, although he was asked about his not participating in the swing cab training and his refusal to operate the boom truck, she did not ask him about the allegation of refusing to leave the line-out meeting. Tr. 106. Therefore, Ruiz confirmed that the letter was the first time the refusal to leave the meeting was claimed as a basis for his termination. Tr. 107. The termination letter refers to Complainant's job classification and that one who occupies that position "must be qualified to operate all equipment connected with tailings dam construction and road maintenance." Ex. R-10. Ruiz did not dispute that the job description so provides. Thus, Ruiz did not then, and does not now, dispute what the job description provides. Tr. 107. However, Clark also asserted that boom trucks and cranes are used in connection with tailings dam construction and maintenance, and Ruiz disputed that, stating that is not true. He informed that in the past, they were used on the tailings dam, but up until approximately the middle of December, they were not used in connection with his job duties. *Id.* Ruiz does not dispute that he had the training in 2013 and received certification for that training. *Id.*

Ruiz's journal entry for December 14th remarks that he refused to participate in the swing cab training, but in his testimony he clarified that he thought it was only boom truck training on that day and that his refusal was only with operating the crane, which he characterized as playing on it. Tr. 30, 108. Instead, Ruiz stated that on that day he told Ronnie Gray that he "did not feel comfortable running the crane, that [he] was scared of them and wanted nothing to do with it." Tr. 109.

Returning to the disputed accounts of the events at the line-out meeting, Ruiz reaffirmed that he never stood up during that meeting. *Id.* However, he acknowledged that he did assert a safety issue regarding his operation of the boom truck and, after that assertion, he added a seniority claim. *Id.* He also acknowledged that he did comment that "this is not high school." Tr. 110. He denied Clark's claim that he told other employees in the meeting to "watch what is going to happen. This is going to get ugly." *Id.* Clark, of course, was never in the line-out meeting. Following his termination, Ruiz filed a termination grievance with the union and, at the date of the hearing in this matter, the union also filed for arbitration. Tr. 111.

Under cross-examination Ruiz agreed that Capstone purchased Pinto Valley from BHP on June 27, 2013 and Ruiz accepted employment with the new owner on July 3, 2013, but the larger point is that he worked for both the old and then the new employer. For Ruiz therefore, with continuous employment, it amounted to a name change in the ownership. Tr. 116. Ruiz agreed that when he was fired, his job classification was "heavy equipment operator on the road maintenance crew." *Id.* He had previously been with the tailings dam construction crew, with the change occurring in the spring of 2015. Tr. 117. He acknowledged that, when with the tailings crew, he did operate some heavy equipment. At an earlier time, the road construction crew and the tailings crew each had their own supervisor. *Id.* Hunnicutt was the road crew's supervisor and a Mr. Gonzalez supervised the tailings crew. Tr. 118. When the crews were combined, Hunnicutt was then in charge of both crews. Under the new configuration, both crews attended the line-out meetings, with the combined number being around 15 employees. Tr. 119.

As he stated earlier on direct examination, Ruiz acknowledged again that he received NCCCO training in August 2013 for the boom and crane; that it consisted of one week of classroom training and one week outside; and that his supervisor at that time, Gonzalez, had encouraged him to sign up for the training. *Id.* He received his NCCCO training card as well, and that card remains valid through August 2018. Tr. 120, Ex. R 9. He was also paid during those two weeks and the company paid for his training. Tr. 120. Ruiz stated that while the terms boom truck and crane can sometimes be used interchangeably, at his work site, they distinguish the two. Tr. 122. Further, while agreeing that he is "certified" for a crane and a boom truck, he stated that he is not "qualified" for any crane. *Id.* The Court would agree that being "*certified*" is not necessarily synonymous with being "*qualified*." This case is an example of such a distinction. Ruiz added, he has "certification from NCCCO, but [he] wasn't 5023ed on any crane there. 5023 after a year becomes void if you haven't touched that piece of equipment." Tr. 123.

Ruiz elaborated upon the basis for his fear relating to his lack of being *qualified*, "The *certification* I got in 2013 at the class just shows that I can operate the levers, that I can -- I look at it pretty much like I can do that little rodeo thing we did with the test. I'm not - I have never

did a lift with it or ran it, operated it, drove it. So to me, I got this NCCCO card, but I still don't feel like I can run it. I don't even know how to drive it.” Tr. 124-25 (emphasis added).

When asked about the refresher training he received in December 2015, Ruiz did not agree that it was pretty much the same as the original training, stating that they did not do the same things in the refresher training. Tr. 126.

An example, among many, of Ruiz’s candor, Ruiz agreed that “[b]etween the time [he] got [his] NCCCO certification in August of 2013 and the time [he] [was] asked to operate a crane on December 10th of 2015, [he] never told anybody that [he] thought his training was deficient,” but added that he “was never asked to run it to even talk about that.” Tr. 128. When asked by Chism to run the crane on December 10th, Ruiz “told him about the safety issue. He said aren't you NCCCO certified, and [Ruiz] said yes, but I don't feel comfortable because I haven't ran it in -- it's close to [a little over two] years.” Tr. 129. He also agreed that he was not required to run the crane that day, that he wasn’t taken down to human services, that he wasn’t disciplined or threatened to be disciplined that day either. Tr. 130. The Court would note that the answer to that question, posed to show he was not disciplined for expressing his safety concerns, actually helps Ruiz, because it amounts to an implicit admission by Pinto that his declining to operate the equipment was both valid and reasonable.

Regarding the December 14th incident, when Ruiz was operating an articulator truck and the mine’s operation was shutting down due to adverse weather, he did not object when Hunnicutt told him he was being assigned for refresher training on the boom truck. He also agreed that he thought it was a good idea, explaining, “None of us were -- I don't know about none of us, but I hadn't touched one in almost two years. As far as I knew, my 5023 was void. Since we hadn't touched one in so long, I thought it would be a good idea to get a refresher on it.” Tr. 136. He agreed that this might have been connected with the events of December 10th as well. Tr. 135.

Ruiz noted that he did not refuse the boom truck training at all; his only refusal that day was to operating the 120 ton crane. Tr. 138. Ruiz signed a 5023 form attesting that he refreshed on the boom truck. Tr. 139; Ex. R 17. The following day Ruiz received rigger⁷ and signalman training and a 5023 form was also completed for that. Tr. 140; Ex. R 18. Whether a boom truck or a crane is involved, one needs to be certified for the role of rigger and signal person. Tr. 140-41.

Interestingly, the day following the rigging and signal training, Ruiz was *the last person* to receive an assignment. Tr. 143. When he was then assigned the boom truck, he reiterated that he had told Pinto that he didn’t feel safe doing that, both for the safety of himself and that of others. *Id.* He agreed that the refresher training he received two days earlier did not change that perspective. Ruiz admitted that when he refused to operate the boom truck, he did not know what the actual assignment would be. Further, he advised that there were three persons with less

⁷ A rigger rigs the item to be picked up and signal person gives the signal for what the machine operator is to do. Tr. 141-42. Such training has nothing to do with the operation of any machinery, including the 120 crane. In contrast, Ex. R 17 does deal with the operation of equipment. Tr. 142.

seniority that could operate the boom. Tr. 145. There was some back and forth between Respondent's counsel and Ruiz regarding how he could object to a task before he knew exactly what it involved. At that point, the Court interceded, stating, "So...regardless of the particular task that would be involved using the boom truck or the crane, from your perspective that didn't matter because...[y]ou didn't feel safe operating either of those pieces of equipment regardless of what they asked you to do with them; is that fair?" Tr. 147. Ruiz responded, "Correct. I assumed it was on the day before -- the workday before they had assigned me to go with the pipe fitters and pull a water well on the crane. So when they did it on Monday, I assumed it was the same job." Tr. 147.

To be sure that it understood Ruiz's testimony on this issue, the Court continued, "It really didn't matter from your perspective to know what particular job you had to do with the boom truck or the crane because no matter what they asked you to do you felt you were unsafe to use those two pieces of equipment?" Tr. 147. Ruiz again responded, "Correct." Tr. 147. Later, Respondent argued that, not knowing what the assignment involved with the boom truck, it was unreasonable for Ruiz to object. The Court sees it very differently. As later testimony revealed, Hunnicutt was quite able to explain, *if in fact it was truly the case*, that the assignment was easy to perform. However, lamely, in the Court's view, Hunnicutt maintained there was no opportunity to offer that fear-allaying information. The Court did not find that claim of "no opportunity" to inform Ruiz to be credible.

Respondent's Counsel revisited the December 16th conflict, with Ruiz again stating that the dispute with Hunnicutt and his order that Ruiz go to his office, was resolved. The Court again interceded to clear up this issue, asking, "In fact, isn't it true, based on your testimony, that when you had this go to the office business essentially this individual [Hunnicutt] backed down from that. He didn't still insist that you go to the office. He retreated from that demand and that's where things stood, right?" Tr. 148. Ruiz responded, "Correct. He asked me one time and I said what I said and we were done." Tr. 148. Following the completion of all the testimony on this issue, the Court expressly credits Ruiz's recounting as the credible version.

Ruiz maintained that when he was thereafter summoned to Hunnicutt's office, he did not think he was in trouble and that he brought his union steward because that was the practice he was trained to use. Tr. 149. The meeting with Hunnicutt, for which Binegar and Pearson⁸ were also present, only involved Ruiz's issue with running the boom truck and the reasons he was opposed to that task. Tr. 151. Ruiz was asked if the boom truck or crane was unsafe or defective and he responded that he did not believe such problems were present. Tr. 154. Of course that question from Respondent missed Ruiz's main point that, for safety reasons, both to himself and others, he was afraid to operate either piece of equipment. As Respondent's counsel expressed it, and to which Ruiz agreed, "[his] position was simply [that] personally [he was] not comfortable with [his] qualification to operate it." Tr. 154-55. Ruiz added that there was only one boom truck to which he could be assigned anyway because he only had a 5023 for that truck and a separate 5023 is required for each piece of equipment. Tr. 154.

⁸ A Mr. Pena was apparently also in the meeting but Ruiz stated that individual said little or nothing. Tr. 151-52.

The Court notes that Ruiz was not making a blanket refusal to ever operate a boom truck or a crane, as this exchange demonstrates when he was asked, “[y]ou testified about the discussion that took place during that meeting in Mr. Pearson's office about getting you some additional -- and I think you've used the expression ‘seat time’ or operating the boom truck to try and get comfortable?” Tr. 155. Ruiz affirmed that was true, adding that such seat time would need to be in a “nonproductive area.” Tr. 156. Though he acknowledged that, as Respondent’s counsel framed it, he “didn't know how much training that would take before [he would be] comfortable,” the Court views that as a practical and sound response, as Ruiz could not be expected to be clairvoyant. Tr. 155. As Ruiz noted, he couldn’t give a prediction; he had never done lifts before. Tr. 155. Ruiz added that at the conclusion of the meeting, “[i]t was stated [he] would be given more training in a nonproductive area with a qualified person to watch over [him] and that he was okay with that arrangement. Tr. 156. As noted, following that meeting, Hunnicutt assigned Ruiz to run a bulldozer in the fine ore bins. *Id.*

Curious, the Court inquired of Ruiz what brought about the change so that the road crew duties suddenly included the use of boom trucks and cranes. Ruiz responded,

From what I understand . . . it is a regular duty now and only the three other guys that were NCCCO qualified -- from what I understand, something happened on property with a pipe fitter who was running a boom truck. He destroyed the boom truck or put some damage to it. They terminated him. He was terminated. His name was Jeff Osborn, I believe. He was terminated.⁹ So from then on, they said no more people can run it unless they're NCCCO qualified. So the company, from what I understand, said from today forward if anyone runs a boom truck they have to be NCCCO qualified, which is -- we're not doing it for our job. We're doing it for pipe fitters. They're pulling us with our NCCCO certification to other classifications because those classifications don't have NCCCO people because they couldn't pass the test.

Tr. 163-64.

Clarifying the new development with when he last worked, the Court then asked, “[y]ou performed your duties with the road crew and there might have been work done by the boom truck or the crane but not while you were there working with the road crew; is that right?” Ruiz confirmed that was true. The Court continued, “So it wasn't like these things [boom truck and crane] were never at the scene? It just wasn't part of the road crew's duties to run those things?” Ruiz also confirmed that was true. Tr. 164.

Apart from whether it was fair to assign the boom truck and crane operation to Ruiz, the story he related underscores that his safety concerns were well-founded and that it was not

⁹ Need the Court mention that, with Ruiz’s awareness of an employee being fired for a boom truck mishap, that knowledge would only underscore his concern about his lack of being truly qualified to operate that equipment. Accordingly, for him, it was a lose-lose situation: termination for balking at the boom truck assignment or termination if he had mishap, through inadequate competency.

simply reasonable, but sound in terms of safety for him to decline the operation of such equipment until such time as he felt competent to do so.

Testimony of Abe Romero

The Complainant then called Abe Romero, who is a current employee at Pinto Valley. Employed there for four years, he is a member of the mine's road crew. He has known the Complainant for some 20 years. Romero transferred to the road crew from the tailings dam crew at the same time as Ruiz. Like Ruiz, both worked for the same supervisor, Hunnicutt. Tr. 166. Romero was aware that Ruiz received NCCCO certification to run a boom truck and a crane in 2013, "Because a group of people were asked in our group who was going to go and he -- actually, the supervisor then appointed people by seniority who was going. I was at the bottom so I didn't go." Tr. 168. Romero affirmed that if one had a "5023," they could run a crane or boom truck. While Romero had experience operating the crane, he lacked certification, at least for Pinto Valley. He was assigned to run cranes and boom trucks.

Romero maintained that although one would rarely be assigned to run such equipment, typically one would volunteer for the duty. Tr. 170. Romero could not remember a December 10, 2015 meeting led by Chism involving work assignments, but he did recall the December 16th meeting led by Hunnicutt. He recounted the event,

Well, of course, [Hunnicutt] gave the safety meeting, and then he started the line out. We were all sitting at the table. It was, actually, two other employees and Manny Ruiz and myself. They made the line out on everybody else, and then he asked Mr. Ruiz if -- he asked Mr. Ruiz to go on the crane. I looked at him and I looked around and I seen his expression on his face like that. . . . [he, Romero] looked at him and [saw] the panic mode. I looked at him and I looked at him.

Tr. 171.

The look of panic on Ruiz's face did not surprise Romero, "Because the time that we worked together, I used to tell him, '[h]ey, you went to the crane school. It's your turn.' He goes, 'I'm not getting on that. It's unsafe.'" Tr. 171-72. Ironically, as just mentioned, Romero is not certified to run the crane either, describing himself as "just a 5023." In fact, supporting the fact that operating a crane is potentially dangerous, he revealed that he "had an accident with the other company that I ran a crane, and since then I -- I was being broke in. I felt very uncomfortable running it when I do run it." Tr. 172. He confirmed that, even with his experience, he still feels uncomfortable running a crane. *Id.* Romero elaborated, "it's like anything you never operated or done in your life and you're expected to do it. It takes hours. It takes time to learn a crane. You can't learn it in a month. You can't learn it in a year. It takes a long time." Asked if one could learn how to operate a crane in a week of classes, he informed, "No sir. No way." Tr. 173.

Romero continued his observations, which were informative about Ruiz's state of mind, relating that Ruiz stated,

I don't want to run it. I have seniority. I looked at him when he said seniority, and I know that wasn't the word he was looking for. I – it's like they threw him in a lake, and he didn't know how to swim. He was looking for the right word without getting embarrassed by everybody else by him saying that.

Id.

Describing Ruiz as no slacker, Romero stated, that “on the equipment that I seen Manny [Ruiz] run, he has mastered every single one except that one.” *Id.*

Continuing with his recollection of the meeting that day, Romero stated, “[Hunnicut] said, “Well, you're going to go on the crane.” Tr. 174. Romero confirmed that Ruiz was the last one to receive an assignment that day. Tr. 176. Subsequently, Romero was interviewed by HR about the event. At that meeting Frankie Brocamonte, the union rep, was there along with Binegar and Hunnicutt. Tr. 178.

Regarding that HR meeting, Romero affirmed that he found it intimidating because it was,

the first time I see a front line supervisor sit with the human resource. It made me kind of nervous. I didn't really want to say anything about it. I didn't want to make it worse. I was trying to stay neutral is what I was trying to do. I didn't want to say anything bad.

Tr. 178.

Following the meeting, Romero asked for another interview with HR because “I wanted to express my feelings - because I had worked with him -- of what the issue really was, that he -- *that he had panicked, and then I knew that he couldn't run that boom truck. He was afraid of it.*” Tr. 179. Romero agreed that his purpose was to express that Ruiz had the safety concern. *Id.*

Romero stated that he also had concerns with the training imparted by Ronnie Gray. Gray is the trainer who certified the individuals for the crane operation, and he also conducted rigging classes. Gray did a rigging class with Romero. However, he had issues with Gray's training in that class, expressing that “he had made a hoist -- a homemade hoist to put the block on to be able to lift the beam that he was lifting, and I brought it up that he could not use that because it was against MSHA using that kind of hoist.” Tr. 180-81. Romero then complained to the company, stating that one must use a ladder, not a chair, to connect a hoist. Tr. 181.

As for the issue of the confrontation between Hunnicutt and Ruiz, Romero affirmed that he heard Hunnicutt tell Ruiz to go to his office. *Id.* He could not remember Ruiz's response to that. However, he did recall Ruiz making a remark that this wasn't high school. *Id.* Romero

stated that he did not recall any discussion that “this is going to get ugly or anything like that.” Tr. 182.

Upon cross-examination, Romero agreed that multiple meetings had been a little heated, and accordingly that such an atmosphere was not simply limited to the meeting in issue in this case. Tr. 182-83. Respondent’s counsel posed questions from Binegar’s notes to Romero.¹⁰ Romero expressed that people were not getting along and he attributed much of the blame to the supervisor, Mike Gonzalez. Tr. 183-184. Romero agreed that the two crews had conflicts over “things like job assignments.” Tr. 184. Gonzalez then left Respondent’s employment. Following that, the crews were consolidated, with Hunnicutt in charge of both, and all being designated as part of the road crew. *Id.* However, this did not, in Romero’s view, bring about harmony, as he stated there was still “a lot of drama.” Tr. 185. As a whole, the Court finds that Romero’s testimony supports Ruiz’s recounting of the line-out meeting and Ruiz’s genuine fear of operating the cranes.

Testimony of Samuel Bell

Samuel Bell was also called by the Complainant. Bell has been employed by the Capstone Mine, Pinto Valley, for the past nine years. He has known Ruiz since 2012, when Ruiz began working there. Formally, his job title is environmental water facility operator. Among the workers at the mine, they are known as the “environmental pump men.” Tr. 188. Though he has never worked with Ruiz on either the tailings dam crew or the road crew, he knows Ruiz because he is a union steward. Bell agreed that he is Ruiz’s “go to” union steward, in that if a problem arises Ruiz will come to him. Tr. 189. Consistent with that practice, Ruiz has called Bell to sit in and participate in disputes with Hunnicutt. *Id.* As to the matter at hand, which arose on December 16, 2015, Bell was called by Ruiz regarding an incident on that date. *Id.* He related that on that date Ruiz asked him to meet at the North Barn trailer and that he needed Bell to be there as a steward. Tr. 191. Upon arriving, Ruiz briefed him about the verbal exchange he had with Hunnicutt. Without reviewing Bell’s recounting of Ruiz’s account, Ruiz reiterated to Bell that he felt uncomfortable running the crane. Tr. 192. Hunnicutt and Steve Pena met them and they then proceeded to Kathy Binegar’s office. The meeting included Ruiz’s expressing the reasons for his qualms about running the equipment. His expressions included that his 5023 MSHA training form was over a year old and that the refresher training he was given was inadequate. Ruiz apparently also asserted that the “refresher course that they had him sit in on was inadequate to refresh his training and make him feel comfortable running that piece of equipment around bystanders and that he felt he needed more time, more experience with the

¹⁰ There were times when the Court concluded that Mr. Romero was mixed up with the questions posed and that as a consequence some answers were unclear as to his intended response. For example, when he was advised that Respondent’s counsel had “a copy of Ms. Binegar’s notes from when she . . . [s]he asked you a question that said, ‘Do you feel Manny is being singled out?’ She wrote down no. Is that an accurate reflection of what you told her in that interview?” Romero answered, “Yes, I did.” Accordingly, it was unclear if Romero meant that he agreed that Ruiz *was not* being singled out or whether his “Yes, I did,” meant he was being singled out. Respondent’s Counsel did not clear this up, moving immediately to a new topic, stating, “And then you talked about -- I’m going to go on and I’ll do this quickly, but it says, “had problems with cone heads when Mike G. was there.” Tr. 183.

equipment prior to being able to run it competently and safely.” Tr. 193. According to Bell, the meeting ended productively, as

[t]owards the end of the meeting, in [Bell’s] opinion, [they] had come to a verbal agreement between [Bell], Mr. Ruiz and the company that they would give [Ruiz] some more seat time, give him an isolated area and a qualified operator to renew his qualifications and to become more comfortable with the piece of equipment and be able to operate it safely.

Tr. 193-94.

However, the meeting was not entirely without friction. According to Bell, Ruiz had some discussions with Binegar,

about some previous incidents where [Ruiz] had felt like he had been harassed and targeted for not only his union participation but for his race and that he didn't feel he was being treated fairly, felt he was being singled out by his supervisor. [Binegar] disagreed and said there hadn't been any proven issue with that, that they looked into that issue in the past and hadn't discovered any discrimination. The exchange got slightly heated on both sides, you know, disagreement. [Bell added that he did] remember [Binegar made] the comment that they could suspend him and independently investigate the situation rather than the settlement that we had agreed to, if he preferred [and in response Ruiz said] no, that he'd rather just take the extra [training].

Tr. 194-95.

In any event, Bell’s understanding, pursuant to the meeting, was that the matter had been resolved. However, Bell learned that later that same day Ruiz was called back for another meeting at which he was informed that he was suspended, pending investigation. Gary Wright, another union steward, was present at that subsequent meeting. While Bell tried to learn the details of the planned investigation, he was advised that there would be no further discussion and it was left that Ruiz was “suspended pending further investigation.” Tr. 196. Some two to three weeks later, an investigatory interview was held. Bell and Ruiz attended. Following that, there was a “termination meeting” via telephone and several grievance meetings after that. A grievance was filed the same day as the termination. Ruiz expressed his belief that he was being singled out. Tr. 197. During the termination meeting call, Binegar and Clark were together and Clark read the termination letter to Ruiz and Bell, with Ruiz acknowledging that he heard and understood it. Tr. 198.

Testimony of Dallas Hunnicutt

The Complainant having rested, Dallas Hunnicutt was then called by the Respondent as its first witness. He is a supervisor at Pinto Valley, employed by that entity since 2013. Tr. 203. In that role, he is responsible for two crews: a road maintenance crew and a tailings construction dam crew. Tr. 209. While he was in charge of one crew originally, around April 2015 he began

supervising both crews. Tr. 210. Mike Gonzalez had been in charge of one of the crews, but then was let go. Ten persons are on the road crew and five on the tailings crew. Hunnicutt's immediate supervisor is Tim Pearson and his superintendent is Sam Clark. He interacts with both men daily. *Id.* Ruiz was originally part of the tailings dam crew and then was moved to the road crew.

Hunnicutt didn't know former supervisor Gonzalez well, as there was not much interaction between the two crews. However, Hunnicutt stated there was some tension between the crews. The road crew apparently felt that the tailings crew "was doing bits and pieces of their job." Tr. 211. Those disputes ended with the consolidation of the crews. *Id.* When Ruiz worked for Hunnicutt he was an equipment operator. Tr. 212. Equipment operators "run blades, loaders, dozers, dump trucks, articulaters, track hoes, water truck, just overall different equipment." *Id.* Shown Exhibit R 21, Hunnicutt identified it as the contract between the company and the bargaining unit union employees. Tr. 213. Referred to Article 7 of that contract, Hunnicutt agreed that it described the heavy equipment operator position. *Id.*

Turning to the events of December 16, 2015 line-out meeting, Hunnicutt offered his version of it, stating,

We had our line-out meeting, did our safety topic and stuff, started lining everybody out. When we got to [Ruiz], I asked [him] to get with Steve Pena, which is a supervisor on one of the other crews, to run a boom truck for him. [Ruiz] told me that he wasn't going to run the boom truck. [Ruiz] said there's three junior seniority people there that could run that boom truck, and I explained to him that seniority didn't have anything to do with job assignments. ... I asked Manny [Ruiz] to go to the office, and we would discuss it after the meeting. After we was done with the line-out meeting, we could talk about it. [Ruiz] told me that -- he said, 'This ain't high school. I don't have to go anywhere.' [Ruiz] was standing up at the time when he said it. He sat back down and looked at the guys at the table and said, 'Watch this, it's going to get real ugly.' [Hunnicutt continued] [a]t that point I told him if he's going to be disruptive he needs to go ahead and leave the meeting. [Ruiz] told me he wasn't being disruptive or insubordinate and he didn't need to go anywhere. At that time I ended the meeting and proceeded to go into the office.

Tr. 214-15.

Referring to the sign-in sheet, Ex. R 23, Hunnicutt stated that it reflects those present when Ruiz allegedly said it's going to get ugly. Tr. 216. The meetings typically discuss safety issues, after which the line-out job assignments are given and people then go to work. Tr. 215. Continuing with his testimony about the events of December 16th, Hunnicutt agreed that he assigned Ruiz with the operation of the boom truck assisting Mr. Pena. Tr. 218. Asked why he gave Ruiz that assignment that day, he stated,

They had just went through a refresher, and he was -- he said he needed more seat time. It was a simple job from the way Steve explained it to me for what they

were doing. It seemed to me like it's a good time to put somebody there to give them training.

Id.

Hunnicuttt claimed that he had not discussed that assignment *with anyone* prior to giving it to Ruiz. *Id.* The Court finds that upon the totality of the evidence, Hunnicutt's claim was not credible. He knew that Ruiz had recently gone for refresher training, stating, "I knew he had went to refresher training on Monday for crane and boom truck refresher, and on Tuesday we sent him for rigging and hand signal refresher." Tr. 219. He knew this, he stated, because they had a record of it. In fact, Hunnicutt was the one who sent him, although he added that he was asked to send Ruiz to that refresher training by Sam Clark. *Id.* Hunnicutt also knew at the time he gave the assignment that Ruiz was certified by the National Commission for Certification of Crane Operators. *Id.* Four people on the tailings dam crew were certified by NCCCO. Tr. 220. Prior to December 16th, Hunnicutt had assigned Jay Shoemaker, Bain Grantham, and Brock Cargill to work on boom trucks, as recently as a few weeks before December 16th. Running the boom trucks was, in Hunnicutt's words, "an on-and-off thing for us." *Id.* He added that around the 16th, the demand became heavier. Before that, the road construction crew really hadn't been using the boom trucks and cranes. Tr. 221.

As noted, around the spring of 2015 the two crews came under Hunnicutt's supervision. Tr. 221. Hunnicutt maintained that once the crews were consolidated, and through December 2015, he assigned people to run a boom truck and crane, "[q]uite often. Sometimes two or three guys a week." *Id.* However, during that time he had never assigned Ruiz for those jobs. When asked why he had never assigned Ruiz during that time, Hunnicutt stated, "Manny was doing some other dirt work projects for us, and he was doing really good on the dirt work projects." Tr. 221-22.

Hunnicuttt essentially stated that the boom truck task he was assigning Ruiz was a simple task that had very little traffic around. However, he did not tell Ruiz about the nature of the assignment because he, (i.e. Hunnicutt) "didn't make it to that point." Tr. 223. Instead they went right to the office. *Id.* While he agreed with Respondent's counsel's suggestion that he never had a chance to describe the assignment at the line-out meeting, even after that he never described it to Ruiz. Tr. 223. Hunnicutt, responding to a question about the role of seniority in making assignments, stated that seniority has no role in those matters and that Article 7, paragraphs 2 and 3 speak to that point. Tr. 223, *see also* Ex. R 21-3.

It was Hunnicutt's claim that, when Ruiz refused the assignment, the crew members acted shocked. Hunnicutt then terminated the line-out meeting. Instead of safety concerns, Hunnicutt asserted that Ruiz's only claim at the meeting was that he could object to the job of running the boom or crane based on his seniority, "At the meeting -- all I got out of the initial meeting was the seniority. There was [sic] three junior seniority people there that can run that and I'm not running it." Tr. 231.

The meeting with management officials, Hunnicutt and Ruiz then followed. As noted earlier, attending were Bell, Steve Pena, Binegar and Tim Pearson. Hunnicutt maintained that

Ruiz's assignment "happened to be the last one that day" and that it was "just coincidence" that it occurred that way. Tr. 225. The Court did not find those claims to be credible.

At the meeting, Hunnicutt acknowledged that Ruiz expressed that "he didn't feel comfortable running it, that he felt he needed more seat time." Tr. 226. He added that there was a discussion about giving Ruiz more seat time. Hunnicutt, when asked if he was surprised upon hearing that Ruiz felt unsafe operating the boom truck, echoed that he was surprised that Ruiz expressed that feeling, because he "didn't hear that mentioned at the line out meeting." Tr. 229. Of interest, Hunnicutt allowed that Ruiz *could have* expressed his safety concerns and that he simply didn't hear them. Tr. 230. He repeated that he *didn't remember* hearing such a concern expressed at the line-out meeting. *Id.* Despite those concessions, Hunnicutt asserted that his first recollection of Ruiz expressing safety concerns about operating the boom truck was at the meeting in Pearson's office.¹¹

Hunnicutt maintained that no decision to provide additional seat time was made at the meeting and no resolution to the dispute was made. Instead, by his account, the meeting ended and management decided to have discussions among themselves. Tr. 228.

Hunnicutt's view of Ruiz not being comfortable about operating the boom or crane was,

In my mind if you're comfortable enough to run it and comfortable enough to sign your 5023, you probably should be okay.... If you're not comfortable running it, you probably shouldn't be signing the paper saying that you - - you're qualified to do it. Once you sign that piece of paper, that's admitting that I'm good to run this.

Tr. 230-31.

Hunnicutt agreed that he relies upon such forms being signed as showing that the individual can run the equipment. Tr. 230-31.¹²

Hunnicutt reaffirmed that he knew that Ruiz received refresher training and signed a 5023 two days before Hunnicutt assigned the boom truck job. Tr. 232. Hunnicutt also affirmed that Ruiz received refresher rigger and signalman training at the same time as the crane and boom training.

In acknowledging that rigger and signalman training, Hunnicutt revealed that the entire nature of the work he was assigning to Ruiz was inherently hazardous, stating,

It's real important when you're on signalman training that your operators of your boom trucks or your crane knows and the crane operator themselves are both on

¹¹ Ruiz has not claimed that the equipment itself, the boom truck or the crane, was unsafe. Tr. 231. The issue is his competence to operate it safely.

¹² The Court commented that Hunnicutt's view about the effect of signing the 5023 form is a legal determination for the Court and therefore Hunnicutt's view does not necessarily rule the day. Tr. 231.

the same page with their hand signals. Safety reasons. Rigging class is real important for your crane operators and your boom truck operators because they're responsible for the load. If they know how their rigging should be, they should be able to look at their rigging and know that it's okay. *There's been -- things happened in the past where you had riggers that didn't know what they were doing and the rigger can get you in trouble, absolutely.*

Tr. 232-33 (emphasis added).

Again acknowledging that the meeting in Pearson's office included discussion of providing Ruiz with additional seat time, Hunnicutt then stated that, with management deciding to talk privately among themselves, he then took Ruiz to begin work on a dozer in the fine ore. Tr. 233. Hunnicutt then returned to the site of the meeting and had a discussion with Clark about the recently concluded meeting. Clark had not attended that earlier meeting. *Id.* Agreeing with counsel's characterization that he "debriefed"¹³ Clark about the meeting, Hunnicutt stated that Clark then instructed him to get Ruiz and bring him back down to Binegar's office. Tr. 234.

Hunnicutt maintained that upon receiving that instruction he didn't know the purpose behind Clark's order for a new meeting, "At the time I didn't know. Once we got to [Binegar's] office, Manny was suspended pending investigation of the incident." *Id.* This claim too, the Court finds, is not credible.

Among other incredible claims of Hunnicutt, he stated that he was not involved in the decision to suspend Ruiz, nor did he recommend it. Tr. 234-35. Ruiz was then suspended with pay. Hunnicutt's subsequent involvement with the matter included sitting in as a witness when the company conducted interviews of the members of the two crews. Hunnicutt stated that the interviews were done by Binegar and him, although he again asserted that he "was instructed to sit in on the interviews conducted by [Binegar]." Tr. 236. Asked about his involvement other than "sitting in" during the interviews, Hunnicutt was asked if he asked questions during those interviews, responding, "*Not that I remember.* If it was, it would have been for a clarification matter, but *not that I remember* did I ask a whole lot of anything."¹⁴ *Id.* (emphasis added).

Asked what happened at the conclusion of the investigation, Hunnicutt maintained he didn't know. *Id.* He only heard that Clark made the decision and that he, Hunnicutt, neither made, nor was he consulted about, the decision, nor did he recommend it. Tr. 237. He did not object to the decision upon learning, after the fact, that Ruiz was fired. *Id.* The Court wanted to

¹³ Using the neutral and professional term "debriefed" is a testament to the skill of legal counsel to employ words which put their client in the best possible light. However, the Court notes that it would be naïve to view Hunnicutt as the detached professional simply giving Clark an executive summary of the events at the line-out meeting. Instead the Court finds that the only reasonable conclusion is that, far from a sterile "debriefing," Hunnicutt played the role of instigator before Clark. As Binegar would later admit, Clark was "spun up" about something after speaking with Hunnicutt. Tr. 285.

¹⁴ Frankie Brocamonte, a union representative, was present during the interviews. Tr. 236

be sure of Hunnicutt's answer, asking "So you never urged that Mr. Ruiz be terminated?" Hunnicutt replied, "No." Tr. 238. Asked who told him of the firing, Hunnicutt stated he *didn't* "remember exactly who informed" him. Tr. 237 (emphasis added). Asked if he discussed the matter at some point with Clark, Hunnicutt responded, "Not that [he] remember[ed]." ¹⁵ Tr. 238 (emphasis added).

Hunnicutt then expressed that his problem,

wasn't so much about the not running the piece of equipment as it was the -- I felt it was more of an insubordination thing in the meeting than it was over the equipment when I asked him to go to the office and he refused to go to the office. Just the way it all fell out was more my concern than the actual boom truck situation itself.

Id.

Counsel translated the remark, asking if Hunnicutt takes insubordination seriously. Unsurprisingly, Hunnicutt responded, yes. Tr. 239.

Upon cross-examination, Hunnicutt agreed that the line-out meeting on December 16th was "a little heated." Tr. 239. Hunnicutt maintained that Ruiz's objection to running the boom truck was solely based on seniority, contending that Ruiz said, "There's three junior, less seniority people here that can run that truck. I'm not running it." Tr. 240. While Hunnicutt believed that Ruiz could not object to the job assignment based on his seniority, he was then asked by counsel for the Complainant, if it was assumed for the moment, that really was the basis for Ruiz's objection, but that he was mistaken about the right to invoke seniority, whether such a mistaken belief could be a basis for firing? Hunnicutt avoided answering the question. Tr. 240-41. The Court noted that the question was not complex, and remarked to Hunnicutt,

It's a pretty plain question. You made a judgment. You talked about your determination, about when you feel such behavior is insubordination and not insubordination. He asked you a very simple question. He's asking you, since you've offered your opinion previously in your testimony about insubordination, would that kind of reaction in your view constitute insubordination, yes or no?

Tr. 241

Finally, Hunnicutt answered, stating, "I would say yes." *Id.* He then held to that view, that simply making a mistake about the effect of seniority on job assignments was a basis to fire Ruiz. Tr. 242.

¹⁵ Having heard Hunnicutt's version of the events, the Court expressed its thoughts on the issue of the line-out meeting, remarking, in effect, that it would have to determine which individuals actually did recommend Ruiz's termination and "the basis for their recommendations if they were not present during the line-out meeting when we have different versions about what happened, about whether Mr. Ruiz stood up or made comments about watch, this is going to be trouble." Tr. 238.

Hunnicuttt affirmed that when he told Ruiz to leave, he made the remark about this was not high school. Tr. 242-43. Hunnicutt maintained that after that remark, made while Ruiz was seated, he told Ruiz that if he was going to be disruptive, he would need to leave the meeting. Tr. 243. However, Hunnicutt again avoided answering a question about the events following his remark about Ruiz leaving the meeting if he was going to be disruptive. Counsel for Complainant inquired, "After you said that, he wasn't disruptive, right? He didn't say anything else, right?" Tr. 243. Hunnicutt again avoided answering the question, responding, "After I said that we ended the meeting, and we all got up and left." Tr. 244. The Court intervened again, remarking, "But the question was: Did he say anything else?" *Id.* Again, Hunnicutt balked at a direct answer, "I didn't give anybody a chance to say anything else. We got up and left." *Id.* Asked if Ruiz said anything else to him after that, Hunnicutt provided a non-answer, remarking, "He talked to the guys on the way out the door." *Id.* The Court persisted, "He didn't say anything else to you after that?" *Id.* Finally, Hunnicutt answered the question, "Not to me after that." *Id.* Hunnicutt then acknowledged that, even under his version, Ruiz "could not have disrupted the meeting any further - because [he] ended the meeting at that point." *Id.*

Hunnicuttt continued to be vague in his recounting of the events. He admitted that after the meeting ended he went to HR and to Pearson's office there. Tr. 244. However, when asked if there was any discussion about Ruiz having stood up at the meeting, Hunnicutt answered, "I don't remember." *Id.* Asked next if there was any discussion about Ruiz having (allegedly) said this is going to get ugly, again Hunnicutt responded "I don't remember." Tr. 245. Next, asked if there was any discussion about Ruiz having (allegedly) refused to leave the meeting, Hunnicutt answered, "I don't believe that we had that discussion. I had talked to Kathy [Binegar] and Tim [Pearson] previous to Manny [Ruiz] coming in." *Id.*

In the Court's view, Hunnicutt continued to create a difficult situation for himself with the follow-up question about his previous discussion with Binegar and Pearson, acknowledging the meeting was about finding some resolution for Ruiz's safety concerns, responding "Yes." *Id.* Nor did Hunnicutt dispute that "a person can be certified to run equipment but still have safety concerns about running it," acknowledging, "Oh, yeah." *Id.* Further, Hunnicutt admitted that such concerns can still be recognized, "[e]ven if they've got a 5023 form or an NCCCO certification." *Id.* Hunnicutt also conceded that he had testified earlier that he was purposely giving Mr. Ruiz an easy assignment that day so that, as Respondent's Counsel suggested, "he would have some opportunity to learn" and that, again as expressed by Respondent's Counsel, the "easy assignment was because of what [Hunnicuttt] had heard about [Ruiz's] objections" the week before. Tr. 245. In fact, Hunnicutt admitted his knowledge on this issue, stating,

From what I had heard, he felt uncomfortable. That was the purpose of sending him back through the training that we sent all four guys back through. For me, if we're sending him back through, there's no better time to start getting them into it than when they first come out of the training.

Tr. 246.

Given Hunnicutt's claimed sensitivity to Ruiz's fears, Counsel for the Complainant naturally followed up, asking why, "[w]hen he objected to the assignment at the line-out meeting

on the 16th, why didn't you respond and tell him that this was some kind of additional training or that this was an easy job?" Tr. 246. Hunnicutt claimed that "[w]e didn't get to that point. When it started getting heated, I just went ahead and shut it down and we went to the office." *Id.* The Court finds that this assertion doesn't add up because Hunnicutt claimed the meeting was over at that point.

Counsel for the Complainant continued, inquiring, if that were so, then "[w]hy didn't you tell him that in the subsequent meeting in Tim Pearson's office?" The Court finds Hunnicutt's answer equally unconvincing, as he asserted, "[a]t that point they had started asking their questions." Tr. 246. With responses such as these, overall the Court did not find Mr. Hunnicutt's testimony to be credible.

Complainant's Counsel then turned to some of the history between Hunnicutt and Ruiz, inquiring if Hunnicutt recalled that, prior to the line-out dispute, there was "an incident where Mr. Ruiz had objected to using a piece of equipment because of a defective parking brake." Hunnicutt asserted that he didn't remember that. Tr. 246. Probing further, he was asked if he also didn't remember Ruiz "complaining [to him] that he was allowing employees to use the equipment even though the parking brake wasn't working." Tr. 246-47. Hunnicutt's answer was vague, as he asserted that he didn't "remember that directly." *Id.*

Finding his responses incredible, the Court inquired, "You have no recollection of that event at all?" and Hunnicutt answered, "No, I do not." Tr. 247. Further attempts to stimulate his memory were unavailing, with Complainant's Counsel inquiring, "To maybe refresh your recollection, do you recall an issue with a vehicle where the parking brake would engage or function when the vehicle was on a downhill slope but not an uphill slope?" Hunnicutt responded succinctly, "No." Tr. 247. The Court, surprised again by the response, inquired, "[t]hat doesn't jog your memory either?" Again, Hunnicutt answered, "No, it does not." *Id.*

Complainant's Counsel then inquired of Hunnicutt if, "[d]uring the course of your current employment, have you ever been the subject of any formal or informal discipline." Tr. 247. Hunnicutt admitted that he was disciplined one time, for "Removing -- given authorization to remove a red tag on a piece of -- on a track hoe that had a tag on it." *Id.* Counsel characterized it as a red tagged piece of equipment that had been tagged as unsafe. Hunnicutt answered, "[c]orrect." Tr. 247-48. Hunnicutt admitted that he was found to be in error in allowing the red tag to be removed. *Id.*

Hunnicutt agreed that he had assigned three other employees to operate the boom trucks in the months prior to December 2015, each of whom was NCCCO certified. Tr. 248. Asked why he had not on those previous occasions assigned the boom truck to Ruiz, Hunnicutt offered that he "had [Ruiz] doing dozer projects for me at the time." Tr. 249. Hunnicutt agreed that it was simply the "luck of the draw, [t]hey spent a lot more time on boom trucks and stuff previous to them rolling into my crew." Tr. 249. This was at the time that the crews were combined, but Hunnicutt admitted that "You can't bring that many people into a crew and just start breaking them out. *You got to put them somewhere where they're comfortable, knowing that they can do it.*" *Id.* (emphasis added).

Also, Hunnicutt admitted that he knew the other three employees had spent more time on a boom truck and that they all, including Ruiz, possessed 5023 qualifications. *Id.* A 5023 form is valid for one year. Tr. 250. Importantly, Hunnicutt admitted that at the time he assigned Ruiz to the boom truck in December 2015, Ruiz *did not* then have a valid 5023 form. *Id.* Accordingly, Hunnicutt conceded that “before [he] made the assignment on the 16th, [he] knew about the training on [December] 14th and [Ruiz’s] objection to using the equipment on [December] 10th.” *Id.*

Testimony of Kathleen Binegar

Kathleen Binegar is employed by Pinto Valley Mining Corporation, which is owned by Capstone. At the time of the hearing she was the HR representative for the mine department, but during the events in this case her job was HR business partner for the processing department. She analogized her job then as akin to a field HR person. Tr. 253-56. Prior to the events in issue, she knew Ruiz only casually, but had no adverse interactions with him, and she had a positive impression of him. Tr. 256-57. Her involvement with the matters of December 16th began when Hunnicutt called her at 6:30 in the morning, wanting to speak with her about Ruiz. She could not recall if Hunnicutt expressed the reason for the call but that both he and Ruiz were on their way to speak with her. The meeting then convened with Pena, Bell, and Pearson also in attendance. There was, according to Binegar, a brief meeting with her, Hunnicutt, and Pearson, prior to the meeting with Ruiz. Tr. 259. At that meeting, Hunnicutt advised that Ruiz had been “disruptive,” and that “that they wanted to talk to us about what we can do as far as additional seat time.” *Id.* When the full meeting then followed, according to Binegar, Ruiz raised the seniority issue and the response was that seniority was not a consideration in job assignments. However, she added that Ruiz “talked about safety, and as a group we talked about what we could do to help [Ruiz] feel more comfortable operating equipment. We came to the conclusion that additional seat time is probably what needs to happen next.” Tr. 260. The Court notes that Binegar admitted that *Ruiz was on board with that decision. Id.* Binegar stated that the meeting “ended on a pretty positive note,” a change from her description of the meeting’s start, which she described as “very tense.” Tr. 259.

Thereafter, still during the morning of December 16th, Sam Clark superintendent of the area, met with Binegar. She advised that, as a result of the earlier meeting, their plan was “to provide space that wasn't congested for [Ruiz] to have some more seat time.” Tr. 261. However, Binegar added that as the company attorney was on site that day, she wanted to discuss the situation with him, as she considered it to be “a little bit of an unusual case.” *Id.* Clark advised that he wanted to attend that meeting with the company attorney. Clark was frustrated and unhappy with the feedback he received about Ruiz disturbing the line-out meeting. *Id.* Upon meeting with the attorney, it was decided to suspend Ruiz, pending an investigation. Tr. 262. Binegar stated that Sam Clark made that decision. According to Binegar, she started the investigation shortly after that, although the Court would comment that it is difficult to determine just what there was to actually investigate.

In any event, Binegar informed Hunnicutt that she needed to talk with Ruiz. She stated, “We brought [Ruiz] in the office and explained to him that we were going to do an investigation. He would be paid while he was off, and it would be best that he's not on the property and that we

would certainly bring him back to get his testimony.” Tr. 264. The Court would comment that at least Binegar recognized that Ruiz should be included in her “investigation.”

Understandably, Ruiz asked why he was being suspended. Not so understandably, Binegar admitted that she “was vague because there were several things that we were looking at the time, and I didn't feel at liberty to tell him exactly.” *Id.* To put it more accurately, Binegar did not really tell Ruiz anything. In the Court’s view, this heralded the start of a biased investigation. The Court noted this, asking Binegar, “You say you were looking at several things. You were vague. . . . You just said we were looking at several things at that time. What were those several things?” Tr. 264. Binegar responded, “Judge, they brought to my attention -- I wasn't aware until lunchtime about how he refused to operate equipment on the 10th and that he had received additional training, and that's basically what it was. They wanted more information on this line-out incident.” Tr. 264-65. However, based on the testimony received up to that point, it was clear to the Court that the “information” supposedly sought was already well known and that what was really afoot was to look at the line-out meeting as a basis to terminate Ruiz. Moving toward that obvious goal, firing Ruiz, Binegar then began preparing her questions to ask the crew members.

Counsel for the Respondent then turned to Ruiz’s interview from Exhibit R 27. Tr. 266. Binegar stated that she interviewed some 12 to 13 members of the crew that were present on December 16th. Among other information Binegar developed during her investigation was Ruiz’ NCCCO certification and his refresher training for that equipment. Binegar expressed that the significance of one such as Ruiz signing the forms, is that “if an employee signs, that [means, according to Binegar] they feel comfortable operating that piece of equipment.”¹⁶ Tr. 270-71. The Court noted that Ms. Binegar’s view of the effect of signing the form was a legal opinion and accordingly a matter for the Court to decide. Tr. 271. Also within her investigation was a letter from Gray, the NCCCO trainer, who asserted that “Ruiz did not participate when he was conducting the crane training.” *Id.* That letter asserted that Ruiz did not want to operate the swing cab crane. Tr. 272. Binegar expressed that, based upon her interviews and what transpired at the line-out meeting that “the company felt that we had given him training and that he should at least participate in training.” *Id.*

Binegar was then asked about her conclusion on the issue of insubordination. She responded, “[w]hen I interviewed the crew, they felt as a whole that they were uncomfortable, that it was getting hostile, and they couldn't understand why [Ruiz] would deny the job when he didn't even - didn't even know what the job consisted of.” Tr. 272. The Court finds it *very unlikely* that the crew as a whole, or even any individual member of the crew, would entertain such thoughts on their own, unprompted.

Binegar was vague when asked about Ruiz’s refusal to leave the meeting, asserting that “[m]ost of them stated that it got uncomfortable, and they were, frankly, very surprised

¹⁶ Serendipity no doubt at work, Binegar and Hunnicutt, both non-lawyers, expressed the same view of the legal effect of signing the NCCCO certification by one who had been trained. Yet, as best the Court could determine from the relevant exhibits, the certification itself makes no such pronouncement. *See*, R’s Ex. R 9 and R 22.

that he didn't obey." Tr. 272-73. Led by Respondent's counsel inquiring if that was "a consistent theme," Binegar stated that it was. Tr. 273. On the issue of Ruiz's safety concerns, Binegar stated she "believe[d] Abe Romero and Ralph Holmes mentioned something about safety." *Id.* However, Binegar admitted that her notes were not verbatim. The Court inquired about the atmosphere surrounding Binegar's investigation, learning that each crew member was interviewed individually, along with the presence of their immediate boss, Hunnicutt, and a union steward. Tr. 273-274. Hunnicutt's presence during the interviews of the crew was inherently intimidating and therefore inconsistent with frank and full disclosures in the "investigation," if comments were critical of Hunnicutt. Binegar's recollection that Romero and Holmes only mentioned "something about safety" is instructive of the pre-determined result behind her "investigation." In the Court's view, Binegar's investigation notes, which were not verbatim recordings of the words of any crew members, were inherently slanted; the agenda was firing Ruiz.¹⁷

Turning to her investigatory interview of Ruiz, she remarked that the Complainant "felt he needed more seat time. He was cooperative." Tr. 275. As to the line-out incident, Binegar acknowledged that Ruiz expressed that he believed he had an agreement to stay in the meeting with Hunnicutt. *Id.* She added however, "he seemed to be the only one that felt he had that agreement." *Id.* She could not *remember* any other crew member feeling that Ruiz had such an agreement. *Id.* It was not until the end of December that Binegar got together with Clark to discuss the matter. The result was Clark making the decision that Ruiz should be fired. Tr. 276. She could not recall if she brought her investigatory notes to her meeting with Clark, nor could she even be sure if she showed her notes to Clark. She summed up her reasons for agreeing with Clark's decision: "Well, with insubordination at the line out, refusing the training, prior discipline, we just felt that it was justified." Tr. 277. While she admitted that, in the earlier meeting, there had been, in the words of Respondent's Counsel, an "informal agreement about additional seat time," Binegar maintained that was before she knew "about the other. I was not aware." *Id.* That is, she agreed she was swayed by what she learned during her "investigation." *Id.* Turning to Exhibit R 24, the Respondent's rule governing insubordination, the Court remarked that it was not very enlightening. In full, the company rule provides, "Insubordination will not be tolerated." Rule 19 within Ex. R 24. There is no definition provided of what constitutes insubordination. Tr. 278.

On cross-examination, Binegar was directed to Ex. R 10, the letter of termination for Ruiz. Although she was asked to review the letter, she stated that she did not write it, nor did she have any input in its drafting. Tr. 280. The Court asked if she edited it, and Binegar stated she did *not recall* editing it, then adding that she made no changes, suggestions or alterations to the termination letter. Tr. 281. Complainant's counsel read from the letter's first paragraph, which provided, "We investigated your refusal to participate in swing cab crane training, your refusal to

¹⁷ This is further demonstrated by Binegar's looking into prior disciplinary actions against the Complainant. Those had nothing to do with the two issues at hand; Ruiz's fear of operating the boom truck and crane and the line-out meeting where that concern came to a head. Binegar stated that, as to prior disciplinary actions, she found three in his file. They were for "[h]arassment and f-ing off employees with the finger." T. 274. Then, her citing of the three instances apparently lost, the three became one, with Binegar advising that "it" was reduced from a written warning to a verbal one. Tr. 274.

operate the boom truck, and your refusal to comply with the instruction to leave the line-out meeting and go to your supervisor's office.” Ex. R 10. Binegar was then asked if those were the three things she investigated. In response, she stated, she “actually investigated the line-out meeting and in doing so, when I was asking for records, we went into the -- it fell into where he was qualified in his training.” Tr. 281-82. However, Binegar agreed those three things led to Ruiz being fired.

Continuing with the termination letter, Binegar agreed that it cites to Rule 19 within Respondent’s “Safety and Operating Rules,” and its words to the effect that “insubordination will not be tolerated.” Ex. R. 24. The letter continues, stating that Ruiz’s refusal to do the three identified things (i.e., his refusal to participate in swing cab crane training, refusal to operate the boom truck, and refusal to comply with the instruction to leave the line-out meeting and go to his supervisor's office) were insubordinate. Tr. 282. Binegar was of the view that Ruiz was insubordinate at the line-out meeting. In fact, Binegar agreed that the focus of what she was doing was looking into the line-out meeting. *Id.* Asked what was insubordinate about Ruiz’s behavior at that meeting, Binegar stated, “When Doc [Hunnicutt] asked him to leave the meeting and he did not. That was basically it.” Tr. 283. She then added, “And then he made those side comments about this is not high school and it's going to get ugly.” Tr. 283. Binegar agreed that she didn’t know about any of those three things until her noon meeting with the company lawyer. *Id.* Accordingly, Binegar was asked if that meant when Hunnicutt and everyone came to the meeting in Pearson’s office, Ruiz’s behavior was not a topic. Binegar then offered that she knew something had happened at the line-out, but she maintained she had no specifics at that time. *Id.* She agreed that the primary topic at that earlier meeting was Ruiz’s concern about safely operating the equipment. However, she added that Ruiz raised the issue of his seniority rights and she advised that was not a legitimate objection. Tr. 283-84. Binegar was then asked the same question which was posed to Hunnicutt, namely would it be insubordination if Ruiz mistakenly believed that seniority was a basis to protect him from running the equipment, and Binegar responded, “Absolutely not.” Tr. 284.

Binegar also conceded that when the meeting ended on December 16th, she thought a resolution had been reached on the issue of Ruiz safely operating the equipment. Tr. 284-85. Further, she agreed that she had no reason to think that there would be any subsequent investigation. Tr. 285. This only occurred after the meeting when she then spoke with Clark and following that, when she and Clark then spoke with the company attorney. *Id.* When asked if this new twist occurred because Clark had spoken with Hunnicutt, Binegar stated she did not know, but she admitted that Clark was “spun up” about something. *Id.* The notice of suspension, which Binegar prepared and which notice was signed by Hunnicutt, followed that meeting. Ex. R25; Tr. 285-86.

Elaborating on the December 14th issue of Ruiz’s alleged failure to participate in the training, Binegar remarked that Ruiz stayed in a pickup truck. Tr. 287. However, she admitted that she had *no idea* how anyone knew that Ruiz had not participated in some aspect of the training on December 14th, stating she “*did not know any specifics.*” *Id.* (emphasis added). This is further evidence of a slanted “investigation.”

Regarding Ruiz's alleged earlier disciplinary infractions, Binegar admitted those were not among the reasons given for his firing, but remarked she thought "they were taken into consideration." Tr. 289. This was despite the fact that those earlier matters were not mentioned in Ruiz's termination notice. *Id.*

Asked about her notes and the entry for December 30th regarding her second interview of Abe Romero, Binegar admitted that Romero came back and requested a second interview. Tr. 289-90. Binegar agreed that, among her notes, there is mention about Ruiz being scared and his need for proper training. Tr. 290. Interestingly, Binegar apparently did not think to ask about whether Hunnicutt's behavior played a role in employees feeling uncomfortable at the line-out meeting, adding that it was "probably both" that contributed to that tense atmosphere. Tr. 292. Binegar asserted that she did not sense that members of Hunnicutt's crew would feel uncomfortable when being questioned about the events, despite Hunnicutt being present during those question sessions. Hunnicutt was present for *every* employee interview. Tr. 293. Hunnicutt, it should not be forgotten, was the crew members' boss. Adding to the oddness and lack of objectivity with her "investigation," Binegar stated that she *never* interviewed Hunnicutt. *Id.* Directed to Ex. R10, and Ruiz's remark to Hunnicutt at the line-out meeting that "this is not high school," there is no dispute that Ruiz made that remark. Counsel for Complainant then inquired about the alleged comment by Ruiz to "watch what is going to happen, this is going to get ugly," asking who told her that remark was made. Binegar couldn't answer that very fundamental question, stating she "would have to check her notes." Tr. 295. Then, asked if it would surprise her that her notes don't record any such remark, Binegar only offered that she "heard it somewhere," an especially odd response for one conducting an "investigation." *Id.*

Continuing with the cross-examination of Binegar and her notes, counsel directed her to the 7th page of Exhibit R 27, where she made a remark that Ruiz was always crying seniority. Binegar remarked that "It just seemed to be a common theme from him," which, according to her, came up whenever Ruiz didn't want to do something. Tr. 297-98. Binegar dug a deeper hole for herself on this issue, displaying the clear predisposition of her "investigation." Though she stated that she was "not sure" if her conclusion was based on events outside of her investigation, and she admitted that other employees *were not* remarking that Ruiz was always crying seniority, Binegar revealed her bias by uttering that Ruiz "was a very outspoken employee." Tr. 298. The Court noted that description was not a compliment and Binegar then admitted that it was, indeed, not expressed as a compliment. *Id.* In fact, then Binegar admitted that the characterization of Ruiz always crying was *her* description. *Id.* Further displaying her predisposition and animus towards Ruiz, she added, "He was very vocal. If there's anything, he would go right to the union steward." Tr. 299. However, despite her claim that he would go to the union steward for "anything," she was unable to "recall specifics right now." *Id.* She then added that such prior issues sometimes ended up in her office. Of this she was clearly not happy that Ruiz brought up issues. Further, the merits of these matters didn't seem to concern Binegar, as she conceded that there were "probably" times when Ruiz was right about a dispute. *Id.*

Regarding Ralph Holmes' second interview on December 22nd, Binegar expressed that Holmes was bothered by the whole line-out event. Hunnicutt, Holmes' boss, was per usual, present again. Binegar admitted that she let Holmes just speak but did not interview him. Tr. 300. Binegar conceded that her notes of Holmes' remarks reflect that the disturbance or contentious

atmosphere was attributable to *both* Hunnicutt and Ruiz. Tr. 301. Binegar also conceded that the investigation interviews reflected that the crew felt Ruiz “was a good operator, I don't think they have a problem with him. They know he's vocal.” *Id.* Here, contrary to the implication of Binegar’s testimony about her view of Ruiz’s penchant for speaking up, the Court would note that being vocal is not inherently a flaw. In matters of safety, it is an attribute.

Turning to her notes of her questions for members of the crew, Binegar agreed that, per her notes for Ralph Bearup, they reflect that “Doc [Hunnicutt] gave his safety meeting and work assignments. MR [Ruiz] refused job. Responded ‘not going to do it.’ *Not safe.* Doc said come to office. MR responded you keep doing this.” Tr. 302 (emphasis added). Binegar agreed that Bearup mentioned Ruiz’s safety concern at the outset. Tr. 303. Asked if she relayed Bearup’s comments to Clark, Binegar couldn’t “remember specifically.” *Id.* Binegar stated that she gave Clark a summary of her notes. She then stated that it would not surprise her if Clark stated that he read transcripts¹⁸ of her interview. Tr. 303. That meant, Binegar conceded, that Clark would have seen her notes, not just her summary. Further, she stated there were no actual transcripts, only her notes. *Id.* Accordingly, Binegar agreed that if Clark did read her notes, then he would have been aware that Ruiz stated he didn’t feel safe operating the equipment. *Id.* Further, Binegar agreed that if Clark remarked that nobody stated that Ruiz had safety worries about operating the equipment, then he was either lying or he didn’t see the notes. *Id.*

Complainant’s Counsel then moved to Binegar’s first interview of Ralph Holmes. Asked if her notes reflect that Holmes stated, “Manny [Ruiz] was assigned a boom truck, said he's unsure and he thinks it's unsafe *and then* he said seniority, right?” Tr. 304 (emphasis added). Binegar agreed. *Id.* Continuing with Complainant’s Counsel’s review of Binegar’s notes, for Abe Romero, those notes reflect that Ruiz brought up both the issue of seniority and then his safety concerns. Tr. 305. Regarding her notes for Jayro Phillips, Binegar admitted that her notation that Phillips stated that Ruiz “doesn’t like it,” referred to Ruiz not feeling comfortable operating a boom truck. Tr. 306. As to Binegar’s notes about the crew’s comments regarding the line-out meeting, when asked if those notes reflected the specifics about the comments of those crew members, Binegar admitted that she “could have been more extensive.” Tr. 307. The Court would comment that a more apt and forthright response to that question would have been, “no, they do not reflect the specifics about the crew members’ comments.” Yet, that was the purported purpose of her investigation – to get the facts. Further demonstrating that Binegar was anything but objective in her “investigation,” regarding her notes for Justin Vickers, when Vickers was asked “do you feel [Ruiz was] being singled out in any way, Vickers responded, “supervisor quick to write him up,” Binegar admitted she failed to ask any follow-ups about why Hunnicutt was quick to write up Ruiz, offering as her excuse that “[a]t the time I was just investigating the line-out meeting.” Tr. 307. However, she then admitted that Ruiz told her at the outset of his interview with her that it was his assertion that Hunnicutt was targeting him and had it out for him. *Id.* Further, she admitted that she did not follow-up on Ruiz’s assertion. Tr. 308.

It was also Binegar’s suggestion that Ruiz receive some additional seat time in a remote area. Tr. 309-310. Significantly, Counsel for Complainant made the probative observation that

¹⁸ Binegar’s notes were just that, notes, not verbatim records of the questions she asked, nor the answers that were given. Therefore, the term “transcripts” is an inaccurate term as applied to her interviews.

there was “not one place in any of these notes where [Binegar made] any statement that Manny Ruiz at any time in the line-out meeting stood up or was standing.” Tr. 310. Binegar, lamely in the Court’s view, only replied that she “did not ask that question.” *Id.* She asserted that wasn’t an issue to her. Not only that, Binegar agreed that nobody stated that Ruiz stood up or was standing either. *Id.* As to the claim that Ruiz said this was going to get ugly, the Court inquired if there was any reference to that assertion in Binegar’s notes, per Exhibit R27. Binegar conceded the remark was not present either. Tr. 311-12.

Binegar agreed with Counsel for Complainant’s summary of witnesses in her “investigation” that, having just testified about “the interviews [] with Abe Romero, Ralph Bearup, Ralph Holmes, Jayro Phillips and Dustin Vickers, five employees[,] [i]n [her] interviews with them, they all mentioned something about Manny Ruiz saying that he was not comfortable or didn’t feel safe operating that equipment.” Binegar affirmed that the summary was accurate, responding, “Correct.” Tr. 312-13. Asked if she reported that to Mr. Clark, Binegar again responded, feebly, “I don’t recall specifically.” Tr. 313.

Testimony of Samuel Clark

Samuel Clark is the superintendent of the hydromet and tailings at the Pinto Valley Mine. Tr. 318. He described the road construction maintenance and the tailings dam maintenance, as being,

generally considered under tailings. There's a lot of work that the road crew does that does end up around tailings as well as either on the dam crest, the reclaim area, as well as the catchments below the face of the dam. . . . [together] [t]here are 52 budgeted employees . . . [o]f the 52, 8 of those are on salary and 44 are hourly.

Tr. 321.

Hunnicut and Pearson are within his chain of command with Pearson, the senior supervisor, reporting directly to him and Hunnicutt reporting to Pearson. Tr. 321-22. Clark stated that when he first learned of Ruiz, it “was related to a disciplinary action back in November of 2014, but at the time [he, Clark] wasn't directly over tailings.” Tr. 323. However, apart from wedging in a negative remark about Ruiz at the start, Clark admitted he “really didn't have anything to do with [that] discussion at the time,” adding that, *from what he heard*, Ruiz’s behavior wasn’t the best. Tr. 323. The Court notes that, apart from his opening negative comments about Ruiz, the more significant observation regarding that vignette was Clark’s admission that the disciplinary matter he cited was dismissed. *Id.*

Regarding the events of December 10, 2015, Clark recounted the stories, told to him by others, that Pearson was overseeing the line-out that day. Hunnicutt had the day off. Pearson told Clark that “as they were going through the line-out that the lead man had asked [Ruiz] to operate a boom truck for pulling one of our wells to do some rehab on it and that [Ruiz] had indicated he didn't feel comfortable doing it.” Tr. 324. Clark learned of this because, allegedly, it prevented that job from being done. Tr. 325. The job was done the following week. Tr. 326. In any event,

Clark believed that Ruiz was uncomfortable because he hadn't operated a boom truck since his NCCCO training. Following that, Clark and Pearson went to Rose Dibona, the mine's training coordinator, to arrange some training for Ruiz. Arrangements were made to have Ronnie Gray provide some refresher training for Ruiz on his next scheduled work day. *Id.*

Clark stated that NCCCO training is not a legal requirement for persons to operate a boom truck, as long as they had a 5023. However, Clark's understanding was incorrect in that the mine's "internal procedure" required NCCCO training for any crane, including a swing cab or boom truck. Tr. 326. Prior to December 10th, Clark knew of those employees who had the certification to use that equipment. Tr. 327. Training then occurred on December 14th. Clark related that he learned that Ruiz "had refused to operate the swing cab and get refreshed on the swing cab." *Id.* Clark was troubled by the refusal, adding that he wanted to learn why Ruiz "had refused the training and if anyone else had refused the training or what might have occurred at the time." *Id.* The trainer, Ronnie Gray, subsequently provided a statement about the issue. Discussions then ensued with Clark, Pearson and Hunnicutt, as they "wanted to make sure that while [Ruiz's] training was fresh on the cranes that he be provided with some opportunity to have seat time as he had indicated that he lacked [that]," as they did not want much time to elapse between the refresher training and seat time. Tr. 328.

Clark then stated that there was no discussion for potential discipline against Ruiz for refusing to operate the equipment, advising, "[w]e don't discipline for safety." Tr. 329 (emphasis added). Clark reiterated that view, stating that he thanked Binegar and Pearson for addressing Ruiz's safety concerns "because we do want to make sure that people who have safety concerns that we provide them opportunities to overcome them or address them in some way." Tr. 336. However, Clark continued with the theme that Binegar and Pearson, neither of whom, it will be recalled, was present at the line-out meeting, described Ruiz's behavior in a manner that Clark concluded "appeared to be insubordinate and belligerent." *Id.*

Clark noted that the refresher training set for December 15th would include rigging training. As for seat time, Clark identified that they,

had a job on the leach stumps that needed to be done. It was a very simple job lifting a six-inch pipe. We needed to fuse it back together, supporting some fusing of the pipe. It's a fairly remote location, no traffic to speak of, and it would be a simple job that would be good to have Mr. Ruiz perform.

Tr. 330.

Clark could not recall who came up with the idea. Tr. 331. Thus, the Court would note that Respondent knew exactly the nature and details of the job that they planned to assign to Ruiz, yet Hunnicutt chose, artfully in the Court's view, to not provide Ruiz that information.

Clark stated that Hunnicutt sent him a text about the line-out meeting at about 6:30 a.m. on the morning of the 16th. The text, Clark described, "[s]imply indicated that Manny [Ruiz] had refused the job." Tr. 332. Clark responded that Hunnicutt and Binegar should talk with him and

that they would consider sending Ruiz home for the day.¹⁹ *Id.* Clark added that *the tone* of Hunnicutt's text was that Ruiz's concern was not safety related. Tr. 334. Thereafter, that same day, Clark spoke with Binegar and Pearson who told him that Ruiz's claim was that he didn't want to operate the cranes because he had seniority over others who were trained. Tr. 334. Binegar and Pearson then reiterated to Clark that seniority was Ruiz's "first concern." Tr. 335. However, Clark then admitted that Ruiz did in fact raise safety concerns in the meeting and Pearson inquired what it would take to make Ruiz comfortable operating the equipment. *Id.* Both Binegar and Pearson told Clark that Ruiz wanted "more seat time." *Id.* A moving target, in terms of Binegar's and Pearson's shifting story of the events, they told Clark that at the line-out meeting, Ruiz did not raise any safety concerns. Of course, it should not be forgotten that neither Binegar nor Clark was present at the line-out meeting.

Interestingly, Clark admitted that, were it not for the claim of insubordination, the Respondent "would have provided more seat time," thereby acknowledging that Ruiz's safety concerns were valid. Tr. 341. In making his decision, Clark reviewed Binegar's notes of her investigation, although he added that he reviewed, "[p]robably half of them, give or take." Tr. 343. With that odd review practice, Respondent's counsel suggested that he was just skimming the notes, a characterization Clark agreed with. *Id.* Clark's conclusion was that Ruiz had displayed a "pattern of insubordination." Tr. 345. He filled in that description, stating,

[f]irst with the swing cab training, which granted at the time was -- I had asked for some investigation on, *but it wasn't something that I would have terminated someone over regardless of the outcome.* Come the morning of the 16th, he had two actions that were directly insubordinate. One in refusing the job on the grounds of seniority, which are not (sic) a sufficient basis according to our contract or our expired contract, and then his refusal to leave the line-out meeting.

Tr. 345 (emphasis added).

Clark considered those two offenses as equally significant. *Id.* Immediately contradicting himself, he then stated that claiming seniority does *not* constitute insubordination. *Id.* Left then, by his own testimony, with a single basis for the alleged insubordination, in capsulizing his conclusion that firing was the appropriate action, Clark stated, "Quite frankly, I've never known someone to be as blatantly insubordinate to their direct supervisor as [Ruiz] was to [Hunnicutt] that morning. [Hunnicutt] gave him an opportunity after he refused the job to actually speak with him in private, and he refused that as well." Tr. 348-49. The Court finds that Clark's description of the "opportunity" that Hunnicutt offered to Ruiz is a gross mischaracterization. Clark added that Ruiz "demonstrated every indication that he flat out was not going to do the job, and he didn't care what his supervisor had to say about it." Tr. 349. Clark maintained that Hunnicutt was *entirely neutral* on the issue of Ruiz being terminated, a claim that the Court completely rejects, as the credible testimony clearly shows otherwise.

¹⁹ Clark also stated that he was approached that morning by Robert Jordan, a "safety specialist" at the mine. Jordan allegedly told Clark that Ruiz "had told him that he [i.e. Ruiz] was concerned that the company was going to be in big trouble because he thought he was going to get fired for raising a safety concern." Tr. 333.

Ruiz's termination letter was drafted with the assistance of legal counsel, but both Clark and Binegar had input into that letter, since Binegar's "investigation" notes had been provided to counsel. The mine's legal counsel suggested that the mine assert three independent grounds for insubordination but Clark rejected that, feeling that the swing cab training was not a valid basis to assert. Tr. 351.

During cross-examination Clark backed away from his earlier responses, expressing that Ruiz's actions regarding the December 14th swing cab training was "*potentially* insubordinate" and "*mildly* insubordinate," but *not* a basis to fire Ruiz. Tr. 352 (emphasis added). Asked if he had information from Ruiz about why he refused to participate in the training, Clark answered that he had Binegar's notes and from those it was clear that Ruiz "indicated that the swing cab scared him." Tr. 354. Thus, Clark, who earlier stated that safety issues are not a basis for insubordination, knew of Ruiz's safety-related fears. Further, Clark did not know how involved the swing cab training was and he conceded that Ruiz did not refuse to participate in it, nor did he refuse to participate in the training the next day. *Id.* In fact, Clark admitted that he knew that Ruiz was objecting because of safety, not seniority. *Id.*

Turning to the grounds for insubordination that Clark did rely upon, he agreed that one was Ruiz's refusal to accept the boom truck assignment. Tr. 355. The basis for Clark's determination that the refusal was insubordinate was that Ruiz "did not have valid grounds to refuse the task." However, that created a testimonial quandary for Clark, because his conclusion rested upon his finding that Ruiz's refusal was based on seniority. *Id.* Asked if he had any information that Ruiz had other grounds for not accepting the assignment, Clark answered, "[n]one that I saw or was told of." *Id.* Inconsistently, Clark then admitted that he knew less than a week earlier of Ruiz's safety concerns about operating a boom truck. Tr. 355-56. Trying to thread the needle, Clark maintained that Ruiz did not bring up the same safety concern again on the 16th. *Id.*

Inconsistently with his own testimony, Clark concurred with the characterization that Ruiz was simply using seniority to get out of running the boom truck. Tr. 357. Asked if he ever sat down with Ruiz to hear his concerns, Clark responded that he did not participate in the "investigation," nor did he know if Hunnicutt sat down with Ruiz to talk about his concerns. Tr. 358. Clark revealed that when he told Hunnicutt that they needed to assign Ruiz the job of operating the boom truck and crane, Hunnicutt "indicated the he flat out didn't think [Ruiz] would accept the job." Tr. 359. Thus, before the assignment was made, Clark and Hunnicutt decided to assign the job to Ruiz ostensibly so that he could get seat time. *Id.* Asked if there would be any reason that Hunnicutt could forget that he and Clark had that meeting and developed the plan to assign the boom truck to Ruiz, and that Hunnicutt's version, claiming that he, Hunnicutt, just decided to assign the job to Ruiz, was incorrect, Clark answered, "[p]ossibly, yes." Tr. 360. Therefore, Clark agreed that in advance he and Hunnicutt created a plan that they would be assigning the boom truck job to Ruiz. To be clear, the Court finds that Hunnicutt's version, contradicted by Clark, was false. The details of the job they planned to assign Ruiz, a job which was, in Clark's estimation, a "simple job," were never provided to Ruiz. As Hunnicutt and Clark knew of the simplicity of the job assignment, they could have easily informed Ruiz of this at the time. Though only Clark and Hunnicutt knew of the claimed simple nature of the boom truck assignment, Clark, seeing things differently, believed that the onus was on Ruiz and

that he would have learned of its simple nature if Ruiz “actually had gone into the supervisor's office for that discussion that he refused to do.” *Id.*

As to the other claimed act of insubordination, Clark conceded that Hunnicutt *had an opportunity to inform Ruiz that the job was an easy one.* Tr. 362. This is consistent with the Court’s earlier observation. Importantly, as to whether the line-out confrontation occurred as Clark described it, his understanding was based on his discussions with Hunnicutt, Binegar and Pearson. Of course, only Hunnicutt’s account was firsthand, as Binegar and Pearson were never in that meeting.

Clark then admitted that he first learned of the dispute during the line-out meeting with Ruiz from Hunnicutt, not Binegar. Tr. 363. Thus, the version Clark bought into from the start was Hunnicutt’s retelling of the event. Oddly, Clark asserted that Hunnicutt’s version was “substantiated in notes that [he] read from [Binegar’s] interviews.” Tr. 364. When confronted that Binegar’s notes make no mention of Ruiz standing up at the meeting with Hunnicutt, Clark admitted that would surprise him as his recollection was different. Tr. 365. He then admitted that, since it was not mentioned in Binegar’s notes, *the story had to have come from Hunnicutt alone.* *Id.* The same was true for the claim that Ruiz allegedly said “[t]his is going to get ugly.” That is, those words also do not appear in Binegar’s notes, *and Clark then conceded the source was, again, Hunnicutt.* *Id.* When Ruiz responded at the meeting to Hunnicutt that they were not in high school, a remark that Clark stated he was aware of being made, he could not recall what Hunnicutt’s response was to that. Tr. 366. Thus, Clark *could not recall* if Hunnicutt responded to Ruiz by answering ‘okay’ or ‘we’ll talk about it later,’ or anything else. Tr. 365.

In summarizing his review of the line-out meeting, Clark maintained that *at no time* did Binegar tell him “that multiple employees had mentioned that in the line-out meeting Manny Ruiz had said he felt that it was unsafe for him to operate the boom truck.”²⁰ Tr. 367. Significantly, when asked if he had known about those fears held by Ruiz, if that would have changed his decision to terminate him, Clark avoided a direct answer, stating he’d “have to see what -- if there was that information, [he’d] have to review it, of course.” Tr. 368. Pressed further, when asked if Ruiz,

had in the meeting behaved -- let's assume he behaved as you thought he had behaved and he had incorrectly raised seniority and that issue was dismissed but then he had explained that I don't feel safe operating this equipment as I've told you guys before, would that have impacted your decision to terminate his employment,

Tr. 368.

²⁰ Clark’s memory let him down on this: As noted above, when asked, “And at any time did [Binegar] tell you that multiple employees had mentioned that in the line-out meeting Manny Ruiz had said he felt that it was unsafe for him to operate the boom truck, Clark answered, “[n]o. ... [n]ot that I recall.” Tr. 367. He gave the same response of “[n]o, I don’t recall that” when asked if Binegar informed Clark that Ruiz had concerns about operating the boom truck and that he felt uncomfortable about it. Nor could he recall if her notes made any mention of those fears and concerns held by Ruiz. *Id.*

Clark then answered without equivocation, “Yes, . . . [because] it’s not [his] practice to terminate someone for raising safety concerns.” *Id.* Further, Clark admitted that the first person he spoke with was Bob Jordan and that Jordan told him of Ruiz’s safety concerns and accordingly Clark conceded that he had “multiple interactions in the days *leading up to the line-out meeting* and then shortly after the line-out meeting where [he, Clark] knew [Ruiz] had some safety concerns.” Tr. 369.

Discrimination Claims under the Mine Act

This discrimination complaint is brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

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

30 U.S.C. § 815(c).

In this instance the Secretary decided not to bring Ruiz’s complaint of discrimination on his behalf. In such circumstances, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, “the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination.” 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco*, “[t]he Mine Act, the Administrative Procedure Act (‘APA’), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation.” *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing “(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *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 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an “alleged danger or safety or health violation. 30 USC § 815(c)(1). However, the Commission and the courts have recognized that other activity, including a miner’s refusal to work in conditions that he or she reasonably believes to be hazardous, is also protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein. Often, the Court

will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action.²¹

An adverse action is any “act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial.²² In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If and when a complainant has established the required elements, the burden shifts to the operator to rebut the prima facie case by showing “either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative “mixed motive” defense by proving that the adverse action was motivated only in part by protected activity, and it “would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, see also *Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether “the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a “limited examination” of the justification’s substantiality, and assesses the narrow question of

²¹ The Commission has stated that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: “(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.” *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

²² *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 428 F.3d 1211, 1219 (D.C. Cir. 2006)) (“[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which [in the context of Title VII retaliation claims] means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”). Although discrimination may be subtle, it “does not mean any action which an employee does not like.” *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981).

“whether the reason was enough to have legitimately moved that operator” to engage in the adverse action.” *Id.* at 2516-17. At no point in this analysis is the Court sitting in judgment of the merits or demerits of the operator’s business decisions.

Discussion

Respondent contends that “[i]n this instance, Ruiz’s conduct at the December 16, 2015 line-out meeting was unprotected under applicable Commission precedent, and even if some of his conduct was protected, the Company has established that it terminated his employment for engaging in unprotected activity that it reasonably deemed to be insubordinate.” R’s Br. at 14. The Court has found otherwise. It rejects Pinto Valley’s claim that Ruiz’s employment was terminated for engaging in unprotected activity that it reasonably deemed to be insubordinate.

The Respondent notes that Ruiz initially refused an assignment to operate a crane on December 10, 2015, despite having volunteered for and received two weeks of training at the Company’s expense that resulted in his being NCCCO-certified to operate that piece of equipment. R’s Br. at 14. It is unfortunate that the training didn’t work out for both Pinto and Ruiz, but there is no suggestion that Ruiz entered the training with an intent to defraud Pinto. Instead, Ruiz’s fears and his articulated bases in support of his view that the training was inadequate caused him to speak up, lest a serious mishap occur. Especially with regard to the latter basis, a problem made worse by the long period between Ruiz’s NCCCO certification, and the demand that he run the crane, and the lack of seat time, those factors reasonably led him to voice that he felt incompetent to operate the cranes.

If one were to accept Respondent’s rationale, Ruiz, knowing that he was unskilled and afraid to operate the crane, still would have been required to accept the assigned task. If, as he feared would happen, an accident then occurred, with damage to the equipment, other miners or himself, Ruiz would have been responsible for the event. Holding a certificate is not the equivalent of genuine competency to operate the equipment the certificate relates to, where an employee is aware of his fear and lack of competency. Respondent’s citation to an OSHA press release is misplaced because it merely states that it will recognize NCCCO documentation as demonstrating that a certified operator meets OSHA’s requirements for crane operator proficiency; the piece of paper cannot outweigh the evidence that a certified person is not sufficiently skilled and consequently afraid to run a crane. Even the cited press release makes clear that it is the underlying ability, not the piece of paper that controls, “The ability of crane operators to safely operate mobile cranes plays a significant role in overall safety on most construction sites,” said OSHA Administrator John Henshaw. Therefore, it is very important that these crane operators are well trained.” R’s Br. at 15, quoting from the OSHA press release. Ruiz, it will be recalled, credibly testified both that the training was insufficient and that he was not confident he could safely operate the equipment.

The Respondent’s brief seems to acknowledge that it is proficiency, not paper, that controls, citing “the Company’s sensitivity to Ruiz’s safety concerns and its overall ‘commitment to . . . safety.’” *Id.* at 16, citing again to the OSHA press release. Respondent then effectively concedes that Ruiz’s concerns were valid and not motivated by an excuse to avoid a particular job, noting that it “initially assigned Ruiz another task, and then . . . ‘address[ed] the perceived danger in a manner that reasonably should have resolved the miner[’s] fears’” by sending Ruiz (and three other NCCCO certified crane operators) to refresher training. *Id.* Thus, it

cannot be disputed that at least up through the time that the Respondent mine determined that refresher training was needed, Ruiz was not fit to run that equipment.

Respondent also points to *Secretary of Labor ex rel. Bush v. Union Carbide Corp.*, 5 F.M.S.H.R.C. 993 (1983), wherein the Commission held that where a miner's work refusal was not objectively reasonable, it was unprotected. R's Br. at 17. But here, the case is inapplicable, as Ruiz's work refusal has been found by this Court to have been objectively reasonable. As just noted, the Respondent's own actions support this finding.

The Respondent further asserts that, "In an observation that has equal application to Ruiz's case, the Commission stated: 'Where . . . the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act.' *Bush*, 5 F.M.S.H.R.C. at 998." R's Br. at 18. The problem with this claimed analogy is that the situations are dissimilar, as the facts do not support the premise. To the contrary, the Respondent had taken some corrective measure by scheduling the refresher training, upon Ruiz's reasonable objection when assigned crane work after a significant dormancy, some two years after his initial NCCCO training. But "corrective measures" require that there has been a correction. Here, the one day event that Ruiz and others took could not shake off for him the great interval between the initial training and the decision to force Ruiz to operate that equipment. Here again, the Respondent acknowledged this – in the meeting following Ruiz's balking at the assignment during the line-out dispute, it was decided that Ruiz indeed needed, as he requested, more seat time to reach a point of competency and confidence so that he could run that equipment without creating a serious safety risk. That the Respondent subsequently tried to recast the conclusion reached at that meeting – that they would indeed provide Ruiz with the additional training so that he could do the job safely – is rejected. In effect, the Respondent reversed itself, at what the Court concludes was Hunnicutt's instigation, thereafter deciding that it would rewrite the meeting's conclusion to provide needed seat time, refashioning it as tentative and not final.

The Court notes that the Respondent's brief shifts back and forth between its claims that Ruiz unreasonably refused to operate the crane and its claim that he was insubordinate in the line-out meeting. It is noteworthy that less than a week elapsed between the crane events. As Respondent admits, on December 10th, 2015, when he refused to operate the boom truck, it neither compelled him to do so, nor did it discipline him. Instead, as just observed, the Respondent, admitting the validity of Ruiz's safety worries, arranged for refresher training four days later, on December 14th. When Ruiz was again assigned to operate the crane two days after the refresher training, the circumstances of that assignment had the odor of a set-up. The plan was set in motion before that meeting and the Court, considering the testimony as a whole, and its determination that Hunnicutt's credibility was low, did not conclude that it was mere happenstance for Ruiz to have been the last miner assigned a job that day.

From Respondent's view, with Ruiz having received the refresher training, he was estopped from asserting to Hunnicutt that he didn't "feel comfortable for the safety of [himself] and others running that equipment." R's Br. at 18, quoting Tr. 79-80. Accordingly, Respondent claims that the refresher training made Ruiz's repeated work refusal unprotected. R's Br. at 19. However, as stated above, the Court has already addressed this argument in two ways. A piece of paper, whether derived from the initial NCCCO training or through a refresher session, does not necessarily imbue a trainee with actual competency. Second, related to this observation, is the

Respondent's recognition of this truth. After all, at the meeting post the line-out event, it was decided to give Ruiz more training, this time in a practical setting, described as seat time. It can be stated that had the Respondent actually believed that Ruiz was competent to operate the equipment it would not have then acceded to additional, allegedly unnecessary, training.

Respondent also cites to *Braithwaite v. Tri-Star Mining*,²³ 15 F.M.S.H.R.C. 2460 (1993) and *National Cement Co. v. FMSHRC*,²⁴ 27 F.3d 526 (11th Cir. 1994) ("*National Cement*") in support of its position. Quoting from the statement in *National Cement*, that "If the work refusal is not objectively reasonable, there is no protected activity," Respondent further notes that decision held that,

[t]he employee's activity was not protected under this standard, . . . because the record indicated that the employee "had adequate experience with the bobcat to safely perform the activity" as originally assigned, and even if that had not been the case, his supervisor's suggestion that he use the wheelbarrow rather than the bobcat "was a reasonably safe alternative."

R's Br. at 21, citing *National* at 533.

Respondent argues that the analysis in *National* is "*directly applicable*." *Id.* It is not. The record fully supports the finding that Ruiz did not have adequate experience to operate either crane safely, nor was Ruiz offered any of the other equipment operator tasks which he was both competent and unafraid to perform. In effect, the Respondent admits this by turning to the refresher training to demonstrate that, after that short training, he suddenly became competent and safe to run the crane. The Respondent's assertion that "[a]t no point did Ruiz assert that the training he received was deficient, or that the boom truck he was assigned to operate was defective or unsafe," is a half-truth, because, as set forth above, Ruiz *did* assert that the training, including the refresher session, was inadequate. R's Br. at 22. Adding the makeweight remark that Ruiz never asserted that the *equipment* was defective or unsafe is a distraction because Ruiz's claim has always been that *he* was unsafe and deficient to operate the equipment. Again,

²³ As the Respondent concedes, "The claimant in *Braithwaite* did not specifically reference safety as the reason for his discomfort in operating the larger truck, nor did he request additional training on the truck." R's Br. at 20, n. 8. However, Respondent then contends that Ruiz acted in a similar fashion. In making that claim of similarity, Respondent shifts from Braithwaite's *failure to reference safety* to Ruiz's *failure to request additional training*, as if the two failures are interchangeable and equivalent. They are not, and Ruiz did repeatedly raise his safety worries, as discussed above. Not helpful to the Respondent's position, again citing *Braithwaite*, is its acknowledgement that "the employee still refused to perform [the job] [with the consequence that] the employer disqualified the employee from his job, although the employee was permitted to exercise his seniority to 'bump' another worker and remain employed in a lower grade position." *Id.* Respondent had ample other qualified employees to run its cranes but, exercising exceedingly poor judgment, through Hunnicutt, it opted for an unnecessary approach that was antithetical to safety.

²⁴ In the Court's view the *National Cement* decision is so dissimilar that it does not advance Respondent's contentions at all.

the Respondent conceded his incompetency to operate the crane by putting Ruiz through refresher training and his continued insufficiency to run such equipment by agreeing, post the line-out meeting, to provide additional seat time. As also noted earlier, Respondent's motives were displayed by the coy approach taken by Hunnicutt, who made Ruiz's assignment to run the boom truck the last assignment at the line-out meeting and by not informing Ruiz when the assignment was made that the task would be a simple one. Had Hunnicutt actually been motivated to give Ruiz the supposedly easy boom truck job, he would have informed Ruiz contemporaneously with the assignment of the nature of the task. Worse, since Clark maintained that safety came first, Hunnicutt would have been quick to provide Ruiz with the controlled conditions they claimed would accompany the assignment and not kept Ruiz in the dark about such details.²⁵

Finally, turning to Respondent's alternative claim that it was actually Ruiz's alleged insubordinate behavior that justified his firing, the Respondent looks to cases which conclude that insubordination is a legitimate basis for firing an employee. R's Br. at 22-23. However, no one disputes that can be a basis for termination, but to state the obvious, it must be determined that insubordination occurred. If the occurrence of insubordination is accepted for the sake of argument, it cannot be invoked where it is a mere pretext for the mine's actual motivation. Respondent asserts that it "terminated Ruiz's employment due to his additional unprotected statements and insubordinate conduct at the December 16, 2015 line-out meeting, including his refusal to leave the meeting when Hunnicutt instructed him to do so." R's Br. at 24. However, Respondent's basis for its claim of insubordination rests upon Binegar's investigation and Clark's conclusions, both of which, as discussed earlier, are seriously wanting. Respondent asserts that it "presented plausible evidence to support its conclusion that Ruiz was insubordinate, and has established that it was this conclusion – and not any discriminatory motive – that led Clark to terminate Ruiz's employment. This is all that is required in order for the Company to avoid liability under the Mine Act." R's Br. at 25.

Presenting "plausible evidence" is not the test. It is the Court that must determine what occurred at the line-out. That determination boils down to an assessment as to whose version of events was more credible. At the end of the day, the line-out meeting came down to Ruiz's accounting of the events and that of Hunnicutt. That determination was not difficult for the Court to reach; Ruiz was by far more credible than Hunnicutt. In fact, the Court was so struck by the lack of credibility with Hunnicutt's version that it so advised the parties at the conclusion of the hearing of that conclusion, in the hope that, aware of that determination, the parties would then settle the matter. The Court would also note that no amount of post-hearing briefing could overturn the Court's credibility determination, as that was made after hearing from Ruiz and Hunnicutt principally, but also upon the conclusion that neither Binegar nor Clark advanced Respondent's version of the events, in the wake of the line-out meeting incident.

²⁵ The Court's reference to Respondent's claims that Ruiz's assignment would be an easy one with assistance provided to ensure that it could be safely performed, should not be taken to infer that the Court buys into as a fact that those safeguards were actually part of the assignment. No legitimate finding of fact can be made about the mine's claim in that regard. All that is truly known is that Ruiz was never informed of the claimed protections.

In contrast, Counsel for the Complainant contends that the reasons for Ruiz's discharge were mere pretext. C's Br. at 1. In making that argument, Complainant notes that the termination letter cites two violations that were directly related to Mr. Ruiz's safety complaints, a refusal to participate in swing cab crane training and refusal to operate a boom truck, while the third reason advanced was the allegation concerning the line-out meeting. As to the crane operation, the Court agrees with Complainant's Counsel's statement that the training Ruiz received occurred in August 2013 and did not involve moving the trucks/cranes from one location to another, or performing lifts with the equipment. Thereafter, Ruiz was not asked to run a crane until the end of 2015, which was more than two years after the initial training. C's Br. at 3-4. Further, the refresher training on December 14, 2016, whether for the boom truck or the 120-ton crane, did not involve any lifts or driving the vehicles, but only involved setting the outriggers and moving the boom. C's Br. at 5.²⁶ Binegar's own "investigation" notes reveal that other employees, including Ralph Bearup, Jayro Phillips, and Dustin Vickers mentioned Mr. Ruiz's discomfort and/or safety concerns. C's Br. at 9. The record also shows that Clark certainly knew about Ruiz's safety concerns regarding the cranes. C's Br. at 10.

The Court therefore agrees that the only basis remaining for the Respondent is the insubordination claim. As Complainant's Counsel notes, "[a]fter the HR meeting on the morning of December 16, 2015, Ms. Binegar was not aware of any reason that would justify an investigation or suspension of Mr. Ruiz, which materialized only after Mr. Clark spoke with Mr. Hunnicutt, causing Mr. Clark to be 'spun up.'" C's Br. at 8. As to the evidence regarding whether Ruiz actually was insubordinate, a claim based on his alleged refusal to leave the meeting, and for allegedly saying to other employees "watch what is going to happen, this is going to get ugly," Ruiz denied that the events occurred as Hunnicutt claimed and no other witness recalled Ruiz having made that comment. C's Br. at 11. Ruiz's behavior was not even a topic of discussion at the HR meeting, nor was he even asked about it when interviewed by Ms. Binegar as part of her investigation. C's Br. at 15. A further problem for the Respondent, Clark based his conclusion that Mr. Ruiz's refusal to operate the boom truck was insubordinate on his belief that Ruiz had only objected to that assignment based on seniority, not safety. C's Br. at 12.

As Counsel for Complainant observed regarding the affirmative defense that Ruiz was fired for its claimed insubordination, the Commission has stated,

[T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982); C's Br. at 15-16.

²⁶ The Court notes that Respondent did not rebut this description of the training, as it presumably could have by presenting testimony from Ronnie Gray.

The Court has concluded that Ruiz's version is the credible accounting of the events at the line-out meeting and that Hunnicutt's telling was not credible.

CONCLUSION AND ORDER

To recap some of the findings by the Court, as discussed in detail above, following Ruiz's original training in August 2013 he was not ever asked to run a crane until more than two years and three months later, in December 2015. Ruiz's recounting of the inadequacy both of the original training and the one day refresher training was not rebutted by any witness. Based on the credibility determinations this Court has made, Ruiz established that Hunnicutt had an animus towards unions generally and to Ruiz as well. While Ruiz did balk at running the boom truck and crane, both objections were based upon his legitimate safety concerns, which concerns were acknowledged by the management for the Respondent. Besides these instances, Ruiz had *never* refused a work assignment, a fact which was also unrebutted by the Respondent. The Court finds that the order of Ruiz's objections at the line-out meeting was first safety, and then pointing out that others were comfortable operating a boom truck and only then, last, did he raise a seniority claim. The Court finds that Ruiz never stood up when questioning the assignment during the line-out meeting, nor did he state at that meeting words such as "watch what is going to happen. This is going to get ugly."

Demonstrating that the Respondent knew that there was a legitimate safety worry advanced by Ruiz, at the meeting which followed Hunnicutt's assignment at the line-out for Ruiz to operate the boom truck, Pearson voiced that they would give Ruiz more time and put him in a location where he couldn't hurt anyone and that they would add a qualified person to help and watch over him. It is noteworthy and instructive that Ruiz advised he was good with that arrangement. The December 16th, post line-out meeting ended with a verbal agreement that Respondent would provide Ruiz with the additional seat time and the matter was resolved. Only after that resolution did Hunnicutt, after sending Ruiz to operate a dozer in the fine ore, return to the meeting location, and then spoke with Clark, fanning anew the matter which had been resolved. It is also informative that when Ruiz was informed by Binegar that he was suspended, and Ruiz responded that he was at least entitled know the reason for the suspension, Binegar answered that it was for refusing to run the boom truck, not for alleged insubordination. The Court rejects Hunnicutt's claim that merely invoking seniority constitutes insubordination.

Ms. Binegar did not advance Respondent's defense either. She was given a private preview by Hunnicutt of his claim that Ruiz had been disruptive at the line-out meeting, but when the meeting actually occurred, *and Ruiz was then present*, the disruptive claim was not repeated before Binegar; only safety and the effect of seniority were discussed and the meeting ended, as Binegar admitted, on a "pretty positive note." In fact Binegar admitted that when the meeting ended on December 16th she thought a resolution had been reached. She also agreed that she had no reason to think that there would be any subsequent investigation. This new twist only occurred after Clark had spoken with Hunnicutt, following which, as she put it, Clark was "spun up" about something. Tr. 285. Clark did not attend that meeting, but he expressed his frustration and unhappiness to Binegar over the feedback he received about Ruiz disturbing the line-out meeting. That "feedback" came from Hunnicutt.

As made clear above, Binegar's "investigation" was anything but objective or fair-minded. The determination about Ruiz's fate was effectively made before the "investigation" proceeded; a sentence followed by the trial, as it were. Symbolic and instructive about her "investigation," Binegar admitted that management was vague about the reasons for Ruiz's suspension. Tr. 264. Although she claimed that the vagueness was justified because they were looking at several things at the time, and didn't feel at liberty to tell him exactly what those things were, such an approach was hardly consistent with a fair inquiry. *Id.* As this decision notes above, Binegar's claim that they wanted "more information" about the line-out meeting was simply an effort to find reasons to terminate Ruiz. The course of Binegar's "investigation" demonstrates its patent lack of objectivity. Binegar's notes, she admitted, were not an attempt to fully and accurately record the remarks of the crew members. Rather, the notes reflected only what she chose to record, with no standard expressed by her as to what was to be recorded.

Further underscoring the lack of objectivity, Hunnicutt, the crew members' boss, was present for each interview, a non-subtle impediment to full disclosure by the crew. Thus, the shortcomings in Binegar's investigation were numerous. Another prime example of the investigation's lack of objectivity is that Binegar never interviewed Hunnicutt. This serious deficiency existed even though she conceded at the hearing that the tense atmosphere at the line-out meeting was attributable to "probably both" Hunnicutt and Ruiz. The Court will not review each deficiency with the investigation, as they are recounted above. However, even as to a fundamental claim in her "investigation," that Ruiz was alleged to have uttered, "watch what is going to happen, this is going to get ugly," Binegar couldn't answer who informed her that remark was made. Advised that her investigations notes don't mention the remark, Binegar could only reply she "heard it somewhere." Nor, she admitted, is there any mention in her investigation notes that Ruiz stood up or was standing.

Though she professed to be neutral about Ruiz, that characterization was belied by her remark that Ruiz was always crying seniority and, clearly implying that it was not a positive quality, she remarked that Ruiz was "a very outspoken employee" and that he would go to the union steward for anything, though the specifics of such matters somehow escaped her.

Binegar, like Hunnicutt, felt that, with Ruiz's training at the mine's expense, he was estopped from objecting to running the cranes, their position admitted despite the acknowledgement that Ruiz needed more seat time and despite the fact that his termination ultimately rested on insubordination. Even Ruiz's termination letter stated that her investigation encompassed Ruiz's "refusal to comply with the instruction to leave the line-out meeting and go to your supervisor's office," evidencing that the refusal to comply was a foregone conclusion, not a fact to be determined. Ex. R 10.

Superintendent Clark's testimony may be quickly capsulized. He discarded any claim that Ruiz's safety issues were suspect, as more training was scheduled, and as he remarked, the mine does not discipline for safety matters, adding that the mine wants to make sure that people who have safety concerns are provided with opportunities to overcome them or to otherwise address them. That left Clark with only a claim of insubordination. According to Clark, Ruiz was guilty of a "pattern of insubordination." That "pattern," consisting of the swing cab training, his alleged refusal based on seniority and his refusal to leave the line-out meeting when Hunnicutt allegedly

told him to do so, quickly disintegrated. Clark himself erased the swing cab basis, advising that wasn't something that he would terminate someone over, *regardless of the outcome*. Then, he tossed the second basis for his “pattern,” advising that a seniority claim does not constitute insubordination. Left with Ruiz’s alleged failure to leave the line-out meeting, Clark could only assert the broad conclusion that he had never before known of an employee to be as “blatantly insubordinate” that morning with Hunnicutt. But upon what basis did Clark form his conclusion that Ruiz so behaved before Hunnicutt that morning? We know it wasn’t from Binegar’s investigatory notes or from any other source except for one – that source being Hunnicutt.

Clark agreed that he and Hunnicutt created a plan in advance to assign the boom truck job to Ruiz. The details of the job they planned to assign Ruiz, which was, in Clark’s estimation, a “simple job,” were never provided to Ruiz. As Hunnicutt and Clark knew of the simplicity of the job assignment, they could have easily so informed Ruiz when it was made. In fact, Clark conceded that Hunnicutt had an opportunity to inform Ruiz that the job was an easy one. As also noted, regarding the question of whether the line-out confrontation occurred as Clark described it, his understanding was based on his discussions with Hunnicutt, Binegar and Pearson, but only one of those three, Hunnicutt, was present at the line-out. Clark admitted that he first learned of the dispute during the line-out meeting with Ruiz from Hunnicutt. Clark also conceded that details, such as whether Ruiz stood up at the line-out and the alleged remark that things were going to get ugly, both came from Hunnicutt, not Binegar. Neither claim was mentioned in Binegar’s “investigatory” notes either.

For all of above stated findings of fact, together with the Court’s associated reasons and analysis, the Court finds that Pinto Valley unlawfully discriminated against the Complainant, Manuel P. Ruiz, for engaging in protected activity and thereby interfering with his statutory rights, in violation of §105(c) of the Act. Further, Pinto utterly failed to establish any affirmative defense.

The Court directs Pinto Valley to permanently reinstate the Complainant to his former position at the mine, together with any back pay and interest due and with all entitled benefits. All references to the termination of Mr. Ruiz, and the reasons asserted therein, are to be removed from his personnel file.

Within 10 days of this Decision, Pinto Valley Mining Corporation shall post this decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Pinto Valley has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also inform all employees of their rights in the event they believe they have been discriminated against.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Pinto Valley Mine is located so that the Secretary may take the actions required by the rule.

Damages

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) (“Local 2274”). When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the administrative law judge may grant “such relief as it deems appropriate.”

Accordingly, the parties are ORDERED TO CONFER within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations, and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

The Court retains jurisdiction of this matter until the specific remedies to which Manuel P. Ruiz is entitled are resolved and finalized, at which time a final decision will be issued. Accordingly, this decision will not become final until an order granting any specific relief and awarding any monetary damages has been entered.

SO ORDERED.

/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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January 30, 2017

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

v.

ASH GROVE CEMENT COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-614-M
A.C. No. 03-00256-388809

Docket No. CENT 2016-249-M
A.C. No. 03-00256-402913

Mine: Foreman Quarry & Plant

DECISION AND ORDER

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

Ryan D. Seelke, Esq., Steelman, Gaunt & Horsefield, Rolla, Missouri, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

These cases are before me upon two petitions for assessment of civil penalties filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue are two citations issued to mine operator Ash Grove Cement Company (“Ash Grove”) under section 104(a) of the Mine Act: Citation Number 8776098 in Docket Number CENT 2015-614-M¹ and Citation Number 8862764 in Docket Number CENT 2016-249-M.

A hearing was held in Texarkana, Texas, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I vacate both citations for the reasons set forth below.

¹ Eight citations were initially at issue in Docket No. CENT 2015-614-M. Prior to hearing, the parties reached a settlement of seven of the citations, which was approved by Order dated July 15, 2016.

II. FACTUAL BACKGROUND

The two citations at issue in this proceeding were written six months apart by two different MSHA inspectors at the Foreman Quarry & Plant, a limestone processing and cement manufacturing facility operated by Ash Grove in Arkansas. Tr. 19, 101, 114, 174. Both citations allege that Ash Grove violated the Secretary's Part 46 training regulations by failing to ensure that independent contractors working at its facility had received new miner training. The specific factual circumstances surrounding each of the alleged violations are set forth in the body of my decision below.

The parties have entered into the following stipulations:

General Stipulations

1. Ash Grove, at all times relevant to these proceedings, engaged in mining activities and operations at Foreman Quarry & Plant in Foreman, Little River County, Arkansas.
2. Ash Grove's mining operations affect interstate commerce.
3. Ash Grove is subject to the jurisdiction of the Mine Act.
4. Ash Grove is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.
6. Leslie Moore and Dwight Shields were at the time the citations were issued authorized representatives of the United States of America's Secretary of Labor, assigned to MSHA, and were acting in their official capacity when issuing the citations at issue in these proceedings.
7. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by Ash Grove.
8. Ash Grove demonstrated good faith in the abatement of the citations.
9. Payment of the penalties will not affect Ash Grove's ability to remain in business.

Stipulations for Citation No. 8776098

10. Lloyd Wright, Carl Hunter, and Michael Johnson, the employees of Prewett Enterprises, Inc., are "employees of independent contractors" as that phrase is used in 30 C.F.R. § 46.2(g)(1)(i). It is not stipulated, however, that Lloyd Wright, Carl Hunter, and/or Michael Johnson engaged in mining operations or were miners under 30 C.F.R. § 46.2(g)(1).

11. Lloyd Wright is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
12. Carl Hunter is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
13. Michael Johnson is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
14. Lloyd Wright did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to “milling” or “crushing.”
15. Lloyd Wright did not engage in the associated haulage of materials within the Foreman Quarry & Plant.
16. Carl Hunter did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to “milling” or “crushing.”
17. Carl Hunter did not engage in the associated haulage of materials within the Foreman Quarry & Plant.
18. Michael Johnson did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to “milling” or “crushing.”
19. Michael Johnson did not engage in the associated haulage of materials within the Foreman Quarry & Plant.
20. Lloyd Wright, Carl Hunter, and Michael Johnson received site specific hazard training from Ash Grove.

Joint Ex. 1; Tr. 5.²

III. LEGAL PRINCIPLES

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

² In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 to S-6 and the Respondent’s exhibits are designated A, B, C, E, F, G, J, K, L, and M. Tr. 5-6, 136.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8776098 (Docket No. CENT 2015-614-M)

Citation Number 8776098 was issued by MSHA Inspector Leslie Moore³ on June 16, 2015 after two hydraulic oil spills occurred at the Foreman Quarry & Plant. Ex. S-2. The initial spill occurred on or about June 10 when a two-inch steel line carrying hydraulic oil ruptured and spilled 40 to 50 gallons of oil onto the concrete pad surrounding the Finish Mill No. 1, which is a machine that grinds limestone into powder as part of the process of transforming it into cement. Tr. 27, 192-93. Ash Grove mechanics repaired the milling equipment immediately and the plant's environmental manager hired independent contractor Prewett Enterprises, Inc. ("Prewett") to remove the spilled oil from the concrete. Tr. 77, 192, 200, 209, 212; Resp. Ex. C. Prewett is a hazmat specialist that provides environmental cleanup services. Tr. 192, 196; Resp. Ex. B. It took Prewett two days to contain and clean up the spill by erecting berms around the leaked oil, spreading Oil-Dri (a diatomaceous material that soaks up liquids) to absorb it, then shoveling the saturated material into buckets that were left onsite for disposal by Ash Grove. Tr. 64-66, 194, 200-02, 210, 215; Resp. Ex. C.

A smaller, subsequent spill occurred a day or so later when the line to the milling cylinder failed again. Tr. 194. Prewett returned to the mine on June 15 to clean this up in the same manner as the first spill. Tr. 194, 214; Resp. Ex. C. Once again, by the time Prewett arrived onsite, Ash Grove's employees had already repaired the milling equipment and the mill was fully operational. Tr. 63-64, 192-94, 202-03, 226. Prewett's sole task was to clean up the spilled hydraulic oil, which took no more than a day. Tr. 194, 203.

Inspector Moore was conducting a regular inspection of the plant, accompanied by Ash Grove Health and Safety Manager Bryan Snell, when he encountered Prewett employees Lloyd Wright, Carl Hunter, and Michael Johnson while they were cleaning the second spill. Tr. 26-28, 223-24. They had already laid out berms and applied Oil-Dri to the affected area and were in the process of shoveling the wet material into buckets. Tr. 64-66, 225. Inspector Moore asked the three workers if they were experienced miners. Tr. 32. They told him they were not. Tr. 32, 35. Moore then asked to review their training records. Tr. 28, 224. Prewett health and safety representative Tracy A. Steward could not provide documentation that any of the workers had received a full 24-hour course of new miner training, and conceded at hearing that he was not sure whether they had actually received such training. Tr. 38, 76, 89, 199-200, 205. However, he and Snell did produce documents showing that each of the three workers had received site-specific hazard awareness training and 9.25 hours of other training, including four hours of new miner training and several hours of First Aid training. Tr. 28-31, 68, 74-75, 205-06, 224-25; *see* Ex. S-6; Resp. Ex. A. Deeming this training to be inadequate, Inspector Moore issued an order compelling Prewett to withdraw the three employees from the mine and issued a duplicate citation, Citation Number 8776098, to Ash Grove on June 16. Tr. 26-27, 199; Ex. S-2 at 1, 3. The citation alleges that Wright, Hunter, and Johnson did not receive new miner training as

³ Moore has been an MSHA inspector for about four years and has conducted approximately 200 inspections. Before becoming an inspector, he worked in the mining industry for twenty years, starting his career in an underground coal mine and ultimately spending seventeen years in managerial positions at metal/nonmetal mines. Tr. 17-20.

required under § 46.5(a), which mandates that a mine operator must provide 24 hours of training to each new miner at its facility within 90 days of the date the miner begins working. Ex. S-2; 30 C.F.R. § 46.5(a). The workers were withdrawn from the mine and apparently never received the training. Tr. 39.

The parties dispute whether Wright, Hunter, and Johnson were “miners” within the meaning of § 46.5 such that they were subject to the 24-hour new miner training requirement. For purposes of Part 46, “miner” is defined as follows:

(1) *Miner* means:

- (i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and
- (ii) Any construction worker who is exposed to hazards of mining operations.

(2) The definition of “miner” does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.

30 C.F.R. § 46.2(g).

The parties have stipulated that Wright, Hunter, and Johnson do not qualify as construction workers under subsection (1)(ii) of the above definition. Joint Ex. 1. Therefore, they can be deemed “miners” only if they were “engaged in mining operations” within the meaning of subsection (1)(i) while working at Ash Grove’s mine.

“Mining operations” are defined as “mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine.” 30 C.F.R. § 46.2(h). Only three of the listed activities are at issue here: milling, which is the process of grinding material into powder form; crushing, which is the process of breaking large rocks into smaller pieces; and maintenance and repair of mining equipment. Tr. 44-47, 62; Joint Ex. 1.

The Secretary argues that because Wright, Hunter, and Johnson were working at the finish mill while at the mine, they were engaged in milling and crushing. Sec’y Br. 9. The Secretary also argues that because the three workers were called to the mine due to the mechanical failure of the hydraulic line, they were participants in the repair job, meaning that they engaged in “maintenance and repair of mining equipment.” Sec’y Br. 9.

Ash Grove disputes that the workers engaged in any milling, crushing, or maintenance or repair of mining equipment or any other type of mining operations. Resp. Br. 10-15. Ash Grove further argues that Wright, Hunter, and Johnson were service workers excluded from the

definition of “miner” under § 46.2(g)(2) because they were not at the mine for frequent or extended periods of time. Resp. Br. 16.

I agree with both of Ash Grove’s arguments.

As conceded by Inspector Moore, the three Prewett employees did not directly engage in any milling or crushing of materials and their activities had no impact on the continuation of mining operations at the plant, as the leaking mill component had already been repaired and the mill restored to full service before they arrived onsite. Tr. 63-64, 77. Prewett was hired for the sole and limited purpose of removing hydraulic oil from the concrete. Tr. 192-94, 200, 209-10, 213-15; Resp. Ex. C. Prewett used its own specialized equipment, supplies, and personnel to accomplish this task. Tr. 201, 211, 215. Prewett’s employees did not operate, work on, repair, or maintain any of Ash Grove’s equipment. Tr. 66, 77, 192-94, 200-03, 210-11, 215, 225. In fact, they were forbidden from using Ash Grove’s equipment because they were not trained to operate it. Tr. 201. Steward, Prewett’s safety representative, could not even identify what piece of equipment had sprung the leak. Tr. 200. In short, the Prewett employees working at Ash Grove’s mine had no involvement with mining equipment, milling or crushing activities, or any other mining operations that may have been underway at the mine, and engaged solely in the assigned task of cleaning spilled oil from the ground.

Although Inspector Moore admitted that the only thing he actually saw the Prewett employees doing was shoveling saturated Oil-Dri into buckets, (Tr. 66, 83-84), he opined that anyone working near the active mill or at an active mine site would be a miner regardless of what task he was performing. Tr. 49, 86-87, 94. This view is clearly at odds with the regulatory definition of “miner,” which (except in the case of construction workers) is limited to individuals who work at a mine *and* are engaged in mining operations. 30 C.F.R. § 46.2(g). Inspector Moore admitted as much on cross-examination. Tr. 59-61. Wright, Hunter, and Johnson did not engage in mining operations and in fact had no contact whatsoever with the mill or any mining equipment while at the mine. It was at most incidental that they were working near the mill.

Inspector Moore also theorized that the three Prewett employees engaged in “maintenance and repair of mining equipment” because their cleanup work was part of the repair job for the hydraulic line. Tr. 47, 49. “[R]epairs are not complete until the housekeeping is done, the tools are cleaned up and put away. That is the complete repair process that I’ve always been aware of both in the Army and all of my management,” he explained. Tr. 62. This overly broad line of reasoning would convert a trash truck driver or a custodian emptying trash at the mine office into miners, which would be absurd. Also, as conceded by Moore, Ash Grove had already completed the repair job on its own and fully resumed normal mining operations before Prewett arrived onsite. Tr. 63-64. The scope of the Prewett employees’ duties were limited to hazmat cleanup, which is required by the Environmental Protection Agency whenever there is a spill of hazardous material. Contrary to the Secretary’s assertions, such activities do not bear a “close proximity to, and relationship with, the overall extraction process” (see Sec’y Br. 9), nor do they convert the hazmat crew into miners.

I conclude that Wright, Hunter, and Johnson did not engage in milling, crushing, maintenance or repair of mining equipment, or any other mining operations while at the Foreman Quarry & Plant and thus do not qualify as “miners” under § 46.2(g)(1)(i).

I further find that they are expressly excluded from the definition of “miner” under the exemption set forth in § 46.2(g)(2). This provision states that “service workers who do not work at a mine site for frequent or extended periods” are not miners. Wright, Hunter and Johnson are service workers because Prewett’s line of work, hazmat cleanup, is a service rendered to a mine operator or any entity when a potentially hazardous material is spilled. As to whether they worked at a mine site for frequent or extended periods, the Secretary’s Program Policy Manual defines “extended” to mean “more than five consecutive work days” and “frequent” to involve “a pattern . . . occurring intermittently and repeatedly over time.” Resp. Ex. K; at 20 Tr. 147. Wright, Hunter, and Johnson’s presence at the mine does not meet these criteria. They spent just two days cleaning the first oil spill and even less time cleaning the second.⁴ Tr. 194, 203. Prewett only rarely provides services at the Foreman Quarry & Plant, and this was the first time these particular Prewett employees had ever been to the site. Tr. 40, 66, 216. They told Inspector Moore they had not previously worked at other mine sites. Tr. 35. Thus, the evidence fails to establish they worked for “frequent or extended periods” at this or any other mine.

The Secretary argues that the appropriate inquiry under subsection (g)(2) is whether Prewett itself, not Prewett’s individual employees, worked at mines for frequent or extended periods. Sec’y Br. 9-10. MSHA data shows that Prewett employees as a whole worked a total of 9,108 hours at MSHA-regulated metal and nonmetal mines across the country in 2015. Tr. 40. Relying on this data, the Secretary takes the position that Wright, Hunter, and Johnson are miners simply by virtue of their status as employees of Prewett.

This argument is without legal basis. The language of subsection (g)(2) clearly references individuals, not operators. The “frequent and extended” exemption applies to Wright, Hunter, and Johnson as individual “service workers.” More broadly, there is nothing in the Part 46 training regulations that would indicate the definition of “miner” is operator-based, and this would make no sense, as it is the individual miners who must undergo the required training. See Tr. 149; *Cyprus Empire Corp.*, 15 FMSHRC 10, 13-14 (Jan. 1993) (noting that status as a miner is not determined by employment with an operator). As acknowledged by Inspector Moore, certain workers such as clerical or office staff may be employed by an operator but still not meet the Part 46 definition of a miner. Tr. 88. This undercuts any theory that miner status is employer-based.

The Secretary cites two ALJ decisions purportedly supporting his contrary position: *Anderson Equipment Company*, 14 FMSHRC 222 (Jan. 1992) (ALJ), and *Lehigh Southwest*

⁴ Steward and plant manager David Dorris estimated that the cleanup took about eight to ten hours or approximately one day. Tr. 194, 203. An invoice confirms that Wright, Hunter, and Johnson were onsite for eight hours on June 15. Resp. Ex. C. Although there is no invoice for the following day, Moore’s inspection notes mention Wright, Hunter, and Johnson by name on both June 15 and 16 and the citation was issued on June 16, indicating the cleanup activities may have continued into a second day. Ex. S-2 at 16, 25. Even if this was the case, I accept Dorris and Steward’s testimony that the total time spent on the job was closer to one workday.

Cement, 33 FMSHRC 3229 (Dec. 2011) (ALJ). Sec’y Br. 9-10. His reliance on these decisions is misplaced. *Anderson* applies the “frequent or extended” analysis to an individual worker rather than the employer, which is the opposite of what the Secretary is asking me to do. 14 FMSHRC at 226. *Lehigh* is also wholly inapposite because it pertains to construction workers, whose status as miners depends on whether they are “exposed to hazards of mining operations” under § 46.2(g)(1)(ii), not whether they are employed by a particular company, much less whether that company works at mines for frequent or extended periods. 33 FMSHRC at 3236. (As noted above, the Secretary stipulated that Wright, Hunter, and Johnson are not construction workers.)

Another line of cases referenced by the Secretary elsewhere in his brief does indeed require consideration of the frequency and extent of an independent contracting company’s presence at a mine, but only in the context of determining whether the independent contractor can be considered an “operator” of the mine within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 802(d), such that it is subject to the Act’s jurisdiction. Sec’y Br. 8 (citing *Otis Elevator Co.*, 11 FMSHRC 1918, 1922-23 (Oct. 1989)). Neither jurisdiction nor Prewett’s status as an operator are at issue in this case. Further, the case cited by the Secretary is based on an earlier decision in which the Fourth Circuit found that employees of a utility company that provided electricity to a mine were not subject to the Secretary’s regulations because they visited the mine property only infrequently and did not perform any services they would not have provided elsewhere (i.e., their services were not specific to mining). *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985). This flies in the face of the Secretary’s position that Prewett’s employees, who analogously did not visit this mine frequently or regularly (see Tr. 186, 204, 216) or provide any services specific to the mining industry, should be subjected to the Secretary’s special training requirements for miners.

For the reasons discussed above, I find that Wright, Hunter, and Johnson did not work as miners at the Foreman Quarry & Plant within the meaning of Part 46. Accordingly, they were not required to receive new miner training under § 46.5(a). Because the regulation is inapplicable, the citation must be vacated.

B. Citation No. 8862764 (Docket No. CENT 2016-249-M)

Citation Number 8862764 was issued by MSHA Inspector Dwight Shields⁵ on December 8, 2015 during a spot inspection focusing on contractors at the Foreman Quarry & Plant. Tr. 102-04; Ex. S-4. When Inspector Shields arrived at the mine that morning, he first obtained a list of the contractors working onsite and then, accompanied by Snell, set out to visit the areas where each contractor was working. Tr. 104, 227. At the MCC (motor control center), the room that houses the electrical switches and panels controlling the mining machinery, Shields observed three employees of independent contractor Hadaway Electric Company, Inc. (“Hadaway”) installing conduit and electrical wiring to bring a new lime injection system online. Tr. 105-07, 230. Inspector Shields spoke to the workers and learned that one of them, Peyton Harvison, was a new employee at this mine. Tr. 105-06, 141, 238. Shields asked to see the workers’ training

⁵ Shields has been a mine inspector for MSHA for about eight years. Previously, he worked at an open-pit barite mine and a sand and gravel operation for about three years and then spent 22 years in the military. He specialized in equipment repair. Tr. 101-02.

records. Tr. 105. Ash Grove had provided all three with site-specific hazard awareness training, which included an overview of the cement manufacturing process and instruction on specific hazards at the plant and on responsibilities such as workplace examinations and injury reporting. Tr. 139-40, 182-83. Two of the workers had also completed new miner training. Tr. 106. The new employee, Harvison, had received eight hours of annual refresher training on November 30, 2015 covering topics including electrical hazards, First Aid, emergency medical protection, lockout/tagout requirements, fall protection, and site cleanup. Tr. 109-10, 127-28, 136-41, 227-28; Resp. Ex. M. He had also gone through journeyman training in electrical work. Tr. 240. However, there was no documentation that he had received 24 hours of MSHA new miner training or any training in the required topic area of miners' rights. Tr. 109-10, 127-28, 133. Inspector Shields believed Harvison's training was inadequate, so he issued a withdrawal order to Hadaway and a duplicate citation, Citation Number 8862764, to Ash Grove alleging a violation of § 46.5(a). Ex. S-4; Tr. 107-08. Harvison was withdrawn from the mine and subsequently completed the training. Tr. 159.

Ash Grove does not dispute that Harvison was a miner who was required to undergo new miner training under § 46.5. As noted above, § 46.5 requires a mine operator to provide 24 hours of training to each new miner at its facility. 30 C.F.R. § 46.5(a). Four of those hours must be provided before the miner begins working and must cover a specific set of topics listed in the regulation. *Id.* § 46.5(b). The balance of the training must be provided within 90 days after the miner begins work. *Id.* § 46.5(c)-(d). Until the full 24 hours have been completed, the new miner must work where an experienced miner can observe him to ensure he is working in a safe and healthful manner. *Id.* § 46.5(a).

Inspector Shields alleged that Harvison had not received new miner training despite being at the mine for more than 90 days and not always working under the observation of an experienced miner. I find that some of these allegations are unsupported.

First, there is no clear evidence that Harvison had been working at the mine for 90 days. There is no documentation to verify his start date at the mine or show how long he was employed there before the citation was issued. According to Inspector Shields, Harvison said he had been working onsite for about three months, but Shields did not bother to check any records for confirmation. Tr. 105-06, 141. Snell testified that Harvison had not reached the 90-day point yet. Tr. 229. The Secretary did not call Harvison as a witness or produce any other evidence to resolve the conflicting accounts. The Secretary bears the burden of proof on this point, and I find he has not carried it by a preponderance of the evidence.

Similarly, there is no clear evidence Harvison worked unsupervised. Shields observed him working with two other Hadaway employees, Tyler Cole and supervisor Randy Johnson. Tr. 105, 152. Both were fully trained under Part 46. Tr. 106. Snell testified that both men were experienced miners and Harvison was working directly under them while at the mine as "more or less a helper, a gofer, and a runner." Tr. 228-31. Former plant engineer Frank Plummer, an Ash Grove employee who was present the day the citation was issued and has since retired, also testified that Harvison was following Cole and Johnson, both of whom are electricians, to learn from them and was helping by bringing parts, conduit, and wires for the job. Tr. 238. By contrast, Shields did not know what job duties Harvison had been assigned. Tr. 129. His only

testimony that Harvison worked without supervision was that he asked Johnson if Harvison ever “go[es] into these electrical boxes by himself” and Johnson said yes. Tr. 111, 142-43, 156-57, 169-70. Shields did not elaborate on what he meant by going “into the box” alone nor did he record this conversation in his notes. Tr. 129-30. The Secretary did not call Johnson as a witness to corroborate the hearsay statement, which gives me further pause to find Shields’ testimony credible. Again, I find the Secretary has not met his burden of proving this allegation by a preponderance of the credible evidence.

Because Harvison was working under the supervision of experienced miners and the evidence does not establish he had been at the mine a full 90 days, he still had time to complete new miner training without running afoul of the regulation’s 24-hour requirement. However, Inspector Shields also alleges that Harvison did not receive four hours of training on the topics listed under § 46.5(b) as mandated by the regulation before beginning work. Tr. 155-56, 166, 244-46. I find that Harvison did, in fact, receive training on many of these topics during the eight hours of refresher training he completed on November 30, 2015, as shown on the training form produced by Ash Grove. Resp. Ex. M. But because his start date at the mine is unknown and he had apparently been working there for several months as of December 8, which was just a week later, it is very unlikely the refresher training took place before he began working. This violates § 46.5(b). In addition, the training certificate does not show instruction in several of the required topic areas required under § 46.5(b), notably the area of miners’ statutory rights and responsibilities, which was of particular concern to Inspector Shields. Tr. 110, 127, 133, 139, 156. I find that Harvison’s training was lacking in this respect.⁶

Nonetheless, Ash Grove argues the citation should be vacated because new miner training was primarily Hadaway’s responsibility; Hadaway received a violation; and Ash Grove, as the production-operator, should not have received a duplicate citation under the circumstances. Resp. Br. 16-19. Responsibility for ensuring that contract workers meet the Part 46 training requirements is divided between the independent contractor and the production-operator under § 46.12. This regulation provides that the independent contractor bears primary responsibility for providing new miner training to any of its employees who qualify as miners, while the production-operator bears primary responsibility for providing site-specific hazard awareness training. 30 C.F.R. § 46.12(a)(1), (b)(1). The Secretary’s Program Policy Manual

⁶ Although technically the standard was violated, I note that the Secretary has failed meet his burden of proof on all other issues. He has completely failed to address the regulation at § 46.12 and related guidance in the Program Policy Manual, which, as discussed in detail in the body of my decision below, are highly relevant to this case because they control whether it was appropriate to cite the production-operator under the circumstances. The Secretary also utterly failed to adduce testimony establishing the violation was significant and substantial (S&S). Inspector Shields acknowledged that the Commission has established a four-part test for S&S in the *Mathies* decision, but repeatedly testified that the sole reason he marked the violation S&S was because “an untrained miner is a hazard to himself and others,” which is not the appropriate legal standard. Tr. 133, 167, 243, 246-50; see *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Secretary has also failed to establish the negligence was high, as is discussed in greater detail later in this decision.

(PPM), a source of policy guidance for both MSHA inspectors and the mining industry, further states:

MSHA views § 46.12 as a regulatory indication of whom the agency will cite for training violations under ordinary circumstances. Both the production-operator and the independent contractor share the responsibility that all miners receive all required training, and in extraordinary circumstances, MSHA may determine that both the production-operator and the independent contractor should be held liable for training violations.

Resp. Ex. K at 31-32. Relying on this guidance, Ash Grove contends the Secretary has not made a showing of “extraordinary circumstances” to warrant the issuance of duplicative citations in this case. Resp. Br. 16-19.

I agree. The regulations and PPM make clear that Hadaway bore primary responsibility for ensuring Harvison received new miner training under § 46.5. As the production-operator, Ash Grove was responsible for site-specific training and for monitoring its contractors to help ensure compliance with the other training regulations. Ash Grove substantially fulfilled these obligations. All three of the Hadaway employees had been given site-specific training. Tr. 139-40, 182-83. Ash Grove had also taken multiple steps to ensure its contractor workforce was adequately trained. For example, the company had invited Hadaway to contractor training conducted by MSHA at the mine site, but Hadaway had chosen not to attend. Tr. 124, 233. According to Snell, Ash Grove had “tried very hard to start getting our contractors to start playing ball” by implementing a comprehensive contractor safety management program. Tr. 232-33. He noted that he had personally taken steps such as auditing contractors’ training materials before allowing them onsite, refusing to hire them if they lacked proper training documentation, and making them leave the site if they were caught without it. Tr. 233-34. George Stephen Minshall, corporate director of health and safety, appeared at the hearing and further described in detail Ash Grove’s procedures for selecting, hiring, and monitoring contractors. Tr. 175-85. The company follows a concrete six-step process that includes determining the scope of the work to be assigned and performing an initial risk evaluation and project expectations assessment which is then used as a roadmap to ensure the mine is hiring qualified workers and to monitor and assess the contracting company’s performance once its workers are onsite. Tr. 175-78.

One of the tools Ash Grove uses to help accomplish these tasks is a contractor prequalification computer system called BROWZ that permits the company to track and view contractors’ training records, health and safety statistics, and insurance certificates, among other things. Tr. 176-77, 181, 183-85, 190-91. The contractor receives a green light in BROWZ if all of its qualifications check out and a red light if not. Tr. 119. In this case, Hadaway had received a green light in BROWZ prior to being hired. Tr. 119-20. Because BROWZ had conferred a green light even though a new miner training certificate for Harvison had not been uploaded to the system, Inspector Shields believed that “BROWZ had a hole in it” and that Ash Grove needed to do more to verify contractors’ compliance with the training regulations. Tr. 121-22. But Minshall explained that BROWZ is not intended to serve as a repository for all contractor

training records. Tr. 181. The contractor is required to upload its Part 46 training plan with at least one other training record to confirm that its training is current and compliant. Tr. 181. Ash Grove employs other measures to help verify compliance with training requirements, including independently checking contractors' records and asking them to bring copies of their training plans and records to the site so they can be reviewed on request. Tr. 179-82, 232-34.

Inspector Moore had cited contractors for training violations on three other occasions over the past two years at the Foreman Quarry & Plant, which was one reason Shields believed BROWZ was not functioning effectively. Tr. 121-22. But Moore himself agreed this is a large mine with 135 employees as of the time he inspected it and multiple contracting companies onsite daily. Tr. 71-72. Ash Grove's witnesses estimated the mine employs one to seven different contracting companies each day, and anywhere from a dozen to a hundred individual contract employees may be onsite on a daily basis depending on the mine's operating status. Tr. 174-75, 222. Given the mine's size and the number of contractors Ash Grove employs, I do not find a history of three violations over two years to be excessive. As Shields conceded, he checked every single contract employee's records while at the mine on December 8 and Harvison was the only person who was not fully trained. Tr. 151. It appears that this miner simply slipped through the cracks. Tr. 151.

The Secretary has not pointed to any other extraordinary circumstances that would justify charging Ash Grove with a duplicate violation. I find that none existed.

Harvison's presence at the mine did not create hazards that would justify Inspector Shields' decision to write a citation. Shields conceded that any hazards present would be lessened if Harvison had electrical training, which he did. Tr. 131, 137-38, 146. In fact, Plummer testified Harvison probably had more electrical training than most people onsite given that he had completed electrician journeyman training. Tr. 240. Harvison was working under the supervision of two experienced miners. Tr. 230, 238. The electrical equipment his crew was working on had not yet been energized. Tr. 132, 229-30, 238-39. In short, this was not a situation where a high degree of danger warranted extraordinary enforcement action.

Ash Grove's conduct also does not justify extraordinary enforcement action in this case. The Secretary asserts that Ash Grove displayed high negligence in the two years preceding the issuance of the citation by failing to implement any changes to its system to verify whether contractors have properly trained their employees. Sec'y Br. 19-20. I note that Inspector Shields initially assessed Ash Grove's negligence as "moderate" but it was later modified to "low" after his field supervisor, Mike VanDorn, had a lengthy discussion with Snell about BROWZ and the measures the company had taken to ensure contractors' compliance with the training standards and agreed there were substantial mitigating circumstances even considering the prior violations. Tr. 153-54, 232-34. It was only during the course of this litigation that counsel alleged high negligence, which I find to be high-handed and completely unjustified. I have already found that Ash Grove substantially fulfilled its obligations under Part 46. The Secretary has not identified any additional measures Ash Grove should or could have taken to comply with the regulations. Hadaway, not Ash Grove, was primarily responsible for complying with § 46.5. The corrective actions taken after the violation reflect Hadaway's accountability for it: Hadaway withdrew its employee from the mine until proper training had been provided and the company owner told

Shields that he would begin maintaining training records at a trailer he kept onsite so they would be more readily accessible. Tr. 116. By contrast, Ash Grove did nothing to abate the duplicate citation, which was terminated four minutes after its issuance due to Harvison's withdrawal from the mine, and apparently changed none of its policies or practices afterward. Ex. S-4. It is not clear what action the Secretary hoped to spur Ash Grove into taking by issuing a duplicate citation. The inspector did not have a good reason to write it and ignored MSHA policy in doing so.

For the foregoing reasons, I vacate the citation.

ORDER

It is hereby **ORDERED** that Citations 8776098 and 8862764 are **VACATED**. Because no issues remain for adjudication, these proceedings are **DISMISSED**.

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

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January 30, 2017

HUNTER SAND & GRAVEL, LLC,
Contestant,

v.

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

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

v.

HUNTER SAND & GRAVEL, LLC,
Respondent.

CONTEST PROCEEDINGS:

Docket No. KENT 2014-391-RM
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM
Citation No. 8728541; 2/25/2014

Mine: Dredge IV
Mine ID: 15-17687

CIVIL PENALTY PROCEEDINGS:

Docket No. KENT 2014-566-M
A.C. No. 15-17687-350333

Docket No. KENT 2015-75-M
A.C. No. 15-17687-362767

Mine: Dredge IV

DECISION AND ORDER

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

Robert Nienhuis, Esq.; Elana Charles, Esq., Goldstein and Price, L.C., St.
Louis, Missouri for Respondent

Before: Judge Barbour

At the heart of this case is an all but certain fatal accident that befell Dustin Burnham, an employee of Hunter Sand and Gravel, LLC (“Hunter”), who in the early morning hours of December 10, 2013, disappeared while working on a company dredge on the Ohio River. Burnham is presumed to have fallen into the river and drowned, but no one saw him fall. His body has not been found, nor have any of his personal effects. He was twenty eight years old. He is survived by a wife and two young children.

Burnham’s disappearance was promptly reported by the company to the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”), which immediately sent investigators to the scene.¹ The investigators delved into the circumstances surrounding Burnham’s disappearance and found Hunter in violation of several of the Secretary’s standards for metal and nonmetal mines. As a result, one of the investigators cited the company for five alleged violations in one citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), one citation issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and three orders issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). In the section 104(a) citation the investigator found that the alleged violation was a significant and substantial contribution to a mine safety hazard (an “S&S violation”) and that the alleged violation was due to the company’s moderate negligence. In the 104(d)(1) citation and the 104(d)(1) orders, the investigator found that the alleged violations were S&S and were caused by Hunter’s unwarrantable failure to comply with the cited standards. The investigator further found that the company’s negligence was high. The company, which filed timely contests of the citations and orders, challenged the alleged violations and the investigator’s findings. Subsequently, the Secretary proposed civil penalties, and when Hunter declined to pay the penalties, the Secretary filed petitions requesting that the Commission assess the penalties as proposed. The company answered the petitions by maintaining it did not violate the standards, or, if it did, that the investigator’s findings were erroneous and the proposed penalties were excessive.

After the citations and orders were contested and the penalty petitions were filed, the Commission’s Chief Judge assigned the cases to the court, which consolidated them and directed counsels to confer to determine if they could resolve their differences. When it became apparent they could not, a trial was held in Paducah, Kentucky.

I. STIPULATIONS

At the commencement of the trial, and at the request of the court, counsel for the Secretary read the parties’ stipulations into the record. Counsel for the Secretary and Hunter agreed that:

1. Hunter . . . is an operator as defined in section 3(d) of the Act, 30 U.S.C. § 803(d);
2. Dredge IV[, the dredge on which Burnham last worked,] is a mine as that term is defined in section 3(h) of the Act, 30 U.S.C. § 803(h);
3. Dredge IV [is] used to extract sand from the Ohio River;

¹ The investigators also were duly authorized mine inspectors.

4. The principal office address for the Dredge IV mine is 1177 Clarksbury Road, Ledbetter, Kentucky 42058;
5. MSHA Inspector Sonia Conway was acting in her usual capacity as an authorized representative of the Secretary when the [subject] citations and orders . . . were issued;
6. Barge MEM 611[, the barge on which Burnham was last seen,] arrived at Dredge IV on December 9, 2013[,] at 11:40 p.m.;
7. Nobody witnessed Dustin Burnham go into the water;
8. Mr. Burnham's body was never recovered;
9. The Secretary will vacate Order No. 8728539²;
10. Government Exhibit 19, the MSHA Proposed Assessment Form accurately sets forth the mine hours worked , 25,667, at Dredge IV . . . for 2012, . . . the total number of assessed violations for the 15 months preceding . . . [February 2014], the month the citations and orders were issued, [a]nd the total number of inspection days for the 15 months preceding . . . [February 2014];
11. Government Exhibit 5, the MSHA [Investigation] Report, is a true and accurate copy of the report compiled and completed by MSHA on the basis of information provided to MSHA by Hunter employee, Robert Stone, on the dates and times set forth therein and may be admitted into evidence as such;
12. Government Exhibit 6, the MSHA Mine Injury and Illness Report 7000-1[,] . . . is a true and accurate copy of the form completed by Hunter employee, Robert Stone, and may be admitted into evidence as such;
13. Government Exhibit 7, which consists of one page of the vessel log from the MV Patsy M[, the tug adjacent to Dredge IV on the night Burnham disappeared], dated December 5 and December 9, 2013. is a true and accurate copy of the log maintained on the Patsy M. by Roger Fairfield and [by another Hunter employee] on the dates and times set forth therein and may be admitted into evidence as such;
14. Government Exhibit 20, drawings and schematics relating to the Dredge IV, contains depictions of the Dredge IV which are not to scale. Accordingly, it may be admitted into evidence only as a general

² Order No. 8728539 (Docket No. KENT 2014-566) alleged Hunter violated 30 C.F.R. § 15005 by failing to provide required safety belts and lines for miners working on Dredge IV. The decision to vacate the order means that two citations and two orders remain at issue.

configuration of Dredge IV and the arrangement of [the] various equipment on Dredge IV that it depicts.

Tr. 16-18.

II. THE TESTIMONY

Edward Jewell

Edward (“Ed”) Jewell has worked as an MSHA inspector for 16 or 17 years. At the time of Burnham’s disappearance Jewell was working in the agency’s Franklin, Tennessee field office in its metal/nonmetal division. Tr. 33, 89. Jewell inspects underground metal/nonmetal mines, surface mines and some facilities such as dredges that are not traditionally thought of as mines. Tr. 34. Although Jewell testified that he usually inspects only one dredge a year (Tr. 90), he has extensive prior experience and on-the-job training in inspecting dredges and barges. Tr. 36-37. Most of the dredges with which Jewell is familiar extract sand and gravel, just like Dredge IV. *Id.* Jewell began his testimony by explaining how such dredges take sand from the floor of a river. The dredges:

have suction devices – heads along the riverbeds. . . .and basically [the devices] suck [the sand] from the bottom. And [the sand] gets pumped up through the two pumps on the dredge and it gets segregated with screens and chutes and [is transferred by chutes] into barges. And from there, [the barges are] towed to a plant . . . where . . . [the sand is] classified or segregated more.

Tr. 38; *see also* Tr. 39.

The dredge operator is in charge of the dredging process and operates the suction devices, the screens and the chutes from a designated operator’s station. Tr. 39-40. Miners (“dredge hands”) are assigned different tasks on dredges. Some do maintenance and repair work. Some do cleanup work and other needed tasks. When a tugboat (“tug”) brings a barge alongside a dredge for loading a miner has to secure the barge to the dredge. Once the barge is loaded it is released from the dredge and towed to a plant facility or to another storage area where the sand is offloaded. Tr. 40. After a full barge leaves the dredge, another empty barge is towed to the dredge to be loaded.

Barges must be loaded evenly. There are hash marks (“draft marks”) along the sides of a barge that indicate if the barge is floating horizontally in the water. The marks also show how much water the barge is displacing (the barge’s “draft”). Miners on a dredge are sometimes asked to take a “draft reading,” which means they must transfer to the barge, look at the numbers on the side of the barge and report the numbers to the dredge operator who can then determine whether the barge is level and the extent of its draft. Tr. 40-41.

Turning to the events of December 9-10, 2103, Jewell testified that on December 10 at around 4:30 a.m. his supervisor called and told Jewell there was a report someone had “[gone] into the water” at Hunter’s Ohio River operation. Tr. 58. The supervisor asked Jewell to contact

Robert Stone, Hunter's manager of sales and compliance, go to the facility, and open MSHA's investigation of the apparent accident. *Id.*

Jewell arrived at the facility around 7:00 a.m. on December 10. Tr. 60. It was, he stated, "very cold." Tr. 59. It had snowed during the night. *Id.* In addition to the snow, Jewell remembered that the Ohio River was "pretty wild[,] . . . swift[,] . . . up . . . [and] high." *Id.* At the shoreline Jewell met Stone and another Hunter official. Jewell asked some general questions regarding what had happened and the state of the rescue and/or recovery operation. Hunter's officials then arranged for Jewell to be transported to the dredge.³ Tr. 60.

Before traveling to the dredge, Jewell spoke with a coworker of Dustin Burnham, the missing miner. The coworker told Jewell that during the early morning of December 10 he and Burnham "had come into the sample room [on the dredge] to warm up a bit. And that [Burnham] was going to go and check the draft marks on the barge." Tr. 74. Jewell thought that taking a draft reading was one of Burnham's regularly assigned duties.⁴ After a short time in the sample room, Burnham told the co-worker he, Burnham, was leaving to take the reading. It was the last communication anyone had with Burnham. Tr. 78-79. Burnham disappeared sometime between 2:30 a.m. and 2:45 a.m. on December 10. Tr. 60.

Roger Fairfield, the pilot of the tug boat that brought the barge to the dredge, was also among those to whom Jewell spoke. Fairfield told Jewell that after the barge was secured next to the dredge, he positioned the tug behind the dredge and the barge. From the wheel house the pilot could see most of the decks of the dredge and the barge. Jewell stated that Fairfield told him he looked down from the wheel house and saw Burnham cross from the dredge to the barge and

³ Stone's office is located at the company's complex in Ledbetter, Kentucky. Tr. 103-104. Jewell knew Stone from his inspections of another dredge owned and operated by Hunter. He also knew him from Stone's work with the Holmes Safety Association, one of the nation's oldest mine safety organizations. Tr. 100. Jewell described Stone as intent on making sure the company's dredges are operated in a safe manner. Tr. 100-101. Jewell agreed that prior to December 10 his experience with the company had been free of "significant" safety issues and that he found the company to be "very cooperative." Tr. 101.

⁴ As Jewell understood it, to take a draft reading Burnham had to cross from the port side of the dredge onto the immediately adjacent starboard side of the barge, travel the barge walkway to the stern, and walk across the back of the stern in order to then read the numbers on the port side of the barge. Tr. 75; *see* Gov't Exh 20 at 1. Asked why Burnham had to cross to the barge to take the draft reading, and why Burnham did not remain on the dredge and read the draft mark numbers on the starboard side, Jewell replied that the only numbers visible to Burnham were on the port side of the barge. Tr. 77. On a diagram of the barge Jewell marked the spot at which Burnham would have stood to take the reading. Gov't Exh. 20 at 1 (*see* red "x" under words "Stern Travel Way"). Jewell stated that when Burnham reached the port side of the barge (also referred to as "the outboard side") he would have had to position himself above the draft marks on the port side, lean out over the river and use his cap lamp to illuminate the hash draft so he could read the numbers. Tr. 77.

take a few steps along the walkway toward the stern of the barge. Tr. 79. As Burnham began to move toward the stern of the barge another vessel came upriver toward the tug. Fairfield turned to see how close the vessel was to the tug. When he looked back at the barge, he did not see Burnham.⁵ According to Jewell, less than a minute later the pilot saw “a light in the water and that’s when [Fairfield] hollered on the [tug’s] radio[,] [‘]man overboard[’].”⁶ Tr. 86.

Turning again to the details of the investigation, Jewell stated that although it felt like it was below zero when he reached the dredge, the temperature could have been in the 20s Fahrenheit. Tr. 97. In addition to inspecting the dredge, Jewell looked at the adjacent MEM 611 barge. Tr. 64-65. Although he never set foot on the barge, from his vantage point on the dredge Jewell noted a buildup of “snow and frozen snow” on the deck of the barge. When asked why he did not transfer to the barge, Jewell stated, “I didn’t want to slip and fall in the river myself.” Tr. 61. He added, “I had a lot of clothes on. There’s not railings . . . all the way around it. It’s a narrow path with a buildup of snow, frozen material. So I didn’t see that I needed to [get on the barge].” Tr. 61-62. Jewell made his observations of the barge around 7:30 a.m. Tr. 62. He took numerous photographs of the dredge and the barge. Most of the photographs were taken between 7:30 a.m. and 9:00 a.m. on the morning of December 10. Tr. 62.

Jewell noted draft marks at the bow and stern of the barge on both sides. The draft marks were in four columns, one column at each end of the barge. The marks were numbered one through nine. The numbered lines indicated the draft of the barge and whether the barge was riding level in the water.⁷

Jewell also testified that there was ice on the dredge, primarily in the screening area. Tr. 95-96. As for the barge, uneven snow covered its walkways. Gov’t Exh. 2 at 7; Gov’t Exh. 20; Tr. 68. The snow also covered ropes and other items that lay on the barge’s deck and walkways. Some of the items protruded up through the snow. Gov’t Exh. 2 at 5; Gov’t Exh. 2 at 4, 5 and 21; Tr. 67-68, 72. Jewell thought that there was probably ice under the snow, but he was not sure because he never walked on the barge. Tr. 97-98. As a result, Jewell had no firsthand experience as to what it was like to walk on the barge. *Id.* But Jewell believed that others, besides Burnham, had walked on the barge because there were several sets of footprints in the snow. Tr. 99.

In addition to his observations about weather, the river and the conditions on the dredge and barge, Jewell testified about the government’s training requirements for miners. He

⁵ On the diagram of the barge Jewell marked with pink “Xs” the spots where he understood Mr. Burnham was last seen by the pilot. Tr. 80; Gov’t Exh. 20 at 1.

⁶ When working at night Hunter’s employees wore a portable light secured around their heads with an elastic strip over their caps. Tr. 86.

⁷ In fact, the barge was not level. Later in the trial Stone estimated that the barge was about 16 degrees out of level at the time of Burnham’s disappearance. Tr. 409. In addition, because the barge was loaded from back to front, Stone agreed that the barge experienced “considerable sloping . . . from front to back.” Tr. 410.

described annual refresher training as general training and task training as training that is “more specific to the job.” Tr. 42. In Jewell’s view, if weather conditions change new task training is required. Tr. 102. Asked why, Jewell stated, “Because mining conditions have changed and procedures have to change.” *Id.*

In Jewell’s opinion an operator is responsible for ensuring that its safety policies and guidelines are readily available to miners and are enforced. Tr. 43. Jewell stated that when he was a supervisor, he ensured compliance by “put[ting] boots on the ground.” Tr. 43. He said, “I had to go out and physically look and see if people were performing their task.” Tr. 44. If miners were not abiding by safety rules or were engaging in unsafe procedures, Jewell spoke with the miners and “tried to get them to change their habits.” *Id.* Jewell agreed that “in terms of regular safety practices, [his] typical progression would be first to counsel [an employee for unsafe practices and then to] remind the employee of the safety rule and the safety requirement[.]” Tr. 93. While the most usual course was to talk with the employee and remind him or her of the disregarded safety requirement, suspension and ultimately termination could follow if the employee proved to be a serial offender. Tr. 93-94

Jewell was not MSHA’s lead investigator, Sonia Conway was. Jewell testified that between the time he arrived at the facility and the time Conway arrived, conditions on the dredge and barge changed. Tr. 82. Before Conway reached the facility company officials informed Jewell that they wanted to use the dredge and barge as staging areas for the continuing rescue and recovery effort. Jewell replied that first the company “needed to do some cleanup and thaw out and secure the scene so that no one else would possibly be in danger of . . . slick conditions.” Tr. 82-83. When the temperature had risen above freezing Jewell allowed the company to eliminate the ice on the dredge and the snow on the barge by washing them off because, as Jewell put it, the decks of the dredge and barge were “pretty treacherous . . . [and] slick . . . [a]nd [he] did not want another accident [to] occur.” *Id.*

Jewell testified that as part of the investigation he looked into the matter of whether or not Burnham was wearing a life jacket when he disappeared. Jewell stated that he asked one of Burnham’s coworkers if Burnham had a life jacket on before he entered the dredge’s sample room. The employee stated that Burnham did. Jewell then asked if the life jacket was assigned to Burnham. Tr. 84. The employee stated that he was not sure. *Id.* Jewell saw a life jacket sitting on a chair in the sample room. The jacket was next to Burnham’s lunch box. Jewell photographed the chair, lunch box and life jacket. Gov’t Exh. 2 at 12. Jewell stated that he could not determine if the life jacket in the photograph was the jacket Burnham was wearing upon going into the sample room. Tr. 85. Jewell also did not know if employees who worked on the dredge were required to leave their life jackets on when they took breaks in the sample room. *Id.*

Jewell testified that Conway arrived at the facility around 11:00 a.m. Tr. 86. Jewell met with Conway and briefed her. He told her about the interviews he conducted and that “Burnham had not been recovered, that he was missing [, and] . . . that [Jewell] had . . . [allowed the dredge and barge to be] clean[ed] up for rescue efforts.” Tr. 87. Jewell also introduced Conway to Stone and to another management official. Tr. 87-88.

Sonia Conway

Sonia Conway, MSHA's primary investigator, testified that her goal was "to get an overview of what happened and . . . to narrow it down to . . . what caused or contributed to the accident" so the agency could educate the public and prevent future accidents. Tr. 108 – 109. Prior to the incident involving Burnham, Conway had investigated four fatal accidents at different metal/nonmetal facilities. Tr. 101. Before being employed by MSHA, Conway worked for 12 years as the safety director for a construction company, a company that also operated quarries. She investigated accidents for the company and she provided training, including new task training, to the company's miners. Tr. 111-13. Conway also conducted workplace examinations. Tr. 113.

Conway testified that on the morning of December 10, 2014, she received a call at her office in Lexington, Kentucky. The person calling was an MSHA official who asked Conway to go immediately to Hunter's Ohio River facility because, "someone had fallen into the water." Tr. 117. Conway never had been to the facility. *Id.*

She arrived around 11:00 a.m. on December 10 and found that the company was still searching for Burnham. Tr. 132. She described the air temperature as "cold" and the water temperature as 41 degrees Fahrenheit. Tr. 133. It was not snowing, but it had snowed during the night. *Id.* Conway first met Jewell and reviewed the information he had collected. She also looked at his photographs. Jewell introduced her to Stone with whom she met. She then interviewed some of Hunter's miners. She asked them what was going on when Burnham disappeared. Tr. 137. She learned that he was last seen between 2:30 a.m. and 2:45 a.m. She also learned it was cold that night and the river was rising and moving swiftly. Tr. 134.

The snow and/or ice that had been on the barge was no longer present when Conway arrived, but Conway remembered seeing sand in the barge's hold. Tr. 135-36. The sand was piled at the outboard side corner near the stern. Tr. 136, 138; Gov't Exh. 20a. She described the barge as "leaning away from the dredge at a pretty good angle." Tr. 136. The lean was caused by the sand being unevenly distributed.⁸ *Id.*

According to Conway, Eddie Henson, a deck hand on the dredge on the night of December 9-10, told her that there was snow on the barge's walkways that night. Tr. 144-45, 406. Conway also stated that tug pilot, Roger Fairfield, told her that company employees occasionally traveled along snow covered barge walkways (Tr. 147-48) and that they sometimes did so when they were assigned to take draft readings. Conway understood that after transferring to the MEM 611 barge, an employee who was asked to take a draft reading walked along the inboard walkway to the stern and then crossed the stern toward the outboard walkway. After

⁸ The court interprets this to mean that anyone using the walkway on the side of the barge closest to the dredge would tend to slide into the barge not away from it toward the water. However, at the stern anyone using the walkway would be traveling from the higher to the lower side of the barge, which would tend to cause someone who slipped or tripped to fall or slide toward the water on the outboard side of the barge. Tr. 136-38; Gov't Exh. 20a.

reaching the outboard walkway above the draft marks, the employee grabbed the coaming [⁹] on the side of the barge, leaned out and down over the water and, if it was dark, shined the light from his or her cap lamp on the draft marks and, using a portable radio the employee carried, called the numbers to the dredge operator.¹⁰ Tr. 162-64. Conway also was told that work assignments involving other tasks on the barge were common. The assignments involved collecting samples of the dredged material and tying up the barge. 173-74. In fact, she maintained that it was not unusual for miners to travel a barge's walkways up to 30 times during the barge loading process. According to Conway, Burnham was not the only employee to use the walkways of the barge during the night he disappeared. She learned that prior to Burnham crossing to the barge, at least one other employee crossed from the dredge and walked on the walkways. Tr. 171.

With regard to working on a dredge or barge when they were snow covered, Conway recalled that Robert Douglas, the dredge foreman, told her the barge he loaded prior to loading barge MEM 611 also was snow covered (Tr. 149), and he stated that he was "used to" snow on barges and he did not think snow and/or ice on the barges was a hazard.¹¹ Tr. 149-50. In any event, Conway understood Douglas to be saying that "it was not uncommon to get . . . the barges . . . with snow and/or ice on them." Tr. 150. And Conway concluded that when snow covered barges had to be used by Hunter, the company's attitude was "business as normal." Tr. 151. Conway believed Hunter's employees "didn't appear to recognize the hazard of snow and/or ice on the walkways." *Id.* When asked about her conclusion as to what had happened to Burnham, Conway answered that, "It appears . . . [Burnham] . . . slipped and fell into the water." Tr. 152.

Conway explained that after the investigation, a final report on the events was completed by MSHA. Tr. 153; Gov't Exh. 8. The report listed among the causes of the assumed accident the failure of Hunter's management to provide a safe working environment for its employees. Conway summarized the report's causal findings as, "Specifically, the operator failed to identify

⁹ A "coaming" is defined as a "raised rim or border around an opening, as in a ship's deck, designed to keep out water." *The American Heritage Dictionary of the English Language Fourth Edition*, " Houghton Mifflin Harcourt (2009) at 353. See Gov't Exh. 8 at 2.

¹⁰ Conway indicated the location of the draft numbers on a diagram of Barge MEM 611 (Tr. 159; Gov't Exh. 20a (draft numbers circled in green)), and she marked with a green "X" where she believed an employee stood to take a draft reading. Tr. 160; Gov't Exh. 8a. Conway thought draft readings also could be taken from a boat obviating the need for an employee to travel along a barge's walkway (Tr. 174), but Fairfield disagreed. Tr. 481. Everyone agreed, however, that the most "common practice" was for employees to travel along the barge's walkways to take the readings.

¹¹ Stone may have had a different opinion. When asked about a photograph of the barge walkways taken the morning of Burnham's disappearance, but before the snow was removed, he seemed to agree that the walkways on the MEM 611 barge were hazardous. Tr. 412. He stated, "Well, the rigging and a cable certainly is there and I see clumps of frozen material. I would still prefer walking in the snow than I would on straight ice. But are there hazards out there, yes, absolutely." *Id.*

the hazard of snow and ice accumulation on the decking [of the barge]. Additionally, they [*sic.*] failed to enforce the life jacket policy.” Tr. 156; *see* Gov’t Exh. 8 at 9-10

On February 25, 2014, and as the result of the investigation including her interviews with both rank and file employees and management personnel, Conway issued the subject citations and orders to the company. Tr. 165; 227-28, 267; Gov’t Exhs. 9, 15, 12. Asked if the enforcement actions were based on the assumption that Burnham slipped on the barge and fell into the water due to snow on the barge, Conway responded, “Not necessarily just the snow, no.” Tr. 264. However, she stated she believed the snow and/or ice on the walkway of the barge was “a contributing factor.” Tr. 170. Conway came to this conclusion from talking with Hunter’s employees and from looking at photographs taken by Jewell. *Id.*

Conway found Hunter in violation of the standard requiring regularly used walkways to be sanded, salted or cleared of snow and ice as soon as practicable. She stated that even if only snow was present on the walkways (as opposed to snow and ice), she would have issued a citation for the same alleged violation and with the same findings (Tr. 268) because Hunter did not sand or salt the walkways of the barge prior to Burnham’s disappearance. *Id.* Nor did Hunter clear the snow from the walkways. Tr. 177. Conway stated; “[P]rior to putting someone in harm’s way, [Hunter] should have cleaned, salted or sanded or found a different way to get the draft readings so there wouldn’t be potential exposures to hazards.” *Id.* Or, Hunter should have restricted access to the walkways.¹² Tr. 178. Hunter’s failure to sand, salt or clear the walkways on the barge subjected those traveling them to the hazards of slipping, tripping or falling.¹³ Tr. 179. In Conway’s opinion, Hunter’s employees “could easily slip and fall.” Tr. 180. But Conway’s primary concern was that Burnham was sent to do a task under conditions that caused his disappearance and presumed death. She stated, “With the conditions that existed, the fact that [Burnham] was last seen on the barge, and . . . the way the barge was tilted, we came to the conclusion that he slipped off of [the barge] due to the ice . . . and/or snow.” Tr. 181-82.

Conway emphasized that it was not just Burnham who was endangered. Through her interviews with others she determined some employees lacked proper training and that some were subject to the same hazards as Burnham. Tr. 266. As she put it, they faced “the same . . . slip, trip and/or fall hazard into the water.” Tr. 182.

Conway thought that given the conditions it was reasonably likely an employee would fall into the water. “The fact that [the employees were] working at nighttime, the fact that [the

¹² She added that the fact Burnham may not have been wearing a lifejacket and that he lacked specific task training were also contributing factors to his disappearance and presumed death (Tr. 178), and while other causes for Burnham’s disappearance were considered, there was no evidence they were a factor. (For example, Burnham had no history of possible contributory medical conditions, and there was no hint that Burnham was in financial difficulty or experienced social problems. Tr. 272.)

¹³ Conway stated, “You had snow and/or ice on the walkways covering part of the way where miners were expected to walk. [T]hey couldn’t see what may be underneath it. But also [there was] the hazard of slipping.” Tr. 179.

barge's walkway was] a regularly used travelway and [that the walkway] was in that [snow covered] condition [and] that the miners would be expected to travel it" contributed to the likelihood Tr. 183. Further, when an employee fell into the water Conway expected the employee would suffer a "very, very serious injury and more than likely a fatality based on the river and cold temperatures."¹⁴ Tr. 184.

Conway was asked by the Secretary's counsel why she found Hunter's negligence to be "high," and she answered that in speaking with Hunter's employees:

[T]hey didn't believe snow and ice accumulation[s] were hazardous. They had not been instructed to remove or sand or salt snow and/or ice prior to traveling [on the barge] and there were no restriction[s]. Nobody had restricted access to that area. And to my knowledge there was no policy on prior to walking on a barge that had snow and/or ice, that they were supposed to . . . clean it or sand it or salt it.

Tr. 186.

In sum, Conway believed no effort was made by Hunter to clear the barge's walkways of snow and/or ice. Tr. 186-87. She stated that it was "common" for Hunter's employees to walk on snow and/or ice, and none of the employees to whom Conway talked told her they were instructed to remove snow and/or ice from a barge. Tr. 187-88. In Conway's opinion Douglas, the foreman of the crew of which Burnham was a part, was particularly culpable. A reasonably prudent person would have "recognized the hazard and addressed it." Tr. 244. In addition, she felt that Douglas's supervisors had "reason to know." *Id.*

Further, she believed that the alleged violation was due to the company's unwarrantable failure because, "[I]t was obvious. It was extensive. It ha[d] existed not only on . . . [the subject] barge . . . [but] on the barge prior to, [and in addition a] person in the supervisory position [*i.e.*, Douglas] . . . saw it."¹⁵ Tr. 245.

Conway also issued a citation to Hunter for its failure to task train employees on "what was going to make [the employees] slip or fall." Tr. 188. She believed that Hunter "failed to

¹⁴ She believed that in addition to Burnham, two or three other miners might have been affected. They typically took draft readings. Tr. 185. However, Conway agreed she only knew for sure of one other miner who had been on the MEM 611 barge before Burnham. *Id.*

¹⁵ Conway acknowledged that the regulation she cited required the snow and/or ice to be neutralized (sanded, salted or cleared) "as soon as practicable." To Conway this meant "when you see it, you address it and don't allow people to walk on it if it's hazardous." Tr. 248-49. In her view, if it was going to take time to get needed sand or salt to apply to the walkways, Hunter should have restricted access to the area to eliminate the hazard the condition posed to employees. *Id.*

provide safe work procedures that addressed snow and ice accumulation on deck surfaces and the additional risk it poses.” Tr. 188-89; *see* Gov’t Exh. 15. She stated,

I issued the [c]itation because when . . . Burnham and possibly other miners went through the task training, the conditions changed after they went through the training And I was given no [indication] that . . . [the employees], as a part of their training, received additional training to recognize those conditions . . . and the . . . hazard associated with . . . [the conditions] while performing their task.

Tr. 152.

Conway maintained if an employee is assigned a new task or a task that creates new hazards and he or she has not been trained in how to avoid the hazards, then, new task training is required.¹⁶ Tr. 257. She testified that whether or not new task training is required “depend[s] on if there are hazards Did the weather create a different hazard than what they had been trained and exposed to?” Tr. 257. If so, employees needed new training. *Id.*

Conway agreed that Burnham initially was given adequate new miner and task training. Tr. 191. However, she maintained that when the conditions changed and Burnham’s job required him to take draft readings in the presence of accumulated snow and/or ice, “[T]he task training should have been revised in order to train him on how to deal with the snow and/or ice on [the barge] walkways.” *Id.*, *see also* Tr. 195. Conway noted that 30 C.F.R. § 47.7(b) states, “If a change occurs in a miner’s assigned task that affects the . . . safety risks encountered by the miner . . . [the operator] must provide the miner with [task] training . . . that addresses the change.”

In Conway’s view task training is not the same as annual refresher training or new miner training. Unlike annual refresher training and new miner training which cover numerous topics, task training requires the operator to ensure its employee is trained “in the specific task that [the employee] is expected to conduct.” Tr. 192. The training must be such that the employee “will demonstrate proficiency in [the] particular task.” Tr. 193. In Conway’s opinion, new task training applies to “[a]ny task [an employee is] asked to perform that [the employee] has not done in the past for the operator.” Tr. 194. Conway emphasized again and again that even if the employee has previously performed the task, “if conditions change” or if the operator sees the employee doing the task in an unsafe manner, task training must be given again. *Id.* Conway believed Hunter’s employees were not taking draft readings in a safe manner when snow and/or ice was present on barge walkways. In her view, Hunter either knew or should have known this and should have trained the employees on the dredge in hazard recognition associated with job performance. Tr. 195, 196. In short, Hunter should have retrained all of the dredge employees, including Burnham, because the dredge employees “did not seem to recognize the hazard of walking on the snow and ice while on the barge.” Tr. 195.

¹⁶ She also stated that if the conditions of a regular task change, an operator is required to provide its employee with new task training that takes account of the changed conditions, and if an employee has done a task before but cannot demonstrate proficiency in the task, an operator is required to provide new task training. Tr. 269.

Conway testified that the failure to task train the employees to recognize the hazards associated with winter weather conditions created the danger that the employees would slip and fall from the barge while performing their draft reading tasks. Tr. 197. From her interviews with miners, Conway concluded the company simply “did not recognize the hazard.” Tr. 245. Hunter’s employees with whom she spoke had a “lack of knowledge on how to deal with the snow and/or ice on the walkways.” Tr. 199. The employees should have been instructed in how to take a draft reading in the presence of snow and/or ice in a way that did not subject them to a slip and fall hazard. Or, if there was not a hazard free way to perform the task in the presence of the snow and/or ice, the employees should have been trained how to ameliorate the hazard before they began the process of taking the reading.¹⁷ *Id.* As she put it, “[e]ither don’t expose yourself [to the hazards] or address the hazards that are there prior to performing . . . the task[.]” *Id.* In Conway’s view, the fact that Burnham was not trained in how to properly take a draft reading in the presence of snow and/or ice directly contributed to or caused the accident that befell him. Tr. 198. She noted that the same hazards apply to taking samples of dredged material since taking samples, like taking draft readings, requires an employee to use the barge’s walkways. Tr. 200-01.

Conway found that the company was highly negligent. She stated, “They didn’t instruct the [employees] to clear sand, [or] salt the snow and ice prior to traveling those areas.” Tr. 201. Conway maintained that when she showed management officials pictures of snow and/or ice on the barge walkways, “[S]ome of the management said yes, it was a hazard. Others said no, it was not.” *Id.* She described the company’s position as “conflicted.” *Id.* However, Conway was certain that Hunter’s employees were not told to clean snow and/or ice from barges. Tr. 203. She also was certain that Hunter made no effort to new task train miners in safe ways to work in the presence of snow and/or ice. *Id.* Management officials should have been aware of the requirement to provide task training, “if there’s a change in conditions.” *Id.* She added, “And [based on] the fact that they operated in winter months, and some of these [employees] were hired . . . [in] warmer months, when the conditions changed, I would think that . . . [Hunter’s officials] would revisit the task training.” *Id.*

As a result of her investigation Conway also issued a citation to Hunter for its failure to include the MEM 611 barge in its workplace examinations. Tr. 208. Although a workplace examination was conducted on the shift during which Burnham disappeared and on all other working shifts as well, barges were not included in the examinations. Tr. 208-09. Conway stated that the purpose of a workplace examination is “to identify hazards that potentially contribute or cause an injury and to address those hazards promptly.” Tr. 209. She added that if the hazards cannot be addressed in a timely fashion, [the operator should] restrict access . . . to prevent potential exposure to the hazards.” *Id.* The operator is required “to do something to eliminate the hazard promptly.” Tr. 209-10. In Conway’s view, the condition of the walkways on the MEM 611 barge presented a hazard that should have been, but was not recognized, reported and corrected. Tr. 210. According to Conway, Hunter’s management “did not appear to understand that the barge walkways in that condition [*i.e.*, covered with snow and/or ice] created a hazard.”

¹⁷ For example, Stone admitted that under some circumstances a draft reading could be taken from a tug boat and that if taken this way, the need for a miner to travel on the barge to take a reading was obviated. Tr. 388-89. However, he noted that a tug always was not available. At times it did not stay at the dredge after it delivered a barge. Tr. 389.

Id. The hazard was one of slipping, tripping and falling, a hazard that Conway believed was reasonably likely to occur and a hazard that she believed was reasonably likely to result in a serious injury or a fatality.¹⁸ In fact, Conway concluded the hazard was a “contributing factor to [Burnham] falling into the water.” Tr. 211. Had Hunter complied with the standard, it would have restricted access to the barge walkways or it would have eliminated the hazard and thus eliminated the likelihood of an employee slipping or tripping on the barge walkways. *Id.*

Conway also testified that she issued an order to Hunter because she concluded employees did not wear life jackets when exposed to the hazards of falling into the water. Tr. 211-12; Gov’t Exh. 12. Conway stated that she believed Burnham was not wearing a life jacket when he transferred from the dredge to the barge because the life jacket she thought was Burnham’s was sitting on a chair near his lunch box and because “no one saw [Burnham] floating.”¹⁹ Tr. 215-16.

Prior to disappearing Burnham was in the breakroom. Tr. 216. Conway was told that miners often took off their life jackets when in the breakroom. *Id.* Conway acknowledged that in addition to the life jacket sitting near the lunch box, other life jackets were available in the breakroom. Tr. 232, 267.

Conway calculated to be dragged down while wearing the kind of life jacket assigned to Burnham, a person would have to weigh 350 pounds. Tr. 219. Therefore, Conway believed if Burnham had worn a life jacket he would have floated, and no one saw Burnham floating.²⁰ Tr. 267. Although Hunter assigned life jackets to miners and typically miners wore the life jackets they were assigned, Conway admitted that she could not determine with certainty if a life jacket was missing because there were extra life jackets on the dredge. Tr. 219-20.

Conway did not review the company’s records to determine if Hunter enforced its life jacket requirement through discipline.²¹ *Id.* However, she saw nothing that led her to believe Hunter ever had taken disciplinary action against a miner for failing to wear a life jacket despite

¹⁸ Conway noted the lack of handrails around the barge walkways as well as the icy temperature of the water in December. Tr. 210-11.

¹⁹ Although an extensive search was conducted on the river and along its banks after the presumed accident, a life jacket that Burnham might have been wearing but lost once he was in the water was not found. Tr. 271.

²⁰ In fact, Conway also testified that winter clothing Burnham wore would have helped him float rather than drag him down because it would have trapped air and increased the buoyancy provided by the life jacket. Tr. 217, 401.

²¹ Hunter had no written progressive discipline policy at its Ohio River operation. Tr. 403. The superintendent imposed discipline either on his own or on the recommendation of the job foreman. Tr. 402. With regard to the subject dredge, if a dredge foreman, for example, Douglas, recommended discipline for one of the members of his crew, the superintendent decided whether to implement the recommendation. *Id.*

the fact she was told that Hunter officials were aware employees at times did not wear them.²² Tr. 221-22.

While life jackets were required to be worn by the company whenever there was a danger of falling into the water, if a management official saw a miner without a life jacket the miner was given a hand signal to put one on.²³ Tr. 236-37. However, based on the interviews she conducted and on the fact that Burnham was not found, she concluded that Hunter failed to effectively enforce its life jacket policy. Tr. 225. Conway testified that a non-compliant employee was likely to drown if he or she fell into the river. Tr. 222.

In addition, she found that the company was highly negligent. Management officials were aware that at times employees did not wear life jackets, yet Hunter did not discipline those employees. Tr. 226. As Conway put it, “[E]nforcement was very lax.” *Id.*

Despite her belief that the company did not effectively enforce its policy, Conway acknowledged that when she interviewed Fairfield he told her that “most times” when he saw employees on the company’s dredges they were wearing life jackets. Tr. 231. Conway also agreed that when she spoke with miner Eddie Henson who worked on the dredge the night Burnham disappeared, Henson stated that he, himself, was wearing a life jacket and that when she asked Henson if he ever saw Burnham on the dredge without a lifejacket, Henson said, “No.” Tr. 228-30. Further, she admitted that in her contemporaneous notes she made no reference to the company failure to enforce its life jacket rule. Tr. 231. Finally, when Conway asked Story, a deck hand on the Patsy M, if he knew of employees not wearing life jackets, she recalled him saying that employees must wear life jackets if they are in places where there was a danger of falling into the water. Tr. 236.

Robert Stone

Robert Stone is Hunter’s manager for sales and compliance. He markets Hunter’s products and interfaces with government regulatory agencies, including MSHA. Tr. 301. Stone is also responsible for health and safety training, including the training of new employees and the annual refresher training of all employees. Further, he reviews the company’s task training and its hazard recognition training. Tr. 302. Stone has worked for Hunter since September 2010. Prior to that, he worked as the general manager for Irving Materials, Inc. (“IMI”), the previous owner of Hunter’s various facilities. Tr. 302-03. Stone had the same responsibilities when he worked for IMI as he has for Hunter. Tr. 303. Stone also has extensive experience with other mining companies. He began training miners when he worked for those companies and when he started working for IMI he was responsible for initiating IMI’s miner training programs. *Id.* All

²² For example, she was told it was common for some employees to relieve themselves off the side of the dredge and not wear their life jackets when doing so. Tr. 223; Tr. 232-33.

²³ Stone testified that the first time a miner was found without a life jacket he or she was reminded orally or through hand signals to comply. Tr. 403. If it happened again, the employee was “told a second time.” *Id.* According to Stone, if it happened a third time, the employee “would be brought in and counseled.” *Id.* If an employee outright refused to wear a life jacket, he or she “would automatically receive [a written warning.]” Tr. 404-05.

told, Stone has worked at Hunter's various locations, including its dredges, for 19 years, and for most of that time he has been responsible for providing new miner training to employees. Tr. 304.

Stone described Hunter's new miner training:

When a decision is made to hire . . . a new individual, the first . . . day is spent with me. I'm given [a new individual's] application and I review that application and make a determination on the type of training that . . . [person is] going to be required to receive. And then I spend eight hours talking to [the individual] about introduction to the workplace and about . . . our training plan and [I follow] through with the requirements of our training plan. I try to meet the minimums in that eight, nine hour period, and then I prepare the forms [that are] sent with the individual when [he or she goes] out to the jobsite so that a competent person can complete the training.

Tr. 304-305. Job site training (also known as "task training") can take up to a year as employees work through each of the tasks their jobs require.²⁴ Tr. 305-06.

Stone was asked if Hunter provided inclement weather training to workers on its dredges and vessels including barges. Stone explained that training to work in adverse weather is "included in the indoctrination training." Tr. 306. He stated, "I have a set pattern that I use to go through the indoctrination training. And it includes lectures, it includes films and it includes demonstrations. And several of [the] demonstrations include caveats for inclement weather." Tr. 306-307. Stone stated:

My position is that an employee's not fully trained until they cycle through a whole year. And a whole year involv[ing] changing of weather conditions but also the cycle of the river conditions. So my position is that people . . . aren't completed in [their] training until they go through the whole river cycle. So yes, we talk to them or ask our people to talk to them about these changes. In the indoctrination training I make a point to tell people that their work environment is never the same two days in a row.

²⁴ Stone described the process as follows:

[Y]ou can take a task training form, send it with the individual, and as they work through the tasks that they're being shown, a task training form can actually be out there on the job for as long as a year before we need to see [it] back in the office.

Tr. 305-06. Once an individual has been trained in all of the tasks his or her job entails the task training form is returned to the company's office, but until then, it is kept at the job site. Tr. 306; *See also* Tr. 330-31.

And I allude to changes in the river conditions and the weather conditions that can affect their job environment.

Tr. 331-32. He added, “We talk about snow, we talk about ice, but we also talk about fog and we talk about high winds [and] lightning.” Tr. 307. Although snow and ice “may not be a line item noted on our task forms . . . it’s talked about” during an employee’s indoctrination training. Tr. 307. He stated, “[T]he information that I provide in the indoctrination training . . . warns people about snow and ice conditions. [The training] warns people to move slowly, to move deliberately, to walk flat footed, [and to] take short steps.” Tr. 307; *see also* Tr. 390.

During indoctrination training Stone testified he also shows a 28 minute film on working in a marine environment. He stated, “and there’s excerpts in [the film] about inclement weather.” Tr. 334. The film is titled, “Slips, Trips and Falls: Don’t Let It Get You Down.” 334-35. According to Stone, “There are scenes of towing vessels in wintertime with ice and snow on decks. And there’s counseling in the film about walking flat-footed, walking deliberately. And there’s also special precaution given about when you come from outside back inside the boat, [where] ice and snow on shoes can cause falls in the interior.” Tr. 335. The training in the film is intended for those working on Hunter’s dredges. *Id.*

Burnham applied to work for Hunter on June 11, 2014, but he was not hired until October. Tr. 320; Hunter Exh. 4. Prior to being hired by Hunter, Burnham worked for Calver City Terminal (“Calver City”), a firm that transloads coal from railcars to barges. Tr. 322. Prior to working for Calver City Burnham worked for Marquette Transportation, where he was responsible for the crew that put barges together as units to be towed. He also did maintenance work on and around boats. Tr. 322-23. Marquette Transportation is a river towing company that operates large tow boats year-round along the Ohio and Mississippi rivers. Tr. 323. Prior to working for Marquette Transportation he worked for United Barge Line (“United”), another company that tows barges year-round on inland rivers. Tr. 324. For United he put barges together as units and did boat maintenance work, just as he did for Marquette Transportation. *Id.* Finally, before United, Burnham worked as a deckhand for Tennessee Valley Towing. Tr. 325. All told, before coming to Hunter, Burnham had approximately five years of experience working year-round on tow boats and barges. Tr. 326. However, he only had three months of MSHA- related experience. Tr. 383. Stone agreed that Marquette Transportation, United Barge, and Tennessee Valley Towing would not have given MSHA training to Burnham. Tr. 384.

Burnham signed his new employee training form on October 22. Tr. 334; Hunter Exh. 10. Burnham’s on-the-job new miner training was given by Robert Douglas, Burnham’s supervisor. It occurred between October 28 and November 7. Tr. 331, 385; Hunter Exh. 9. Training for the dredge was given to Burnham by Robert Douglas on October 28, and the training form was signed by Stone on November 11. Tr. 348; Hunter Exh. 13. The dredge training included the need to be alert for tripping hazards and to use extreme caution near the dredge’s edges. Tr. 338; Hunter Exh. 11.

Burnham also received experienced miner training. According to Stone, during that training, issues relating to working in winter conditions were covered, including working when snow or ice was present on the barge. Tr. 349-50; Hunter Exh. 14. Moreover, Burnham received

newly employed experienced miner training when he worked for Southern Coal Handling (“SCH”) before coming to work for Hunter.²⁵ Tr. 343; Hunter Exh. 12. Further, at Hunter, he received new task training. This included the specific tasks involved in working with a barge when it was towed to a dredge, for example, properly positioning a barge that was to be loaded. Tr. 352; Hunter Exh. 15. Stone was asked whether Hunter provided new training for specific tasks every time there was a change in weather conditions, and Stone replied, “We do not.” Tr. 352. He added that while Hunter’s trainers talk to miners new to various jobs about the hazards posed by snow, ice, fog, and lightening, “It would be terribly onerous to document every different condition.” Tr. 353.

Regarding the presence of snow and/or ice on working surfaces, Stone maintained that “a lot” of the training films emphasize “that you try to abate the [snow and ice] condition by removing the ice and snow, putting some sort of a deicing agent down.” Tr. 308. The recommended deicing agents are salt or sand, and Stone added, “[W]e use sand wherever possible.”²⁶ *Id.* Stone thought it was a good practice to use sand on iced-over walkways. Tr. 393-94. Further, during annual refresher training, training that Burnham would have received had he not disappeared, the need to take note of icy surfaces would have been emphasized. Tr. 378; Hunter Exh. 19. Stone agreed, however, that Hunter’s training while recommending caution to miners did not require them to salt or sand icy and/or snow covered surfaces. Tr. 398.

According to Stone, the company’s policy with regard to working in snow conditions “depend[s] on the conditions.” Tr. 308.

If there is a circumstance where we’re going to get a little sunlight, for example, [we will] take a hose and wash [the snow and/or ice] off, because the sun on the metal deck . . . [of the] barge structure . . . will actually dry off [the water], and that [was] apparent after [the] MEM 611 was cleaned that morning. But overnight it’s safer to walk in the snow because any water you put on at that time is simply going to freeze and reduce the snow to ice.

Tr. 308-09; *see also* Tr. 396.

Therefore, in Stone’s view, whether or not to hose down snow with water depends on the temperature. For example, if the temperature is in the mid-twenties (Fahrenheit), Stone believed, “if you wash a deck down, you’re simply going to [exacerbate] the condition and it’s going to turn to ice. And it would be a greater hazard than walking on snow.” Tr. 310. In fact, temperatures during the evening and night of December 9 and 10 were in the mid to high

²⁵ SCH is a coal handling facility and the training Burnham received was coal facility specific. Tr. 392-93. Burnham was hired by SCH as a newly employed inexperienced miner. Tr. 393. He worked for SCH for three months before he was hired by Hunter. *Id.*

²⁶ Although Stone testified that “typically” ice melt was kept on a dredge, there was no salt or other ice melt on Dredge IV when Burnham disappeared, even though Stone agreed there likely was ice on the dredge. Tr. 390, Tr. 397-98, 411.

twenties Fahrenheit. Tr. 327-28; Gov't Exhs. 7, 8. There also was a light snow fall, which continued into the early morning after Burnham disappeared.²⁷ Tr. 329-30.

Stone also testified concerning the company's policy regarding the wearing of life jackets, to wit, "that life jackets are to be worn at any time the potential exists for [an] individual to fall [into] the water." Tr. 310, *see also* Tr. 313. The policy is explained to employees during indoctrination training. It is reinforced during site hazard training, and it is emphasized in site specific training for the dredge.²⁸ Tr. 338; Hunter Exh. 11. In addition, Stone testified that he showed a film entitled "Minutes To Live" at all of Hunter's job sites. The film emphasized the wearing of life jackets and "how to survive falling in the river."²⁹ Tr. 339.

Stone recalled that in addition to being highlighted during training, the company's life jacket policy is reviewed when the company experiences a "stand down situation."³⁰ Tr. 310.

²⁷ The temperature during the shift Burnham worked on December 9 and 10 was 29 degrees Fahrenheit at the start of the shift. By 11:00 p.m. on December 9, it fell to 26 degrees. Tr. 327; *see also* Hunter Exh. 7. By 3:00 a.m. on December 10, the temperature was 24 degrees. Tr. 328; Hunter Exh. 8.

²⁸ However, the site specific training given by Stone consisted solely of class room type training. Douglas is the person who actually supervised Burnham's carrying out of the various tasks for which he was trained. Tr. 391-92.

²⁹ Stone was so impressed by the film he reduced its contents to a written outline and every newly hired miner, including Burnham, was given a copy of the outline to keep and review. Tr. 355, 366; Hunter Exh. 17. Stone also added his own comments to the outline. Tr. 357-58. The comments included the danger posed by wet and icy decks and a reminder of the importance of wearing life jackets. Tr. 358-59; Hunter Exh. 17.

³⁰ A "stand-down" is when an unusual event occurs, for example, when there is exceptionally high water on the river. If the event affects working conditions, a special safety meeting is held to discuss the condition and to review the safety measures employees should take. Stone stated that during a stand-down safety meeting involving high water, "[W]e admonished everyone to wear their life jackets, to move slowly and deliberately, [and to] use the buddy system. And we outlined a great many guidelines that we'd like them to follow during periods of extraordinary high water, citing to them in these circumstances -- you're not allowed to make a mistake." Tr. 311.

However, Stone noted that even if an employee is wearing a life jacket, if he or she falls overboard the employee may not survive.³¹ Tr. 340.

According to Stone, the company's lifejacket rule is enforced by management and by rank and file employees. Both remind non-compliant employees by gesture (hands to shoulders) to put on missing life jackets. *Id.*, Tr. 313. The policy is also enforced through Stone's unannounced "mock inspections." Tr. 313. Stone maintained that he conducts such inspections on a quarterly basis and that he has never noticed an employee who should be wearing a life jacket without one. *Id.* Stone stated that there never has been an instance where an employee "blatantly" failed to comply with the company's life jacket policy and therefore he never disciplined a miner in writing for noncompliance. Tr. 314. ("I have not written a citation for [non]compliance with the life jacket rule. I've always been able to do it with a simple . . . reminder." *Id.*)

Stone also testified that wearing life jackets when in danger of falling into the water is a topic that is raised during annual refresher training in February when boat crew concerns are discussed. Employees are reminded to always wear a life jacket when on a boat. Tr. 367-368, 370; Hunter Exh. 18. They are also reminded to always wear a life jacket on the deck of a barge, to watch for tripping hazards on the barge, to be extremely cautious of wet or icy deck surfaces, to move slowly and deliberately, to use sand or salt to lessen the hazard of slipping and to warn others of any hazardous conditions. Tr. 370, 372; Hunter Exh. 18. Three of the five members of the crew of the Dredge IV were employed by Hunter in February 2013, and they received annual refresher training. Tr. 369-70. During the training slip and trip hazards were emphasized as a reason for falling overboard (Tr. 375), and even though Burnham missed the training, a "good portion" of the subject matter was provided to Burnham during his training in October 2013, including the company's emphasis on complying with its life jacket policy. Tr. 376-77

Stone confirmed that while the life jacket policy is always in effect on the deck of the dredge, it is not in effect in the break room, the control room, or the engine room of the dredge because there is no danger of falling into the water while in those rooms Tr. 312. He also stated that usually there are extra life jackets on the dredge. Tr. 316.

Stone was asked about the length of Burnham's shift on December 9 and 10, and he testified it was a twelve hour shift beginning at 6:00 p.m. on December 9 and ending at 6:00 a.m. on December 10. Tr. 317-318. According to Stone the preshift examination form for the crew

³¹ Stone explained that if an employee falls off a dredge or barge and is pulled under the vessel, "wearing a life jacket will not save [him or her]." Tr. 341. In addition, if an employee is carrying heavy equipment and becomes trapped by the equipment, the employee may be pulled under despite his or her life jacket. *Id.* Another problem as described by Stone is that even with a life jacket on, when a person falls and hits the water, his or her arms tend to be extended upward, and the life jacket may "ride up" on the person's body, slip over the person's head and become free, in which case the person finds himself or herself in the river without a means to stay afloat. Tr. 360. Nonetheless and despite the fact that life jackets do not provide fool proof protection, Hunter's training film emphasizes the necessity of wearing a life jacket at all times when there is a danger of falling into the river. Tr. 341.

boat that took the miners who worked on Burnham's shift to the dredge indicates there was at least one lifejacket for each person working on Burnham's crew that morning. Tr. 318; 381-82; Hunter Exh. 3.

Rodney Story

Rodney Story, a Hunter employee, has worked for the company for eight years. At the time of the hearing he was 42 years old. Tr. 417. In December 2013 Story was a deck hand on the Patsy M. Tr. 417-18. As a deck hand Story also occasionally worked and traveled on barges. Tr. 418. Story testified that he worked the night shift on December 9 – 10, 2013. During the shift Roger Fairfield piloted the Patsy M. Tr. 419. Close to midnight on December 9 the Patsy M. picked up the MEM 611 barge and towed it to Dredge IV. Tr. 420. The barge was empty, and it was riding high in the water. *Id.* In the course of the operation Story testified that he walked on the stern deck of the barge and along its sides. According to Story, there was snow on the deck, but no ice. *Id.* Story had no trouble walking on the snow. Tr. 421, 449. Story connected cable from the Patsy M. to fittings at the stern end of the barge and then walked down the side of the barge to the barge's bow to disconnect the barge from the other barges to which it was still cabled. Tr. 421-22. Although there was snow on the side walkway, just as there was on the stern, Story had no difficulty walking. He took draft readings at all four corners of the barge. Tr. 426. He further testified that he could hold onto the coaming as he walked along the side. *Id.* The towing operation began, and when the Patsy M and the MEM 611 barge reached Dredge IV it was shortly before midnight on December 9. Tr. 438. Story then transferred back to the deck of the MEM 611 barge and helped secure the barge to the dredge. Again, he maintained that he had no problem walking on the barge's deck and that he had "sure footing." Tr. 427. He agreed, however, that when walking on snow on the deck he had to be cautious and pay attention. Tr. 428.

With regard to the wearing of life jackets, Story described Hunter's policy as requiring employees to, "Always wear one buckled up when there's a potential to fall in the water." Tr. 429, *see also* Tr. 481. As far as Story knew, this had been the policy ever since Hunter acquired the company from IMI. Story believed that the policy was standard in the industry. *Id.* The policy is enforced by "everybody watch[ing] one another." *Id.*

Although Story wore his life jacket all of the time (Tr. 430), he acknowledged other employees sometimes did not. "From time to time they were all guilty, but we always made sure, hey, go put it on." *Id.* While he had seen "some" employees walking around a dredge or barge without life jackets, he believed their failure was, "mainly just out of accident." Tr. 445. He was not aware of anyone ever being disciplined for failing to wear a life jacket. Tr. 445-46. Story also acknowledged that working as a deckhand is hazardous and that unfavorable weather conditions (wind and snow) and high water can make falling overboard more likely. Tr. 443-44

During his testimony Story recounted the events surrounding Burnham's disappearance. At some point during the early morning hours of December 10 while Story was in the galley of the Patsy M, he remembered hearing Fairfield give a "man overboard" call over the tug's radio. Tr. 431. Story rushed out of the galley to unmoor the Patsy M. so she could engage in rescue efforts. Tr. 431-32. Story stood in the bow of the tug as it backed away from the barge and turned

downriver. Tr. 432-33. As the boat turned Story saw a light in the water. Tr. 433. Both the Patsy M. and the light were moving downriver, but the boat was moving faster, gaining on the light. Story stated, “When we got closer to the light, I didn’t see . . . any movement or know who it was or anything.” Tr. 433-34. Story added, “[W]e continued . . . to get close to the light so I could actually get ahold of whoever it was just to try to get them stable to the boat so maybe we could get some assistance to drag the victim . . . up[.]” Tr. 434. Even though lights on the boat illuminated the area, all Story could see at first in the water was the light and then he saw what he thought was a portion of arm from the elbow to the shoulder.³² Tr. 436. The Patsy M. continued to gain on the light and it got within 15 to 20 feet when “the light went out of sight and nothing was seen after that.” Tr. 437. The Patsy M. moved further downstream. Management was notified and the search continued, but to no avail. *Id.*

Roger Fairfield

Roger Fairfield is the 44 year old pilot of the Patsy M. He has worked for Hunter since the company acquired the business. Tr. 451-53. Prior to that, he worked for IMI as a dredge operator. Tr. 451-52. He worked in the latter capacity for seven or eight years, and before that he worked as a deck hand. Tr. 453.

Fairfield testified that he was piloting the Patsy M. on the night of December 9 and 10. Tr. 453-54. Around midnight Fairfield picked up an empty barge (the MEM 611) and towed it to Dredge IV. Tr. 455. The deckhand, Rodney Story, had to walk on the barge’s deck to uncable the MEM 611 from other empty barges so it could be towed. Tr. 456-57. According to Fairfield, snow covered the deck of the barge, and Story walked on the snow to secure the cables. Fairfield testified that Story, who walked on the port side from the stern up to the bow of the barge and back again, had no trouble. Tr. 456-58. Fairfield was not surprised by this because, he maintained, the snow provided “more traction.” *Id.* He added, “If you’re walking on ice you pretty well got to kind of baby step it and hold on real tight. With snow you just seem like you get a whole lot better traction[.]” Tr. 456-57. Fairfield did not consider the snow to be a hazard, and he had never been taught in his training that it was a hazard.³³ Tr. 482.

If there had been ice on the barge Fairfield maintained that the situation would have been “a lot different.” Tr. 458. He stated that with ice, “you just slip, slide. You[‘ve] got to really hold on . . . [a]nd baby step it, just kind of keep your balance.” Tr. 458. According to Fairfield, if there is ice on the deck of a barge Hunter’s practice is to put sand on the ice. The sand is usually kept on the dredge. *Id.* He stated the sand is a “non-skid” that “kind of keep[s] you from sliding.” Tr. 458-59. Fairfield did not know of any environmental concerns preventing the use of sand on ice, and he stated Hunter uses sand “because we got plenty of it.” *Id.* However, Fairfield maintained that he never put sand or ice melt on snow. Tr. 458, 480. In his opinion doing that would “just pack [the snow] down.” Tr. 459. Also, he believed washing off snow could be dangerous. He

³² When asked if he also saw a life jacket, Story responded, “What appeared could have been a life jacket, but I can’t say definitely it was a life jacket, just the shoulder section.” Tr. 447.

³³ However, somewhat contradictorily, Fairfield also agreed that walking on a snow covered walkway was more dangerous than walking on a clear walkway. Tr. 480.

stated,”[I]f you wash it off, it’s just a matter of seconds before it’s going to be iced right back up.” Tr. 481.

As for Hunter’s lifejacket policy, Fairfield stated, “It’s policy and everybody knows it and it’s preached a lot.” Tr. 460. If there is any chance of falling into the river, an employee must wear a life jacket. *Id.* The rule is discussed at both the company’s weekly safety meetings (tailgate meetings) and at MSHA refresher training. *Id.*, Tr. 461. In addition, there are other times when the rule is talked about. Tr. 460. He stated that he never has seen anyone working outside a room on the dredge or on a barge without a life jacket. *Id.*; Tr. 483. He knows of no employee who has been “written up” for failing to wear a life jacket or for wearing one but not properly fastening it. Tr. 485.

When the Patsy M. reached the dredge, Story walked onto the stern of the MEM 611 to moor it to the Dredge IV. The dredge then began loading the empty barge with sand. Fairfield, who was in the wheelhouse of the Patsy M., was looking down at Story as he moved about the barge and returned to the dredge. Story had no trouble walking. Tr. 465-66.

There are movable steps on the dredge which are used to provide access to the barge. Because an empty barge rides higher than a dredge, the steps are needed to get onto the deck of the barge. Tr. 467. On December 10 the steps were placed about 25 to 30 feet from the stern of the barge on the barge’s port side. *Id.*, 467. The Patsy M. was facing the stern of the barge. Fairfield, looking from the wheelhouse, noticed Burnham as he mounted the steps and crossed from the dredge to the barge.³⁴ Fairfield testified he could only see the top part of Burnham’s body. He could not determine if Burnham was wearing a life jacket. Tr. 471. As he looked down on Burnham, Fairfield heard a radio communication from another boat that was coming up river behind the Patsy M. Fairfield swung around in his chair to see how close the boat was to the Patsy M. Tr. 473. (She was approximately three fourths of a mile downriver. *Id.*) Fairfield continued:

[A]fter I turned [back] around . . . I kind of looked down and I couldn’t see [Burnham]. I thought . . . maybe he’s kind of hunched down over on the starboard side maybe checking the draft or something. That’s when I stood up and really started looking. Then I didn’t see him, and that’s when I got turned back around. And when I turned all the way around, then that’s when I see a light going across the stern . . . in the water.

Tr. 474.

Fairfield was sure the light was from a headlamp. Tr. 478. It was tantalizingly close, five to ten feet away, but moving downriver fast. Fairfield saw no motion. Tr. 475. He placed a “man overboard” call on the radio. Tr. 475. At that point, the light was significantly further down river. Story unmoored the Patsy M., and it motored toward the light. When it got approximately 20 feet from the light -- about 400 to 500 feet from Dredge IV – Fairfield could “see the light go down

³⁴ Burnham did not notify Fairfield that he intended to cross to the barge. Tr. 478. However, five or ten minutes before seeing Burnham, Fairfield heard a radio instruction issued to Burnham to take a draft reading. Tr. 482-83.

underneath the water.” Tr. 476. Fairfield testified he also observed an “orangeish” or reddish color that could have been a lifejacket or a coat; he wasn’t sure. Tr. 477.

III. THE ISSUES

The principal issues are whether the alleged violations existed. If so, what was their gravity? Were they S&S? Were they the result of Hunter’s unwarrantable failure and negligence? And if the violations existed what are the amounts of the civil penalties that must be assessed for the violations, taking into account the statutory civil penalty criteria? 30 U.S.C. § 820(i).

IV. THE ALLEGED VIOLATIONS AND THE COURT’S FINDINGS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728537	2/25/14	56.11016	\$70,000

THE VIOLATION

The citation was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). The citation contains Inspector Conway’s findings that the alleged violation of section 56.11016 could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter’s unwarrantable failure and high negligence. The citation states:

On December 10, 2013, a fatal accident occurred at this dredge operation. A dredge hand walked onto the snow and ice covered deck of the barge to obtain a draft reading. The victim slipped and fell into the water. The mine operator was aware the deck of the barge was covered with snow and ice. However management did not take action to sand, salt, or clear the barge deck’s regularly used walkway of snow and ice. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management had been made aware of the snow and ice hazard and failed to take corrective action. This violation is an unwarrantable failure to comply with a mandatory standard.^[35]

Gov’t Exh. 9 at 1.

Section 56.11016 states, “Regularly used walkways and travelways shall be sanded, salted or cleared of snow and ice as soon as practicable.” Something that happens “regularly” happens in a “[c]ustomary, usual, or normal” fashion.³⁶ The record establishes that the walkways

³⁵ The alleged violation was abated on December 10 after the accident but later in the day after the temperature rose above freezing. In a section of the citation titled “Termination Action,” the inspector wrote, “On December 10, 2013 at 15:37 hours [3:37 p.m.], the barge walkway was observed cleared of snow and ice eliminating exposure to the hazards.” Gov’t Exh. 9 at 1.

³⁶ *The American Heritage Dictionary of The English Language*, Fourth Edition, Houghton Mifflin Harcourt (2009) at 1471.

on both sides of the MEM 611 barge and at its stern were normally used by dredge hands who were sent onto the barge to take draft readings and perform other tasks. Inspector Jewell offered the best description of how the readings were taken. He explained how a miner transferred from the dredge to the barge, walked along the side of the barge to the stern, crossed the stern and traveled up the outboard side of the barge to where the draft marks and numbers were visible. Then, leaning out over the water and looking down at the numbers and marks on the side of the barge, the deck hand reported a reading to the dredge operator so the operator could load the barge evenly. Tr. 40-41; *see also* Tr. 77, 80 and 159-60, 162 (Conway's description of the task). Conway was told that miners also regularly transferred to the barge to perform other tasks, *e.g.*, taking sand samples and mooring and unmooring the barge. Tr. 173. Hunter did not challenge the description of the tasks nor the fact that deck hands who regularly transferred to the barge traveled its walkways. The court therefore concludes that the walkways were "regularly used."

In reaching this conclusion the court has considered Hunter's argument that the walkways along the sides of the barge were not "travelways" because the Part 56 regulations do not encompass "transient, moveable barges in underwater dredging operations." Tr. 23. The court is not persuaded. Part 56, under which section 56.11016 was promulgated, applies to "surface metal or nonmetal mines." 30 C.F.R. § 56.1. "Mines" include "equipment . . . on the surface . . . used in, or to be used in, or resulting from, the work of extracting . . . minerals [in this case, sand and gravel] from their natural deposits in non-liquid form." 30 U.S.C. § 802 (h)(1)(C). The "surface" can be composed of land or water. It only needs to be a top most layer, and MSHA has long exercised jurisdiction over mining carried out from the top (the surface) of rivers, lakes and ponds. Further, barges used to haul material from mining operations carried out on top of the water are "equipment . . . used in the work of extracting . . . minerals," just as trucks used to haul minerals extracted from operations carried out on the surface of the land are such equipment.

The standard also requires that an operator clear snow and ice from regularly used walkways "as soon as practicable." 30 C.F.R. § 56.11016. A great deal of testimony was offered regarding whether or not ice was on the barge walkway when Burnham disappeared. Although Conway in issuing the citation stated that both "snow and ice" were present (Citation No. 8728537) the record only supports finding the presence of snow. Conway saw neither snow nor ice because whatever was on the barge walkways was removed by the time she arrived. Tr. 135, 238. Story, who was called to the scene before Inspector Jewell arrived, testified that there was snow on the walkways but no ice, and the essence of the testimony of the Patsy M.'s pilot, Roger Fairfield, who had a first-hand view of the conditions on December 9 and 10 was the same, to wit, that there was snow but no ice. *See* Tr. 458-59. The presence of the snow is not surprising. It was December, and an area weather report for that night shows temperatures in the high 20s Fahrenheit with light snow. Tr. 327-28, 329; Gov't Exhs. 7, 8. Further, the photographs taken by Jewell shortly after he arrived on the scene show snow but no identifiable ice. *See* Gov't Exh. 2. The court therefore finds that on the night of December 9 and 10, only snow covered the regularly used walkways of the MEM 611 barge.

The question then is whether this snow was cleared from the walkways “as soon as practicable.” Commission Judge Richard Manning considered the meaning of the phrase “as soon as practicable” and offered helpful guidance. Judge Manning stated:

The issue of what constitutes “as soon as practicable” is not entirely clear. “As soon as practicable” is not defined in the Secretary's regulations. The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines “practicable” as “possible to practice or perform: FEASIBLE.” *Webster's New Collegiate Dictionary* 895 (1979). Relying on such, a reasonable interpretation of the cited standard would require that snow and ice be sanded, salted, or cleared as soon as possible.

Caballo Coal Co., LLC, 32 FMSHRC 1736, 1741 (Nov. 2010).

During the early morning hours, enough time elapsed prior to Burnham’s disappearance to allow the empty MEM611 barge to be brought to the Dredge IV and moored, for dredging to get underway and for sand to be loaded into the barge. Was there enough time to sand or salt or to otherwise safely remove the snow before Burnham was ordered to take a draft reading? The court concludes the Secretary did not prove that there was.

The court recognizes the pragmatic problems faced by Hunter in this regard. Any miner assigned to clear the snow prior to Burnham’s disappearance would have encountered at least the same hazards that Burnham faced. As Stone and Fairfield suggested, washing off the snow would have created a greater hazard on the barge by icing over the barge’s walkways and transforming any remaining snow to an icy, snowy mix. Tr. 308-09, 310, 481. The fact that ice formed on the dredge at the spot where suctioned water spilled onto the dredge deck supports this conclusion. Tr. 95-96. In addition, Fairfield’s testimony that using sand on the snow would have packed down the snow making it more slippery was not refuted by the Secretary. Tr. 459. Indeed, the Secretary did not provide any solution to the problem presented by the snow aside from suggesting Hunter not assign the task of taking a draft reading to Burnham, but this “solution” is not contemplated by the standard, which speaks only of the removal of snow or ice as soon as practicable. The record thus leads the court to conclude that the first practicable time to remove the snow from the barge deck was later in the morning when the temperature warmed enough to allow snow to be washed off the deck without the water freezing, a procedure followed to abate the alleged violation. In reaching this conclusion the court discounts Conway’s view that washing off the barge at night in below freezing temperatures would “[n]ot necessarily” create more hazards. Tr. 248-49. Her opinion defies a law of physics. Water freezes at 32 degrees Fahrenheit and below, especially water on a metal surface. Indeed, as the court just noted, ice had formed on the dredge screening area, and similar accumulations of ice could be expected on the barge. Tr. 95-96.

Conway believed that until the snow could be eliminated, Hunter had an obligation to eliminate the hazard:

You address it and you don't allow people to walk on it if it's hazardous. Find another way of doing that. If you have a miner, restrict the access. It may take you time to get whatever you need to wash, sand or salt, but do address the hazard. Don't say be careful while you're walking across there because it might be slick.

Tr. 248.

Conway's instincts were sound. Operators ought to restrict access to hazards by those under their care. Indeed, 30 C.F.R. § 56.11001 in effect contains such a requirement. Section 56.11001 states, "Safe means of access shall be provided and maintained to all working places," which the operator arguably failed to do when it permitted Burnham entry to the barge in the midst of hazardous conditions. However, the Secretary did not allege the company violated that standard, although he could have amended his pleadings to do so. Rather, he cited the company for violating a standard that requires the sanding, salting or clearing of snow "*as soon as practicable.*" The standard does not require barring miners from using snow covered walkways until snow has been sanded, salted or cleared. Had the Secretary wished he could have, and perhaps should have, promulgated the regulation to so state, but he did not. The court holds to the notion that words have consequences and that the court must judge whether the Secretary proved a violation of the standard as it is written. Here, the court finds that the Secretary did not prove that Hunter failed to sand, salt or clear snow from the walkways of the MEM 611 Barge as soon as practicable, and the citation will be vacated.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728540	2/25/14	46.7(b)	\$70,000

THE VIOLATION

The order was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1) The order contains Inspector Conway's findings that the alleged violation of section 46.7(b), C.F.R. § 46.7(b), could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter's unwarrantable failure and high negligence. The order states:

On December 10, 2013 a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. The task of obtaining a draft reading changed due to snow and ice accumulations on the barge deck surface. The snow and ice slip and fall hazard affected the health and safety risk encountered by the victim. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management failed to provide safe work procedures that addressed snow and ice

accumulation on deck surfaces and the additional safety risk that it poses. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 15 at 1.

Section 46.7(b) relates to new task training. The standard, which is addressed to the mine operator, states, "If a change occurs in a miner's assigned task that affects the health and safety risks encountered by the miner, you must provide the miner with training under paragraph (a) [30 U.S.C. § 46.7(a)] of this section that addresses the change.

Paragraph (a) of section 46.7 advises a mine operator in part:

You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task This training must be provided before the miner performs the new task.

30 U.S.C. § 46.7(a).

The order alleges that, "[M]anagement failed to provide safe work procedures that addressed snow and ice accumulation on deck surfaces and the additional safety risk that it poses." Order No. 8728540. The change that occurred in Burnham's assigned task (to take a draft reading) was snow covering the walkways of the barge. (As previously noted, the record does not support the presence of ice.) The parties agree and the record confirms that snow in fact covered the barge walkways when Burnham was assigned to the task. The court finds ample evidence that the snow created a slip and fall hazard. The court further finds the slip and fall hazard changed the task in that it changed the way the task should have been undertaken or it warranted delaying the task until the snow could be removed. Thus, the court finds in the words of section 46.7(b) that "a change occur[red] in [Burnham's] assigned task that affect[ed] the . . . safety risks encountered by [Burnham]," and the court concludes the standard required Hunter to "provide [Burnham] with additional training under paragraph (a) [of section 46.7]."

Section 46.7(a) in turn required Hunter to "provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the . . . safety aspects of the task . . . including the safe work procedures of such task" and to do so "before the miner performs the new task." 30 C.F.R. § 47.7(a). The Secretary does not contend that the new miner training Burnham originally received was deficient. Conway testified "it appeared [Burnham had] gone through the task training at the time, and [it] had been sufficient." Tr. 191. It is the alleged failure to train Burnham in how to take a draft reading when snow covered a barge's walkways that constituted, in the Secretary's view, the violation. As Conway stated, "[W]hen the conditions changed in that the weather change[d] . . . when he had to take draft readings, at that time the task training should have been revisited in order to train [Burnham] on how to deal with the snow and/or ice on the walkways, what to do it if was on the barge." Tr. 191.

The Secretary argues that Hunter failed to train miners to identify snow covered walkways as a hazard and failed to inform Hunter employees of the requirement to sand, salt, or clean barge walkways when practicable. Gov't Br. 31. Conway believed that miners taking draft readings on a barge should be trained either to address the snow hazard prior to attempting their task or to avoid exposing themselves to it. Tr. 199. Unlike earlier, the validity of this argument does not depend on the precise definition of "practicable" or require a conclusive finding on whether it was practicable for Burnham to sand, salt, or clear snow from the barge walkway during the night he disappeared. The evidence in the record that Hunter employees did not recognize snow covered barges as hazardous (*see* Tr. 195, 466, 482) and were not trained on the necessity of neutralizing snow or ice hazards when practicable (Tr. 445) establishes the inadequacy of Hunter's task training. Moreover, given Section 46.7(b)'s broadly worded requirement to address task changes that affect health and safety risks, Hunter's task training should have included instruction to delay the task of taking a draft reading when snow covers the barge walkways until the hazardous snow can be cleared from the deck, even if the much more narrowly worded standard dealing with removal of snow does not include such a requirement.

The court has considered Hunter's position that given Burnham's work experience prior to being hired by Hunter, the company was under no obligation to provide Burnham with new task training when conditions changed and snow covered the walkways of the MEM 611 barge. Hunter points to the language in section 46.7(a) which requires an operator to provide "any miner who is reassigned to a new task in which he or she has no previous experience with training in the health and safety aspects of the task to be assigned" (30 C.F.R. § 46.7(a)) and it notes that MSHA's accident report states that "Burnham had about 55 months of mining and/or river experience that included . . . loading barges . . . [and] putting barges together." Gov. Exh. 8 at 17; *see* Hunter Br. 31-33. The court agrees with Hunter that the record establishes that Burnham had extensive experience working in a marine environment before he was hired by the company. He also had more limited experience working for a surface coal facility. Tr. 320-26, 343, 383-84, 392-93. What is missing is any evidence that Burnham's prior experience brought him under Part 46 because of his engaging in the words of Part 46 in "shell dredging" or because he was "employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines." 30 C.F.R. Part 46. The "task training" reference in section 46.7 refers to tasks as performed in the specific kinds of mining referenced in Part 46, and there is no evidence that Burnham previously worked at facilities engaged in such mining.

Further, the company's argument that "hazard recognition training specific to the assigned task" was given to Burnham before December 10 (Hunter Br. 33-34, *quoting* 46.7(d)) is not supported by the record. The type of training required by the standard is training addressing the specific task of taking a draft reading (or other task) on a barge when snow covers the walkways of the barge. Hunter may well have provided Burnham training in which "issues related to winter condition on a barge . . . including snow or ice on a barge were addressed" (Tr. 349-350; Hunter Br. 35), but this is not training "specific to the assigned task" that is referenced in section 46.7(d).

Conway believed that Hunter made no effort to new task train miners, including Burnham, in safe ways to conduct assigned tasks in the presence of snow and/or ice (Tr. 201), and Stone agreed that the company did not provide new training for every task when there were

changes in the weather. Tr. 352. To do so and to document the training would have been, in Stone's view, "terribly onerous." Tr. 353. While it indeed might have been burdensome to give and document weather driven new task training, the burden is beside the point. The fact remains that Burnham was assigned the task of taking a draft reading under a changed condition that affected his safety. Pursuant to section 46.7(b) he should have been trained to perform the task in a way that took account of the hazard posed by the new condition. Since this did not happen, the court concludes Hunter violated section 46.7(b) as charged.

S&S AND GRAVITY

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 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 (Apr. 1081).

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 . . . 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 v. Secretary of Labor*, 861 F. 2d 99, 103-104 (5th Cir. 1988, *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission has recently clarified the key distinction between the second and third *Mathies* prongs. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir.)) The second prong concerns the "likelihood of the occurrence of the hazard," while the third prong is "primarily concerned with *gravity* – the seriousness of the expected harm." *Id.* The ALJ must "clearly" and "adequately define the particular hazard to which the violation allegedly contributes" in terms of "the prospective danger the cited safety standard is intended to prevent." *Id.* at 2038. After "[h]aving clearly defined the hazard," the ALJ's next task at the second prong is to assess "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.*

If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the ‘hazard’ defined in the second prong, the Judge then *assumes* the occurrence of the hazard and analyzes whether the assumed hazard would be reasonably likely to result in injury in the third prong. *Id.* (citing *Knox Creek Coal Corp.*, 811 F. 3d at 161-62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The court has found that a violation of section 46.7(b) occurred. Further, the court finds that a discrete safety hazard contributed to by the violation existed, *i.e.*, the danger of an inadequately trained dredge hand slipping on a snow covered barge walkway and falling into the icy Ohio River while taking a draft reading, and if not falling into the river, the danger of slipping and falling onto the metal and object strewn walkway. The prospective danger that section 46.7(b) is intended to prevent will vary based on the particular change in conditions necessitating new task training. In this instance, new task training was necessary because of the prospective danger of slipping and falling.

While not as hazardous as walking on ice, walking on snow nonetheless posed a serious slip hazard. In reaching this conclusion the court is aware that the record supports finding the barge’s walkways were snow covered, not ice-coated, and it has not discounted Fairfield’s testimony that, “With snow . . . you get a whole lot better traction.” Tr. 456-457. But while Fairfield may be right that a person walking on a snow covered barge walkway has better traction, he was speaking in comparative terms. Compared to walking on ice, a person’s traction may indeed be better, but still not good, as witnessed by the precautionary manner in which Hunter recommended its employees proceed slowly, deliberately, and with short, flat footed steps. Tr. 307, 311. 372, *see also* Tr. 390. The court concludes it would defy common sense to find it was not dangerous in early December when temperatures were in the 20s Fahrenheit to walk on a snow covered, raked³⁷, object strewn walkway at night, and above a high and icy river with light from a cap lamp illuminating the way. Tr. 162, 327-328; 443; Hunter Exh’s 7, 8. The hazard of slipping and falling may be greater on ice than on snow, but the barge’s snow covered walkways under these conditions still presented a very significant hazard, and Burnham had no training as to how to accomplish the assigned task in the event of this hazard other than altering his gate and pace, a “solution” that still left him exposed to the hazard. Therefore, the lack of new task training to address the change of conditions on the barge was reasonably likely to lead to a slip and fall hazard.

³⁷ Stone estimated the barge was approximately 16 degrees out of level when Burnham disappeared. Tr. 409.

The court next finds a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Given the time of year (December) and the location of the barge on an Ohio River that was, as Jewell described, “pretty wild . . . swift . . . up . . . [and] high” (Tr. 59), the court finds it reasonably likely that a dredge hand who slipped on the snow would fall into the river and suffer a serious injury (hypothermia) or death (hypothermia and/or drowning). Even if the miner avoided falling into the river, falling to the metal walkway where numerous objects lay under the snow, was in the court’s opinion, reasonably likely to result in a seriously sprained or broken extremity, injuries that are reasonably serious. For these reasons the court concludes the violation was S&S.

There is also no doubt the violation was very serious. As the court reads *Newtown* the third and fourth prongs of the S&S test and the gravity of a violation are closely related. 38 FMSHRC at 2838. They both focus heavily on the effect of the hazard if it occurs. The hazard was a likely slip and fall into the river or onto the equipment strewn deck. If the slip and fall resulted in the dredge hand ending up in the river but surviving until rescued, hypothermia that can lead to vascular constriction and organ failure, including cardiac arrest, was likely. If he or she was not timely rescued death from hypothermia or drowning was virtually a given. And if the dredge hand was fortunate and the slip and fall did not send him or her into the water, he or she nonetheless was likely to suffer broken bones, sprains, cuts and/or bruises.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In *Manalapan Mining Co.*, the Commission summarized the factors to be evaluated in determining whether a violation was caused by an operator’s “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.

Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013).

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See Beth Energy Mines, Inc.*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams “presented a danger” to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992 (finding unwarrantable failure based upon “common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment”)); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were “highly dangerous”). The Commission has specifically noted that the factor of “dangerousness,” by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining*, 35 FMSHRC at 294. Indeed, and as noted, in making a finding regarding unwarrantable failure, all of the factors must be considered by the judge.

The court concludes that the factors it must consider point in the direction of unwarrantable failure. The violation was extensive. The record supports finding there was no specific training given to any employee, including Burnham, regarding how safely to take a draft reading when snow covered the deck of a barge. The violation had existed for some time. The snow fell along the Ohio River on the night of December 9 and the early morning of December 10. The court notes that snow along the Ohio River in December is not unusual. Hunter should have anticipated the change in conditions and should have known to conduct the training in advance of the snowfall, especially given the widespread lack of recognition at the mine of the hazards posed by snow on the barge walkways. *See Tr.* 195, 466, 482. There is no doubt the violation posed a high degree of danger. The most significant danger was that a worker who was not trained to perform his or her task in the presence of the snow would slip and fall into the river. As has been observed by the court the result of such an event was likely to be serious injury or death. Even if the worker avoided going overboard there was a significant danger of broken bones, sprains or contusions caused by slipping and falling on the metal deck or on some of the equipment piled onto the deck. The likelihood of snow during Hunter’s December operations made the violation obvious. And although there is no evidence in the record that Hunter had been placed on actual notice that the training was required, it should have been clear to Hunter that additional training was needed to comply. Given these factors, and the lack of any evidence of mitigating efforts to abate the violative condition the court concludes that the company unwarrantably failed to train Burnham in how safely to take a draft reading when snow covered the deck and walkways of a barge.

The court further concludes that Hunter was highly negligent. The court is convinced that a prudent operator would have provided the training. In reaching this conclusion the court recognizes a feasible argument can be made that the company's negligence is lessened by the experience Burnham brought to the job when he was hired and by some of the training he received upon being hired. In employing Burnham the company hired a person with approximately five years of prior experience working year in, year out, on and around barges. Tr. 326; *see* Tr. 321-25. Hunter's management might reasonably have assumed that Burnham brought to the job at least a few basic safety techniques required for winter work on barges. Moreover, the record confirms after Burnham's hiring working in winter weather conditions was discussed during his new miner training. Tr. 306-07. The court also recognizes that like all new miners trained by Hunter, Burnham was told that when working in the presence of snow and/or ice, a miner needed to move slowly, to take short steps and to walk flat footed. Tr. 307, 390. The court further accepts Stone's testimony that near the end of October, Burnham watched a training film about working in a marine environment, including working during winter, and that the film addressed tripping and falling hazards and also advised miners to walk deliberately and in a flat footed manner in the presence of snow and/or ice. Tr. 334-35. Nonetheless, there is no evidence specific training was given regarding safe work procedures to implement when required to take a draft reading from a snow covered walkway, and this is what the law required.³⁸ Given the extreme danger the task posed, the court concludes Hunter failed in its duty to meet the high standard of care demanded by the circumstances despite factors that might otherwise be viewed as mitigating Hunter's negligence. Therefore, it is the court's conclusion that the danger inherent in assigning Burnham to take a draft reading was such that the standard of care required of Hunter was very high and its failure to meet the standard was equally high, and the court concludes that Hunter was highly negligent.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728538	2/25/14	56.15020	\$5,645

THE VIOLATION

The order was issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1) The order contains Inspector Conway's findings that the alleged violation of section 56.15020 could reasonably be expected to cause a fatal injury, was S&S and was due to Hunter's unwarrantable failure and high negligence. The order states:

On December 10, 2013 a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. The victim was not wearing a life jacket. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that management was aware miners, not wearing life jackets, were working and traveling where there was a danger of falling into the

³⁸ Only instructing a deck hand to walk slowly, to take short steps and to walk flat footed was clearly inadequate under the circumstances.

water. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 12 at 1.

Section 56.15002 states: "Life jackets or belts shall be worn where there is a danger of falling into the water."

The regulation is straightforward. If there is a danger of falling into the water, a miner must wear a life jacket or a life belt. The Secretary alleges Burnham was not wearing a life jacket when he crossed to the barge and traveled its walkway on his way to taking a draft reading. The court first considers whether Burnham was in "danger of falling into the water" when he was on the walkway and the court finds he was. There was nothing to restrain Burnham if he slipped or fell. The sides of the barge adjacent to the walkway were open. There were no railings. There were no fences. There were no ridges along the edges of the barge. There was nothing to impede him if he slipped and fell toward the edge of the barge. Therefore, the court finds in the words of section 56.15020, "there [was] a danger of falling into the water," and it concludes that Burnham was required to wear a lifejacket.

The court next considers whether Burnham was not in compliance. The Secretary must prove the violation by a preponderance of the evidence. The Commission has set forth what the burden entails:

The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. See 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). The Supreme Court, in *Concrete Pipe*, 124 L.Ed.2d at 563 . . . explained that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" See also 2 *McCormick* § 339, at 439 n.12, citing Model Code of Evidence, Rules 1(3) & (5).

In Re: Contests of Respirable Dust Sample Concentration Citations, Keystone Coal Mining Corp. 17 FMSHRC 1819, 1837 (December 1995).

Although the record is void of testimony that anyone saw Burnham with or without a life jacket [³⁹], although Burnham's body with or without a life jacket was never recovered, although the record does not establish that of the life jackets available to miners on the Dredge IV all but one were present, and although a life jacket downstream was never found, the court concludes it is more probable Burnham was not wearing a life jacket than he was wearing one.⁴⁰ Tr. 84. First, prior to transferring to the barge and before he entered the sample room, Burnham was wearing a life jacket. Tr. 84. A life jacket, the one he was most likely assigned, was found next to the chair in which he was sitting while in the sample room. Tr. 84, 232, 267, 316; Gov't Exh. 2 at 12. Second, Conway's testimony that she determined a life jacket of the kind worn by Hunter's miners normally would "float" a person of up to 350 pounds and that Burnham, who weighed considerably less, would have "floated" had he been wearing a jacket was persuasive and is credited by the court. Tr. 219, 297-299. Finally, the area of the river downstream from the barge was searched and neither Burnham nor a life jacket was found. Tr. 271. Given these facts the court concludes it is much more likely Burnham was not wearing a life jacket than he was, and that the violation existed as charged.

S&S and GRAVITY

The court has found that a violation of section 56.15020 occurred. Further, the court finds that the violation was reasonably likely to lead to a discrete safety hazard; *i.e.*, without a life jacket a person falling into the river was in grave danger of failing to float to the surface of the river. This hazard would in turn likely result in a miner suffering hypothermia or drowning. In fact, given that the river was high ("pretty wild"(Tr. 59)) and very cold (approximately 41 degrees Fahrenheit (Tr. 137)), a person falling into the river without a life jacket was virtually assured of such consequences. In the court's view the violation was obviously S&S.

The violation also was very serious. As noted above, severe hypothermia or death were virtually a given.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The record establishes that although Hunter did not exercise the care required, its failure was not unwarrantable. The Secretary acknowledges that Hunter had a policy of requiring its miners to wear life jackets when in danger of falling into the water. Hunter also had a method of enforcing the policy by reminding offending miners through hand signals to put jackets on when they were seen in situations where jackets were required but not worn. Tr. 237. Although Conway described Hunter's enforcement of its policy as "very lax," the record does not support her description. Tr. 226. Rather, Robert Stone, who was in charge of regulatory compliance,

³⁹ Story and Fairfield, eyewitnesses to what was almost certainly Burnham being swept downriver, could not say for certain whether he was or was not wearing a life jacket. Tr. 447, 477.

⁴⁰ The court accepts as circumstantial facts that the light seen by both Fairfield and Story was the light from Burnham's cap lamp and the part of an arm from the elbow to the shoulder seen by Story was part of Burnham's arm. Tr. 434-36; 474-78. In other words, the court accepts that it was Burnham who was in the water.

described Hunter's progressive discipline policy. He explained that when an employee was seen without a life jacket, he or she was reprimanded orally on site. When he or she was seen a second time, the miner was again reprimanded orally. The third time the miner was brought into the office and counseled. If he or she refused to wear a life jacket he or she received a written reprimand and warning. Tr. 404-05. Stone indicated that the company never had to issue a written reprimand and warning and that it always found oral warnings sufficient. Tr. 314. The court credits Stone's testimony. It further finds that the company's measures to abate violations of the standard as they arose weigh against an unwarrantable finding, and it notes that there is no evidence that Hunter previously had to remind or discipline Burnham regarding his failure to wear a life jacket.

In addition, the company made sure its employees were trained that life jackets always had to be worn where there was a danger of falling into the water. The policy was explained during indoctrination training. The policy was again emphasized during site specific training for the dredge. Tr. 338. Moreover, the life jacket requirement was one of the subjects of a video entitled "Minutes to Live," which all new employees were shown. Tr. 339. The topic was also covered in a written outline of the video which each new employee was given. Further, Stone testified there were times when because of adverse river and/or weather conditions, employees were reminded during company safety "stand downs" to wear life jackets. Tr. 311. The topic was also discussed at annual refresher training. Tr. 367- 68, 370; Hunter Exh. 18. Fairfield described the policy of wearing life jackets on the job when there was a danger of falling into the water as being "preached a lot," and the record bears him out. Tr. 460. Moreover, the company made sure life jackets were readily available, as evidenced by the fact that on the Dredge IV there were more life jackets than deck hands. Tr. 332.

The court has not discounted the fact that there is evidence that miners occasionally were seen without life jackets when they were in danger of falling overboard. Tr. 445. For example, there was credible testimony that miners sometimes removed their life jackets when they needed to relieve themselves. Tr. 232-33. But there is no evidence of a long or extensive pattern of disregard of the requirements of section 56.15020, a pattern of non-compliance putting Hunter on notice that greater efforts were necessary to ensure its life jacket policy was followed. Moreover, as previously noted, in Burnham's case there is no evidence he habitually disregarded the standard and that Hunter should have anticipated his noncompliance. Nor is there any evidence that Hunter had been cited previously for its employees violating section 56.15020.

While the failure to wear a life jacket when in danger of falling into the river is a very serious violation and while failing to wear a life jacket under such circumstances is a visually obvious violation (assuming other employees and/or management officials are present), the evidence does not support finding Hunter knew or should have known that Burnham was not wearing a life jacket when he responded to the instruction to take a draft reading early on the morning of December 10.

This stated, the record certainly supports finding that Hunter should have been more careful in ensuring compliance with the standard. Hunter knew that its employees were inclined to remove their life jackets when entering the sample room of the dredge, yet there is nothing to indicate it took any measures to remind employees to don their jackets when they left the room.

There were no pictorial or written reminders posted by the room's exits. Further, there was no evidence Hunter posted signage on its dredges or barges reminding miners not to remove their life jackets when nature called. Nor is there any evidence that Hunter included such specific reminders in its training. These are things a reasonably prudent operator would have done, and the court concludes that the company was moderately negligent in failing to meet its requisite standard of care.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8728541	2/25/14	56.18002(a)	\$1,530

THE VIOLATION

The citation was issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). The citation contains Inspector Conway's findings that the alleged violation of section 56.18002(a), 30 C.F.R. § 56.18002(a), contributed to a fatal accident, was S&S and was due to Hunter's high negligence. The order states:

On December 10, 2013, a fatal accident occurred at this dredge operation. A dredge hand walked onto a snow and ice covered barge to obtain draft readings on the opposite side of the barge. The victim slipped on the barge and fell into the water. Miners travel barge walkways to obtain draft readings and collect samples. Management failed to ensure that a competent person examine each working place at least once each shift for conditions which may adversely affect safety and health.

Gov't Exh. 17 at 1.

Section 56.18002(a) states: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

The Court concludes the Secretary easily met his burden of proof. The standard requires the Secretary to prove that the walkways of the cited barge were a "working place." Section 56.2 defines "working place" as "any place in or about a mine where work is being performed." The walkways of the cited barge were used by Burnham and others to take draft readings and for other work-related tasks. The miners exerted themselves while on the walkways to perform the tasks. The walkways were more than simple travelways; they were areas from which and on which work was performed and as such, they came within the standard. Indeed, so integral were the walkways to the tasks, the court considers the barge itself as a workplace. The walkways should have been examined for conditions that affected the safety of Burnham and others.

Conway testified she was told barge walkways were not included in workplace examinations at Hunter's facility. Tr. 208. The company does not dispute the truth of what

Conway was told.⁴¹ Tr. 208. The court therefore finds that a competent person did not examine the walkways on the MEM 611 barge before Burnham was assigned to take a draft reading and that, as a result, Hunter did not eliminate a serious slipping or stumbling hazard prior to Burnham transferring to the barge's walkway. Tr. 209-10. Conway was right to cite the company for a violation of section 56.18002(a), and the court finds the violation existed as charged.

S&S and GRAVITY

The court has found that a violation of section 56.18002(a) occurred. Further, the court finds that a discrete safety hazard contributed to by the violation existed. The standard is directed against hazards that may be missed or inadequately addressed absent a workplace examination, in this case a slip and fall hazard from snow on the barge's walkways. The failure to conduct the workplace examination resulted in the failure to eliminate the snow covering the barge's walkways or to otherwise eliminate the hazard by using an alternative means to take the draft reading or by postponing the work until the temperature rose above freezing. The company's failure in turn led to assigning Burnham to a task whose execution was reasonably likely to result in a slip and fall accident. The court's finding in this regard is informed by the common knowledge that snow can be slippery, that snow covered the barge's walkways and obscured the presence of items lying on the walkways, that the barge on which Burnham was assigned to walk was listing, and that its walkways were open to the river with nothing to restrain a slipping or stumbling person from falling into the water. A fall into the river could reasonably be expected to result in hypothermia and/or death. A fall onto the metal and object strewn walkway could reasonably be expected to result in broken bones, cuts or sprains. It is clear to the court that the violation was S&S.

The violation which presented a high degree of danger was also very serious and the court so finds.

NEGLIGENCE

Inspector Conway found that the violation was due to the company's moderate negligence, and the court agrees. Gov't Exh. 17 at 1. Although Conway believed that when conducting the examinations certified persons concentrated too much of their efforts on looking for mechanical defects rather than for safety hazards, she stated that except for failing to include the barges in the examinations, the company's examinations met the requirements of the standard. Tr. 208-09. The company appears not to have understood that if employees were assigned to work on a barge and the work involved travel along the barge's walkways, the barge became a "working place" within the meaning of the standard and its walkways had to be examined. Tr. 207-09. A reasonably prudent operator who intended to assign an employee to a task involving travel on a barge's walkways would have included the barge and its walkways in

⁴¹ Hunter claims that it did informally inspect the barge for hazardous conditions, but that it could not perform a "formal on-shift examination" because the barge arrived at Dredge IV "nearly 6 hours after the . . . shift began." Hunter Br. 37. The court finds this informal inspection to be insufficient. Given that the barge was present at the mine long enough for sand to be loaded onto it and for Burnham to attempt to take a draft reading, there was ample opportunity for the company to perform a formal on-shift examination before Burnham performed his assigned task.

its workplace examination. Hunter did not do this and therefore did not exercise the care required of it.

OTHER CIVIL PENALTY CRITERIA

The company is not a serial violator of the regulations. As counsel for the Secretary agreed, its violation history is small. Tr. 288-89; *See* Gov’t Exh. 21. The Secretary did not offer any testimony or introduce any evidence regarding the company’s size. However, when proposing penalties, the Secretary assigned three size points to Hunter. *See e.g.*, Secretary of Labor’s Petition For The Assessment of Civil Penalty, Exh. A, Docket No. KENT 2014-566. Under the Secretary’s regulations for proposing penalties, three points indicates an operator that is small in size. 30 C.F.R. § 100.3. Hunter does not argue that the size of any penalties assessed will affect its ability to continue in business, and the court concludes it will not. Further, although at the hearing the Secretary did not address whether the company exhibited good faith in abating the violations, it is clear from the record that in each instance it did.

V. ASSESSMENT OF CIVIL PENALTIES

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728537	2/25/14	56.11016	\$70,000	\$0

The court has found that the Secretary did not prove the violation. Therefore, a penalty cannot be assessed.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728540	2/25/14	46.7(b)	\$70,000	\$45,000

The court has found that the violation was very serious and that it was caused by Hunter’s high negligence. Given the court’s gravity and negligence findings and the other civil penalty criteria discussed above it is clear that a substantial penalty is warranted, although not in the amount proposed by the Secretary. Pursuant to the Special Assessment provision in Part 100 of his regulations the Secretary arrived at the proposal through electing to waive the regular assessment. 30 C.F.R. § 100.3. The Commission has recently clarified that the Secretary’s special assessment “does not negate the Judge’s duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria.” The Commission has further instructed that, “Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge’s findings and conclusions.” *The American Coal Company*, 38 FMSHRC 1987, 1993-94 (Aug. 2016). The Secretary’s special assessment in this matter is premised in part on his finding that “the violation contributed to a fatal accident. The snow . . . on the barge deck created a slipping and tripping hazard. The miner slipped and fell into the water and drowned.” Petition for the Assessment of Civil Penalty, Exh. A, Narrative Findings for a Special Assessment, at 6-7 of 11. Therefore, the court will make specific findings on the alleged facts and circumstances supporting this rationale for the maximum penalty.

The Secretary's factual statement that Burnham "slipped and fell into the water" may or may not be true. It is fair to note that the Secretary did not and could not prove the claim. With no eyewitness to the accident and no physical evidence as to what actually happened (for example, no evidence of footprints indicating Burnham slipped) there is no way to know if he actually slipped, and there are other possible explanations that are unrelated to the violation. For example, he may have stumbled over something; he may have inadvertently stepped off the edge of the barge, or he may have suffered a sudden loss of consciousness. The same is true of the Secretary's assertion that Burnham drowned. The Secretary cannot prove the claim. Because Burnham's body was not recovered the cause of his death will never be known for certain. For example, it is possible, albeit unlikely, that Burnham suffered a physical catastrophe and died before or upon falling into the water. The court believes that in the interest of justice, it is within its province to take these uncertainties which impinge on the gravity of the violation into account when assessing a penalty. The court also concludes it would be inequitable to assess the maximum penalty allowed (30 U.S.C. § 820(a)) in the face of such uncertainties. Given that the violation was very serious and was due to the company's high negligence as well as the other civil penalty criteria referenced above, it is the court's judgement that a penalty of \$45,000 is warranted. In the court's view, the penalty is large enough to have a substantial deterrent effect while it avoids fiscally punishing Hunter based on causal premises that have not been established. In addition, the assessment recognizes that Hunter is not a habitual offender but rather an operator with a small history of prior violations, and a "very cooperative" operator that Jewell described as being free of "significant" safety issues before the events of December 9 and 10. Tr. 101.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728538	2/25/14	56.15020	\$5,645	\$4,000

The court has found that the violation was very serious and that it was caused by Hunter's moderate negligence. Since in the court's view the company's negligence is less than the Secretary asserts, the court departs somewhat from the Secretary's proposed penalty. Given the court's gravity and negligence findings and the other civil penalty criteria discussed above, the court finds that a penalty of \$4,000 is appropriate. The assessment also reflects Hunter's small history of prior violations.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8728541	2/25/14	56.18002(a)	\$1,530	\$1,530

The court has found that the violation was very serious and that it was caused by Hunter's moderate negligence. Given the fact that the court's gravity and negligence findings are consistent with the Secretary's allegations and in view of the other civil penalty criteria discussed above, the court concludes that the penalty proposed by the Secretary is appropriate, and it assesses Hunter \$1,530 for the violation.

ORDER

Citation No. 8728537 **IS VACATED**. The negligence finding on Order No. 8748538 **IS MODIFIED** from “high” to “moderate.” In addition, the finding of unwarrantable failure on Order No. 8748538 **IS DELETED**. Within 30 days of the date of this decision, Hunter **SHALL PAY** total civil penalties of \$50,530 for the violations found above. In addition, and within the same 30 days, if he has not already done so, the Secretary **SHALL VACATE** Order No. 8728539 (Stip.9). Upon payment of the penalties and vacation of the order(s), this proceeding **IS DISMISSED**.⁴²

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

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⁴² Payment shall 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.

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

January 31, 2017

JIM WALTER RESOURCES, INC.,
Contestant,

v.

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

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

v.

JIM WALTER RESOURCES, INC.,
Respondent.

CONTEST PROCEEDING

Docket No. SE 2007-203-R
Citation No. 7689677; 02/15/2007

Mine: No. 7
Mine ID: 01-01401

CIVIL PENALTY PROCEEDING

Docket No. SE 2007-294
A.C. No. 01-01401-118868

Mine: No. 7

DECISION ON REMAND

Appearances: Neil Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

John B. Holmes, III, Esq.; Allen B. Bennett, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for Respondent.

Before: Judge Bulluck

These cases, brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(d), were heard by former Commission Administrative Law Judge (“ALJ”) Avram Weisberger, who concluded that Jim Walter Resources, Incorporated

("JWR") did not violate 30 C.F.R. § 75.202(a) and vacated Citation No. 7689677.¹ *Jim Walter Res., Inc.*, 34 FMSHRC 1386 (June 2012) (ALJ).²

The Secretary filed a Petition for Discretionary Review on July 24, 2012. The Commission reversed the judge, finding that in a workplace and travelway, "[t]he roof fall that pinned McKinney under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls," and remanded the case for further proceedings to decide whether the violation was significant and substantial ("S&S") and to assess an appropriate civil penalty. *JWR*, 37 FMSHRC 493, 496-97 (Mar. 2015).³

I. Proceedings on Remand

On August 12, 2016, I held a telephone conference with counsel representing the parties, who agreed that the record was sufficiently developed to resolve the issues on remand. On September 2, 2016, JWR filed a Supplemental Brief; on September 9, 2016, the Secretary filed a Response to Respondent's Supplemental Brief, moving to dismiss the cases as moot. On September 20, 2016, JWR then filed a Reply, also construed as a motion to dismiss.

For the reasons set forth below, I **DENY** the Secretary's and Respondent's motions.

In his Response, the Secretary asserts that these cases should be dismissed as moot because, as a result of bankruptcy proceedings, JWR "does not presently operate any mines." Sec'y Resp. to Resp't Suppl. Br. at 2. It is well settled that bankruptcy proceedings do not preclude proceedings before the Commission. *See* 11 U.S.C. § 362(b)(4) (exempting from the Bankruptcy Code's automatic stay provision any action or proceeding by a governmental unit to enforce its police or regulatory power); *Big Laurel Mining Corp.*, 37 FMSHRC 1997, 1998 (Sept. 2015) (finding that civil penalty proceedings initiated by the Secretary fall within the section 362(b)(4) exemption); *accord Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1550 (June 2013). As such, the Commission may set penalties under the Act without regard to separate bankruptcy proceedings, with the caveat that the Commission's judgment is enforced in other forums. *Sec'y of Labor on behalf of Price v. JWR*, 12 FMSHRC 1521, 1530 (Aug. 1990). On the other hand, section 110(i) of the Act may permit consideration of bankruptcy when fixing a penalty amount where the operator is still in business, has not dissolved, and has not sold its assets, because "[e]vidence of an operator's financial condition is relevant to the ability to continue in business criterion," which is one of the six statutory penalty factors. *See Georges*

¹ By order of the Bankruptcy Court for the Northern District of Alabama, JWR is now known as "New WEI 13, Inc." Resp't Suppl. Br. at 1.

² Two civil penalty dockets were at issue in the ALJ's decision, SE 2007-263 and SE 2007-294. Only the latter docket was taken by the Commission on appeal.

³ Judge Weisberger has retired and the remanded case was assigned to me by the Chief ALJ.

Colliers, Inc., 23 FMSHRC 822, 825 (Aug. 2001). However, the mere fact of a bankruptcy does not, under this body of binding precedent, render a case moot.⁴

Even assuming, *arguendo*, that this matter is moot, dismissal below the Commission level is not warranted. The adjudication of the citation at issue is governed by the “law of the case,” consistent with the Commission’s specific remand instructions. The Commission explained this doctrine in a case where it found that the ALJ had failed to follow remand instructions:

As we held long ago, “[a]n administrative law judge must follow the rules and precedents of the Commission.” *Sec’y of Labor on behalf of Jones v. Oliver*, 1 FMSHRC 23, 24 (Mar. 1979). This is the Commission’s formulation of the well-settled rule that requires a lower tribunal to strictly adhere to the terms, express or implied, of an appellate court’s mandate, “taking into account the appellate court’s opinion.” *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985). The “law of the case” doctrine is a specific application of the mandate rule that requires a trial court to follow appellate determinations of fact and law in subsequent proceedings in the same case, unless new evidence or an intervening change in precedent dictates a different result. *Id.* at 1120.

Dolan v. F&E Erection Co., 23 FMSHRC 235, 240 (Mar. 2001); *see E. Ridge Lime Co., L.P.*, 21 FMSHRC 416, 421-22 (Apr. 1999) (factual conclusions made by Courts of Appeal constitute the law of the case and must be accepted by the Commission when the case is remanded). Here, the Commission reversed the ALJ and found that a violation had occurred, and ordered that further proceedings be held to determine whether the violation was S&S and assess the appropriate penalty. *JWR*, 37 FMSHRC at 497. Therefore, I must strictly adhere to the law of the case and follow the Commission’s specific instructions. Accordingly, the Secretary’s motion is denied.

Turning to JWR’s motion to dismiss, the operator asserts that “the Secretary has voluntarily declined to prosecute this case further and [has] thereby withdrawn the citation and proposed penalty.” Resp’t Reply at 2. JWR states further that the Secretary’s discretion to withdraw civil penalties and citations is unreviewable. *Id.* at 2 (citing *RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993)). In *RBK Construction*, the Commission granted the parties’ motions to dismiss upon recognizing the Secretary’s unreviewable authority to withdraw citations under circumstances in which no findings of violation had been made. 15 FMSHRC at 2101. As has been fully discussed, the instant matter is not analogous. Therefore, at this stage in the proceeding, where the Commission has found a violation and remands with specific instructions to assess the penalty, the Secretary does not have the discretion, prosecutorial or

⁴ I note that in a matter involving an operator seeking relief from a final order, the Commission dismissed the case as moot after the Department of Labor’s Civil Penalty Compliance Office had informed it that the penalty case was being closed as uncollectible, because the operator had been subject to dissolution in bankruptcy and was no longer in the mining business. *River Point Processing, Inc.*, 21 FMSHRC 413 (Apr. 1999). In the instant matter, where there is a finding of a violation without a penalty assessment and, therefore, no final order of the Commission, I decline to follow *River Point Processing*.

otherwise, to circumvent the Commission's finding. Accordingly, JWR's motion to dismiss is denied.

II. Factual Background⁵

Jerry McKinney was a miner and special projects manager at JWR. As such, he was known "for being all over the mine" and as the "man to go to" for ventilation and roof control problems. Tr. 281, 516. On October 12, 2006, McKinney examined the permanent stopping north of survey station 3575, also known as spad 3575, and was in the process of repairing it; subsequently, he was found pinned under a 83" x 43" x 7" rock that had fallen from the mine roof near a prior roof fall. Tr. 242-43, 335-36, 339; Gov. Ex. 10 at 4, 12; Gov. Ex. 5 at 3. The rock had been supported by two roof bolts and a metal strap that were still attached to it after the fall. Tr. 401-03, 431. There was no witness to the accident. Tr. 254.

A few hours after the accident had occurred, MSHA personnel, Inspector Harry Wilcox, Electrical Specialist John Church, and Supervisor Jerry Langley conducted an investigation. Tr. 262, 265-66; Gov. Ex. 5 at 2. Wilcox traveled to the accident site by the "green path," the same path that Wilcox determined that McKinney had traveled, which had been re-supported with timbers in 2003. Tr. 292-93, 383, 491-92; Gov. Ex. 10 at 12. In order to make the accident area safe for the investigation team, Wilcox had JWR install timber posts to support the roof. Tr. 293-94. Wilcox observed an earlier rock fall in the immediate vicinity of the accident area which, he determined, may have compromised the integrity of straps and bolts securing the roof at the accident site. Tr. 336-37, 406-08. He concluded that McKinney had been fatally injured by a rock that had fallen from the brow of that nearby, earlier fall. Tr. 339. Wilcox also observed two other previous rock falls to the east of the accident site, which he opined had not occurred recently. Tr. 374, 378. He testified that JWR Miner's Representative Joe Martin told him that he had seen a rock fall near the accident site between July and September of 2006. Tr. 357-58; Gov. Ex. 5 at 14. He further testified, based on his interview with JWR employee Paul Arthur Philips, that miners traveled the "red path," instead of the shorter green path, because of adverse roof conditions. Tr. 373; Gov. Ex. 6 at 22. McKinney's notes from the day of the accident recorded three rock falls in the vicinity of the accident area (two of these falls were the two identified by Wilcox as having occurred some time in the past). Tr. 270, 374; Gov. Ex. 9 at 3; Gov. Ex. 10 at 9.

On February 15, 2007, MSHA issued its Report of Investigation and Citation No. 7689677 to JWR, alleging a violation of section 75.202(a).⁶ Gov. Ex. 10. Wilcox determined that the violation was S&S, and that JWR was moderately negligent in violating the standard. Gov. Ex. 15.

III. Significant and Substantial

⁵ The factual findings of the Commission are, hereby, incorporated by reference in their entirety. 37 FMSHRC at 494.

⁶ 30 C.F.R. § 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). 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. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The Commission has recently explained that the second *Mathies* criterion requires the judge to define the hazard against which the violation contributes, and then determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp.*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The Secretary argues that the inadequately supported roof contributed to a rock-fall hazard, and that McKinney's fatal injury establishes that a 7' x 3' x 7" (approximation of the actual dimensions) falling rock is reasonably likely to lead to reasonably serious injuries. Sec'y Br. at 20-21. JWR argues that the occurrence of the fatal rock fall, alone, does not automatically trigger a finding of S&S. Rather, it contends, the appropriate focus of the inquiry is whether the rock fall was reasonably likely to occur, and reasonably likely to result in serious injury. JWR Suppl. Br. at 1-2. JWR argues that the rock fall was highly unlikely to occur because the roof was supported in accordance with its roof control plan, and that injury was highly unlikely because the accident occurred in a section of the mine that was rarely traveled. *Id.* at 2-3.

The fact of violation has been established, in that the Commission found that the roof in the area where McKinney was working was inadequately supported. Respecting the second *Mathies* criterion, the hazard against which section 75.202(a) is directed is a rock fall and, notwithstanding JWR's contention that the existing roof support complied with its roof control plan, the rock fall resulting in McKinney's death was reasonably likely to occur because of the likelihood that the anchorage points around the fallen rock had been compromised by the previous, adjacent rock fall; also, numerous other documented rock falls in the vicinity of the accident area evidenced the heightened probability of another occurring nearby. The third *Mathies* criterion has been met, in that a rock falling from the roof and striking a miner was

reasonably likely to result in injury. It is also highly likely that a rock at least 7' x 3' x 7" in dimension would result in serious musculoskeletal to fatal injuries, as the occurrence of McKinney's death demonstrated, satisfying the fourth *Mathies* criterion.

IV. Negligence⁷

The Secretary argues that JWR was moderately negligent, and makes several contentions to demonstrate that management knew that the roof support in the accident area was inadequate. He contends that the 2003 re-support project in the green path put JWR on notice of the hazard, that a reported rock fall had occurred within 100 feet of the accident area, and that miners avoided traveling the green path because of unsupported roof. Sec'y Br. at 21-22; *see JWR*, 34 FMSHRC at 1392. The Secretary also argues that JWR was negligent through the actions of McKinney, its agent, because McKinney continued to work in the accident area despite having personally recorded three rock falls. *Id.* at 22-23.

On the contrary, JWR contends that previous rock falls did not put it or McKinney on notice of an impending rock fall because roof conditions are localized. It also contends that McKinney traveled only under supported roof six to ten feet away from the previous fall, and that retreating from the accident area would have prevented McKinney from making essential repairs to the ventilation system. JWR Br. at 29-31.

It is undisputed that JWR was aware of deteriorating roof conditions and rock falls within hundreds of feet of the accident site and, crucially, that JWR was aware of a rock fall adjacent to the accident site only a few months prior to McKinney's death. Indeed, miners chose to bypass the entire green pathway in favor of a longer route, so as to avoid exposure to inadequately supported roof. Thus, the record establishes that rock falls in the vicinity of the accident area were fairly commonplace, and that McKinney's work there, even if six to ten feet from the brow of the recent rock fall, was simply too close to known unsupported roof for the operator to claim ignorance of the heightened danger. JWR's contention, that maintaining the mine's ventilation system required McKinney to work in the area of the accident is unpersuasive, because it fails to recognize the operator's duty to make the area safe by setting additional timbers or other supplemental roof support. This is precisely the action that JWR took to alleviate the hazard after the fatal accident had occurred. For these reasons, and absent any indication that JWR took any measures to protect McKinney from performing his duties under the inadequately supported roof, work it deemed essential to the maintenance of the mine's ventilation system, I find that JWR was highly negligent in committing the violation.

⁷ The Commission's remand directing assessment of an appropriate penalty, of necessity, requires a negligence finding.

V. Civil Penalty Assessment

While the Secretary has proposed a specially assessed civil penalty of \$35,500.00, I must independently determine the appropriate penalty by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). See *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). These criteria are: the operator's history of previous violations, the appropriateness of the 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 operator in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

JWR argues that MSHA's Assessed Violation History Report, offered by the Secretary, should be excluded from evidence because it lists citations from JWR's mines that are not at issue in this proceeding, as well as citations that have been vacated, paid, or are duplicative.⁸ JWR Br. at 31-34; see Gov. Ex. 16. I find that JWR's contentions apply to the appropriate weight afforded the Report, rather than its admissibility. Therefore, Government Exhibit 16 is, hereby, **ADMITTED**.

Accounting for the objections raised by JWR, and considering only violations at the No.7 mine in the 15-month period preceding issuance of Citation No. 7689677, JWR was cited for a total of 386 violations, 10 of which were violations of section 75.202(a). Gov. Ex. 16. Based upon this record and JWR's stipulation at hearing that it was a large operator, I find that JWR's violation history is neither an aggravating nor mitigating penalty factor. See Jt. Stips. 20. I also find that JWR demonstrated good faith in achieving rapid compliance after notice of the violation. See Sec'y Br. at 25. In addition to the seriousness of the violation and JWR's high negligence, I note the longstanding judgment of the Commission that subjecting workers for any amount of time to hazardous roof conditions is an especially egregious violation, as was demonstrated here by McKinney's tragic death. See *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984) ("Roof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining."). The final penalty criterion, JWR's ability to continue in business, involves the financial status of the operator and is inapplicable due to JWR's dissolution in bankruptcy and asset sale.

⁸ Neither Judge Weisberger nor the Commission ruled on the admissibility of Government Exhibit 16.

Therefore, having considered the seriousness of the violation, JWR's large size, non-aggravating history of violations, high negligence, and good-faith abatement, I find that a penalty of \$35,500.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, Citation No. 7689677 is **AFFIRMED**, as modified to reflect "high" negligence, and it is **ORDERED** that Jim Walter Resources, Incorporated **PAY** a civil penalty of \$35,500.00 within thirty (30) days of this Decision.⁹

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
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. Please include Docket Number and A.C. number.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

January 13, 2017

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

v.

NORTH AMERICAN QUARRY AND
CONSTRUCTION SERVICES, LLC,
and AUSTIN POWDER COMPANY,
Respondent.

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

v.

MARTY HARRINGTON, formerly
employed by NORTH AMERICAN
QUARRY AND CONSTRUCTION
SERVICES, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2013-212-M
A.C. No. 30-00287-330292 (2KX)

Mine: Mt. Marion Pit and Mill

CIVIL PENALTY PROCEEDING

Docket No. YORK 2015-134-M
A.C. No. 30-00287-387349A

Mine: Mt. Marion Pit and Mill

**ORDER GRANTING SECRETARY’S MOTION TO AMEND PETITION TO ADD
AUSTIN POWDER COMPANY AS RESPONDENT**

These dockets are before me upon the Secretary of Labor’s petitions for the assessment of civil penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815, and section 110(c) of the Mine Act, 30 U.S.C. § 820(c), filed against North American Quarry and Construction Services, LLC (“NAQCS”) and Marty Harrington, respectively. The Secretary has now filed a motion to amend its civil penalty petition against NAQCS to add Austin Powder Company (“APC”), NAQCS’s parent company, as a respondent under a “unitary operator” theory for purposes of joint and several liability. NAQCS and Marty Harrington (“Respondents”) oppose the motion.

I. PROCEDURAL BACKGROUND

MSHA issued one citation and three orders to NAQCS resulting from an investigation into a fatal accident at the Mt. Marion Pit and Mill on November 1, 2012, and all four violations

were designated as flagrant violations, with total civil penalties amounting to \$507,720.¹ These violations are contained in Docket No. YORK 2013-0212-M. On March 10, 2014, NAQCS filed a Motion to Stay, pending a related section 110(c) investigation. The Secretary agreed with the Motion to Stay, but requested that I allow discovery to continue as NAQCS had not yet responded to the Secretary's discovery requests. I issued an Order Granting Stay on April 14, 2014, which directed the parties to continue the discovery process during the stay. The Secretary ultimately filed a civil penalty petition under section 110(c) in Docket No. YORK 2015-0134-M against Marty Harrington, a foreman for NAQCS at the time of the accident. As a result, I lifted the stay in Docket No. YORK 2013-0212-M on December 8, 2015, and consolidated the two dockets for hearing.

The parties engaged in a contentious discovery process. On August 19, 2015, the Secretary sent NAQCS a set of interrogatories and document requests seeking information about NAQCS's relationship with APC. NAQCS objected to the interrogatory requests that dealt with APC, claiming that the information was irrelevant, overly broad, unduly burdensome, and protected by the work-product doctrine and attorney-client privilege. The Secretary requested the information again on October 21, 2015. On February 16, 2016, the Secretary served NAQCS with a notice of deposition concerning these topics. NAQCS did not comply with the notice and on February 25, 2016, the Secretary filed a Motion to Compel NAQCS to produce discovery and appear at a deposition focusing on the business relationship between NAQCS and APC. I granted the Secretary's Motion to Compel on March 18, 2016, and ordered NAQCS to produce the eight requested documents, to answer the Secretary's interrogatory, and to designate an individual to appear at the Secretary's deposition.

The parties jointly requested and were granted a 90-day extension and then a 9-day extension. On August 23, 2016, I issued a Notice of Hearing and Order to File Prehearing Report. The matter is currently set for hearing on March 27–31, 2017, in Albany, New York.

II. MOTION TO AMEND

On November 30, 2016, I received the Secretary's Motion to Add APC as a Respondent to Petition for Assessment of Civil Penalty Brought Against NAQCS (hereinafter "Sec'y Mot."), wherein the Secretary seeks to amend his petition to add APC as a respondent with NAQCS under the Commission's "unitary operator" theory. On December 12, 2016, I received NAQCS's Response in Opposition to the Secretary's Motion to Add APC as a Respondent (hereinafter "NAQCS Resp."). On December 15, 2016, I received Harrington's Joinder in NAQCS's

¹ The civil penalty petition for Docket No. YORK 2013-0212-M includes Citation No. 8712623 and Order Nos. 8712625, 8711442, and 8712624. The originally proposed penalty for the four violations was \$517,700.00. The Secretary filed an Unopposed Motion to Amend Petition for Assessment of Civil Penalty on March 9, 2015, requesting that the total penalty be reduced to comport with the Secretary's Special Assessment Penalty Conversion Table for Flagrant Violations. I granted the Secretary's Motion on March 12, 2015.

The civil penalty petition under section 110(c) for Docket No. YORK 2015-0134-M includes Citation No. 8712623-00019433A and Order No. 8712625-00019433A.

Response in Opposition to the Secretary’s Motion to Add APC as a Respondent (hereinafter “Harrington Resp.”), adopting and incorporating NAQCS’s response. Thereafter, on December 16, 2016, I received the Secretary’s Motion for Permission to File Reply to Respondent NAQCS’ Opposition Memorandum to the Secretary’s Motion to Add APC As Respondent to Petition for Assessment of Civil Penalty (hereinafter, “Sec’y Reply”), which I hereby grant.

For the reasons that follow, I hereby **GRANT** the Secretary’s motion to amend his petition filed against NAQCS to include APC as Respondent with NAQCS, its wholly owned subsidiary, because the Secretary did not act with bad faith or undue delay in filing the motion to amend, NAQCS will not be prejudiced by the addition of APC as Respondent, and the hearing will not be delayed as a result.

A. Principles of Law

The Commission does not have a procedural rule regarding pleading amendments² but has analogized the modification of a citation to the amendment of pleadings under Federal Rule of Civil Procedure 15. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); Fed. R. Civ. P. 15.³ Rule 15 states that after more than 21 days after filing initial pleadings, a party may amend its pleading “only with the opposing party’s written consent, or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Rule 15 further states that “[t]he court should freely give leave when justice so requires.” *Id.* Rule 15’s language has been interpreted to allow amendments unless one of the following factors is present, justifying denial: (a) undue delay; (b) bad faith by moving party; (c) repeated failure to cure deficiencies by previous amendments; (d) undue prejudice to the opposing party; or (e) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Particularly, the Commission has explained that legally recognizable prejudice to the operator bars otherwise permissible modification. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992).

In reviewing the pleadings and analyzing below these five factors, I determine that justice requires adding APC as a respondent and Respondents have established nothing to justify denial of the Secretary’s motion to amend the petition against NAQCS to add APC as a respondent.

² Commission Procedural Rule 1(b) states that “[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure.” 29 C.F.R. § 2700.1(b).

³ The Commission has held that granting or denying amendments is largely a discretionary matter with the ALJ to whom the motion is made. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981). Relevant to this case, Commission ALJs have granted the Secretary leave to amend pleadings to add unitary operators as respondents. *See, e.g., Quality Materials*, 36 FMSHRC 2334, 2334–35 (Aug. 2014) (ALJ) (granting Secretary’s unopposed post-hearing motion to add related company as a unitary operator); *Sec’y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, 34 FMSHRC 894 (Apr. 2012) (ALJ) (allowing Secretary to add entity to its temporary reinstatement application after determining the alleged joint employer was a unitary operator with named Respondent).

B. Analysis

Although any unitary operator theory would need to be litigated fully at hearing, the Secretary presents compelling evidence to support his contention that APC and NAQCS were a unitary operator at the time relevant to the violations, and that justice requires that APC be included as a respondent in this matter.

1. APC as a Unitary Operator with NAQCS

The unitary operator theory is a doctrine (akin to the “alter ego” theory in corporate law) under which the Commission has treated multiple entities as a single mine operator for purposes of Mine Act liability because the entities are so closely related that together they essentially constitute a single association/organization that operates, controls, or supervises a mine. *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1305–18 (Dec. 1999). More than one entity in a company may be held liable based on the Commission’s unitary operator theory. The Commission looks to the following factors to determine whether to treat entities as unitary operators for purposes of the Mine Act: (1) the interrelation of operations, (2) common management among the operations, (3) centralized control over mine health and safety, and (4) common ownership. *Berwind Natural Res. Corp.*, 21 FMSHRC at 1317. The court need not find that every factor of the *Berwind* test is met, and there is no hierarchy among the factors. The Commission has held that the proper test is to “weigh the totality of the circumstances to determine whether one corporate entity exercises such pervasive control over the other that the two entities should be treated as one.” *Id.* For example, Judge Andrews consolidated a number of cases involving APC and its subsidiaries and found them to be a unitary operator. (Sec’y Mot. Ex. B); *Austin Powder Co.*, 38 FMSHRC 539, 544 (Mar. 2016) (ALJ).

Based on evidence the Secretary gathered during discovery, APC and NAQCS’s operations appear significantly interrelated and support the notion of being one entity. For example, the Secretary notes that the deceased miner in this matter signed an employment agreement with APC rather than NAQCS and was paid by APC. (Sec’y Mot. at 4.) I note that exhibits attached to the Secretary’s Motion to Compel dated February 25, 2016 appear to support that allegation. (Sec’y Mot. to Compel, Exs. B, F.) Further, NAQCS employees were expected to abide by the APC Employee Handbook. (Sec’y Mot. at 4.) This fact is also supported by an exhibit attached to the Secretary’s Motion to Compel. (Sec’y Mot. to Compel, Ex. C.) NAQCS was undercapitalized, according to information revealed during discovery, as it had only a petty cash account and no bank account; indeed, NAQCS customers paid APC and APC paid NAQCS’s expenses. (Sec’y Mot. at 4-5.) Additionally, APC filed a tax return on behalf of NAQCS. (*Id.* at 5.) APC provided NAQCS with insurance for workers’ compensation, property, vehicles, and employee health. (*Id.*) APC’s website advertised for NAQCS as NAQCS did not have its own website, and the APC logo is on the vehicles NAQCS used. (*Id.*) An exhibit attached to the Secretary’s Motion to Compel shows a NAQCS truck with an Austin Powder logo on the side. (Sec’y Mot. to Compel, Ex. J.) The Secretary’s evidence suggests APC performed the bulk of administrative services for NAQCS, including accounting, human resources and information technology. (Sec’y Mot. at 5.)

The common management between NAQCS and APC also appears to indicate that the two companies are more akin to a single entity. (Sec’y Mot. at 5-6.) In *Berwind* the Commission held that common management and officers weighed in favor of two entities being considered a unitary operator. *Berwind*, 21 FMSHRC at 1322. Here, NAQCS’s only two board members, Michael Gleason and David True, were also on APC’s board of directors. (Sec’y Mot. at 6.) True was President of APC with the power to appoint the NAQCS board. (*Id.*) Two of the three officers that worked at NAQCS also had significant roles at APC. (*Id.*)

The Secretary further alleges that APC exercised significant control over NAQCS’s safety procedures and training. In *Berwind*, two companies that were considered unitary operators worked together in health and safety issues. *Berwind*, 21 FMSHRC at 1322. Here, the Secretary states APC created the new hire training program for NAQCS employees and required that certificates be sent to APC’s headquarters. (Sec’y Mot. at 6-7.) This contention is supported by an exhibit to the Secretary’s Motion to Compel. (Sec’y Mot. to Compel, Ex. G.) Moreover, NAQCS was required to comply with APC’s safety programs for items such as hazardous communication and lockout/tag-out procedures. (Sec’y Mot. at 7.)

The common ownership prong also weighs in favor of the Secretary’s argument that NAQCS and APC be considered a unitary operator. Common ownership was a significant factor in the Commission’s *Berwind* decision to find that two entities were a unitary operator. *Berwind*, 21 FMSHRC at 1322. Here, NAQCS was a wholly owned subsidiary of APC at the time of the accident that led to the issuance of the citation and orders. (Sec’y Mot. at 7.)

In sum, I determine that the Secretary has adduced evidence during discovery supporting the allegations in his motion that APC and NAQCS should be treated as a unitary operator, which justifies permitting amendment of his petition against NAQCS subject to the five factors under *Foman v. Davis*. Consequently, I must analyze whether the following factors are present. *Foman v. Davis*, 371 U.S. at 182.

2. Bad Faith, Repeated Failure to Cure Deficiencies, Futility or Undue Delay

First, in analyzing the factor of bad faith by the moving party, nothing indicates that the Secretary acted in bad faith by filing the motion to amend. The Secretary states he wishes to add APC for purposes of joint and several liability. (Sec’y Mot. at 2.) Respondents contend that adding APC serves no purpose and is not required for the interest of justice under Rule 15 because NAQCS is capable of satisfying the proposed civil penalty. (NAQCS Resp. at 8.) Yet the Secretary alleges that NAQCS does not have its own bank account and its expenses are primarily handled by APC. (Sec’y Mot. at 4–5.) The Secretary’s allegations are compelling given evidence that NAQCS has only petty cash, which would be insufficient to cover a proposed civil penalty totaling more than half a million dollars. (*Id.*) I therefore determine that Respondents have not established that the Secretary acted in bad faith.

Second, the repeated failure to cure deficiencies factor is inapplicable to this analysis. Although the Secretary previously amended the petition, he did so to reduce the civil penalty and before he was aware of the extent of APC and NAQCS’s relationship. Moreover, nowhere in

their response do Respondents argue that the Secretary repeatedly failed to cure deficiencies. Thus, I determine that Respondents have failed to establish applicability of this factor.

Third, amending the petition to add APC would not be futile. *See, e.g., Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002) (“An amendment would be futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.”). Here, the Secretary has a valid reason to include APC in the pleadings, inasmuch as information gathered during discovery indicates APC and NAQCS may be a single entity for purposes of joint and several liability. Consequently, I determine that Respondents have failed to establish the futility of amendment factor.

Fourth, with regard to undue delay, Respondents suggest the Secretary’s motion to add APC to the petition is untimely because the accident giving rise to the citation and orders in this docket occurred in November 2012, more than four years ago. (NAQCS Resp. at 2.) The Secretary, however, maintains he only became aware that APC may be a unitary operator during the course of pre-hearing discovery, namely a deposition errata sheet executed on September 9, 2016, and documents produced by NAQCS on October 28, 2016. (Sec’y Mot. at 3.) The Secretary’s argument is persuasive, as the Secretary filed the motion to amend on November 30, 2016, about a month after receiving the relevant discovery documents, a reasonable amount of time to confer with NAQCS regarding the issue and then file the motion. Moreover, NAQCS has hindered the progress of the case with its refusal to cooperate with the Secretary’s discovery requests, which also caused delay. The hearing is still 2-1/2 months away, the parties have had ample time to complete discovery to this point, and counsel for NAQCS and APC (which are the same) are familiar with the unitary operator issue. Consequently, I determine that Respondents have not established that granting the Secretary’s motion to amend to add APC as a respondent would cause undue delay in this matter.

3. Undue Prejudice to Respondents

In analyzing the undue prejudice factor, I note Respondents argue that adding APC to this proceeding would be unduly prejudicial, as it may possibly subject APC to duplicative litigation and delay the outcome of this case. These arguments all hinge on Respondents’ assertions that APC will have to defend itself in a unitary operator case, requiring litigation on the same issue it has defended against in other dockets, and that requiring APC to address the unitary operator issue will also require this matter to be consolidated with the other APC unitary operator cases pending before another ALJ, thus delaying resolution of this matter.

For the reasons that follow, I am unpersuaded by the argument that NAQCS would be subject to multiple duplicative litigation, and thus unfair prejudice, if APC is added as a respondent.

First, Judge Andrews consolidated numerous cases involving APC’s regional subsidiaries and ultimately ruled that those subsidiaries were unitary operators with APC. (Sec’y Mot., Ex. B); *Austin Powder Co.*, 38 FMSHRC at 544. Although NAQCS is a subsidiary of APC, it appears the unitary operator analysis regarding NAQCS will be factually distinct from those Judge Andrews considered and therefore not duplicative. Indeed, NAQCS is unique from the

other APC regional subsidiaries because those entities were spun off from APC in December of 2004, whereas NAQCS was acquired by APC at a different time in 2004 and has a unique name that does not include “Austin Powder.”⁴ Those “regional subsidiaries” were assigned the same MSHA contractor identification number; NAQCS was not.

Second, although Respondents presented two cases to support the notion that potential exposure to multiple and duplicative litigation is recognized as prejudice, their reliance on these cases is misplaced as they can be easily distinguished.⁵ Further, there is no doubt that the prejudice of subjecting the nonmoving party to multiple duplicative suits should be considered in a motion to amend, but it is not an issue in this matter because litigation regarding NAQCS’s relationship to APC will be distinct from the litigation involving the APC regional subsidiaries.

Third, the hearing in this matter will not be delayed by allowing the Secretary to pursue his unitary operator theory. I note that NAQCS’s relationship to APC is particular to this matter and, as such, the case at this juncture should not be consolidated with the dockets before Judge Andrews. Furthermore, Judge Andrews issued his order regarding APC and its regional subsidiaries on March 9, 2016, and no interlocutory appeal has been filed to date. Most importantly, APC had the opportunity to add NAQCS to the dockets before Judge Andrews but failed to do so. Indeed, both APC (in the matter before Judge Andrews) and NAQCS are represented by the same counsel. On October 20, 2014, Judge Andrews issued an Amended Order to Consolidate in the APC cases and put the onus “on the parties” to “report any other Austin Powder Co. dockets that should also be consolidated due to the similar unitary operator issue.” (Sec’y Reply, Ex. B.)⁶ In response to Judge Andrews’ order on the unitary operator issue,

⁴ The entities in the cases before Judge Andrews were Austin Powder Appalachia, LLC; Austin Powder MidSouth, LLC; Austin Powder Northeast, LLC; and Austin Powder Central States, LLC.

⁵ The Sixth Circuit held that duplicative litigation could be prejudicial and would be weighed in its decision regarding a labor union’s motion for *intervention*. *United States v. City of Detroit*, 712 F. 3d 925 (6th Cir. 2012). The Sixth Circuit weighed the potential unfairness of multiple litigation, but as it was applied to intervention, and to the moving party. The Tenth Circuit in *Garcia v. Hall* recognized that the risk of multiple litigation could be prejudicial, but ultimately declined joinder of an insurance company in a suit because to do so would have destroyed diversity jurisdiction. *Garcia v. Hall*, 624 F.2d 150 (10th Cir. 1980). Neither case is binding nor persuasive under the particular circumstances of this pending matter.

⁶ The history of the APC cases before Judge Andrews, and this case before me, have raised concerns regarding NAQCS counsel’s candor with the court. Judge Andrews’s Order dated October 20, 2014, required the parties to report any other APC dockets that would present the unitary operator theory. This Order was distributed to APC counsel, which included attorneys David Hardy, Christopher Pence, Eric Silkwood, James McHugh, and Scott Wickline from the law firm Hardy Pence, PLLC. David Hardy, a partner at Hardy Pence, represents NAQCS before me. Hardy filed NAQCS’s pleadings, from the Answer to Petition on December 6, 2013 to NAQCS’s Response in this matter. Additionally, Hardy engaged in discovery with the Secretary. Judge Andrews consolidated additional APC cases on December 23, 2014, and March 27, 2015. Thus, Respondent’s counsel was aware of Judge Andrews’s order to include potentially related

(continued...)

APC submitted a list of thirteen operating companies with which it contracted, but APC failed to identify NAQCS on its list. The Secretary apparently was unaware of the extent of NAQCS's relationship with APC until discovery progressed in this matter, so the Secretary was not on notice. The Secretary indicates that NAQCS's name and its absence from the spin off agreements that covered the other regional subsidiaries made it difficult to ascertain whether NAQCS should have been involved in the consolidated matters. Of course, NAQCS was in the best position to include itself in the APC unitary operator litigation before Judge Andrews, but neglected to do so. NAQCS cannot now prevent the Secretary from presenting a unitary operator theory in this case because it and/or APC chose to exclude NAQCS from other litigation involving APC and its regional subsidiaries.

Lastly, no other arguments were presented by the Respondents to establish any legally recognizable prejudice to NAQCS that would bar an otherwise permissible modification. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992). Indeed, the Commission has explained that for purposes of determining legally cognizable prejudice the danger of prejudice is not enough; rather, the non-movant must make a specific showing of actual prejudice, i.e., prejudice that is "real" or "substantial," such as the inability to call witnesses or an inadequate opportunity to prepare for hearing. *See Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012). Respondents have not made that showing here.

In sum, after analyzing the factor of undue prejudice under *Foman v. Davis*, 371 U.S. at 182, I conclude that granting the Secretary's motion to amend the petition to add APC as a respondent with NAQCS does not unduly prejudice either NAQCS or APC.

⁶ (... continued)

dockets after this docket was filed. In fact, NAQCS answered the penalty petition and this matter was assigned to me months before Judge Andrew's decision, so counsel for NAQCS was aware that it possibly presented a unitary operator argument, but neglected to bring it to my attention. Instead, NAQCS delayed discovery in this matter. NAQCS's argument regarding multiple, duplicative litigation is disingenuous; even if the litigation would be duplicative—and I determine it is not—NAQCS's counsel created the dilemma.

I have reviewed the pleadings, Fed. R. Civ. P. 15, and the five factors under *Foster v. Davis* in considering whether to grant the Secretary's motion to amend its petition to add APC as a respondent with NAQCS. Consequently, I conclude that justice requires that the Secretary should be permitted to amend its petition to include APC as a respondent.

III. ORDER

Accordingly, the Secretary's motion to amend the civil penalty petition in Docket No. YORK 2013-212-M to add APC as a respondent with NAQCS is hereby **GRANTED**.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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January 23, 2017

KENNETH L. WOLFF,
Complainant,

v.

BRIDGER COAL COMPANY,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-602
DENV-CD-2016-17

Jim Bridger Mine
Mine ID: 48-00677

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Before: Judge Simonton

This case is before me upon a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. The Complainant, Mr. Kenneth Wolff, worked for Bridger Coal Company ("Bridger" or "Respondent") as a leadman for ten years and a supervisor for two to three years until his resignation in August of 2012. Statement of Kenneth Wolff to MSHA, August 23, 2012, pp. 1-4 ("Wolff Statement"). Wolff alleged that he was improperly placed on "crisis suspension"¹ because he discussed and criticized Bridger Coal's handling of his safety concerns with a co-worker. *Id.* at 4. On July 27, 2012, Mr. Wolff quit in response to being placed on crisis suspension. His resignation became official on August 3, 2012.

Mr. Wolff first filed a section 105(c) complaint with MSHA on April 14, 2016, three years and eight months after his resignation and the alleged adverse action. On June 9, 2016, MSHA notified Wolff that "MSHA does not believe that there is sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred." June 9, 2016 MSHA Notification Letter. Mr. Wolff filed a 105(c)(3) complaint with the Commission on July 26, 2016.

For the reasons explained below, the court finds that the Complainant failed to provide a justifiable explanation sufficient to excuse the initial filing delay of over three and a half years, and that such a delay materially prejudices the Respondent. 30 U.S.C. 815(c)(2) (requiring miners to file discrimination claims with the Secretary of Labor within sixty days of the date of discrimination); *see also Herman v. Imco*, 4 FMSHRC 2135, 2138 (Dec. 1982) (affirming ALJ dismissal of 105(c) claim filed eleven months late where Complainant knew of his rights and decided to file a late complaint after developing a desire to be vindicated); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (dismissing 105(c) claim filed over two

¹ In his statement to MSHA, Mr. Wolff defined a "crisis suspension" as "sending a person home while [mine management] makes a decision." Wolff Statement, at 4. According to Paul Gust, Manager of Safety, Health and Training at the Surface Operations at Bridger Coal, crisis suspension includes pay. Respondent's Mot. to Dismiss, Declaration of Paul Gust, at 1.

years late because Complainant's serious injuries did not prevent him from filing worker's compensation claim and thus did not excuse the delay in filing with MSHA).

Commission Procedural History

Mr. Wolff filed a discrimination complaint with MSHA on April 14, 2016, over three and a half years after he resigned due to the alleged adverse action. Kenneth Wolff December 30, 2016 Explanation Letter ("Wolff Explanation"). Wolff alleged that he resigned because he was improperly placed on crisis suspension for discussing and criticizing Bridger's safety decisions surrounding the emergency stop on a vacuum truck. Wolff Statement at 4. On June 9, 2016, MSHA notified Wolff that it did not have sufficient evidence to pursue the claim.

Mr. Wolff subsequently filed a 105(c)(3) complaint on July 26, 2016. On the same date, Chief Judge Robert J. Lesnick sent Wolff an acknowledgement letter to inform him that his complaint was incomplete and ordered Wolff to provide proof of service and a short and plain statement of the pertinent facts surrounding his complaint within 30 days. Chief Judge July 26, 2016 Acknowledgement Letter. When Wolff failed to provide proof of service within the 30-day period, Chief Judge Lesnick issued an Order to Show Cause requiring Wolff to provide proof of service, contact information, and a short and plain statement of the facts, or face dismissal. Chief Judge October 5, 2016 Order to Show Cause.

Though never properly served, Bridger Coal discovered that Mr. Wolff filed a 105(c)(3) complaint against it when it submitted a routine FOIA request for quarterly Dodd-Frank disclosures on November 7, 2016. Resp. Mot. to Dismiss at 1-2. On December 2, 2016, Bridger filed a motion to dismiss the case because Wolff failed to file his complaint with MSHA within the 60-day deadline and failed to serve the complaint on Bridger. *Id.* at 2-3. The case was assigned to this court on December 8, 2016.

On December 15, 2016, the court issued a second Order to Show Cause requiring Mr. Wolff to provide a statement of the facts and an explanation for his late filing. Mr. Wolff responded with a brief handwritten letter on December 30, 2016. Bridger filed a reply on January 6, 2017. The Respondent argued that Wolff's complaint should be dismissed because he provided no justifiable circumstances for the three and a half year filing delay and because the delay materially prejudiced Bridger. *See generally* Resp. Rep. Specifically, Bridger argued that the key witnesses to the events in Mr. Wolff's complaint had either passed away or retired in the time between the alleged adverse action and the claim being filed. *Id.* at 6-7.

After careful review, the court finds that the Complainant has not provided a justifiable explanation sufficient to excuse a filing delay nearing four years, and that such a delay materially prejudices the Respondent. Having made this determination, analysis of the Respondent's alternate grounds for dismissal is unnecessary.

Section 105(c)(2) Discrimination Claim Filing Requirements

Under 30 U.S.C. § 815(c)(2), "Any miner...who believes that [s]he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection

may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination.” After a miner files a complaint, the Mine Safety and Health Administration (MSHA) investigates it on behalf of the Secretary of Labor. *See, e.g., Simpson v. Fed. Mine Safety & Health Review Comm’n*, 842 F.2d 453, 456 n. 3 (D.C. Cir. 1988). If the Secretary finds that a violation occurred, the Secretary may pursue the claim on the miner’s behalf before the Commission. 30 U.S.C. § 815(c)(2). If not, the miner may file a claim with the Commission on his own behalf under 30 U.S.C. § 815(c)(3).

The Mine Act’s legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be constructed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted* in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

Accordingly, the Commission does not consider the 60-day time limit of § 815(c)(2) to be jurisdictional. *See Morgan v. Arch*, 21 FMSHRC 1381, 1386 (Dec. 1999) (“Commission case law is clear that the 60-day period for filing a discrimination complaint under section... § 815(c)(2), is not jurisdictional”). It will hear cases in which a complaint’s untimely filing is due to “justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect.” *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996).

On the other hand, “[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal.” *Id.* at 1922; *see also Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”). The Commission places the burden of proving justifiable circumstances on the miner, and places the burden of demonstrating material legal prejudice on the mine operator. *See id.*; *Schulte v. Lizza Indus. Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

Analysis

Mr. Wolff resigned in response to Bridger’s decision to place him on crisis suspension on July 27, 2012, effective August 3, 2012. Mr. Wolff did not file a claim with MSHA until April 14, 2016, three years and eight months after his resignation. The Complainant must therefore demonstrate that justifiable circumstances explain the 1,289 day delay that occurred after the 60 day filing period expired on or about October 3, 2012.

It is undisputed that Wolff was aware of his right to file a 105(c) complaint. In fact, Wolff states he was encouraged by MSHA Inspector Jim Ellenberger to file a 105(c) complaint with MSHA a few weeks after his 2012 resignation. Wolff Explanation. MSHA Inspector Rick Dickson also apparently encouraged Mr. Wolff to file a complaint in late 2015, and Wolff again declined. Resp. Rep. at 2. Wolff claimed that he did not want to file a complaint on either occasion because he was “sick...and done with Bridger,” and thought that the matter would go away with time. Wolff Explanation.

Wolff did not give extensive detail regarding his sickness, but did mention that on one occasion he had to be rushed to Salt Lake City for medical care due to the stress caused by the events surrounding his resignation. Kenneth Wolff Letter to Chief Judge Robert J. Lesnick (“Wolff Letter”). It does not appear that Wolff’s illness was incapacitating, however, as he was able to procure other work following his resignation. Wolff Statement. Rather, Wolff argues that he simply wished to move on with his life, and believed that the pain that resulted from his severance with his employer would diminish with time. Wolff Letter. Wolff has been unable to get over the matter, however, claiming that it “ate at [him] night and day.” *Id.* He thus decided to file a complaint to obtain closure.

The Complainant failed to justify the filing delay because his illness and reluctance to file his complaint with MSHA do not amount to “excusable neglect.”

The court finds that the combination of the Complainant’s illness and enduring reluctance to file a complaint does not justify a filing delay of over three and a half years. The Commission has identified “excusable neglect” as a justifiable circumstance that may excuse a late filing, but held that “the fair hearing process does not allow us to ignore serious delay.” *Hollis v. Consolidation Coal*, 6 FMSHRC 21, 25 (Jan. 1984); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127, 1130 (Oct. 1999)(ALJ) (“the lengthier the delay, the stronger the justification required to overcome it”); *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ) (delay of over three years is “inherently prejudicial”).

Wolff first argues that he did not file a claim when first encouraged to do so because he was sick. Wolff Explanation. The court sympathizes with the Complainant’s health issues, but cannot find that they prevented him from filing a complaint for the entire three and a half year delay period. Administrative law judges have been reluctant to find even significant injuries and surgery to be sufficient reasons for a delay unless the complainant is fully incapacitated or clearly prevented from filing. *See Hacking v. Staker & Parson Companies*, 38 FMSHRC 851 (Apr. 2016) (ALJ) (holding that Complainant’s complications from surgery, divorce, and caring for her son were not sufficient justifications for a 900 day filing delay because she nonetheless managed to testify before Utah Labor Board in that time); *Keys v. Reintjes of the South, Inc.*, 21 FMSHRC 1127 (Oct. 1999) (ALJ) (holding that Complainant’s significant injury was not a justifiable circumstance because he was not incapacitated and continued to pursue a worker’s compensation case).

Wolff did not claim that his illness rendered him incapable of filing a claim within the 60-day limit, nor did he suggest that he was significantly ill or incapacitated for the entire three and a half year period. In fact, Wolff quickly found another job after his resignation and was thus

able to continue working in spite of his illness. The 105(c)(3) filing process is not so difficult or taxing that one who is healthy enough to return to work cannot complete the paperwork, especially with the aid and encouragement of an MSHA Inspector. Thus, I find that Wolff's decision not to file within the 60-day limit is due to his personal choice rather than health limitations.

Mr. Wolff next claimed that he did not file within the 60-day period because he no longer wished to associate with Bridger or revisit the stress and trauma of the events surrounding his resignation. Wolff Explanation. The Complainant explained that he disregarded MSHA Inspector Ellenberger's recommendation to file a complaint two weeks after his resignation because he "was done" with Bridger Coal. *Id.* Specifically, Wolff claimed that these events were too painful to discuss and that he believed that the pain matter would fade with time. Wolff Letter; Wolff Statement. When the events continued to "[eat] at [him] night and day," Wolff ultimately decided to file his claim in the hope that resolving the issue through the Commission may bring closure. *Id.*

The Commission has held that a miner's conscious and voluntary decision not to file a 105(c)(3) claim does not constitute excusable neglect. *Herman v. Imco Services*, 4 FMSHRC 2135, 2138 (Dec. 1985). In *Herman*, the Commission affirmed the administrative law judge's decision to dismiss the complaint where the miner did not file a complaint within the deadline because he did not want to do so at the time. *Herman*, 4 FMSHRC at 2138. The Complainant explained that, after thinking about his situation for some time, "he concluded that he had been wronged and that he desired to be vindicated." *Id.* The Commission held that the Complainant's explanation was not attributable to his being misled as to or misunderstanding his rights under the Act, and thus did not constitute a justifiable circumstance for the delay. *Id.* at 2138-39.

Like *Herman*, it is clear that Mr. Wolff knew that he could file a complaint with MSHA shortly after his resignation. Mr. Wolff was twice encouraged by MSHA Inspectors to file a 105(c) complaint and both times elected not to do so. While the Complainant stressed that the mental and emotional difficulties he experienced following his resignation from Bridger Coal made him reluctant to pursue a claim, his initial decision not to file stemmed from his desire not to associate with Bridger Coal, not from a mental or emotional inability to file. In fact, it appears that Mr. Wolff's emotional difficulties with the events are what finally encouraged him to interact with Bridger Coal and file a complaint nearly four years later. The court therefore finds that Mr. Wolff's explanation does not amount to "excusable neglect" and does not excuse the 1,289 day filing delay.

The extreme filing delay materially prejudiced the Respondent.

Even if the Complainant's explanation justified the filing delay, the Respondent has demonstrated that the 1,289 day filing delay is materially prejudicial because key witnesses are no longer available to testify. As the Commission stated in *Herman v. Imco*, the 60-day limitation is designed to ensure fairness for the opposing party by:

...preventing surprises through the revival of claims that have been allowed to slumber until evidence have been lost, memories have faded, and witnesses have

disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Herman 4 FMSHRC at 2139; *see also Fulmer v. Mettiki Coal Corp.*, 30 FMSHRC 523, 525-26 (June 2008) (ALJ); *Wilson v. CSR Southern Aggregates*, 22 FMSHRC 1218, 1221 (Oct. 2000) (ALJ); *Sinnott v. Jim Walter Res., Inc.*, 6 FMSHRC 2445 (Dec. 1994) (ALJ) (claim filed three years and three months after the alleged discrimination was “inherently prejudicial”).

I agree that Mr. Wolff’s 1,289 day filing delay materially prejudiced Bridger Coal’s opportunity for a fair hearing. Bridger indicated that six key witnesses in the case are no longer available to testify. *See* Resp. Rep. at 6; Mot. to Dismiss, pp. 10-13; Wolff Statement pp. 3-7. Three Bridger employees with firsthand knowledge of the facts surrounding Wolff’s complaint passed away between 2013 and 2016. Resp. Rep. at 6. Two other Bridger employees, as well as the MSHA inspector that investigated the hazard complaints of the vacuum truck at issue, have retired. *Id.* Bridger notes that, had the Complainant filed his complaint within the 60-day limit, all of these witnesses would have been readily available to testify on the matter. *Id.*

Even if Bridger were able to locate the three living witnesses, it is highly unlikely that they would have a present and accurate recollection of events that took place four years earlier. *See Sinnott*, 16 FMSHRC at 2448. In *Sinnott*, the administrative law judge found that after a delay of three years, “it is highly questionable whether the other company employees who might have had some knowledge of the events surrounding (the) termination would have a present recollection of those events.” *Id.* Here, the delay nears four years, significantly longer than any delay previously excused by the Commission. *See Hacking*, 38 FMSHRC 851 (noting that a delay of 31 months is more than three times longer than any filing delay previously excused by the Commission) (citations omitted). The length of the delay and the general unavailability of key witnesses materially prejudice Bridger’s ability to put on its defense to Mr. Wolff’s allegations, and must be dismissed.

Thus, allowing the Complainant to proceed without a justifiable excuse would not only exceed the limits of delay permissible under the Mine Act, but would materially prejudice the Respondent’s right to a fair hearing. *Sinnott*, 16 FMSHRC 2447, (stating that “At some point there has to be an outer limit, if the 60 day rule contained in the statute has any meaning at all”).

ORDER

The Respondent’s Motion to Dismiss is **GRANTED**. Accordingly, this matter is **DISMISSED** with prejudice. The Complainant may appeal this matter to the Commission within 30 days of the date of this order.

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

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January 25, 2017

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT
CANYON GOLD, LLC,
Respondents.

MATTHEW VARADY,
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT
CANYON GOLD, LLC,
Respondents.

DISCRIMINATION PROCEEDINGS

Docket No. WEST 2014-614-DM
WE-MD 14-04

Docket No. WEST 2014-307-DM
WE-MD 14-03

Jerritt Canyon Mill
Mine ID: 26-01621

BRIEFING ORDER

Before: Judge Simonton

These discrimination cases are before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). In 2015, Daniel Lowe and Matthew Varady (“Complainants”) established discrimination claims against Veris Gold USA, Inc. (“Veris Gold”), operator of the Jerritt Canyon Mill Mine. *See Daniel B. Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ); *Matthew Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ). Veris Gold filed for bankruptcy prior to those discrimination hearings, and the Complainants amended their complaint to include Jerritt Canyon Gold, LLC (“JCG”), purchaser of Veris Gold’s assets in bankruptcy. The Complainants also sought to add WBox 2014-1 Ltd. (“WBox”), which they alleged is also associated with JCG as a successor in interest to the Jerritt Canyon Mill mine. Currently, WBox is not a party to these cases.

On August 9, 2016, JCG and WBox filed a motion to reopen the bankruptcy proceedings to enforce the sale order and related injunction and seek sanctions against the Complainants for continuing to pursue their discrimination claims. In an Order dated September 2, 2016, the United States Bankruptcy Court of the District of Nevada enjoined the Complainants “from pursuing claims against the Purchaser, WBox 2014-1 Ltd...in any other Court or proceeding, including any administrative proceeding.” Though the Judge elected not to sanction the

Complainants at that time, he expressed his concern that other proceedings were being conducted in another administrative forum in violation of section 362(a) of the Bankruptcy Code.¹ The Judge ordered the Complainants to stop pursuing their cases before the Commission or face possible monetary sanctions.

Following the Order of the Bankruptcy Court, the assigned administrative law judge stated that he could not “put the pro se, non-attorney Complainants in financial jeopardy” and dismissed the Complainants’ cases, though no party sought dismissal at that time. The Complainants filed a petition for discretionary review with the Commission on November 23, 2016. The Commission granted the petition, and on December 16, 2016, vacated the dismissal and reopened the case. The Commission stated that,

Claimants may determine freely their response to the Order of the Bankruptcy Court. Separately, respondents may choose to file motions to dismiss or we would expect the Administrative Law Judge would ask for expeditious briefing on the impact, if any, of the Bankruptcy Court’s Order upon these cases.

Daniel B. Lowe v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC, Matthew Varady v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC, 2016 WL 7432617 (Dec. 2016). On December 10, 2016, the cases were assigned to this court on remand.

A conference call was held with the representatives of the parties and WBox on January 18, 2017.² It was determined during the call that the Respondents intended to file a motion to dismiss, which the Complainants planned to contest. The parties disagree over whether the Bankruptcy Court’s Order effectively bars the Complainants from pursuing their discrimination claims under the Mine Act. The Complainants argue that miners who have established

¹ 11 U.S.C. § 362(a) of the Bankruptcy Act provides in relevant part :

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay applicable to all entities of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of this case under this title, or to recover a claim against the debtor that arose before the commencement of this case under the title.

² Representatives of the Solicitor were not present at this conference call. Initially, this court believed it unnecessary for the Solicitor to brief this matter. Upon further reflection, however, the court now believes that the Solicitor’s input regarding the mandatory penalty assessment for 105(c)(3) discrimination findings, discussed below, would be instructive in determining the impact of the Order of the Bankruptcy Court on these cases.

discrimination under 105(c) of the Mine Act have a Congressionally-recognized status. The Bankruptcy Court's Order should therefore not affect their right to pursue remedies for findings of discrimination under the Mine Act. Veris Gold, JCG, and WBox argue that the Complainants, as 105(c)(3) discriminatees, lack the authority to challenge the stay implemented by the Bankruptcy Court under 11 U.S.C. § 362(a), and do not fall into the "governmental unit" exception outlined in section 362(b), discussed below.

In addition, the Complainants maintain that JCG and WBox can be held liable for the findings of discrimination against Veris under the Mine Act's successorship law. The Respondents and WBox again disagree.

In order to reach the question of the successorship status of JCG and non-party WBox, this Court must first address the impact of the Bankruptcy Court's Order on the Commission's jurisdiction. Only if this court determines that the Commission retains the authority to modify the Complainants' 105(c)(3) claims shall it proceed to address the interaction between the Bankruptcy Code and the Commission's successorship doctrine. Thus, this court finds it prudent to have the parties, as well as WBox and the Solicitor, brief the matters discussed below.

While the Commission declined to draw any legal conclusions based on the record in the recent Order, Commissioner Cohen provided some observations in his concurrence. Commissioner Cohen noted that because section 105(c) of the Mine Act outlines specific, Congressionally-granted rights to encourage miners to actively participate in matters of mine safety and health, the Act grants miners a status beyond ordinary unsecured creditors in the Bankruptcy Code. The Commissioner believes that this status applies to both 105(c)(2) discrimination complaints, which MSHA brings on behalf of miners, and 105(c)(3) discrimination complaints, which miners bring themselves.

Commissioner Cohen emphasized that the Commission is bound to uphold the Congressionally-recognized purposes of the Mine Act. Congress granted the Commission, not the Bankruptcy Courts, the authority to modify and set aside discrimination and interference claims under the Mine Act, and as such, the Commission has the exclusive authority to pursue these discrimination claims. Commissioner Cohen notes that this view is shared by other federal agencies. *See International Technical Products Corp.*, 249 NLRB 1301 (Jun. 1980) (determining that the Board had exclusive authority to set aside claims under the NLRA, and failure to do so would be "tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority...to proceed against a successor employer in furtherance of that obligation"), *reaffirmed in Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010).

Finally, Commissioner Cohen observed that courts have proven willing to hold successors in interest liable for the actions of bankrupt predecessors because many of the protections of the Bankruptcy Code no longer apply to either party after the closing of bankruptcy proceedings. *See Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al., v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995). Thus, there is precedent permitting successorship liability for a predecessor's actions after a "free and clear" asset sale.

Persuasive precedent exists in favor of the Respondents and WBox as well. In a similar case that was not appealed to the Commission, this court found that a discriminatee cannot pursue a claim against a successor in interest for the predecessor's discriminatory behavior when the successor purchased a bankrupt company's assets "free and clear of all Liens, Claims, and interests." *Marshall Justice v. Gateway Eagle Co., LLC*, 38 FMSHRC 2341 (Aug. 2016) (ALJ). In *Gateway Eagle*, this court granted the complainant an order of default against predecessor Gateway Eagle for a section 105(c)(3) violation because it failed to file an answer or respond to an Order to Show Cause. The court declined to extend the default order to include Rockwell LLC, the purchaser of Gateway's assets in bankruptcy. *Id.* The Court looked to the holding of the 4th Circuit in *In re Leckie Smokeless Coal Co.*, which held that a pension fund's right to collect premium payments from a successor under the Coal Act was an interest in property that arose from the property being sold. *Id.* Thus, the interest could be extinguished by a § 363 sale because the rights were grounded in the fact that those assets were employed for coal-mining purposes. *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996).

Also at issue is the status of 105(c)(3) complaints in relation to the automatic stay provision of section 362 of the Bankruptcy Code. Section 362(b) exempts any "continuation of a proceeding by a 'governmental unit' to enforce the governmental unit's police or regulatory power" from the automatic stay. *See Big Laurel Mining*, 37 FMSHRC 1997, 1997-98 (Sept. 2015). The Commission has held that "governmental unit" includes the Secretary of Labor, the Department of Labor, and MSHA within the meaning of the Bankruptcy Code. *Id. citing Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990).

Neither party disputes that section 105(c)(2) discrimination complaints brought by MSHA are excepted from the automatic stay provision of the bankruptcy code. It is less clear, however, whether the exception applies when miners bring their own discrimination complaints before the Commission under section 105(c)(3) of the Mine Act. The Commission has held the Secretary of Labor is required to pursue a civil penalty in all cases in which discrimination has been found. *See Callahan v. Hubb Corp*, 20 FMSHRC 832 (Aug. 1998); *Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993). There appears to be no case law interpreting whether the Solicitor's mandatory pursuit of civil penalties in all 105(c) findings of discrimination affects the automatic stay provision of the Bankruptcy Court.

Absent binding Commission precedent on these matters and at the direction of the Commission, further briefing is necessary to determine the impact, if any, of the Bankruptcy Court's Order on the Commission's jurisdiction to determine successor liability in these cases.

The parties, WBox, and the Secretary shall file briefs regarding the impact of the Bankruptcy Court's Order upon these cases.³ Within their responses, the parties shall address:

- 1) The observations put forth by Commissioner Cohen in his concurrence.
- 2) This court's opinion in *Gateway Eagle*, 38 FMSHRC 2341.
- 3) The impact, if any, of the Bankruptcy Court's Order on the Commission's authority to pursue, modify and set aside 105(c) discrimination claims.
- 4) Whether sections 105(a), 105(c)(3), and 110(a) of the Mine Act, requiring the Solicitor to assess a civil penalty for established 105(c)(3) discrimination violations, affect or implicate the automatic stay provision in section 362 of the Bankruptcy Code.
- 5) Whether a successor in interest may be found liable for a predecessor's actions even after a "free and clear" asset sale in bankruptcy.

WBox and the Solicitor are provisionally added as parties for purposes of responding to this Order. The parties, WBox, and the Solicitor are hereby **ORDERED** to submit briefs on the issues outlined above no later than February 27, 2017.

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

³ The court stresses that this briefing order does not change the non-party status of WBox or the Solicitor for this case. The court recognizes that the Solicitor opted not to represent the Complainants in the discrimination cases and that the Complainants' Motion to Amend to add WBox as a party to this dispute was never granted. Neither WBox nor the Solicitor are parties to this proceeding for any purpose outside of this order.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, on behalf of
STEVE GLOSSON,
Complainant,

v.

LOPKE QUARRIES, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. SE 2017-19-DM
MSHA Case No. SE-MD-16-09

Mine: Dunn Construction
Mine ID: 01-03411

ORDER COMPELLING PRODUCTION OF DOCUMENTS
ORDER DENYING REQUEST TO POSTPONE HEARING

This proceeding is before me upon a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2). A hearing is scheduled for February 28 to March 1, 2017. The Secretary has filed a motion to compel responses to the Secretary’s Requests for Production of Documents and a motion to postpone the hearing.

The Secretary’s motion sets forth the following timeline of events that have occurred during discovery.

On December 6, 2016, the Secretary served discovery requests on Respondent Lopke Quarries, Inc. (“Lopke”). Lopke’s responses were due on January 3, 2017. Lopke requested and received an extension of time until January 6 to respond. On that date, Lopke responded to the Secretary’s Requests for Admissions but failed to respond to the Secretary’s Interrogatories or Requests for Production.

During a phone call on January 12, Lopke’s counsel agreed to provide the outstanding discovery responses by January 13 in order to allow the Secretary time to prepare for depositions scheduled for January 25. On January 13, Lopke failed to provide discovery responses. On January 16, Lopke provided incomplete discovery responses. The specific deficiencies identified by the Secretary are that Lopke failed to respond to six of the interrogatories and, in response to the Requests for Production, submitted unnumbered documents without indicating to which Requests they were responsive. Sec’y Mot., Ex. G.

During a phone call on January 18, Lopke’s counsel agreed to postpone the scheduled depositions and provide complete discovery responses by January 20. On January 20, Lopke failed to provide discovery responses. On January 23, Lopke again provided incomplete responses to the Requests for Production and failed to provide any supplemental interrogatory responses. Sec’y Mot., Ex. I. On January 25, Lopke’s counsel provided supplemental interrogatory responses and sent a series of emails with documents attached, but failed to

indicate to which requests the documents were responsive. Sec’y Mot., Exs. L, M. Moreover, the Secretary alleges that none of the documents appear to be responsive to his specific request for service records for loaders the Complainant operated while working at the mine. The Secretary asserts that these records are relevant to Lopke’s allegations that Complainant was unwilling to safely operate the loaders to which he was assigned and intentionally damaged the brakes on one of them.

On January 26, the Secretary filed a motion seeking to compel Lopke to “respond fully to the discovery properly served in this case.” The Secretary asserts he is entitled to reasonable development of evidence in support of his case pursuant to Commission Procedural Rule 56. 29 C.F.R. § 2700.56. Lopke’s failure to provide full and complete discovery responses has prevented the Secretary from adequately preparing for trial or depositions or from fully identifying Rule 30(b)(6) deposition topics.¹ The Secretary’s motion also requests that the hearing be postponed to April 18-19, 2017 so that he will have time to adequately prepare for and take depositions.

Counsel for Lopke emailed my office on Friday, January 27, stating that she would file a response to the Secretary’s motion “as soon as possible today.” However, my office did not receive a response that day. This morning (January 30), counsel emailed my office again, stating, “The Respondent will be filing a motion in opposition today.”

Although I have not yet received Lopke’s response, this matter requires expeditious resolution because the Secretary has been waiting several months for opposing counsel to provide the information necessary to allow him to prepare for depositions and trial. The specific documents identified by the Secretary that Lopke has not yet produced are the complete service records for the loaders Complainant operated while at the mine. Lopke is hereby **ORDERED to produce to the Secretary labeled copies of the service records for the loaders by close of business today, January 30, 2017.** In addition, **Lopke shall immediately make available any witnesses the Secretary needs to depose.**

¹ Rule 30(b)(6) of the Federal Rules of Civil Procedure permits a party to name a business organization as a deponent and requires the named organization to then designate one or more officers, directors, managing agents, or other persons to testify on its behalf. Fed. R. Civ. Pro. 30(b)(6); *see* 29 C.F.R. § 2700.1(b) (applying Federal Rules to this proceeding).

The hearing is scheduled to begin four weeks from now, on February 28, 2017. Provided that Lopke responds to the Secretary's discovery and makes its witnesses available immediately, the parties still have sufficient time to take depositions. Accordingly, the Secretary's request to postpone the hearing is **DENIED**.

Because Lopke has delayed discovery and the taking of depositions, the due date for the close of discovery and for the parties to file copies of their witness lists and exhibits is hereby extended to **February 14, 2017**.

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

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