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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 21, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. LAKE 2017-0248 LAKE 2017-0224 LAKE 2018-0146 LAKE 2018-0141
NORTHSHORE MINING COMPANY, ROGER PETERSON, employed by NORTHSHORE MIINING COMPANY, and MATTHEW ZIMMER, employed by NORTHSHORE MINING COMPANY	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; and Althen, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") from Cross Petitions for Discretionary Review filed by the parties. Northshore asks that we find that the Administrative Law Judge ("Judge") erred in determining that a citation and order were unwarrantable failures and constituted reckless disregard.[1] 41 FMSHRC 50 (Feb. 2019) (ALJ). Messrs. Peterson and Zimmer ask that we find the Judge erred in assessing penalties against them pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 815(c).[2] The Secretary asks that we find the Judge erred in

[1] Northshore also petitioned for Commission review of whether the order was a violation. We declined to undertake that review.

[2] Section 110(c) provides "[w]henever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties [as the corporate operator]." 30 U.S.C. § 820(c).

finding that the order did not constitute a flagrant violation under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2).[3]

The citation, order, and section 110(c) penalty assessments arise from the dislocation of a conveyor walkway ramp at a processing plant owned and operated by Northshore. The Order (Order No. 8897220) alleges that the walkway ramp was "not of substantial construction nor . . . maintained in good condition," in violation of 30 C.F.R. § 56.11002[4] and was a flagrant violation. S. Ex. 5. The Citation (Citation No. 8897219) alleges that the ramp was "not barricaded or posted to alert miners to the compromised condition of the floors," allowing miners to access the ramp, in violation of 30 C.F.R. § 56.20011.[5] S. Ex. Finally, the Secretary undertook separate proceedings under section 110(c) of the Mine Act against Messrs. Peterson and Zimmer.

As set forth below, we affirm the findings of reckless disregard and an unwarrantable failure for both violations. Substantial evidence does not support the Judge's assessment of individual penalties under section 110(c), and we reverse those findings. We affirm the Judge's deletion of the flagrant designation for the violation of section 56.11002.

I.

Factual and Procedural Background

A. Factual Background

1. Background of the Mine and the Events Preceding the Accident

Northshore operates a large iron ore mine in Minnesota including a production plant that processes iron ore pellets, known as taconite. The production plant houses a conveyor gallery, which contains two parallel conveyor belts: the 62 conveyor and the 162 conveyor. The conveyors are 400 feet long. Tr. 150. They slope at an upward angle and transport taconite from various facilities either up to storage bins or back to the production yard.

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[3] Section 110(b)(2) of the Mine Act defines a flagrant violation as "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).

[4] Section 56.11002 provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 56.11002.

[5] Section 56.20011 provides that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required." 30 C.F.R. § 56.20011.

A center walkway between the two conveyor belts serves as the primary travelway in the conveyor gallery. It is constructed of two separate layers. The top layer is comprised of concrete reinforced with steel mesh, and the bottom layer consists of reinforced perlite[6] panels. Tr. 316-17, 365; S. Ex. 12. Steel plates were added under the center walkway in 2010 for additional reinforcement.

Along the outer side of the two conveyor belts are two additional walkways in the gallery: the east outer walkway and the west outer walkway. The dislocation at issue occurred at the east outer walkway. Tr. 52-53, 58-59. Both outer walkways are approximately 30 inches wide, much narrower than the center walkway. They are four inches thick. They rise along the full length of the gallery, parallel to the center walkway and conveyor belts to a height of approximately 72 feet. They are constructed in similar fashion as the center walkway (reinforced concrete over reinforced perlite panels) but do not have added underlying steel plates.

Unlike the center walkway, the outer walkways were not normally used as travelways. They would only be accessed when a belt support roller, known as an "idler," needed to be changed or if cleaning the outer walkways was necessary. The rollers were approximately 40 inches wide and weighed about 100 pounds.[7]

Daniel Scamehorn has been the supervisor in charge of providing engineering services for all areas of the mine since 2011. In 2013, one of Scamehorn's subordinate engineers submitted a work order concerning the need for repairs in the 62/162 gallery, including the outer walkways. The work order stated that: "Lightweight concrete [perlite] panels on underside of 62/162 belt gallery are falling. . . . Center walkway was repaired with steel plate; outside walkways and below conveyor need to be repaired." S. Ex. 18. It stated the "[b]est procedure is to demo [the panels]" and "put a plate on under side." *Id.* Repairs, however, were not made at that time. Instead, repairs to the 62/162 gallery's outer walkways were put on what Scamehorn described as the equivalent of a "to-do list." Tr. 339.

2. The KOA Report

Scamehorn contracted with Krech & Ojard ("KOA"), an engineering firm, for a thorough review and second opinion on the condition of the gallery, including an examination of the outer

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[6] Perlite is "one of the natural volcanic aluminosilicate glasses (rhyolitic rocks) which formed by the rapid cooling of viscous lava or magma." Reka, Arianit A., *et al., Chemical, mineralogical and structural features of native and expanded perlite from Macedonia,* Journal of the Croatian Geological Survey and the Croatian Geological Society, 2019 | 72/3 | 215-221 (2019) at 215. The perlite at the plant is a "portland cement mixture but it has perlite aggregates in it as opposed to general concrete." Tr. 241.

[7] It was necessary to clean the outer walkways periodically because taconite would spill over from the conveyors and accumulate on the outer walkways. Miners would use hoses to wash taconite down the outer walkways. Miners therefore needed to work on the outer walkways in order to do a "thorough cleaning." Tr. 435.

walkways. Tr. 323-24; 41 FMSHRC at 54. Patrick Leow, an engineer with the firm, went to the mine in March 2015 to examine the gallery.

In June 2015, KOA completed a report setting out its observations and conclusions. The report found that KOA had not seen holes in the outer walkways, but it did "[o]bserve[. . .] damage . . . [that] included spalled concrete, delaminated concrete, debonded reinforcement and corroded reinforcement over large areas of the walkway slab underside."[8] S. Ex. 12, at 1. The report also noted that the topping slab was "in poor condition and i[n] need of replacement due to the large surface cracking and heaving . . . ." *Id*. The report concluded that "the deteriorated perlite slabs are compromised and provide little to no structural support" and that "[t]he heaving and cracked concrete topping slab is also compromised providing little to no structural support in the walkways as well as presenting an uneven walking surface." *Id*. at 2

The report indicated that the outer walkways lacking steel plate reinforcing "may not contain adequate structural support for the use of these walkway areas." S. Ex. 12, at 2; Tr. 144. The report concluded that, while the reinforced portions of the center walkway could withstand some limited "minor" use, the outer walkways *"*cannot be found to be structurally adequate for use." S. Ex. 12, at 2. The report recommended that Northshore "prohibit" the transportation of heavy equipment along the center walkway and "restrict" access to the *outer walkways* "as they are not safe for personnel to be using until a repair has been completed." S. Ex. 12, at 2.

Scamehorn shared the report with other management personnel, including Zimmer and Peterson. Zimmer was a Section Manager responsible for scheduling repairs, planning repairs, and monitoring equipment to "predict failure . . . before the failure actually occurs." Tr. 380-83. Peterson was responsible for maintenance of the conveyor. Tr. 418-20. Scamehorn did not close the outer walkways to foot traffic but did instruct Zimmer and Peterson to "restrict access as noted." Tr. 327.

Scamehorn testified that he initially was uncertain about what Leow meant by the term "restrict." Tr. 326-29. He testified to a follow-up discussion with Leow, during which Leow said the report's observations about the condition of the concrete of the outer walkways pertained only to localized spots and did not suggest a potential failure of the overall walkway. Furthermore, Leow testified that he had used the term "restrict" to indicate that there was no outright prohibition on travel along the outer walkways, so long as travel was minimal and limited to "authorized personnel" and that further preventative safety measures were taken. Tr. 370-71.

Scamehorn testified that, based upon his understanding of the report and his subsequent discussion with Leow, Northshore instituted a requirement that employees wear fall protection when accessing the outer walkways. They did not erect any barricades or post any warning signs about the condition of the walkways.

[8] Spalled concrete means the surface of the concrete contains cracks or is chipping. It is commonly seen in concrete driveways. Delamination is a splitting into layers.

The requirement of fall protection was conveyed to Northshore's workforce through safety meetings and trainings. According to Zimmer, Peterson, and a maintenance supervisor Erik Ollila, management did not receive any complaints from the workforce regarding the need to wear fall protection. Tr. 452.

Operations at the mine slowed between November 2015 and March 2016. According to Ollila, shortly after operations fully resumed, miners informed Northshore that perlite from the underside of an outer walkway was falling from the bottom of the conveyor gallery. In response, Northshore brought in jersey barriers to barricade the area below the walkways where the material was falling.

3. The Accident and MSHA's Investigation

On September 6 and 7, 2016, Evander King and two other contract miners, received orders from Northshore to clean the east outer walkway. The walkway was covered with 6 to 12 inches of taconite pellets and mud. Their job was to wash taconite pellets down the walkway in order to remove it. As they washed the material down the walkway, it began to amass into a larger amount of material.

Dennis Lehtinen, an hourly day-crew operator, gave the work instructions to the cleanup crew. Lehtinen had been instructed by John Gornick, the Electrical Supervisor and the liaison to contract employees, to tell the crew to wear the fall protection. Lehtinen testified that he went to the 62/162 conveyor gallery to make sure they were wearing the fall protection correctly. He stated that he went to the top of the conveyor gallery and observed that the crew members were tied off at an appropriate place. According to King, Lehtinen basically instructed the crew members generally on how to put the safety harnesses on and how to tie off with the lanyard from the harness. Lehtinen testified that he effectively instructed the crew to tie off the entire time, by taking them through the process. According to Lehtinen, he instructed them to affix lanyards in sequence as each descended the walkway, and he told them to tie off to structural steel supports. Tr. 485-87.

King testified that he heard Zimmer and Gornick decide that the crew should use fall protection. King asked them why it was necessary for the enclosed walkway. Peterson replied that fall protection was needed in case the miners slipped on the pellets or if a piece of their clothing got caught in the conveyor. 41 FMSHRC at 52.

King testified that Lehtinen did not instruct the contract crew specifically on how or where to tie off as they went down the walkway and that it was not possible to be tied off 100% of the time on the outer east walkway. He said that, due to the location of anchor points, miners would "unclip, take off the strap with the D-rings, move down, put the strap back on, and then tie the lanyard to the D-ring and reclip it." Tr. 54-55.

The crew was unable to finish the cleanup before the end of its shift on September 6, 2016 and resumed its work the following day. King testified that he was hosing down the taconite pellets at a height of approximately 50 feet when "the entire structure began to shake."

Tr. 58-59. "[A]ll of a sudden sheets of thick, caked mud" and other "buildup around the structure began falling." Tr. 58.

As instructed, King was wearing fall protection. He saw a hole covered by wire mesh in the floor immediately in front of him. He waited briefly to make sure the event was over, unclipped himself from his lanyard, and ran back up the ramp.

King testified that, immediately after the event, maintenance technician Matthew Bailey ran up to the transfer tower and asked the crew what happened. King told Bailey that "something just gave way in there." Tr. 60. Bailey asked, "You were on this side?" *Id*. King responded, "yes." *Id*. Bailey said, "You never should have been in there." *Id*. Bailey said to King that the conveyor should have been shut down and, "we've been telling them [upper management] that that has been in terrible condition for years now." *Id*. King testified that Bailey repeated this statement as he drove the crew to the pelletizer break room.

Later that day, in the break room, King told Senior Maintenance Technician Steven Floen what had happened. Floen became "very angry" and "he said that he had been telling those people upstairs about this problem for a long time, years he said even." Tr. 61. King testified that Floen said, "they [upper management] just don't seem to care." *Id*.

King testified that when he returned to work on September 8, 2016, Gornick "said he was glad that nothing terrible had happened but that they had known the potential of a collapse or of a failure and they had been hoping to take the weight of the pellets off to make sure the ramp would last a little bit longer before they had to replace it." Tr. 66.

The following day, King submitted a hazard complaint to MSHA about the 62/162 gallery's outer walkways. The complaint stated that "miners were assigned to a work area without being informed of known hazards." S. Ex. 2. MSHA Inspector Terrance Norman conducted the investigation to follow up on the complaint. Norman also consulted with Michael Superfesky, an MSHA civil engineer.

Superfesky examined the plant. He confined his inspection of the walkways to views from beneath the walkway and did not examine the walkway from above. In testifying regarding the perlite, he opined that wire mesh is "essential" to construction because the tensile strength of concrete is "very poor" on its own. Tr. 242. Once the mesh debonds from the perlite, the load-carrying capacity of the walkway is "highly compromise[d]" and "you don't want to walk on it." Tr. 243. Superfesky's testimony, however, shows he did not realize that the concrete above the perlite panels was reinforced with steel mesh. Tr. 261.

Superfesky concluded that the mesh in the lower layer of perlite had debonded and that the outer east walkway was structurally deficient for foot traffic at the time of the accident. Superfesky also inspected the outer west walkway and noted debonding and spalling on that walkway, as well.

Superfesky testified that fall protection does not prevent serious injury when the hazard is a structural deficiency. He asserted that the force on the body when falling with protection is

severe, the miner might be hit with debris from the collapse, and if not rescued quickly, suspension trauma might cut off circulation resulting in loss of limb. His testimony in this respect was general and did not include analysis of any likelihood of injuries, possible, probable, or expected at the Northshore plant.

Mine management conducted its own investigation. According to Michael Osmundson, an expert metallurgist, and David Franseen, an expert KOA engineer, the failure of a diagonal steel cross member beam caused the dislocation of the walkway. The beam failed at a series of rivet holes positioned above the walkway due to the weight of taconite being washed down the walkway. As a result of the steel failure, the steel structure rotated and removed support from the outer edge of the portion of the walkway that failed. The steel structure supporting the east walkway had dropped about 2 feet at the point of failure causing a segment of the floor to dislocate. Tr. 522, 526, 528, 530; Resp. Ex. M3; Resp. Ex. M5; Resp. Ex. O.

A subsequent analysis of the failed beam by metallurgist Osmundson demonstrated, and Superfesky agreed, that a crack had existed at the point of failure on the diagonal steel beam. Osmundson testified that the crack had developed at a connection point near the roof of the gallery structure and was covered by a gusset plate, obscuring the crack from view. Tr. 501-02; Resp. Ex. K. During cross-examination, MSHA's Superfesky agreed that the immediate cause of the dislocation was the failure in the steel beam but asserted that if the walkway had been in better condition it would not have dislocated. Tr. 287-288. It was noted that after the incident, the walkway remained intact even with only one side supported by steel. In repairing the walkway, the concrete came out in long unbroken segments and was difficult to break. Tr. 399, 533.

4. MSHA's Issuance of the Citation and Order

Following MSHA's investigation, the agency issued the order alleging the "reckless disregard," "unwarrantable failure," and "reckless" flagrant violation of section 56.11002 alleging Northshore's failed to maintain the walkway in "good condition." S. Ex. 5, at 5-6. MSHA also issued the citation alleging a "reckless disregard" and "unwarrantable failure" violation of section 56.20011 for the failure to barricade or warn miners away from the damaged walkways. S. Ex. 6. MSHA proposed penalties of $130,000 and $69,400 respectively.

MSHA also issued proposed penalty assessments against Zimmer and Peterson. The assessments alleged that they had knowingly failed to maintain the walkways in good condition and proposed penalties of $4,300 and $4,500 respectively. These assessments were based upon a later investigation and interviews conducted by MSHA Investigator James Hautamaki, from November, 2016 to January, 2017.

Northshore, Zimmer and Peterson filed notices of contest. The matters were assigned to the Judge, who consolidated the dockets for a single hearing.

B. The Judge's Decision

In upholding the citation and order, the Judge found them to be S&S and the result of an unwarrantable failure and reckless disregard. 41 FMSHRC at 61, 63, 66. The Judge found

Zimmer and Peterson personally liable under section 110(c) for knowingly failing to maintain the walkways in good condition. Finally, the Judge found the violation of section 56.11002 was not a flagrant violation. *Id*. at 68-69.

1. The Charge of Individual Penalty Assessments to Zimmer and Peterson

The Judge noted that Zimmer and Peterson had worked at the mine for 13 years and 25 years, respectively, and had managerial roles since at least 2015. The Judge found that Zimmer and Peterson used the requirement of fall protection to avoid fixing the actual problem: the hazardous walkway. She concluded that they "failed to act on the basis of the walkway information to protect worker safety and health." *Id.* at 76.

The Judge also relied on the fact that Zimmer and Peterson received copies of the KOA report, along with the email from Scamehorn suggesting that they "restrict" access. According to the Judge, they should have known that the conveyor walkways must be maintained in good condition or, alternatively, restricted from access appropriately. As such, the Judge found that Zimmer and Peterson engaged in a knowing violation of section 56.11002, and assessed a penalty of $4,000 against each of them.

2. The Charged Violation of 30 C.F.R. § 56.20011

In concluding that Northshore's failure to barricade the walkway "was the result of reckless disregard," the Judge found that that Northshore "knew of the problem with the east walkway but took no steps to limit access," thereby demonstrating "an indifference to a known violation." *Id*. at 71.

The Judge also upheld the unwarrantable failure designation. The Judge's analysis was similar to that concerning section 56.11002 set forth in detail below.

3. The Charged Violation of 30 C.F.R. § 56.11002

a. Reckless Disregard

In analyzing negligence, the Judge found that the walkway "continued to deteriorate" after the KOA report and concluded that the operator's failure to maintain the walkway in good condition was the result of reckless disregard. *Id*. at 62. The Judge found that "mine management knew of the condition of the area yet demonstrated indifference to the violation, thereby placing the contract miners in a hazardous position." *Id*. at 63.

b. Unwarrantable Failure

The Judge found aggravating circumstances for each of the seven factors used to evaluate unwarrantable failure violations. *Id*. at 63-66, citing *IO Coal Co*., 31 FMSHRC 1346, 1352 (Dec. 2009). Although the Judge acknowledged the testimony of the KOA expert who was present throughout the dismantling of the structure (*Id.* at 59), the Judge credited Superfesky's testimony that the condition of the walkway was the primary reason for the failure. The Judge also credited

Inspector Norman's testimony regarding statements made by miners during his investigation, namely that miners had complained about the walkway being in a deteriorating condition. The Judge rejected Leow's explanation that his use of the term "restrict" in the KOA report did not suggest a complete prohibition of use of the walkways. *Id*. at 59.

c. Flagrant Charge

The Judge found all of the criteria for a flagrant violation existed except Northshore's conduct was not "reckless" within the meaning of section 110(b)(2). *Id*. at 68-69. The Judge cited *The American Coal Co*., 38 FMSHRC 2062, 2069-70 (Aug. 2016), for the proposition that "based on the heightened penalties available under the flagrant provision, the violations should be distinguishable from those addressed under the S&S and unwarrantable failure provisions of the Act. . . . Thus, the 'reckless failure' component of a flagrant violation requires a higher negligence showing than that required under the unwarrantable failure analysis." 41 FMSHRC at 68.

The Judge opined that to sustain a flagrant violation, the Secretary must prove a heightened degree of recklessness in which the operator consciously disregards an expectation of serious injury. The Judge found that Northshore believed, albeit wrongly, that fall protection would "solve the problem" with the walkways until repairs were completed. *Id*. The Judge found that the operator "could have repaired the walkway, but the mine chose to use fall protection as a solution," but that "[g]iven that decision, there is no evidence to suggest a conscious or deliberate indifference to the risks on the part of the mine." *Id*.

Thus, the Judge found that Northshore's conduct was insufficient to meet the recklessness necessary for a flagrant violation. *Id*. at 68-69. Upon dismissing the flagrant violation, the Judge assessed a penalty of $60,000 for Order No. 8897220. *Id*. at 77.

II.

Disposition

A. Substantial Evidence Does Not Support the Judge's Findings of Individual Liability of Zimmer and Peterson under Section 110(c).

Section 110(c) provides that:

> Whenever a corporate operator violates a mandatory health or safety standard[,] . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

An agent violates section 110(c) through a knowing violation "when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.' *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy*, 14 FMSHRC at 1245." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 2003 (Aug. 2014) (Young, M. and Althen, W. concurring and dissenting).

Importantly here, a violation of section 110(c) requires that the agent must be "in a position" to remedy the condition at issue, in order for section 110(c) liabilities to attach. *See, e.g.*, *Maple Creek Mining, Inc*., 27 FMSHRC 555, 567-70 (Aug. 2005) (one foreman was liable for water accumulation but two were not because they did not have authority to take remedial action); *see also Lafarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998), citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981).

Applying this standard, substantial evidence does not support the Judge's findings that Zimmer and Peterson were "in a position" to take action to repair the walkway. The Judge found that "Zimmer testified that it was part of his job to plan and coordinate the maintenance and repair work that would take place in the 62/162 gallery, and ensure that his group worked safely." 41 FMSHRC at 74. However, the Judge failed to distinguish the scope of Zimmer's repair duties regarding the walkway structures as opposed to the conveyors. Nor did the Judge distinguish how much involvement, if any, Zimmer had on how to prioritize, as opposed to implement, repairs.

In fact, the record contradicts the Judge's findings. Specifically, the evidence shows that the duty of arranging for repairs of the walkways fell strictly within the purview of the Engineering Department, which was overseen by Scamehorn – not by Zimmer or Peterson. Tr. 314, 339, 358, 370, 371. Scamehorn testified about his evaluation process of determining which projects should be prioritized. Tr. 353-55. Importantly, according to his testimony, the Engineering Department, and not Zimmer, decided whether to initiate repairs of the walkways, and how to prioritize the repairs – as opposed to any other department. *Id*.

Moreover, the record demonstrates that, prior to June 1, 2015, Zimmer was in charge of maintaining the pellet plant and *equipment* at the mine. Tr. 381. This is an important distinction.

Additionally, Jason Betzler, a Northshore maintenance planner, testified that work orders sent to the Engineering Department under Scamehorn would address the maintenance of the *buildings, grounds*, "or anything that required *engineering* or *structure*. . . ." Tr. 304 (emphasis added). By contrast, Zimmer was involved only in the "maintenance of the conveyors *inside*" the structures, as opposed to the maintenance of the walkway structures themselves. Tr. 384-85. (emphasis added).

Regarding Zimmer's work after June 1, 2015, he oversaw day-to-day planning, scheduling, and reliability functions. Tr. 382. Zimmer testified that the planning and scheduling were essentially "administrative" functions. Tr. 382-83. Zimmer supervised the planners who

planned out the work, determined what was needed for the job, what parts needed to be bought, how the work would get done, and how many technicians are required to do the job. Tr. 383. He also supervised the schedulers who organized the work orders in the backlog to repair a piece of equipment at a given point in time.[9] Tr. 382-83.

In other words, the record demonstrates that Zimmer primarily oversaw the *implementation* of repair efforts *once they were initiated*, but did not have the discretion to decide whether to initiate such repairs in the first place or how to prioritize them. In fact, Zimmer took "direction" from the Engineering Department. Tr. 386. As such, substantial evidence does not support the Judge's finding that Zimmer was "in a position" to be responsible for maintenance of the walkway or other building structures or grounds. He was not in a position to order any remedy to structural problems with the walkway.

Similar facts pertain to Peterson. He was responsible for overseeing the running of equipment. Tr. 418. Any maintenance duties he had at the facility were similar to those of Zimmer. Thus, Petersen testified that he was in charge of maintaining and repairing equipment. Tr. 418. As with Zimmer, Peterson did not have control over a project when it was assigned to the engineering department. Tr. 420-21.

The Judge found that "Peterson was largely responsible for reviewing work orders, prioritizing and directing maintenance work, and, when necessary, informing miners of any changes in safety policies or procedures." 41 FMSHRC at 74. However, as noted above, Peterson's maintenance and work order duties appeared to only relate to *equipment*, and not to the *building structures*, such as the walkway. Repair of the walkway, by contrast, fell within the purview of the Engineering Department.

The fact that neither Zimmer nor Peterson was in a position to initiate or prioritize repairs of the walkway is unsurprising when viewed in light of the significance of the repairs that were required. Unlike the typical section 110(c) scenario involving a foreman observing and ignoring an easy-to-fix hazard, such as a stuck belt roller, the operator here bore the responsibility to take care of and repair the entire gallery walkway. Such remedial efforts would have taken extensive time, effort, and expense, as shown by the KOA report. *See* S. Ex.12. Northshore estimated the total cost of all walkway repairs to be $300,000 prior to the dislocation. There is no evidence in the record to indicate that either Zimmer or Peterson were in a position to authorize such a large expenditure.

Based upon the foregoing discussion, we find Zimmer and Peterson were not in a position to initiate, create, or prioritize a plan to repair the outer walkways. Accordingly, we reverse and vacate the Judge's section 110(c) findings.

[9] Zimmer also supervised the monitoring of the pellet plant equipment. Tr. 383.

B. Substantial Evidence Supports the Judge's Finding that the Operator's Violation of 30 C.F.R. § 56.20011 Resulted from its Reckless Disregard and Unwarrantable Failure.

Northshore accepts that it was aware of the hazards on the walkway and that, nonetheless, the walkway was not barricaded. The requirement in section 56.20011 is *site-specific*. It goes to the issue of what should be done *on the site* – not what is happening at a meeting *off* the site. The KOA report specifically recommended restricting access on the outer walkways precisely because the walkway was "not safe" to work on. S. Ex. 12, at 2.

Despite knowing the walkway should be barricaded, Northshore left the site without a barricade for more than a year. During that period, the walkway was open to anyone, and although some might recognize the surface conditions, others might not have appreciated the hazard of walking on the walkway especially due to the buildup of mud and taconite. Nothing was done to bar entry.

Finally, despite obtaining review before the Commission, Northshore offered the Commission no argument for reversal thereby effectively waiving its request for review. Having not been presented with a viable reason for Northshore's failure to comply with the mandatory standard, we find none. Accordingly, the Commission affirms the findings of reckless disregard and unwarrantable failure for Citation No. 8897219.

C. The Judge Properly Found That Northshore's Violation of Section 56.11002 was Not Flagrant.

We affirm deletion of the "flagrant" designation for the violation of section 56.11002.

1. Background of "Flagrant" in Section 110(b)(2)

In response to sequential tragedies at the Sago, Alma, and Darby mines in 2006, Congress enacted the MINER Act. Among other changes to the Mine Act, Congress inserted an enhanced penalty for a new type of violation – a flagrant violation. The definition of a "flagrant" violation is succinct but complex. 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. § 110(b)(2).

Of course, as with all assessments, the Secretary bears the burden of proving all necessary elements of a violation. Therefore, the Secretary has an obligation to prove each element of a flagrant violation by a preponderance of the evidence.

The legislative history of the MINER Act makes it clear that Congress and the President intended flagrant violations to target the elimination of particularly severe violations of the mine safety and health standards. The flagrant penalty targets "bad actors"' who fail to take their safety responsibilities seriously by providing an increased maximum penalty for flagrant violators. 152 Cong. Rec. S4619 (daily ed. May 16, 2006) (statement of Sen. Michael Enzi); s*ee also* 152 Cong. Rec. E1071 (daily ed. June 8, 2006) (statement of Rep. Jerry F. Costello)

(supporting "stiffer penalties for flagrant violations of the law"). Upon signing the MINER Act into law, President George W. Bush stated: "[T]o ensure compliance with the law, the MINER Act will increase the maximum penalty for flagrant violations of mine safety regulations nearly four-fold." Presidential Statement on Signing the Mine Improvement and New Emergency Response Act of 2006, 2006 U.S.C.C.A.N. S27 (June 15, 2006).

Further, the Commission has observed that the Mine Act's overarching enforcement scheme promotes mining operators' compliance with its requirements by providing "'increasingly severe sanctions for increasingly serious violations or operator behavior."' *Emery Mining Corp*, 9 FMSHRC 1997, 2000 (Dec. 1987), quoting *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 828 (Apr. 1981). Inclusion of the flagrant provision in the MINER Act added another, expressly severe sanction for especially wrongful misconduct. A four-fold increase in potential penalties demonstrates that the denomination of "flagrant" applies to the most serious violations of the Mine Act in the final step of civil penalties.

Recognizing this legislative history and consistent with the progressive scheme of deterrence, in *American Coal*, 38 FMSHRC at 2069-70, a unanimous Commission found the flagrant provision created a type of conduct not previously addressed in the Mine Act. We found that a flagrant violation must constitute conduct of a violation other than the existing types of violations stating:

> [I]t is reasonable to expect that flagrant violations be of a type that was not addressed in the original Mine Act. Otherwise, Congress could have simply increased the maximum amount at which a penalty can be assessed and avoided creating a new statutory classification of violation.

Id..

The Commission recognized that the Mine Act already dealt with unwarrantable failures – that is, conduct involving aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 1997. Additionally, through the treatment of "significant and substantial" violations, the Mine Act dealt more harshly with violations that create a cause and effect resulting in a reasonable likelihood of a reasonably serious injury. *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984); *Peabody Midwest Mining, LLC,* 42 FMSHRC 379 (June 2020). If Congress wished simply to enhance penalties for these types of violations, it could have done so through penalty increases standing alone. Instead, it increased penalties four-fold for violations in which an operator demonstrated an extremely high level of negligence approaching willfulness in failing to eliminate a known violation that proximately and substantially caused death or serious bodily injury or created a reasonable expectation of proximately and substantially causing death or serious bodily injury. The flagrant violation, therefore, is a wholly new category of violation.

As enacted, the Mine Act did not contain the word "reckless." The MINER Act inserted the term "reckless" in two provisions. The first is the new flagrant section at 110(b)(2). The second is in section 116(a).[10]

The purpose of section 116(a) is to provide protection against liability for persons carrying out activities responding to mine accident rescue or recovery operations. However, the section explicitly exempts any action "that is alleged to result in the property damages or injury (or death) was the result of gross negligence, *reckless* conduct, or illegal conduct." 30 U.S.C. § 826(a) (emphasis added).[11]

In the MINER Act, therefore, Congress identified three levels of misconduct – gross neglect, reckless conduct, and illegal conduct. Congress classified recklessness as misconduct beyond gross negligence and bordering upon illegal conduct. This not only confirms that recklessness is substantially higher than ordinary negligence, but that the term "reckless" for MINER Act purposes stretches into the fringe, or actually reaches willfulness when applied to a flagrant analysis.

Congress' use of the term "flagrant" gives flavor and context to section 110(b)(2).[12] In *American Coal*, 38 FMSHRC at 2069-70, we found that a "flagrant" violation falls far outside the bounds of "ordinary" negligence. Congress enacted a distinct category of "flagrant" violations for violations of which the operator has actual knowledge but recklessly fails to eliminate the violation despite a reasonable expectation that it will be a substantial and proximate cause of death or serious bodily injury. The violation is a conspicuously offensive violation that flouts the Mine Act. In short, the acid test for flagrant violations is whether the conduct flouts the salutary purposes of the Mine Act by disregarding the safety of the miners.

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[10] Section 116(a) states the following:

No person shall bring an action against any covered individual or his or her regular employer for property damage or an injury (or death) sustained as a result of carrying out activities relating to mine accident rescue or recovery operations. This subsection shall not apply where the action that is alleged to result in the property damages or injury (or death) was the result of gross negligence, reckless conduct, or illegal conduct or, where the regular employer (as such term is used in this Act) is the operator of the mine at which the rescue activity takes place. Nothing in this section shall be construed to preempt State workers' compensation laws.

30 U.S.C. § 826(a).

[11] Section 116 is the only section of the Mine Act that contains the term "gross negligence."

[12] Webster's Unabridged Dictionary describes the etymology and definition of flagrant as "*flagrans*, -*antis*, p. pr. of *flagrate*, to burn. https://www.merriam-webster.com/dictionary/flagrant?src=search-dict-box. This definition accords with the common dictionary definitions. Merriam-Webster's Dictionary defines flagrant as "1**:** conspicuously offensive *flagrant* errors *especially* so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality." *Id*.

Finally, section 110(b) contains prerequisites for a finding of flagrancy that go substantially beyond the attributes of an unwarrantable failure or a significant and substantial violation. Particularly, the operator must fail to eliminate a "known" violation. The violation must cause or reasonably be expected to substantially and proximately cause death or serious bodily injury. The express statutory requirement for a reasonable "expectation" of "serious bodily injury" substantially exceeds the "reasonably likely" standard utilized at step three of *Mathies*, *Newtown Energy, Inc.*, and *Peabody Midwest Mining, LLC*. That "expectation" standard also far exceeds the fourth step of the same S&S test (that requires a reasonable likelihood of a "reasonably serious injury."). *Id*. A flagrant violation is not a significant and substantial violation or unwarrantable failure writ large; it is a uniquely unconscionable failure. It is clearly a uniquely wrongful violation.

2. The Plain Meaning of the Flagrant Section

In increasing the maximum penalties, Congress dealt with two of the six penalty factors expressed in the Mine Act – negligence and gravity. With regard to a flagrant charge, these two factors must be viewed from the extreme extent in that the required level of negligence approaches illegal or willful acts and the level of gravity must be death or a reasonable expectation of death or serious bodily injury. It is essential to break down the meaning of each phrase in section 110(b)(2).

a. "Reckless"

The term "reckless" has been defined in numerous reference sources.[13] The Restatement (Third) of Torts captures the best applicability of that term to a flagrant charge by stating "[a] person acts recklessly in engaging in conduct if":

> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and

[13] The New Oxford American Dictionary defines "reckless" as acting "without thinking or caring about the consequences of an action." The New Oxford American Dictionary 1414 (2d ed. 2005). Black's Law Dictionary defines "reckless" as conduct "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do." Black's Law Dictionary (11th ed. 2019). And as a modifier to "flagrant," the gross deviation must be "intolerable, glaringly obvious, or notorious." *Id*. The Cambridge Dictionary defines it as "doing something dangerous and not worrying about the results." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/reckless (last visited Jan. 12, 2021). Indeed, the website dictionary.law.com defines reckless disregard as "gross negligence without concern for danger to others." Legal Dictionary, dictionary.law.com (last accessed Jan. 12, 2021).

> (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.[14]

Restatement (Third) of Torts § 2 (Am. Law Inst. 2010).

An operator is "reckless" for the purposes of a "flagrant" violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard. Applying the Restatement (Third) of Torts § 2 to a flagrant charge, the risk of harm is "unjustifiable" if the burdens of reducing that risk are so slight relative to the risk resulting from the operator's failure to eliminate the violation.

The Judge below used the definition of "recklessness" set out by a fellow Administrative Law Judge in *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ). There, the Judge stated recklessness is when an operator "consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury." *Id.* at 804. We recognize the key part of this definition is the requirement for a "conscious or deliberate disregard." However, contrary to the Judge's use of the term "reasonably likely," a flagrant violation applies only to creation of a reasonable *expectation* of death or a serious body injury just as the statute clearly states. 30 U.S.C. § 820(b)(2).

The proper standard for a "flagrant" charge is that there must be a conscious or deliberate disregard for the safety of the miners through a failure to eliminate a violation, of which the operator has actual knowledge, that proximately and substantially caused death or serious bodily injury, or is reasonably expected to proximately and substantially cause death or serious bodily injury.

b. "Known violation"

Use of the term "known" in the context of the four-fold increase in penalties in section 110(b)(2) is consistent only with "actual knowledge."[15] As demonstrated in the discussion of the background of section 110(b)(2), the provision was aimed at an especially bad actor – that is, an operator who failed to take steps to eliminate a violation even though he or she *knew* the

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[14] The Third Restatement's comments on the definition of "reckless" state that "Section 2 . . . sets forth a standard for recklessness that is somewhat more restrictive than that included in the previous § 500 [the applicable Second Restatement section]."

[15] Black's Law Dictionary defines "knowledge" as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Black's Law Dictionary (11th ed. 2019). Black's then describes the well understood distinctions between "actual knowledge" ("direct and clear knowledge") and "constructive knowledge" ("[k]nowledge that one using reasonable care or diligence should have"). *Id*.

violation existed and would *expect* it to kill or cause serious bodily injury. Without doubt, Congress intended to impose those penalties upon an operator who had *actual knowledge* of such a violation but deliberately and consciously failed to act – essentially a conscienceless violator. This intent is consistent with a requirement of actual knowledge. Consequently, a violation is "known" by the operator when the operator is, in fact, aware of the violation.

c. "Reasonably could have been expected to cause death or serious bodily injury"

Just as Congress undoubtedly was aware of the factors for unwarrantable failures and significant and substantial violations in the Mine Act, Congress was surely aware that the Commission adopted a "reasonably likely" test for S&S violations. Therefore, Congress' use of the term "expected" rather than "likely" or even "reasonably likely" is highly significant.[16]

In considering whether the Secretary has proven a "reasonable expectation" of death or a "reasonable expectation" of a serious bodily injury, the Judge must first consider whether it is reasonably "expected" that an identified hazard will occur. If so, the Judge must then determine whether occurrence of the hazard would be "expected" to cause death or serious bodily injury. Such evaluation must be made in light of steps, if any, that the operator took to eliminate the hazard.

An operator's duty under the Mine Act is to eliminate violations. Actions an operator must take to eliminate the violation, itself, might not be the same as steps taken to eliminate the *hazard* which might lead to death or serious bodily injury. In evaluating the "expectation" element of an alleged flagrant violation, the Judge must consider the totality of the circumstances related to the "expectation" of death or serious bodily injury including measures taken to eliminate potential injuries. While steps taken to abate the likelihood of injury do not satisfy the duty to eliminate the violation, they are considerations for whether a violation is flagrant. For example, barricading the ground below the walkway did not eliminate the violation. However, by barring entry to the area below the walkway, it did eliminate any reasonable expectation that miners would be hit by perlite falling from above that area.

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

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[16] Merriam-Webster defines "expect" to mean "to consider probable or certain." Merriam-Webster, https://www.merriam-webster.com/dictionary/expect (last accessed Jan. 12, 2021). The Cambridge Dictionary defines "expect" as "to think or believe something will happen." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/expect (last accessed Jan. 12, 2021). The Macmillan dictionary also defines the term as "to think that something will happen." Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/expect (last accessed Jan. 12, 2021). Finally, in accord with the other dictionaries, Black's Law Dictionary defines "expectation" as "1. The act of looking forward; anticipation. 2. A basis on which something is expected to happen." Black's Law Dictionary (11th ed. 2019).

Notably, therefore, the definition of an imminent danger is identical to the definition of the physical elements of a flagrant violation except for the use of the word "bodily" in place of "physical." Given the identical language, and putting aside the temporal issues involved in an imminent danger, the expectancy and harm elements of a flagrant violation essentially may be considered the repeated or reckless failure to eliminate a known violation that is an imminent danger.

In summary, a reasonable *expectation* of death or serious bodily injury is not satisfied by a reasonable *possibility* or even a reasonable *likelihood* (as that term is construed in the Mine Act) that a death or serious bodily injury will happen. Hazards created by the known violation must be reasonably expected to occur and, in turn, must create a reasonable expectation of death or serious bodily.

3. The Judge Properly Found the Violation Was Not "Reckless" Within the Meaning of section 110(b)(2).

Relying upon the Commission decision in *American Coal* , the Judge identified the following elements of a flagrant violation:

> (1) there was a condition that constituted a violation of a mandatory health or safety standard[;] (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated."

41 FMSHRC at 67, *citing* 38 FMSHRC at 2066-67.[17]

Consistent with the proper definition of "reckless" as set forth *supra*, the Judge explored whether Northshore consciously or deliberately disregarded an expected risk of death or serious bodily injury. Based upon this analysis, the Judge ruled:

> Respondent could have repaired the walkway but the mine chose to use fall protection as a solution. ***Given that decision, there is no evidence to suggest a conscious or deliberate indifference to the risks on the part of the mine.*** Instead, the evidence indicates that the mine was limited at best in its evaluation of the risks. In other words, rather than ignoring the problem, the mine did not fully consider the appropriate steps to take to mitigate the risk posed by the condition of the walkways. . . . Therefore, I find that the violation of section 56.11002 cited in Order No. 8897220 is not

[17] Preferably, the Judge would have inserted the statutory term "and proximately" after "substantially."

flagrant within the meaning of section 110(b)(2) of the Act.

41 FMSHRC at 68-69 (emphasis added).

Substantial evidence supports the Judge's finding. The record indicates that the operator implemented the fall protection measures in an attempt to eliminate the safety hazard of miners falling on the walkways. Tr. 331-33, 427. While fall protection is not the maintenance of the walkways, it is relevant to determining whether "conscious or deliberate indifference" existed to a safety issue in a flagrant analysis.

Here, the operator had reached out to the engineering company, KOA, to learn about the condition of the walkway. S. Ex. 12. It did not ignore the condition of the walkway reported internally and in the KOA report. If an operator is acting with "conscious or deliberate indifference" to an issue, it does not spend time and money hiring someone to tell it about the problem, discussing the issues with the consultants, and taking safety measures in an effort to mitigate the hazard.

Moreover, once the operator received the KOA report from Leow, it did not attempt to bury or hide the evidence in the report. Such an act would be in line with the "conscious or deliberate indifference" of a "bad actor" that Congress intended to address with this statute. Rather, Engineering Manager Scamehorn shared the report with the other section managers at the mine, i.e., Zimmer and Peterson. Tr. 327. Scamehorn then followed up with Leow to get clarification on some of the report's recommendations. Tr. 326-30. The report recommended prohibiting the use of heavy equipment on the center walkway, and there is no evidence that the operator had failed to adhere to this. S. Ex. 12. The report also recommended restricting access to the outer walkways and there is no evidence rebutting the operator's testimony that it did, in fact, tell miners to avoid using the outer walkways and to use fall protection when they were required to perform work on the outer walkway.[18] *Id*.

The operator conducted numerous safety meetings with its miners in which the condition of the walkways was discussed. Tr. 109, 118, 123, 208, 428. In doing belt maintenance, typically replacing rollers, the miners did not traverse the outer walkway. They climbed over the stopped conveyor and, then while wearing fall protection, did the necessary work at a stationary position.[19]

All of these facts in the record were reviewed by the Judge, and they support the finding that the operator did not "consciously or deliberately disregard" the risk of death or serious bodily injury posed by miners falling through the walkway floor, nor did it deliberately shirk

[18] As noted *supra*, crew members were instructed on how to put the safety harnesses on and how to tie off with the lanyard from the harness. The crew was instructed to tie off the entire time, and to affix lanyards in sequence as each miner descended the walkway. Tr. 485, 486-87.

[19] The evidence does not suggest that any expert witness would find the weight of one miner would have caused the steel structure to break, thereby creating the horizontal movement causing a portion of the walkway to dislocate.

responsibility to work to eliminate the hazard. 41 FMSHRC at 68. Such actions did not vitiate the violation but they did show a substantial concern for safety. Essentially, the Judge found that Northshore did not "flout" the Mine Act. Substantial evidence supports the Judge's conclusion that the Secretary failed to demonstrate "recklessness" for purposes of proving a "flagrant" violation, under section 110(b)(2).

4. Substantial Evidence Does Not Support the Finding that the Violation Was Reasonably Expected to Cause Death or Serious Bodily Injury.

The Judge described three types of hazards: (1) falling near a moving conveyor, (2) material falling to the ground below and causing uncertain footing, and (3) the danger of the walkway giving away. 41 FMSHRC at 61. Separately, the Judge found the condition of the walkway was the primary cause of the dislocation, and Superfesky testified that a fall, even with the use of fall protection, created a risk of a loss of a limb or other serious injury. Tr. 262.

For purposes of the flagrant violation, therefore, the first relevant question is whether the violation was reasonably expected to result in any of the hazards described by the Judge. Here, the most serious hazard suggested by the Secretary was the possibility of a miner falling through a hole in the walkway. 41 FMSHRC at 62.

Although the Judge found hazards included slipping, tripping, and falling on the walkway, the danger of falling through a hole in the walkway is by far the most serious. A fundamental issue in the flagrant analysis in this case, therefore, must be whether Northshore should have reasonably expected that the violation would result in a hole in the walkway through which a miner would be reasonably expected to fall. We must also consider whether the violation created an expectation of the other identified hazards of slipping, tripping, and falling within the walkway structure.

If either of those questions is answered affirmatively, the Judge needed to resolve separately whether the occurrence of the hazard would be reasonably expected to result in death or serious bodily injury. Also, recognizing Northshore required the use of fall protection, there is the additional issue of whether that requirement for fall protection would mitigate a reasonable expectation of serious bodily injury.

a. There is no substantial evidence proving the surface condition of the walkway caused, or was reasonably expected to cause, the failure of the diagonal beam and dislocation of the gallery walkway or any hazardous event such as falling through a hole.

The Judge accepted Superfesky's testimony that the surface condition of the walkway was the primary reason for the dislocation of the walkway. 41 FMSHRC at 58. However, no substantial analysis or consideration was given to the dislocation cause or whether it was

expected, as required by the statute. To the contrary, there is substantial evidence that there was no expectation of dislocation based upon the observable surface condition of the walkway.[20]

Superfesky erred in many important respects. He did not take any samples of the material or conduct any scientific analysis of the cause of the steel beam failure and the resultant dislocation of the walkway. He spent his entire physical investigation below the walkway, never examining the scene of the dislocation from above. His testimony suggests he erroneously thought the perlite panels were the primary support for the walkway(s) and his testimony regarding debonding applied to the perlite panels rather than the reinforced concrete layer. Tr. 261, 144. In fact, the evidence shows that the perlite panels were primarily only forms for placement of the concrete walkway. Tr. 399, 532-34, 549.

Superfesky did not know the concrete was reinforced with a steel mesh and he did not know the wire mesh was attached to the steel. Tr. 288-89. Very significantly, wire mesh covered the opening near where King was standing at the time of the beam failure. Tr. 280-81, S. Ex. 7 at 23 (picture 921).

Superfesky did not calculate the force of the event when the diagonal beam failed. Tr. 299. The fracture of the beam resulted from the unusual weight of the large volume of taconite pellets being progressively washed down the walkway. Tr. 530-532. Thus, spalled or cracked concrete or delamination did not initiate the beam failure and the resultant dislocation of the walkway.

Most importantly, Superfesky agreed with Northshore's experts that the immediate cause of the dislocation was the break from the unknown crack covered by the gusset plate that was part of the steel structure rather than the walkway. Tr. 284-289. Having conceded that the break in the steel structure initiated the dislocation, Superfesky simply asserted, without any persuasive explanation, that if the walkway had been in good condition, it would not have dislocated. Basically, he accepted that the breaking of the rivets would have applied a great torsion upon the walkway that was heavily laden with taconite and mud, and that the rotation resulting from the broken beam would have moved the walkway.

Superfesky continued to assert, without any support, that the movement would have been insufficient to cause the dislocation. He did not explain why or how the concrete slab would have stayed intact if a failure of the walkway concrete slab caused the dislocation. Indeed, he was not even aware that large portions of the slab remained intact. The sustained strength of the slab undercuts a notion that the walkway itself caused the dislocation. Tr. 399, 532-33. Superfesky's testimony, therefore, remains unsupported, unexplained, and does not support a finding that Northshore should have expected a dislocation of the walkway.

[20] Obviously, wholly unexpected accidents can cause fatalities and serious bodily injuries. Standing alone, therefore, the occurrence of an event does not compel a conclusion that the event was reasonably expected by observation. *See Asarco, Inc.*, 14 FMSHRC 941, 946 (June 1992) ("Neither the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined.")

On the other hand, Northshore's experts, metallurgist Osmundson, who worked with an outside laboratory testing the steel, and civil engineer Franseen, provided detailed testimony and test evidence of the causes of the dislocation. They testified without challenge that due to the weight of the taconite pellets, the steel structure holding the steel support failed and applied very significant torsion force to the structure including the walkway. Tr. 505, 528-32. The walkway simply could not withstand that tremendous force and, consequently, rivets snapped causing an outward movement of the walkway. Tr. 283-84, 535.

Based upon his experience and testing of the steel support of the structure, Osmundson testified that "steel is what holds everything up" (Tr. 498) and that the condition of the walkway had nothing to do with the collapse. Tr. 505-506. The reports by Northshore's expert civil engineer and metallurgist demonstrate that the walkway did not fail but, in fact, remained substantially intact despite the force of the deflection of the steel superstructure.[21]

In summary, all of the expert testimony demonstrates that substantial evidence does not support the contention that the condition of the walkway caused the dislocation. The Secretary did not present any evidence that Northshore should have expected a dislocation, in any event. Thus, the Secretary's case, premised upon his conjecture of the dislocation, fails at the first stage of analysis. The Secretary did not prove that the walkway was reasonably expected to dislocate.

b. The evidence does not show that the condition of the walkway, taking into account fall protection, was reasonably expected to cause reasonably serious bodily injuries to miners.

The failure of Superfesky's testimony to support an expectation of a dislocation, or failure of the walkway due to its condition, does not mean that there was no expectation of the hazards of a slip, trip, or fall. Given the condition of the walkway as described in the KOA report, there is ample evidence that persons walking on the walkway reasonably could be expected to slip, trip, or fall. Therefore, the facts demonstrate the Secretary proved a reasonable expectation of the occurrence of a slipping hazard by the condition of the walkway. Indeed, Northshore must agree with this premise lest it would not have instituted fall protection.

We must turn, therefore, to the second step of analysis: Whether such hazards in the context of the totality of the circumstances created a reasonable expectation of serious bodily injury. An expectation that the miners would slip or trip while not wearing fall protection responds to the element of showing a reasonable expectation of the occurrence of the hazard due to the condition of the walkway. It does not resolve the next step, however, namely, of whether a reasonable expectation exists that a slip, trip, or fall on the walkway would result in death or a serious bodily injury.

In using the term serious bodily injuries, Congress selected terminology that appears frequently in federal law. Appearing often in the criminal code at Title 18 as well as elsewhere

[21] Franseen testified that the weight of the pellets was evidence of the *strength* of the walkway. The walkway sustained the weight of the taconite on it. In turn, it was that weight on the walkway holding the taconite that caused the failure of the steel beam while the concrete walkway remained largely intact. Tr. 536, 539.

in throughout the Code, the term "serious bodily injury" is typically defined as an injury: i) involving extreme physical pain; (ii) involving substantial risk of death; (iii) involving protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or (iv) requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. *See* 18 USC 1365(h)(2); 42 USC 1397j; 42 USC 5928. However, the same or similar definition appears elsewhere in the Code. 42 U.S.C. § 1397j; 42 U.S.C. § 6928(f)(6).

With regard for the expectation of slipping or falling, the Judge principally relied upon evidence that the contract employees did not always use the fall protection but would unhook to move from station to station along the walkway and to return up the walkway. Testimony supports that finding. Tr. 51, 54-55, 57, 109-10, 116-117, 119-21, 194-96. We must accept, therefore, that Northshore should have reasonably expected that miners would not uniformly use the fall protection. Given that presumption, the final question is whether Northshore should have reasonably expected a miner would slip without wearing fall protection and suffer serious bodily injuries.

No witness presented any testimony on the likely nature of fall injuries under these conditions. Superfesky testified that very serious injuries such as the loss of a limb *may* result from use of fall protection; however, that testimony was given in the context of a fall from or through the walkway. Tr. 262-63. As noted *supra*, wire mesh covered the opening near where King was standing at the time of the beam failure. Tr. 280-81; S. Ex. 7 at 23 (picture 921). Moreover, King testified that he was wearing fall protection when he saw the hole immediately in front of him with wire mesh intact in the floor. Tr. 59. As such, the Secretary's proffered evidence is not given in terms of an expectation but rather, implicitly, in terms of possibilities. Given MSHA's reliance upon fall protection throughout the mandatory standards, it would be difficult to find that MSHA "expects" a miner using fall protection to lose his life or a limb.

Again, crucial to this analysis is an evidentiary finding of the expectation of death or serious bodily injury. The Judge does not find or suggest this type of consequence from a fall on the surface of the walkway. Moreover, the Judge did not find that a miner wearing fall protection would suffer a serious bodily injury from slipping or tripping on the walkway. Accordingly, there is virtually no evidence as to the type or severity of expected injuries from falling onto the taconite pellets and mud in the walkway.

The Judge accepted MSHA's testimony that use of fall protection could result in the loss of a limb. However, that testimony occurs in the context of fall through a hole and, in any event, is not framed in any terms as being a likely result of use of fall protection. If such injuries were "expected" to result from use of fall protection, it would cast a pall on MSHA's ubiquitous allowance of fall protection throughout the mandatory safety standards. As with the issue of the reasonable expectation of a dislocation of the walkway, the Judge merely assumed any injury resulting from occurrence of the hazard of slipping or falling in the walkway would be death or serious bodily injury.

We do not diminish the hazard of slipping or falling on a rough, uneven walkway. Further, as seen below, we do not condone Northshore's failure to repair the walkway for over a year. However, the Secretary must prove each and every element of a violation. When the

Secretary seeks to enforce a flagrant violation, it cannot be by conjecture. The Secretary must prove by a preponderance of the evidence that the posited hazard is expected to occur and that the occurrence of such hazard is expected to cause serious bodily injury. Here, it appears the Secretary essentially relied upon the occurrence of dislocation as homemade *res ipsa loquitur* for the expectation of hazards and the expectation of serious bodily injury. The failure to produce evidence of the types of injuries expected to result from a slip or fall on the walkway must result in a dismissal of the flagrant charge.

In summary, Congress' use of the terms "reasonably expected" and "serious bodily injury" indicate Congress clearly and plainly required an *expectation* for the occurrence of a hazard and an *expectation* that the occurrence would result in death or serious bodily injury. The Secretary did not present evidence of such an expectation and the Judge found, on the basis of substantial evidence, that the operator did not disregard an expectation that a slip on the walkway would cause death or a serious bodily injury. Thus, the Judge found, on the basis of substantial evidence, that the Secretary failed to provide sufficient evidence to prove proof that this case met the "reasonably expected to cause" requirement for a flagrant violation.

5. The Dissent Misconstrues the "Flagrant" Analysis

Arguing against the Judge's substantial evidence-based finding that the operator's actions did not meet the standard of recklessness for a flagrant violation, our dissenting colleague sets up a classic straw man by asserting that we have made "intention" an element of a flagrant violation. That is not our holding. We have accepted the Judge's analysis that the Secretary did not show the operator believed there was reasonable *expectation* of death or serious bodily injury from continuing work while wearing safety lines. Thus, the Judge found the operator did not consciously – that is, recklessly – disregard a danger of an *expectation* of death or serious bodily injury. That standard is, of course, significantly higher than the negligence standard of *reasonable likelihood* for non-flagrant penalties. Consequently, our finding in this case aligns fully with the graduated enforcement scheme of the Mine Act as established by Congress.[22]

We accept the Judge's conclusion as supported by substantial evidence. As noted, our colleague, however, goes on, at slip op. at 40-42, and elsewhere, to claim that our interpretation construes the flagrant provision to apply only to deliberate attempts to cause death or serious bodily injury. That is certainly neither our holding nor suggested by our holding. Our holding is that the Judge cited substantial evidence to support the conclusion that the operator did not consciously disregard a reasonable expectation that miners wearing safety belts would be killed or suffer serious bodily injury – the plain statutory requirement for a flagrant violation.

Indeed, rather than examining the elements of a flagrant violation in terms of section 110(b)(2), our dissenting colleague plucks the term "reckless disregard" from cases where

[22] Moreover, the maximum penalty for a flagrant violation is indexed to account for inflation. As of this year, the maximum flagrant penalty is nearly $271,000. 85 Fed. Reg. 2292, 2299 (Jan. 15, 2020) (annual amendment of 30 C.F.R. § 100.5(e)). Thus, as far as the monetary penalty that can be imposed, flagrant violations are now subject to a *higher* maximum monetary penalty than can be imposed upon first time criminal offenders under section 110(d) of the Mine Act, 30 U.S.C. §820(d), and it will be increasingly higher in each future year.

defendants are charged for *criminal violations* of the Act under section 110(d), 30 U.S.C. § 820(d), addressing the commission of "willful" acts. Slip op. at 39-40. Our colleague argues that our interpretation of the flagrant provision will result in a higher evidentiary standard for flagrant violations than for criminal violations. *Id.* That is clearly incorrect. A plain reading of section 110(d) demonstrates that it is clearly a *criminal statute* aimed at punishment rather than deterrence and, therefore, *requires proof beyond a reasonable doubt*. That criminal provision of the Mine Act is completely different from section 110(b)(2) which requires only proof by a preponderance of the evidence. Thus, the evidentiary standard for a criminal violation far exceeds that for a section 110(b)(2) flagrant violation.

Inclusion of reckless disregard within the scope of willfulness in criminal statutes aimed at persistent violations of federal law and repeated warning does not suggest the obverse – that "reckless" in a civil penalty statute requires an intent or willfulness to harm – and we do not make such a finding. As we hold, the term "reckless" in section 110(b) ***goes to an expectation*** of death or serious bodily injury and ***a conscious disregard of that expectation.*** The Judge's finding is supported by the evidence and must be affirmed.

D. Substantial Evidence Supports the Judge's Finding that the Operator's Violation of 30 C.F.R. § 56.11002 Resulted From an Unwarrantable Failure and Reckless Disregard.

1. The Record Supports the Judge's Finding of Unwarrantable Failure.

Again, we reiterate that the Mine Act's overarching enforcement scheme provides "increasingly severe sanctions for increasingly serious violations or operator behavior" as noted in *Emery Mining*, 9 FMSHRC at 2000, and *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC at 828. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care." *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2007) ("Consol") (citing *Emery*, 9 FMSHRC at 2002) (internal quotations omitted). It is a separate and distinct charge from the flagrant provision in the Mine Act which expressly levies the most severe sanctions for especially wrongful misconduct.

In determining whether a violation is an unwarrantable failure, the Commission has instructed its Judges to consider all of the relevant facts and circumstances in the case and to determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *IO Coal*, 31 FMSHRC at 1350-51; *see also Consol*, 22 FMSHRC at 353.

Substantial evidence supports the Judge's finding that the clear weight of such analysis, here, demonstrates an unwarrantable failure:

- The violation had existed "at least from the time in June 2015 when the KOA report had been completed" until "the time of the accident in September 2016." 41 FMSHRC at 64; Tr. 364-65; S. Ex. 12.

- The physical extent of the violation "included the entire 300 feet on the east outer walkway, as well as the west outer walkway." 41 FMSHRC at 64; Tr. 239.

- The KOA report clearly notified Northshore of the insufficiencies of the walkway long before the dislocation. Thus, Northshore "was put on notice of the defective walkway through . . . KOA engineering report in June 2015." 41 FMSHRC at 64-65; Tr. 61, 336-37; 364-65; S. Exs. 12, 18.

- The evidence does not reveal any attempt by the operator to repair the surface of the walkway. Rather than dealing with the unsatisfactory condition of the walkway, the operator dealt with danger. The Judge found "no effort was made to address the deteriorating walkway itself" because "use of fall protection . . . does not correct the condition." 41 FMSHRC at 65; Tr. 147, 149-50.

- Regarding whether the violation posed a high degree of danger, the Judge found the violation created the hazard of "falling through the walkway," which is a "serious safety hazard and thus a high degree of danger." 41 FMSHRC at 65; Tr. 202. As noted *supra,* there is no substantial evidence supporting a conclusion that the condition of the walkway caused the event on the day of dislocation or that there was a danger of falling through the walkway due to the existence of the wire mesh. The danger of falling in a narrow walkway while walking on taconite, on the other hand, cannot be discounted.

- The deficiencies in the walkway were obvious. Also, the expert consultants provided a written report explaining the deficiencies. 41 FMSHRC at 66; Tr. 61, 336-37; S. Ex. 12.

- Finally, regarding the operator's knowledge of the violation, once again, "the engineering report made it clear that the walkway was not safe for use." 41 FMSHRC at 66; Tr. 364-65, S. Ex. 12.

Based upon this analysis, substantial evidence supports the Judge's finding of an unwarrantable failure.

2. The Record Supports the Judge's Finding of Reckless Disregard.

First, we must again draw a distinction between the analysis for "reckless disregard" and the distinct analysis noted *supra* regarding "reckless failure" as it applies to a flagrant charge. They are two distinct analyses.

Conscious or deliberate action or inaction that consciously disregards or shows no concern for danger is a uniform element of reckless disregard.[23] After notice and comment rulemaking, MSHA defined "reckless disregard" as occurring when an "operator display[s] conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d). Notably, therefore, the Secretary's definition of reckless disregard, for which we show respect but not total obeisance, is similar to stating that an operator engages in reckless disregard when it consciously disregards the danger of its actions.

Most importantly, we have applied the conscious disregard of serious danger as the touchstone of the phrase "reckless disregard" in our cases. We stressed the importance of an operator's intentional disregard as the key element of "reckless disregard." We have found reckless disregard exists in "situations where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk." *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 280 (Apr. 2018).

It is clear that the outer walkway was not maintained in accordance with the requirement of section 56.11002 that "elevated walkways . . . shall be of substantial construction . . . and maintained in good condition." 30 C.F.R. § 56.11002. Of particular importance in this case, Northshore permitted the violation and, hence, hazards to exist for an extended period of time.

Northshore received the KOA report in June 2015. That report identified many problems with the surface of the walkway and stated that the walkways were "not safe for personnel to be using until a repair has been completed." S. Ex. 12 at 2. Nonetheless, although taking actions to *mitigate* danger, Northshore did not take any action to *abate* the violation prior to the accident in September 2016. Therefore, even as we accept the Judge's finding that the Northshore exercised a degree of care, did not ignore the violative conditions of the walkway, and sought to provide protection, such conduct does not mitigate allowing a violation of a mandatory of which Northshore was specifically aware to continue unabated for fifteen months.

We reject Northshore's argument that the Judge erred by relying solely on the KOA report "despite its ambiguity" and Leow's "clarifying" statements made at hearing. Resp. Br. at 16-17. Northshore claims that its actions "must be viewed in light of what they were told by . . .

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[23] Black's Law Dictionary defines "reckless disregard" as, "1. Conscious indifference to the consequences of an act. . . . 3. The intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result." Black's Law Dictionary (11th ed. 2019).

Leow," namely, that a recommendation for "restricted" access was not an outright prohibition on access, and that the Judge erred by discrediting Leow's testimony. *Id*. We disagree. The issue is whether substantial evidence supports the Judge's conclusion that the KOA report put the operator on notice that the outer walkways were unsafe and therefore a serious violation of a mandatory safety standard.

We find that it does. The report plainly concluded that the walkways "*are not safe for personnel to be using until a repair has been completed*." S. Ex. 12 at 2 (emphasis added).[24] While Northshore deemed fall protection adequate protection against the hazards it believed arose from the condition of the walkway, it did not address the underlying violation. Therefore, Northshore disregarded the existence of the violation to the extent that it failed to deal with the violation in a remotely timely manner.

Thus, in this case, we accept the Judge's finding of reckless disregard with respect to not abating the violation.[25] Northshore's failure to deal with the walkway violation for fifteen months permits the Judge's finding of reckless disregard of the underlying violation to stand affirmed.

[24] We further hold that it was within the Judge's purview to credit the report and not credit Leow's contradictory testimony. "A [J]udge's credibility determinations are entitled to great weight and may not be overturned lightly." *Consolidation Coal Co.*, 20 FMSHRC 315, 319 (Apr. 1998). Leow's testimony conflicts with his report's conclusions that the walkway was not structurally sound or safe for use. S. Ex. 12, at 2. The Judge was there to observe the witness – we were not. The Judge's credibility determination against Leow was reasonable given the clear tension between the plain language of the report and Leow's testimony. *See, e.g.*, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1391 (Dec. 1999) ("Before a [J]udge credits any testimony, [s]he must reconcile all record evidence that is inconsistent with that conclusion.").

[25] In considering the flagrant charge, however, the Judge stated, "[g]iven that decision [to use fall protection], there is no evidence to suggest a conscious or deliberate indifference to the risks on the part of the mine." 41 FMSHRC at 68. This statement made in regard to the flagrant analysis would seem at odds with a finding of "reckless disregard" from a negligence standpoint. However, the additional factors found by the Judge, noted *supra,* support our affirmance of the Judge's finding of negligence with respect to the violation.

IV.

Conclusion

For the reasons stated above, we affirm the Judge's findings of "reckless disregard" and unwarrantable failure for the violations of 30 C.F.R. § 56.11002 and 30 C.F.R. § 56.20011. We also affirm the Judge's findings that the violation was not flagrant in violation of section 110(b)(2). We reverse the Judge's assessments of the individual penalties against Zimmer and Peterson under section 110(c) of the Act and vacate the assessments.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

Commissioner Traynor, concurring in part and dissenting in part:

I.

Introduction

When Northshore Mining Company managers became aware that a conveyor walkway 50 feet off the ground had deteriorated, they ordered an engineering report to assess the situation. They then proceeded to ignore the report's recommendations and continued to assign miners to work on the walkway. Subsequently, when a miner was working on the walkway it collapsed, and he was hit with falling debris. The miner suffered injuries but survived.

I join the majority in affirming the Judge's conclusion that both violations[1] were due to negligence that amounted to a "reckless disregard" and that Northshore's actions were an "unwarrantable failure" to comply with the safety standard.[2] I dissent from my colleague's conclusion that Northshore's failure to maintain the walkway in good condition in violation of section 56.11002 was not "flagrant" within the meaning of section 110(b)(2).

More specifically, as I will explain, I dissent from my colleagues' interpretation of the "reckless flagrant" provision in section 110(b)(2) as applied in this case. Specifically, the Secretary sought review of the Judge's interpretation of the term "reckless" in section 110(b)(2). My colleagues would require the Secretary to produce evidence of the mental state that motivated the operator's failure to take reasonable steps to maintain the walkway in safe condition – specifically, evidence that the operator's failure to eliminate the violation was done with a "conscious" or "deliberate" expectation of death or bodily injury, rather than simply a "reckless" disregard for such danger. My colleagues thus ignore the plain meaning of section 110(b)(2); Congress could not have intended that the increased civil penalties for flagrant violations[3] are only available in cases involving conduct so bad it would amount to homicide.

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[1] The operator was charged with a violation of 30 C.F.R. § 56.11002, which provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. . . . ." It was also charged with violating 30 C.F.R. § 56.20011 for failing to barricade the walkway or post warning signs.

[2] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C.§ 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted).

[3] Currently the maximum penalty for a non-flagrant violation is $73,901, 30 U.S.C. § 820(a)(1), compared to a maximum of $270,972, 30 U.S.C. § 820(b)(2). 85 Fed Reg. 2292 (Jan. 15, 2020).

Even if the language of section 110 establishing flagrant violations were not clearly directed at the "reckless" (not intentional) failure to eliminate dangerous violations, the Secretary's reasonable interpretation of ambiguous statutory language is entitled to deference. I would thus reverse the Judge on this issue, concluding that the Secretary establishes a "reckless flagrant" violation with proof the operator acted with reckless disregard for the danger caused by its failure to eliminate dangerous violations.

I also dissent from my colleagues' determination that the operator's agents were not individually liable under section 110(c), as I find that the individual supervisors knowingly carried out the violation.

II.

The Judge's Ruling That the Violation was Not Flagrant Should be Reversed.

The flagrant provision of the Mine Act was added in 2006, after fatal accidents at three mines. S. Rep. No. 109-365, at 2 (2006). Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act amended the penalty section of the Mine Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty to deter repeated or reckless failures to eliminate known dangerous violations. Pub. L. No. 109-236, 120 Stat. 498, 500 (2006). In the MINER Act, Congress defined a flagrant violation as:

> 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) (emphases supplied).

We have had occasion to interpret and apply the MINER Act's flagrant provision in a number of cases issued subsequent to the passage of the MINER Act. In our most recent decision resolving such a case, we held that:

> for a flagrant violation, it must be established that: (1) there was a condition that constituted a violation of a mandatory health or safety standard, (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated."

Am. Coal Co., 38 FMSHRC 2062, 2066-67 (Aug. 2016). That case involved a "repeated flagrant" allegation – that is, one involving an operator's "repeated" failure to make reasonable efforts to eliminate the violation. Here, as a matter of first impression, we are not dealing with

the allegation of a repeated failure. Rather, we are reviewing the Judge's application of our *American Coal* test in the context of the Secretary's allegation that such failure was "reckless."

In the decision on review, "[t]he Judge found all of the [*American Coal*] criteria for a flagrant violation existed except Northshore's conduct was not 'reckless' within the meaning of Section 110(b)(2)." Slip op. at 9. The Secretary's Petition for Discretionary Review listed four assignments of error for appeal, including that:

> (1) The ALJ erred by requiring a higher negligence showing to establish the "reckless failure" component of a flagrant violation than is required to establish reckless disregard and unwarrantable failure.
>
> (2) In evaluating the operator's conduct under a "conscious[] or deliberate[] disregard" standard, the ALJ impermissibly imposed a scienter requirement for reckless flagrant violations.
>
> (3) The ALJ erred by determining that the operator's fall protection policy mitigated a reckless failure to eliminate the walkway violation.
>
> (4) Even applying the erroneous legal standard the ALJ used, substantial evidence does not support the ALJ's finding that the violation was not a "reckless" flagrant.

S. PDR at 1-2. The operator's Petition for Discretionary Review did not reference the Judge's reckless flagrant decision at all. *See generally* Resp. PDR. Thus, the Judge's rulings as to elements (1) to (4) of our *American Coal* test – including the operator's knowledge and whether the violation reasonably could have been expected to cause death or serious bodily injury – are not at issue on this appeal.[4] The precise legal question at issue on appeal concerns only element (5) and whether a determination that a "reckless flagrant" violation is the product of a "reckless . . . failure to make reasonable efforts to eliminate a known violation" requires proof of an intent to cause harm, not simply reckless conduct. 30 U.S.C. § 820(b)(2).

A. Whether the term "reckless" in the Mine Act's flagrant provision requires proof of intentional conduct or simply reckless conduct?

Our task in this case is to determine whether the text, structure, purpose and history of the "reckless flagrant" provision answers the specific question of statutory interpretation at issue: whether to prove a "reckless flagrant" violation, the Secretary must provide proof that the operator's failure to eliminate a known violation was done with conscious or deliberate disregard for an expectation of death or bodily injury, not merely reckless disregard for such danger.

[4] The discussion of these elements in the majority's opinion, slip op. at 15-25 , are merely *dicta* and any decisions purportedly reached on these issues are *ultra viries* and without precedential value. *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 22 (Jan. 2020) (affirming that "if [a PDR is] granted, review [by the Commissioners] shall be limited to the questions raised by the petition." 30 U.S.C. § 823(d)(2)(A)(iii)).

In considering the question of statutory construction, our first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the meaning of the statute, courts determine whether Congress had an intention on the specific question at issue ("*Chevron I*" analysis). *Chevron*, 467 U.S. at 842-43*; Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Emp't Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). When undertaking the *Chevron I* analysis, we must not be too quick to find ambiguity, but must thoroughly "examine the [statute's] text, structure, purpose, and legislative history to determine if the Congress has expressed its intent unambiguously." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605 (D.C. Cir. 2016) (per curiam), *cert. denied*, ___ U.S.___, 137 S. Ct. 2296 (2017). "[I]n interpreting a statute, a court 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Czyzewski v. Jevic Holding Corp.*, ___ U.S.___, 137 S. Ct. 973, 985 (2017).

If after a thorough *Chevron I* analysis we find the statute is truly ambiguous or silent on the precise question at issue, deference is accorded to the interpretation of the agency charged with administering the provision in question (in this case, the Secretary of Labor), provided that the interpretation is reasonable (*Chevron II* analysis). *See Chevron*, 461 U.S. at 843-44; *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). As the D.C. Circuit has stated:

> In the statutory scheme of the Mine Act, "the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard," and so is also deserving of deference. *Excel Mining*, 334 F.3d [1,] 6 [(D.C. Cir. 2003) (alterations in original) (quoting *RAG Cumberland Res. LP v. Fed. Mine Safety & Health Review Comm'n*, 272 F.3d 590, 596 n. 9 (D.C. Cir. 2001)); *cf. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156–57, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (explaining that the OSH Act's analogous allocation of responsibilities requires according *Chevron* deference to the Secretary's litigating positions).

Am. Coal Co. v. FMSHRC, 796 F.3d 18, 24 (D.C. Cir. 2015); *see also Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012) (in considering the Secretary's litigation interpretation of section 103(k) of the Mine Act, Court states that the Secretary's interpretations before the Commission are entitled to *Chevron* deference if reasonable).

As explained below, an examination of the text, structure, purpose, and legislative history of the flagrant provision provides a clear and unambiguous answer to the precise question of whether, as the majority contends, establishing a "reckless flagrant" violation requires proof that an operator's failure to eliminate a known safety violation was done with a deliberate purpose or conscious understanding that such failure is expected to cause serious injury or death; or, whether as the Secretary contends, Congress's use of the word "reckless" plainly indicates the

statute is directed toward penalizing the reckless failure to eliminate known dangerous violations, even where no proof of the operator's conscious expectation of serious injury or death is available.

Thus, I would resolve the case at the first step – *Chevron I*. Even if I were to find the statutory language is ambiguous with respect to this question, which it is not, I would defer to the Secretary's reasonable interpretation of the language (*Chevron II*). I would find the Secretary's interpretation – the "reckless flagrant" category does not require the Secretary to prove the operator's failure to eliminate a known violation was done with a conscious expectation of death or serious injury, only that it was objectively reckless – to be eminently and obviously reasonable and therefore entitled to deference.

1. *Chevron I* Analysis – The Mine Act clearly requires proof of "reckless" failure to eliminate a known dangerous violation, not proof of a deliberate or conscious expectation of serious injury or death.

The *Chevron I* analysis of the "reckless flagrant" provision to answer the specific question of whether it requires evidence of intentional conduct begins with the "text, structure, purpose, and legislative history to determine if the Congress has expressed its intent unambiguously." *U.S. Sugar Corp.*, 830 F.3d at 605. The text, structure, purpose, and legislative history of the Mine Act provision at section 110(b)(2) indicates that proof of negligent conduct rising to the level of recklessness is necessary to deem a violation a "reckless flagrant," but not proof that such failure was the product of the operator's conscious understanding or deliberate purpose that such failure is expected to cause serious injury or death.

a. *Chevron I* – Text

In the text of the "reckless flagrant" provision, we find a clear indication of Congress's intent: its choice of the word "reckless" in the statutory text to refer to a "reckless . . . failure," 30 U.S.C. § 820(b)(2), rather than any of the other adjectives commonly used to require proof of intent, *i.e.*, conscious, deliberate, knowing, intentional, etc.[5]

[5] The statutory text very clearly does not accommodate what the majority claims is its own "plain meaning" interpretation – one they maintain is so unambiguously clear that they need not defer to the Secretary's reasonable interpretation of a "reckless" failure. The majority demands proof of "a conscious or deliberate disregard for the safety of the miners through a failure to eliminate the violation, of which the operator has actual knowledge, that proximately and substantially caused death or serious bodily injury, or is reasonably expected to proximately and substantially cause death or serious bodily injury." Slip op. at 16. Yet, nowhere in the text of the statute are words referencing a "conscious or deliberate" expectation of serious injury or death from a failure to meet safety obligations. Nor are there words indicating a violation is only flagrant if was actually rather than constructively known.

The majority overlooks a key distinction between the type of intentional conduct described by words such as "conscious" or "deliberate" and the type of unintentional, though highly negligent conduct described as "reckless." Simply put, there is a fundamental difference between conduct that is intentional and reckless wrongdoing. An intentional wrong is designed to inflict harm. *See* Restatement (Second) of Torts § 8A (1965) (finding "intent" where "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."). A reckless wrong is not. "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Id*., § 500 cmt. f, at 590. In reaching a contrary conclusion – that a "reckless failure" involves a conscious or deliberate (intentional) expectation of serious harm to miners – the majority is confused.

The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for failing to eliminate a violation and the *mens rea* for causing harm with that failure. The majority claims that a "reckless failure" to take reasonable steps to eliminate a dangerous violation demands proof that the person who so fails has the deliberate purpose or conscious understanding that such failure is expected to cause serious injury or death, as compared with proof that an objectively reasonable miner understands that there is a risk it might do so (the proper standard for recklessness). In the language of *mens rea*, the majority is saying that a "reckless flagrant" is really an intentional violation.

When an operator fails to eliminate a violation with a "deliberate" purpose "conscious" that such failure is expected to cause serious injury or death, he intentionally produces a result. When a person acts consciously or deliberately – that is, with an expectation that certain consequences will result – the law imputes to that person the intent to cause those consequences. As the expectation of such consequences becomes objectively less likely, "the actor's conduct loses the character of intent, and becomes mere recklessness." Restatement (Second) of Torts § 8A cmt. b, at 15. And the distinction between intentional and reckless conduct is key for defining a "reckless failure" in the context of a flagrant violation. When an operator fails to take steps to eliminate a known violation with a conscious understanding of an expectation of serious injury or death, he intends to cause harm. In the case of reckless wrongdoing, however, the injury the actor has caused (or could be expected to cause) is a byproduct of a failure to take steps to eliminate a known violation that a reasonable miner could reasonably expect to cause serious bodily injury or death.

At the time Congress passed the MINER Act in June of 2006, the Restatement (Second) of Torts, at Section 502 (emphases supplied), defined "reckless disregard of safety" as follows: "an actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing *or having reason to know* of facts which *would lead a reasonable man to realize*, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."[6] At Section 500, the comments to the

[6] Then, as now, "reckless" was commonly understood as "without thinking or caring about the consequences of an action." The New Oxford American Dictionary 1414 (Erin (continued…)

Second Restatement state "recklessness" occurs when an "actor has such knowledge, or reason to know, of the facts, but *does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so*." Restatement (Second) of Torts § 500 cmt. a (emphasis supplied). Under both formulations, the actor is reckless if a reasonable person would realize the risk of harm, and not, as the majority contends, only where there is proof the actor had a "conscious" or "deliberate" expectation of harm.[7]

At the time Congress passed the MINER Act, the Commission – consistent with the Restatement of Torts – had interpreted the term "reckless" to apply to situations where the actor did not intend to cause the harm which could result from the act. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 719-23 (Aug. 2008) (where mine fan stopped and foreman directed miners to attempt to repair damaged cable rather than withdraw from working section, Judge properly characterized foreman's action as reckless disregard); *RAG Cumberland Res. LP*, 23 FMSHRC 1241, 1261 (Nov. 2001) (ALJ) (finding recklessness in operator's "failure to suspend production despite its knowledge of" elevated methane.). This is the MINER Act definition of "reckless" that informed Congress's choice to use that word in the flagrant provision, rather than words such as "intentionally," "consciously," or "deliberately." But the majority asserts, without authority or good reason, that Congress did not intend this widely accepted use of the term "reckless" and rather intended a strangely unique definition of "reckless" that covers only conduct undertaken with a conscious or deliberate expectation of serious injury. In support of their unusual notion, the majority cites no source of authority – no restatement, no statute, no case – in which the term "reckless" is interpreted to encompass an *exclusively* intentional (e.g. conscious or deliberate) expectation of harm.

We have held – consistent with the definition in both the Second and Third Restatement of Torts – that recklessness will be found where "the level of negligence did not involve a

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[6] (…continued)
McKean ed., 2d ed. 2005). As a legal term, "reckless" had been described as conduct--[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for ***or indifference to*** that risk; heedless; rash . . . Reckless conduct is much more than mere negligence: it is a gross ***deviation from what a reasonable person would do***." Black's Law Dictionary 1298 (8th ed. 2004) (emphases supplied).

[7] A portion of the Restatement (Third) of Torts was released in 2010 and supplemented in 2012, well after passage of the MINER Act. Restatement Third of Torts: Liability for Physical and Emotional Harm (2010/2012). Accordingly, it cannot be used to understand the plain meaning of a law enacted in 2006. Still, the majority cites Chapter 1, Section 2 of the Third Restatement in an effort to support its "conscious and deliberate" interpretation (slip op. at 15-16), but even the Third Restatement is clearly incompatible with it. That definition begins by establishing that, "[a] person acts recklessly in engaging conduct if the person knows of the risk of harm created by the conduct ***or*** *knows facts that make the risk obvious to another in the person's situation . . . . .*" (emphasis supplied). Thus an operator may be reckless under this definition even if it lacks anything approaching a "deliberate" or "conscious" expectation of serious injury or death, so long as the risk of serious injury or death would be obvious to a reasonably prudent miner in the operator's circumstances.

conscious intention to cause harm to a miner, [but] it did involve a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner." *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 283 (Apr. 2018).

b. *Chevron I* – Structure

My colleagues reference the Commission's statement in *American Coal* that "it is reasonable to expect that flagrant violations be of a type that was not addressed in the original Mine Act [because] otherwise, Congress could have simply increased the maximum amount at which a penalty can be assessed and avoided creating a new statutory classification of violation." Slip op. at 13 (quoting 35 FMSHRC 2061, 2069-70 (Aug. 2016) (footnote omitted)). Where I part ways with them is on their insistence that to distinguish a flagrant violation from other Mine Act provisions, we must apply a heretofore unheard of interpretation of "recklessness" that excludes indifference. Slip op. at 9.

The majority insists that the level of recklessness in a "reckless flagrant" violation must be more egregious than that needed to prove an unwarrantable failure violation. *Id*. at 13, 15. My colleagues mistakenly assume, however, that the latter always requires a showing of "recklessness." This is incorrect. As the majority acknowledges, unwarrantable failure is "aggravated conduct constituting more than ordinary negligence."[8] Slip op. at 13. Although it may be proven by a showing of reckless disregard or intentional misconduct, it may also be characterized by high negligence or a "serious lack of reasonable care." *Id*. at 24 (citing *Consolidation Coal Co.,* 22 FMHRC at 353 (Mar. 2007) (citing *Emery Mining Corp*., 9 FMHRC at 2001-04)). In fact, the Commission has previously explicitly stated that:

> [a] finding of unwarrantable failure does not require a finding of "reckless disregard." The Commission has also previously recognized that a finding of high negligence suggests unwarrantable failure. In *Eastern Associated Coal Corp.,* 13 FMSHRC 178, 187 (Feb. 1991), the Commission stated: "'Highly negligent conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure.

[8] 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*, 22 FMSRHC at 353.

> Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence."

Eagle Energy Inc. 23 FMSHRC 829 (Aug. 2001). Moreover, the Fourth Circuit has defined an unwarrantable failure as "conduct that is 'not justifiable' or is 'inexcusable.'" *Consol Buchanan Mining Co. v. Sec'y of Labor,* 841 F.3d 642, 654 (4th Cir. 2016) (citations omitted).

Thus my colleagues' insistence that the Secretary prove recklessness above and beyond that required to demonstrate unwarrantable failure arises from their faulty assumption that an unwarrantable failure violation must itself stem from behavior deemed reckless. They have, in effect, bumped up the bar needed to show unwarrantable failure, and by doing so have crafted an artificial rationale for their view that the Secretary must demonstrate an extraordinarily high *mens rea* – essentially proof the operator acted (or failed to act) with a conscious expectation of serious bodily harm or death – in order to prevail.

As the Secretary points out, there is no indication in the statute or legislative history that Congress intended that the Secretary would need to demonstrate operator conduct surpassing traditional concepts of recklessness under the Mine Act in order to prove a "reckless flagrant" violation. Moreover, in crafting the statutory definition of "flagrant," Congress has in fact created a new enforcement mechanism for a type of egregious violation not previously found in the Mine Act. The "reckless flagrant" is not like any other category of violation and when it is viewed in its entirety, it is clear that, even if the term "reckless" is defined as it has historically been used in negligence and unwarrantable failure determinations, something more than what is needed to prove an unwarrantable failure is <u>already</u> required to prove a flagrant violation. This includes all of the following:

1. A level of danger ("death or serious bodily injury") that, at a minimum, is on a par that required to prove a significant and substantial violation (*See American Coal*).

2. A violation that substantially and proximately causes, or reasonably could have been expected to cause, such a level of danger.

3. A level of aggravated conduct well beyond "ordinary negligence."

No other provision of the Mine Act requires proof of all of the above elements. For instance, in the analysis of whether a violation is significant and substantial, the operator's negligence is not relevant. Conversely, unwarrantable failure violations do not necessarily include proof of the violation's dangerousness. As we explained in *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013):

> We are troubled by the judge's statement implying that there is a "requisite high degree of danger" that must be present to support an unwarrantable failure determination. [32 FMSHRC] at 701. The degree of danger, although a relevant factor, is not a threshold requirement for determining whether a violation is unwarrantable.

> The level of danger is but one factor to be considered in evaluating whether a violation is unwarrantable. . . . . The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition – that the absence of significant danger precludes a finding of unwarrantable failure – is not true.

Thus, the majority's assertion that the Secretary's interpretation is functionally identical to unwarrantable failure language of section 104(d)(2), slip. op. at 13, 24, is simply wrong. My colleagues' claim that the Mine Act's scheme of "increasingly severe sanctions for increasingly serious violations or operator behavior" means something more than recklessness is needed to prove a reckless flagrant, slip op. at 13, falls apart when the statutory language of a flagrant violation is carefully considered. Upon examination, it becomes clear that such a violation – even when the existing Mine Act definition of "reckless" is applied – already requires more egregious conduct than that needed to prove violations under other Mine Act provisions. Consequently, the majority's rationale for requiring a higher *mens rea* than recklessness be established in order to prove a flagrant violation, based on a need to distinguish such a violation from other Mine Act provisions, is baseless.

The majority also includes in its new definition of "reckless" the test for "reckless disregard" as set forth in Part 100 of the Secretary's penalty regulations. Slip op. at 27 ("conduct which exhibits the absence of the slightest degree of care"). *See* 30 C.F.R. § 100.3 (d) Table X. Use of this standard would make it almost impossible to prove that a violation is flagrant, as any morsel of operator care would suffice to defeat a flagrant charge. In *Lehigh Anthracite*, we explicitly refused to utilize MSHA's penalty regulations to define levels of negligence, stating:

> In particular, MSHA's definition of 'reckless disregard,' which focuses on whether an operator has exhibited the "slightest degree of care," is either inappropriately subjective or, if read literally, almost indistinguishable from intentional misconduct by an operator's agent. The definition is therefore not well suited to the objective "reasonably prudent person" standard used by Commission Judges.

40 FMSHRC at 280.

The majority's choice to require a deliberate or conscious expectation of harm in order to demonstrate recklessness would require a *more* culpable *mens rea* than the state of mind required to prove criminal violations under the Mine Act. *See* 30 U.S.C. § 820(d) ("Any operator who willfully violates a mandatory health or safety standard . . . shall, upon conviction, be punished by a fine of not more than $250,000, or by imprisonment for not more than one year, or by both . . . ."). When it passed the MINER Act, Congress was aware that the term "willfully" in section 110(d) imposed criminal penalties on operators who acted "either in intentional disobedience of the [safety] standard ***or in reckless disregard of its requirements****." United States v. Blankenship*, 846 F.3d 663, 674 (4th Cir. 2017) (emphasis supplied) (discussing a *mens rea* first applied in *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984)); *see also United.States. v. Consolidation*

Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974) (criminal sanctions available for "either in intentional disobedience of the [safety] standard or in reckless disregard of its requirements.").

"We assume that Congress is aware of existing law when it passes legislation . . . ." *Blankenship*, 846 F.3d at 674 (quoting *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990)). A conclusion that Congress intended to require for a "reckless flagrant" proof of a *mens rea* more culpable than the reckless disregard required by section 110(d) for application of the harshest penalties available under the Act, including high fines *and imprisonment*, does not comport with the notion of "increasingly severe sanctions for increasingly serious violations or operator behavior," slip op. at 13, unless the "reckless flagrant" was intended to be the most severe sanction available under the Act. There is no indication it was. Even the most serious sanctions available under the amended Mine Act – criminal fines of up to $250,000 and up to one year imprisonment – can be obtained with proof of a *mens rea* below a deliberate, conscious intent and equivalent to recklessness.[9] The most severe sanctions available under the Mine Act punish reckless conduct, in addition to intentional conduct. The reckless flagrant – which imposes less severe sanctions – is also intended to reach reckless conduct that otherwise meets the elements of a flagrant violation.

What the majority proposes is limiting the "reckless flagrant" tool only to those cases in which the Secretary would be able to demonstrate the type of deliberate and intentional conduct the government could already – before the Miner Act amendments – sanction with severe criminal penalties, including prison. Requiring a *mens rea* above the level of criminality is obviously not consistent with the clear purpose of the Miner Act amendments to provide the Secretary with additional tools to impose greater civil penalties on the especially problematic category of violation in which an operator shows either a reckless or repeat failure to eliminate a known hazard that the reasonably prudent miner (an objective, not subjective standard) would expect to result in serious injury or death.

c. *Chevron I* - Purpose

The purpose of the Mine Act "is to increase the health and safety of the mining industry's 'most precious resource-the miner,' by requiring inter alia that every operator and miner comply with federally promulgated health and safety standards." *Richardson v. Sec'y of Labor*, 689 F.2d 632, 633 (6th Cir. 1982) (quoting 30 U.S.C. § 801). As discussed more fully below in connection with the Act's legislative history, the Act and its amendments have, over time, consistently increased the penalties for various types of violations of the Secretary's safety and health regulations, including penalties available for flagrant violations. With respect to the specific

[9] My colleagues' response to this point, at slip op. 24, exposes their unfortunate confusion of two very basic legal concepts: *mens rea* and burden of proof. The *mens rea* necessary to establish the violation of any given statute – whether civil or criminal – concerns the state of mind of the person accused of the violation at the time of the allegedly violative conduct – e.g., negligently, recklessly, willfully, deliberately. The burden of proof is an entirely different concept, concerned with the mental processes of the judicial decision-maker and what quantity and weight of evidence are necessary to establish a violation – e.g., beyond a reasonable doubt, or by a preponderance of the evidence.

question at issue, interpreting the term "reckless" as requiring proof of a deliberate or conscious expectation of serious harm to miners will exclude from increased civil penalties operators who are among the worst of the bad actors. Indeed, such an interpretation limits application of the "reckless flagrant" section to those whose acts were so notoriously homicidal they could be proved to have acted or failed to act with a conscious or deliberate expectation of causing serious harm or death.

The majority's interpretation of a "reckless failure" would shield from the enhanced penalties in the "reckless flagrant" provision some of the most reckless operators – including those so habitually reckless they would lack a "conscious or deliberate indifference" to the danger of their failure to eliminate known violations that could be expected to cause death or bodily injury.

For example, the majority's interpretation does not apply to the operator who fails to eliminate a known violation if the Secretary cannot prove that he or she consciously realized or appreciated but nevertheless disregarded the high degree of risk involved in the failure to eliminate the violation, even if it is indisputable that a reasonable operator in the same position would do so. In order that the operator's failure to eliminate a dangerous violation may be reckless, it should not be necessary that the Secretary prove the operator recognized its own conduct was expected to cause serious bodily injury or death. An operator's inability to realize such danger may be due to its own reckless character, or to the abnormally favorable results of previous conduct of the same sort. Moreover, the absence of evidence of such "conscious" or "deliberate" disregard for the danger would often likely be due to the general inaccessibility of evidence of an operator's actual mental state at the time of the violation in question.

The Secretary would very rarely, if at all, be able to meet the majority's unreasonable demand for proof that the operator had an actual subjective knowledge "the violation existed" and he or she "would expect it to kill or cause serious bodily injury." Slip op. at 17. It is unreasonable to interpret a statute aimed at "reckless" actors to apply only to the most cold-blooded killer. The word "reckless" indicates Congress's intent that it is enough that the operator has reason to know of circumstances which would bring home the realization of the ordinary, reasonable operator the dangerous character of a failure to take reasonable steps to eliminate dangerous violations.

d. *Chevron I* – Legislative History

In both the legislative history to the 1977 Mine Act and the 2006 MINER Act, Congress laid blame for then recent mining tragedies, in part, on insufficiently low penalty amounts that had failed to deter operators from violating MSHA's mandatory health and safety standards. Indeed, provisions that give the Secretary of Labor authority to propose higher penalties to improve compliance with health and safety standards have been a central feature of every piece of mine safety legislation in U.S. history.

The Senate Report accompanying the original 1977 Mine Act noted that under the predecessor legislation – the 1969 Coal Act - "[t]he assessment and collection of civil penalties is intended to encourage a state of constant compliance with the Act on the part of operators, but as noted, the penalty system has been solely deficient in meeting this objective." S. Rep. No. 95-

181, 95th Cong., 1st Sess., at 39 (1977) ("1977 Senate Report"). The 1977 Senate report stated further that "[t]o be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for a[n] operator to comply with the Act's requirements than it is to pay the penalties assessed." *Id*. at 41. The 1977 Senate Report concluded that:

> [i]n overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

Id.

In the aftermath of a series of tragic mining accidents in 2006, Congress amended the Mine Act to, among other things, once again increase penalties. A Senate Committee stated that:

> [t]he purpose of the "Mine Improvement and New Emergency Response ['MINER'] Act of 2006," S. 2803, is to further the goals set out in the Mine Safety and Health Act of 1977 and to enhance worker safety in our nation's mines. The bill amends the 1977 Act "to... improve safety-related procedures and protocols and increase enforcement and compliance to improve mine safety.

S. Rep. No. 109-365, 109th Cong., 2nd Sess. (2006). To that end, the legislation "increases both civil and criminal penalties for violations of federal mining safety standards." *Id*. President George W. Bush signed the MINER Act into law on June 15, 2006, explaining that "to ensure compliance with the law, the MINER Act will increase the maximum penalty for flagrant violations of mine safety regulations nearly four-fold." *Presidential Statement on Signing the Mine Improvement and New Emergency Response Act of 2006*, 2006 U.S.C.C.A.N. S27 (June 15, 2006).

The clear trend toward giving the Secretary greater authority to impose increasingly higher fines must inform the inquiry at hand – whether Congress, in using the word "recklessly," meant to make the four fold increase in civil penalties for flagrant violations available only when an operator acts with a deliberate expectation of harm but not where the operator is recklessly indifferent to such harm. No sanction available under the Mine Act had ever been interpreted to require proof that an operator had a conscious or deliberate expectation of harm. A clear legislative intent to increase penalties should inform our analysis of Congress's use of the word "reckless" in the flagrant provision and whether it reflects: (1) a legislative intent to require the Secretary to take the unprecedented step of proving intentional harm in order to assess the new increased flagrant penalties or (2) a legislative intent to make assessment of such penalties available upon proof of a reckless disregard for serious injury or death. Just as only the latter interpretation squares with the plain meaning of the statutory text and its structure, only the latter

interpretation is consistent with the Congressional intent to increase penalties assessed for particularly dangerous reckless and repeat violations.

2. *Chevron II* Analysis - Even if the statute does not provide a clear answer to the question of whether proof is required of a conscious expectation of serious injury or death, the Secretary's reasonable interpretation that it does not require such proof would be entitled to deference.

The *Chevron I Analysis*, above, provides a clear and unambiguous answer to the specific question of whether deeming a violation "reckless flagrant" requires proof that the operator's failure to eliminate the violation was done with a conscious or deliberate expectation of harm, rather than recklessness. I find that the question is answered at the first step of *Chevron* because the text, structure, purpose and legislative history of the MINER Act amendments at Section 110(b)(2) lead me to a clear and unambiguous conclusion that Congress meant what it said – a reckless flagrant is predicated on "reckless" conduct. And for that same reason, I obviously conclude that the majority's claim to have come to an unambiguously clear but completely contrary interpretation is without merit.

Even assuming arguendo that the result of the *Chevron I Analysis* was that section 110(b)(2) is ambiguous as to the question of the appropriate *mens rea* needed to prove a "reckless flagrant" violation, the D.C. Circuit in *Natural Resources Defense Council, Inc. v. EPA* noted that, under step two of *Chevron*, "the agency's interpretation must be sustained if it is reasonable in light of the language, legislative history, and policies of the statute." *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987). Thus, the *Chevron I Analysis,* which focused on these same subjects, meaningfully informs the reasonableness inquiry at the heart of the *Chevron II Analysis*. And the D.C. Circuit has held that the Secretary's interpretations of the Mine Act are entitled to special deference given the Mine Act's important purpose:

> in the context of a remedial health-and-safety act like the Mine Act whose "primary purpose . . . [is] to protect mining's most valuable resource—the miner," *Int'l Union, [UMWA] v. [MSHA]*., 823 F.2d 608, 617 (D.C. Cir. 1987) (internal quotation marks omitted), we must "'liberally construe[ ]'" the Act's terms, meaning that we are all the more "obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable." *Cannelton Indus*., 867 F.2d at 1437 (internal quotation marks omitted).

Am. Coal Co. v. FMSHRC, 796 F.3d 18, 24 (D.C. Cir. 2015).

As described more fully above, the Secretary's interpretation of the term "reckless" in the Mine Act's flagrant provision protects miners from the reckless bad actors Congress intended, unlike the overly restrictive approach adopted by the majority that would only sanction those operators so notoriously pathological it could be proved that they acted with a deliberate and

conscious expectation of causing death or serious bodily injury. Unlike the majority's non-expert approach, the Secretary's interpretation is a reasonable one, and is consistent with the formulation of "reckless" set out in each of the Restatements and our case-law. Indeed, the Secretary has adopted the interpretation set forth in the Restatement (Second) which provides that "recklessness" occurs when an "actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Sec Br. at 30 (quoting Restatement (Second) of Torts § 500 (1965)). Thus, the Secretary's interpretation of a Section 110(b)(2) reckless flagrant violation has several elements:

- To establish a reckless "failure to make reasonable efforts to eliminate a known violation," 30 U.S.C. § 820(b)(2), the Secretary must demonstrate that the operator made a choice not to correct a violation that is actually or constructively known (or exhibited indifference in failing to correct such a violation).

- The level of negligence is that required under common law and existing Mine Act case-law involving "recklessness" – there is no "heightened recklessness" required and phrases or terms in the flagrant provision that are the same or similar to those used elsewhere in the Mine Act should be interpreted similarly.

- There is no scienter requirement. The word "reckless" does not require proof of the operator's deliberate or conscious expectation of harm.

I fail to see anything unreasonable about the Secretary's interpretation of the term "reckless" in the flagrant provision of Section 110(b)(2) to mean the same thing as "reckless" in any other Mine Act context – that no showing of the operator's intent is required. S. Reply Br. at 2-3. In short, the Secretary's focus is on the operator's choice not to correct a problem when the operator is aware *or should be aware* of the potential consequences. Under this interpretation, proof of an operator's conscious intention to disregard the risk of harm to a miner when failing to eliminate a deadly violation is not required. S. Br. at 29-32. This is a reasonable interpretation consistent with the purposes of both the Mine Act and the MINER Act amendments, and would answer the specific question not clearly answered at *Chevron Step I*. Therefore, I would defer to the Secretary's reasonable construction, as I am required by law to do.

B. The operator's failure to maintain the walkway in good condition was a flagrant violation.

The facts of this case are so egregious that even under the incorrect interpretation of "reckless" adopted by the Judge and the majority – one that requires a *mens rea* for intentional rather than reckless conduct – this violation would be flagrant. A written engineering report outlining the dangers of the walkway and an operator's deliberate choice to put essential repairs for the walkway on the to do list, Tr. at 339, are exactly the type of operator conduct Congress was trying to deter by including the flagrant penalty language in the Miner Act.

The engineering report stated unequivocally that without steel plate reinforcing, the outer walkways "cannot be found to be structurally adequate for use," and that the walkways "are not safe for personnel to be using until a repair has been completed." S. Ex. 5 at 2.

However, Northshore management failed to remedy the ongoing walkway safety issues. As early as 2013, a Northshore engineer submitted a work order stating that "outside walkways and below conveyor need to be repaired." S. Ex. 18. Even after commissioning a report about the condition of the walkway, Northshore failed to correct the safety problems until the accident occurred ten months later. This despite language in the report that the outer walkways "cannot be found to be structurally adequate for use. . . . [T]hey are not safe for personnel to be using until a repair has been completed." S. Ex. 5.

Such a potentially lethal combination of a very serious condition which lasted for a very long time fits squarely into the interpretation of "reckless" outlined above. The dangerous conditions were compounded by the fact that, unlike a visibly unsafe roof or a water inundation in a mine, the contract miners working for Northshore were not aware of the unsafe condition of the walkway. Northshore assigned them to work on the walkway, but gave them no notice of its dangerous condition.

Although the Judge ultimately ruled that the violation was not flagrant, she found that all of the criteria needed to prove a flagrant violation were met with one exception: that the operator's failure to make reasonable efforts to eliminate the known violation was "reckless." *Cite to ALJ Dec.* at 68-69. Substantial evidence – including evidence the majority uses to find reckless disregard and unwarrantable failure, slip op. at 25-28, supports her findings that the other criteria were met. Northshore had knowledge of the safety hazard – Northshore's own engineers submitted work orders for the outer walkways, and other miners complained about the conditions. *Id.* at 54. Moreover, the operator did not make reasonable efforts to repair the walkway, and the structural defect could reasonably be expected to cause death or serious bodily injury.[10]

My colleagues make some head-spinning pronouncements about factors that support their finding of reckless disregard and unwarrantable failure and at the same time, form the basis of their opinion that the violation was not flagrant. First, the majority emphatically rules that, pursuant to *Lehigh Anthracite*, 40 FMSHRC 273, 281-82 (Apr. 2018), Northshore's use of fall protection does not mitigate a negligence finding of "reckless disregard," explaining that fall protection was a completely inadequate effort to satisfy the standard's requirement and address

[10] The Judge's conclusion that the violation reasonably could have been expected to cause death or serious bodily injury is not at issue in this appeal. The Judge's finding that the violation did in fact meet this requirement of proving a flagrant violation was not challenged in either petition for discretionary review, addressed in our order directing review, or briefed by the parties. In *dicta*, supra 17-18, the majority attempts to depart from our precedent in *American Coal*, 38 FMSHRC at 2066 and *Lehigh Anthracite*, 40 FMSHRC at 280 (directing an objective analysis of whether the violation could have reasonably been expected to cause death or bodily injury) to instead require an unsuitable subjective analysis. This portion of their decision is decided *ultra vires* of our statutory authority and therefore does not disturb existing precedent.

defects in the walkway. Slip op. at 28. I agree. Yet earlier, for purposes of their flagrant analysis, the majority explains that the Judge correctly relied on the operator's use of fall protection as a mitigating factor in her "reckless flagrant" analysis. Slip op. at 19-20. Citing no authority, the majority suggests that an analysis of whether a violation is "reckless flagrant" focuses on whether the operator acted intentionally while our negligence analysis does not. And because the majority views the use of fall protection as an indication that the operator had no deliberate purpose or conscious expectation of severe harm, it views these efforts having nothing to do with a reasonable attempt to eliminate the violation as mitigating the operator's culpability. *Id.*

Under this theory, an operator may avoid a "reckless flagrant" charge, not by attending to the safety hazard at issue, but by ignoring it, substituting its judgment for that of the Secretary, and by instituting alternative measures. Here, the introduction of such alternative protocols (fall protection) clearly indicated that the operator was aware of the safety hazard, making the decision not to correct it appear intentional. In addition, the emphasis on fall protection placed the burden to work safely only on the miners, instead of on the operator who should have corrected the underlying condition.[11]

Similarly, in finding "reckless disregard," the majority rejects Northshore's argument which claimed that the engineering report's statement that the operator should "restrict access" to the walkway was not an outright prohibition on access. Slip op. at 27-28. Yet my colleagues base their finding that the violation was not flagrant in part on the fact that the report recommended restricting access to the outer walkways and that there was no evidence that this recommendation was ever violated (even though, of course, access was never prohibited). Slip op. at 19-20.

Arguably, in the absence of high penalties associated with flagrant violations (up to approximately $271,000), some operators might be tempted to roll the dice by putting off safety repairs, knowing that non-flagrant penalties are capped at approximately $74,000 and thus might be much less costly than the repair itself.[12] This was precisely the situation that Congress wanted to address by providing meaningful penalties under the Act.[13] Northshore's actions in ignoring the recommendations of its own experts and playing Russian roulette with the safety of its workforce is properly deemed a "reckless flagrant" violation.**[14]**

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[11] We note that in an S&S analysis, the operator's defense that fall protection was utilized would have been rejected as a "redundant safety measure." *See Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018).

[12] The repair was estimated to cost $300,000. At the time of the violation, the maximum penalty for a non-flagrant violation was $69,417. 82 FR at 5383 (Jan. 18, 2017).

[13] *See* S. Rep. No. 95-181, at 9 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978) ("Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions . . . .").

[14] Indeed, Northshore's repeated failure to take reasonable steps to repair the walkway

(continued…)

I would reverse the Judge's ruling that the operator was not "reckless" and remand for a decision consistent with this opinion and for the assessment of a penalty.

III.

The Judge's Findings of Individual Liability Should be Affirmed

A. The merits of the section 110(c) charges

Matthew Zimmer and Roger Peterson were high-ranking managers at Northshore Mining who were intimately involved with the problems surrounding the defective walkway. Importantly, they each received a copy of the KOA report which, as previously noted, emphasized that the walkways were "not safe for personnel to be using until a repair has been completed." Tr. 327; Resp. Ex. D; S. Ex. 5 at 2.

Their response to this information was to continue to send miners to work on the walkways. Their only nod to safety needs was to determine that fall protection was needed. Tr. 48-49; 478. Although they had the authority to prohibit miners from using the walkway, they chose not to exercise it. Instead, they appeared satisfied with a status quo that put the workforce in danger for months at a time.

The Judge found the two individuals liable under section 110(c) for knowingly failing to maintain the walkways in good condition in violation of 30 C.F.R. § 56.11002 (they were not charged with failure to barricade or put up warning signs). She assessed penalties of $4,000 against each of them. For the reasons discussed below, I conclude that the Judge's finding of individual liability is supported by substantial evidence, and thus dissent from the majority's ruling reversing the Judge.[15]

Section 110(c) states that "[w]henever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties [as the operator]." 30 U.S.C. § 820(c).

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[14] (…continued)
could itself establish recklessness, consistent with our observation in *Wolf Run Mining Co*.,35 FMSHRC 536, 543 (Mar. 2013) that "repeated failure to make reasonable efforts to eliminate a single known and dangerous violation will often be considered reckless."

[15] 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)).

An individual acts knowingly when the individual is in a position to protect employee safety and health and fails to act on the basis of information that provides knowledge or reason to know of the existence of a violative condition. *McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1996 (Aug. 2014). As discussed more fully below, Zimmer and Peterson were clearly in a position to protect the safety and health of Northshore miners, but failed to act on the information in the engineering report. The majority, however, relies on *Maple Creek Mining, Inc.*, 27 FMSHRC 555 (Aug. 2005) to conclude that these individuals should escape liability. According to the majority, the Secretary failed to prove that these two individuals were "in a position" to remedy the condition at issue, which under *Maple Creek*, is a prerequisite for section 110(c) liability.[16] Slip op. at 10-11. As demonstrated by the record evidence, their ruling is misguided.

Matthew Zimmer was section manager of Hot Side Asset Management. He had administrative functions, would supervise work planners and supervise how many technicians were needed for a job. He would supervise schedulers who organized work orders to repair equipment, would review work orders, and provide his input on scheduling of a work order.

Roger Peterson was section manager of Hot Side Operations. It appears that he was responsible for the running of equipment. He was also responsible for the maintenance group whose workers changed the idlers on the walkway. As previously discussed, both Zimmer and Peterson received a copy of the engineering report regarding the defective walkway, and both were involved in discussions about the use of fall protection. Both Zimmer and Peterson had the authority to shut down operations for any reason, and were responsible for the safety of the workforce. Tr. 402, 433.

The Judge's finding of liability was based on:

- The fact that both managers informed their respective crews about the condition of the walkways and that access was to be restricted but did not give the contractor crew such warning.[17]

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[16] For the reasons set forth in Commissioner Jordan's dissent in *Maple Creek*, I believe that the majority in that case erred in requiring the Secretary to show that individual miners "possess the power to take remedial action" in order to prove liability under section 110(c). Slip op. at 10-11. This added a new component to the traditional section 110(c) analysis, which simply required the Secretary to show that the individual was "in a position to protect employee safety and health." *Maple Creek*, 27 FMSHRC at 567. Moreover, this new evidentiary element mandated by the majority in *Maple Creek*, which requires proof that the individual has the authority to take remedial action, fails to take into account that section 110(c) envisions liability simply when an operator's agent "carries out" a violation. Nonetheless, I analyze this issue using the analysis set forth in the Commission's *Maple Creek* opinion.

[17] The mine's own permanent miners who were more aware of the structural issues felt it was too dangerous to use the outer walkways, and found alternate ways to perform conveyor maintenance. Tr. 116-17. By contrast, contract miners could not see the walkways under the

(continued…)

- Sufficient evidence to demonstrate that both managers knew that the walkways were not maintained in good condition.

- The fact that both managers received copies of the engineering report.

- The fact that both managers failed to act on the basis of the walkway information to protect worker safety.

- The fact that both managers spoke with the Northshore engineer who received a work order about the walkway, and together they decided to take no corrective action but instead, decided to put the walkways on a list for later repair. S. Ex. 19 (report of MSHA investigator).

- The fact that neither manager fully considered the importance of repairs.

- The fact that managers did not consider the importance of repairing the walkways or warning miners of its deteriorated state, but tried to work around the issue by implementing a fall protection policy.

- The fact that Zimmer authorized a work order for the 62/162 gallery in September 2015 which stated in part "[v]erify the floor is safe on the east side of the conveyor. Roger [Peterson] says that fall protection is required."[18] Resp. Ex. E.

41 FMSHRC at 73-76.

Even under the Commission's *Maple Creek* test, substantial evidence supports the Judge's finding of liability against these two individuals. Although it is true that, as Zimmer and Peterson argue, the Engineering Department (under Daniel Scamehorn) had the direct responsibility and authority to repair the walkway, Zimmer and Peterson were not without recourse. They had the means to eliminate the hazard – miners working on a dangerous walkway – in two regards. First, it was within their authority to send a work order requesting that the walkway be repaired, and to follow up if the repair was not performed in a timely fashion. Second, it was within their ability to ensure that miners did not go onto the walkway – even if that meant shutting down operations.

As to their authority to send in work orders and to subsequently check on the status of such orders, the record evidence is as follows:

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[17] (…continued)
pellets, did not see any hazard or warning signs on the walkways, and were not aware of problems with the walkways. Tr. 53, 68-69, 194, 202-03, 205-07; S. Br at 12.

[18] The work order to which the Judge referred was not an order to repair the walkway. Rather, it was an order to deal with an idler replacement.

- Anyone at Northshore with the proper computer system access could generate a work order and send it to the Engineering Department;

- An individual sending a work order could prioritize it if it involved a safety hazard (identifying it as a safety issue), which Betzler had done in the past; and

- If the above occurred, the work order would have higher priority.

The testimony of Jason Betzler (maintenance planner) was that work orders could be coded to indicate the presence of a safety hazard. Mr. Betzler further testified that such orders were given a quick review for any safety issues. If there was an immediate concern, the subject area would be taped off, etc. Mr. Betzler testified that the safety notation heightened the order to the top of the list for his review. Tr. 305.

The testimony of Matthew Zimmer was as follows:

> Q. Was it ever your understanding that there was a potential for a failure of the floor to occur that would result in a fall to a person?
> A. No
> Q. If you had had that understanding that that potential existed on the outer walkways, what would you have done?
> A. I would have elevated the concern to my supervisor or both to the Safety Department.

Tr. 413-14.

The testimony of Peterson was as follows:

> Q. If a work order is sent to Engineering, does that affect your involvement on it?
> A. No. Once it went to Engineering, it was really out of my control, my input."

Tr. 421.

However, Peterson added that "[w]e would meet with the Engineering Department every month or two to go through the backlog to reprioritize if anything needed to be changed." *Id*

Both Zimmer and Peterson stated that "[they had] the authority to shut down operations for any reason." S. Ex. 17. Therefore, at least theoretically, they could have shut down operations until the walkway was repaired. S. Ex. 19 and 20 (Statements to MSHA investigator).

Thus Zimmer and Peterson could have played a major role in remedying the hazard. They could have submitted work orders about the walkway and marked them as affecting safety. They

then could have followed up with the Engineering Department (Peterson's testimony) or contacted a supervisor or safety official (Zimmer's testimony). Relieving them of liability simply takes advantage of a company organizational chart as a defense to a serious violation, as the record indicates that these were high-ranking individuals who could have exerted pressure on the Engineering Department to make the repairs.

The evidence regarding their authority to keep miners off of the walkway (thus eliminating the hazard) is even more compelling. Peterson told the MSHA investigator that "I am in charge of all work, operations and maintenance. . . . I direct people that direct the workforce." S. Ex. 17. Peterson and his subordinates were responsible for implementing the means of protection for accessing the outer walkways. Resp. Br. at 28. He testified that on the day of the incident he told another supervisor that it was fine to let a cleanup crew go up to the 162 conveyor to perform cleanup work and to make sure they knew to wear fall protection. Tr. 431. Zimmer heard the conversation and told the supervisor to be sure fall protection was worn. Tr. 477-78. Hence, as a manager with the authority to tell miners where they could and could not work, Peterson had the ability to eliminate the hazard.

Zimmer told the MSHA investigator "I do direct the workforce" although he also testified that when he moved into the Asset Management position, the people who worked under him would have no reason to be on the outer walkways. S. Ex. 17. Generally, he had responsibility for directing the miners, and ensuring that they worked safely. Tr. 402. Thus, like Peterson, he had the power to keep the miners off of the walkway.

In short, there is more than one way to fix a problem – there is more than one way to "take remedial action to eliminate the potential . . . hazard." *Maple Creek Mining*, 27 FMSHRC at 569. Even the *Maple Creek* majority, in finding two of the foremen not liable under section 110(c) for failure to properly maintain an inundated escapeway in a safe condition based their ruling on the fact that "neither was authorized to redesign the pumping system *or to construct an alternative walkway.*" *Id*. (emphasis added). The *Maple Creek* majority also relied on the Commission's *Kenny Richardson* decision, quoting the Commission's statement that "Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline . . . should have removed it from service."[19] *Id*. at 569 n. 9. In effect, Zimmer and Peterson could have "removed the walkway from service" by prohibiting miners from working on it. Neither did.

In conclusion, substantial evidence supports the Judge's finding of liability. It is clear that Zimmer and Peterson were well aware of the problem with the walkway and relied on fall protection to solve it, instead of advocating for timely repairs. Their complacency, particularly in

[19] Granted, the safety standard at issue in *Kenny Richardson* explicitly required not only that equipment be maintained in safe operating condition but that unsafe equipment be removed from service immediately. 30 C.F.R. § 77.404(a). However, Northshore could have avoided liability under section 56.11001, which requires that the walkway be maintained in good condition, if the walkway, in effect, had been "taken out of service" by forbidding miners to go on it, and by barricading it. *Id.*

light of the engineering report, is deeply troubling and constitutes the requisite "aggravated conduct" required to find liability under section 110(c).

B. Procedural issue – Delay in Proposing Penalties

The Secretary must file a penalty petition within a "reasonable" period of time. The operator argues that there was undue delay (about 16 months after the operator was cited) in MSHA's filing of the section 110(c) penalty petitions. However, the operator has not been able to persuasively articulate how it was prejudiced by any alleged delay.

The operator bases its argument on section 105(a) of the Act which provides in pertinent part that:

> [i]f, after an inspection or investigation, the Secretary issues a citation or order . . . he shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited . . . ."

30 U.S.C. § 815(a) (emphasis added).

Consequently, the Commission has held that, while delay on the Secretary's part in proposing a penalty may not vitiate the civil penalty proceeding and the finding of a violation, an inordinate and unjustifiable delay might well vitiate the imposition of the penalty itself. *Twentymile Coal Co*., 26 FMSHRC 666, 682 (Aug. 2004), *rev'd on other grounds*, 411 F.3d 256 (D.C. Cir. 2005) ("*Twentymile I*").

Regardless of how important procedural regularity may be, however, "it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety [and the Commission] therefore must balance concerns for procedural regularity against the severe impact of a dismissal on the Mine Act's penalty scheme." *Webster Cty. Coal, LLC*, 34 FMSHRC 1946, 1949 (Aug. 2012).

The requirement in section 105(a) that the Secretary propose a penalty assessment "within a reasonable time" does not impose a jurisdictional limitations period but rather turns on whether the delay is reasonable under the circumstances of each case. The Commission examines whether adequate cause existed for the Secretary's delay in proposing a penalty and considers whether the delay prejudiced the operator. In *Twentymile Coal Co*., 411 F.3d at 256 (involving a late-filed penalty assessment against an operator), the D.C. Circuit formulated the following test when an operator charged that a proposed assessment was untimely: (1) was the delay in proposing the penalty a reasonable one and (2) did the operator show prejudice from whatever delay in fact occurred? *Id.* at 262. The Court clarified that the time period subject to the reasonableness requirement begins only upon the completion of the investigation necessary to support the penalty proposal. *Id*.; *see also Salt Lake County Rd. Dep't*, 3 FMSHRC 1714, 1716-17 (July 1981); *Medicine Bow Coal Co*., 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996); *Black Butte Coal Co*., 25 FMSHRC 457, 459-61

(Aug. 2003). The Commission has held that a delay of less than 11 months is not unreasonable, particularly when there is a related ongoing section 110(c) investigation taking place. *Sedgman, and David Gill, employed by Sedgman,* 28 FMSHRC 322, 340 (June 2006) (separate opinion of Commissioners Suboleski and Young).

An operator must show at least some "actual prejudice" arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. *See Long Branch Energy*, 34 FMSHRC 1984, 1991-93 (Aug. 2012); *see also Twentymile,* 411 F.3d at 262. Furthermore, the prejudice must be "real" and "substantial" to "justify the drastic remedy of dismissal." *Long Branch*, 34 FMSHRC at 1993.

The operator contends that the delay caused prejudice at the hearing in part due to the need for Inspector Norman (who conducted the investigation into the walkway collapse) to rely on his notes on the witness stand rather than his own personal recollection or his observations of recollections by other witnesses. According to the operator, James Hautamaki, who led the MSHA section 110(c) investigation after the initial citation and order were issued to the operator, experienced similar problems at the hearing because of the delay, while Evander King (a contract miner who filed a complaint with MSHA) did not recall crucial aspects of the event when cross-examined. Northshore's counsel contends that this is prejudicial because it affected the operator's ability to cross examine the witnesses and present evidence. The operator further argues that the cases against Peterson and Zimmer were essentially based not on the testimony of Inspector Norman or the Special Investigator Hautamaki, but on the recitation of hearsay evidence from persons who the Secretary did not produce as witnesses or even identify in any fashion that would establish their credibility. As such, the operator argues that the delay was unreasonable. Resp. PDR at 20 n.9.

The Secretary never provided an explanation for the delay,[20] arguing to the Commission that the issue had been waived.[21] However, the operator failed to demonstrate that it suffered any "actual," "real," or "substantial" prejudice to "justify the drastic remedy of dismissal."[22] Consequently, I would reject Northshore's procedural challenge.

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[20] The Secretary erroneously claims that the operator waived this argument before the Judge because the Secretary incorrectly states that the operator raised this argument for the first time in its opening brief. The operator made this argument before the Judge at the hearing and in its answers to the Secretary's section 110(c) petitions. Tr. 225-26. Therefore, the Judge had an "opportunity to pass" on the issue. 30 U.S.C. § 823(d)(2)(A)(iii); *accord* 29 C.F.R. 2700.70(d). Furthermore, the operator states that it was unable to develop the argument in its post-hearing brief because of a "[twenty]page limit" that the Judge "imposed on the parties for post-hearing briefs" – despite the numerous complex issues involved in the case. NS Resp. Br. at 31-32.

[21] Before the Judge, the Secretary did not offer any explanation for the delay. However, if the operator is to be given leeway for failing to brief the issue given the 20 page limit imposed by the Judge for the parties' post-hearing briefs, the same leeway must be given to the Secretary.

[22] An MSHA inspector having to refer to contemporaneous interview notes is not unusual
(continued…)

IV.

Conclusion

I join the majority in affirming the Judge's findings of "reckless disregard" for both violations. I also affirm the Judge's conclusion that the two violations were the result of the operator's unwarrantable failures. However, I would find that the Secretary proved a flagrant violation and that the individual miners were liable under section 110(c).

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

[20] (…continued)
at Commission hearings and hardly qualifies as "real" or "substantial" prejudice that justifies outright dismissal. Furthermore, Commission procedural rules expressly allow for hearsay evidence. 29 C.F.R. § 2700.63(a).

Distribution:

R. Henry Moore, Eq.
Fisher & Phillips LLP
Six PPG Place, Suite 830
Pittsburgh, PA 15222
hmoore@fisherphillips.com

Archith Ramkumar, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202
Ramkumar.Archith@dol.gov

April Nelson
Office of the Solicitor
U.S. Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450
nelson.april@dol.gov

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450
garris.melanie@dol.gov

Administrative Law Judge Margaret A. Miller
Federal Mine Safety Health Review Commission
721 19th Street, Suite 443
Denver, CO 80202-2536
mmiller@fmshrc.gov

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 5, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. U.S. SILICA	Docket No. WEVA 2020-0270 A.C. No. 46-02805-499009

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). On December 14, 2020, the Commission issued an order to show cause within 20 days why the Commission should not deny the motion to reopen and dismiss the docket for an unexplained delay in filing the motion.

On December 15, 2020, the Commission received an email from counsel for the operator stating that it did not intend to file a further motion and would allow the Commission's December 14 order to become final. Consistent with that order, the motion to reopen has been denied and this matter is dismissed with prejudice.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (email)

Michael Peelish
Attorney for U.S. Silica
Law Firm of Adele L. Abrams, PLLC
mpeelish@aabramslaw.com

John M. McCracken
Senior Trial Attorney
Office of the Solicitor
Mine Safety and Health Division
U.S. Department of Labor
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
GVoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
Garris.Melanie@DOL.GOV

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. STEWART SERVICES	Docket No. CENT 2020-0007 A.C. No. 13-00095-485512

BEFORE: Rajkovich, Chair; Althen and Traynor, 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. (2018) ("Mine Act"). On October 4, 2019, the Commission received from Stewart Services ("Stewart") a motion seeking to reopen a penalty assessment that had apparently 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).

The record reveals that on February 13, 2019, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 9383277 to Stewart for an alleged violation. On March 20, 2019, MSHA issued Assessment No. 000485512, proposing a civil penalty for the alleged violation. According to MSHA's records, MSHA attempted to deliver the proposed assessment to Stewart on March 23, 2019, but the assessment was returned to MSHA on April 27, 2019, due to an inability to deliver it. On July 5, 2019, MSHA sent Stewart a delinquency notice regarding the unpaid civil penalty.

Stewart, through its representative, claims that it did not receive the proposed assessment, and that it intended to contest Citation No. 9393277 and the associated penalty. After receiving the delinquency notice, Stewart contacted MSHA and requested a copy of the proposed assessment, which it received on July 22, 2019. On July 24, 2019, Stewart sent a letter to MSHA contesting the subject citation and proposed penalty. When Stewart's representative later contacted MSHA to confirm receipt of the contest, he was informed that MSHA had received the contest but considered the proposed penalty assessment to have become a final Commission order.

Having reviewed Stewart's request and the Secretary's response, we conclude that Assessment No. 000485512 has not become a final Commission order. The proposed penalty assessment was not received by Stewart until July 22, 2019, and, following such receipt, Stewart timely contested Citation No. 9383277 and the associated proposed penalty. Accordingly, we deny the request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chair

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution:

Michael L. Beard, President
Andrew Weitkamp
Stewart Services
2411 Brownsboro Road, #205
Louisville, KY 40206
mike@stewart-services.com
andrew@stewart-services.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mcCracken.john.m@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2020-0155-M A.C. No. 39-00022-508281
GCC DACOTAH, INC.	Docket No. CENT 2020-0156-M A.C. No. 39-00022-509671

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 28, 2020, the Commission received from GCC Dacotah, Inc., ("GCC Dacotah") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

[1] The two motions addressed in this order rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on February 3 and March 9 and became final orders of the Commission on March 5 and April 9, respectively. GCC Dacotah's motion says that the proposed assessments in these matters were not timely contested due to an improper understanding and implementation of an internal procedure. GCC Dacotah's motion notes that it paid the uncontested penalties for the assessments before the contest date. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed GCC Dacotah's requests and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. In the interest of justice, we hereby reopen these matters and remand them 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (by e-mail):

C. Gregory Ruffennach, Esq.
Counsel for CGG Dacotah, Inc.
1629 K Street, NW, Suite 300
Washington, DC 20036
greg@ruffennachlaw.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mccracken.john.m@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
U.S. Department of Labor
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CENTRAL SAND CO., INC.	Docket No. CENT 2020-0178-M A.C. No. 14-01733-512758

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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 June 23, 2020, the Commission received from Central Sand Co., Inc., ("Central Sand") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 18, 2020, and became a final order of the Commission on June 18. Central Sand's motion says that its office was short-

staffed due to Covid 19. The motion was filed five days after the underlying assessment had become a final order of the Commission.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. Having reviewed Central Sand's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (by e-mail):

Holly Schrag
Assistant Comptroller
Central Sand Co., Inc.
7945 N Broadway
Valley Center, KS 67147
hollys@fremarcorp.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mccracken.john.m@dol.gov

Chief Administrative Law Judge Glynn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	SE 2020-0250-M A.C. No. 40-00166-509672
NYRSTAR TENNESSEE MINES, STRAWBERRY PLAINS, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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 March 6, 2020, the Commission received from Nyrstar Tennessee Mines, Strawberry Plains, LLC ("Nyrstar") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 6, 2020, and became a final order of the Commission on April 7. Nyrstar's motion says that it inadvertently sent the

notice of contest to MSHA's payment address in St. Louis, along with partial payment of the uncontested penalties.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed at the correct address. Having reviewed Nyrstar's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. 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.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (by e-mail):

Donna Vetrano Pryor, Esq.
Husch Blackwell, LLP
1801 Wewatta Street, Suite 1000
Denver, CO 80202
Counsel for Nyrstar Tennessee Mines, Strawberry Plains, LLC
donna.pryor@huschblackwell.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mccracken.john.m@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. W.W. CLYDE & CO.	Docket No. WEST 2020-0141-M A.C. No. 42-01729-499482

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 7, 2020, the Commission received from W.W. Clyde & Co. ("W.W. Clyde") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 30, 2019, and would have become a final order of the Commission on December 3, 2019. W.W. Clyde's motion says

that was in regular contact with MSHA concerning this assessment, and that it received the proposed assessment by email on October 17, 2019. The motion says an MSHA employee helped the operator's safety director fill out the form over the telephone. The motion says the operator then mailed the notice of contest via certified mail, return receipt requested, and includes documentation supporting this claim.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed at the correct address. However, it appears that the operator did in fact submit its notice of contest to the correct address before the proposed assessment became final. The problem is that the operator returned its notice of contest, having received it in advance by email, before MSHA had recorded the delivery of its assessment by certified mail.

Having reviewed W.W. Clyde's request and the Secretary's response, we find that the proposed assessment did not become final because the operator submitted a timely notice of contest. Thus, the operator has not been properly found to be in default. Accordingly, the operator's motion is denied as moot. This case remains open, and 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (by e-mail):

Nathan Neal
Safety Director
W.W. Clyde and Co.
Orem, UT 84057
nneal@wwclyde.net

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mccracken.john.m@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SPARTAN MINING CO., LLC	Docket No. WEVA 2020-0473 A.C. No. 46-01544-511969

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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 16, 2020, the Commission received from Spartan Mining Company, LLC ("Spartan Mining") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 13, 2020, and became a

final order of the Commission on May 14. Spartan Mining's motion says that it failed to timely contest the penalties in this matter due to an internal clerical error. MSHA sent the operator a delinquency notice on June 29. The operator said that it identified the error after receiving the notice and contacted counsel to prepare the motion to reopen this matter.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future assessments are timely contested by mailing the forms to the address provided.

Having reviewed Spartan Mining's request and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (by e-mail):

Christopher D. Pence, Esq.
Hardy Pence, PLLC
Attorneys for Spartan Mining Company, LLC
10 Hale Street, 4th Floor
P. O. Box 2548
Charleston, WV 25329-2548
cpence@hardypence.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
mccracken.john.m@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
gvoisin@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
garris.melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LUDWIG EXPLOSIVES, INC.	Docket No. LAKE 2020-0033 A.C. No. 11-01657-500192

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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 20, 2019, the Commission received from Ludwig Explosives, Inc. ("Ludwig") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 30, 2019, and

became a final order of the Commission on October 30, 2019. Ludwig asserts that it had a lay person (a risk management consultant) handle the contest and that the consultant had filed it within thirty business days. The Secretary found it was late because it was not filed within thirty calendar days. The consultant further explains with detail how he has been experiencing a family medical emergency, which contributed to his confusion about the computation of the deadline. In addition, he cites to a confirmation of receipt from the Chief Administrative Law Judge regarding the operator's notice of contest of the citation, with an order of assignment to an ALJ (LAKE 2020-0021-RM), as a contributing factor to his confusion. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Ludwig's request and the Secretary's response, we find that the operator acted with excusable neglect due to the confusion from the separate docket and his family medical emergency. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (e-mail):

Daniel P. Foltyniewicz,
Ludwig Explosives, Inc.
P.O. Box 5312
Wheaton, IL 60189
Dpf49@aol.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2019-0622 A.C. No. 46-09357-481953
v.	Docket No. WEVA 2019-0623 A.C. No. 46-01368-491694
KC TRANSPORT, INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 5, 2019, the Commission received from KC Transport, Inc. ("KC") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2019-0622 and WEVA 2019-0623 involving similar issues. 29 C.F.R. § 2700.12.

good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for WEVA 2019-0622 was delivered on January 29, 2019, and became a final order of the Commission on February 28, 2019. MSHA records also indicate that the proposed assessment for WEVA 2019-0623 was delivered on May 28, 2019, and became a final order of the Commission on June 27, 2019. The operator asserts that on July 11, 2019, the operator learned from counsel that both proposed assessments were delinquent. KC asserts that the administrative assistant working at the mine had thought she had sent the proposed assessments to their counsel, when in fact, she did not. The operator explains how it has since improved its processing and handling of proposed assessments to make sure this does not happen again. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed KC's request and the Secretary's response, we find that the operator acted with excusable neglect and has taken steps to improve its internal processing systems. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

Distribution (e-mail):

James P. McHugh, Esq.,
Hardy Pence, PLLC
10 Hale Street, 4th Floor
P.O. Box 2548
Charleston, WV 25329-2548
JMchugh@hardypence.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Chief Administrative Law Judge Glynn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NYRSTAR TENNESSEE MINES, STRAWBERRY PLAINS, LLC	SE 2020-0251-M A.C. No. 40-00170-515280

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 September 18, 2020, the Commission received from Nyrstar Tennessee Mines, Strawberry Plains, LLC ("Nyrstar") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 11, 2020, and became a

final order of the Commission on July 13. Nyrstar's motion says that it inadvertently sent the notice of contest to MSHA's payment address in St. Louis, along with partial payment of the uncontested penalties. MSHA received payment of $123 for the uncontested penalties on June 29. The agency says it sent the operator a delinquency notice on August 26.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed at the correct address. Having reviewed Nyrstar's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (by e-mail):

Donna Vetrano Pryor, Esq.
Husch Blackwell, LLP
Counsel for Nyrstar Tennessee Mines, Strawberry Plains, LLC
1801 Wewatta Street, Suite 1000
Denver, CO 80202
Donna.Pryor@huschblackwell.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	SE 2021-0024-M A.C. No. 01-02901-520230
v.	
PEABODY SOUTHEAST MINING, LLC	

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 12, 2020, the Commission received from Peabody Southeast Mining, LLC ("Peabody") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 24, 2020. On September 14, the penalty for the citation at issue in this motion was inadvertently paid along with 26 other assessments. The proposed assessment would have become a final order on

September 23. Peabody's motion, and a supporting affidavit, say that it inadvertently paid the penalty upon the recommendation of a company official to pay all 27 assessments. The operator did not note that the proposed assessment included a citation it wished to conference in connection with an ongoing dispute about a section 104(b) order for failure to abate the violation cited by the assessment at issue here. It requests that the Commission reopen both the mistakenly-paid citation and the associated section 104(b) order. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Peabody's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (by e-mail):

Arthur M. Wolfson, Esq.
Fisher & Phillips, LLP
Counsel for Peabody Southeast Mining, LLC
6 PPG Place, Suite 830
Pittsburgh, PA 15222
AWolfson@fisherphillips.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LIMESTONE DUST CORP.	VA 2020-0057-M A.C. No. 44-02783-513669

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 3, 2020, the Commission received from Limestone Dust Corp. ("LDC") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 7, 2020, and became a final order of the Commission on June 8. LDC's motion states that it timely completed the contest form and emailed it to an attorney in a law firm with which it had previously worked.

That attorney, however, was away from the firm. It appears, therefore, that the failure to file resulted from a miscommunication by email during the pandemic and was corrected immediately upon discovery. We urge operators and representatives to take proper measures to assure adequate communications during this challenging period.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. Having reviewed LDC's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. The operator diligently followed up on the contest, and the motion was quickly filed and is well-documented. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (by e-mail):

Diana R. Schroeher, Esq.
Law Office of Adele L. Abrams, PC
Counsel for Limestone Dust Corp.
4740 Corridor Place, Suite D
Beltsville, MD 20705
DSchroeher@aabramslaw.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COAL-MAC, LLC	WEVA 2021-0025-M A.C. No. 46-08984-516627

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 12, 2020, the Commission received from Coal-Mac, LLC ("Coal-Mac") a motion seeking to reopen a penalty assessment that appeared to have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 25, 2020, and became a

final order on July 27. The operator had conferenced the underlying citation unsuccessfully, and timely contested the citation. The motion states that when the operator received the proposed assessment, it believed the matter was already in litigation. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests ae timely filed.

Having reviewed Coal-Mac's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (by e-mail):

Mark E. Heath, Esq.
Spilman, Thomas and Battle, PLLC
Counsel for Coal-Mac, LLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, WV 25321
MHealth@spilmanlaw.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 25, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DECKER COAL CO.	Docket No. WEST 2021-0015 A.C. No. 24-00839-504839

BEFORE: Traynor, Chair; Althen and Rajkovich, 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 October 22, 2020, the Commission received from Decker Coal Co. ("Decker Coal") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 10, 2019, and became a final order of the Commission on January 13, 2020. In its motion to reopen, Decker Coal states that it would "love to give a list of viable excuses" for not timely contesting the proposed assessment here, but states instead that the matter simply "fell through the cracks" and

that the operator "forgot" about it. The Secretary does not oppose the request to reopen, but notes that a delinquency notice was mailed to the operator on February 24, 2020. Decker Coal provides no excuse for not filing its motion to reopen until nearly eight months after the delinquency notice was mailed. Instead, the operator suggests that due to the involvement of a third party, it is "between a roc and a hard place." .

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening.

"We have repeatedly and unequivocally held that a failure to contest a proposed assessment as a result of an inadequate or unreliable internal processing system does not establish grounds for reopening an assessment." *Lone Mountain Processing, Inc.,* 35 FMSHRC 3346 (Nov. 2013, *citing Oak Grove Res., LLC,* 33 FMSHRC 103, 104 (Feb. 2011). "Further, we have emphasized the importance of the operator's explanation of the time it took to file for reopening after receipt of a notice of delinquency." *Id., citing Highland Mining Co.,* 31 FMSRC 1313, 1315-16 (Nov. 2009).

This requirement is grounded in the requirement in Rule 60(c) of the Federal Rules of Civil Procedure, which provides that a Rule 60(b) motion shall be made "within a reasonable time." In the present case, the operator offers literally no excuse for its failure, which suggests that its internal procedures are inadequate to ensure that contests are timely filed, or to determine what has gone wrong when they are not. The operator also did not act to cure its delinquency for nearly eight months after the Secretary claims, in an assertion that Decker Coal has not rebutted, that it sent a delinquency notice to the operator. That failure, too, is unexplained. We cannot find that the motion was made within a "reasonable time" without an explanation for the extraordinary delay, and cannot find good cause when none is offered as an excuse.

Accordingly, we deny Decker Coal's motion.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Distribution (by e-mail):

Don Kollekowski
Manager of Safety and Health
Decker Coal Co.
P.O. Box 12
Decker, MT 59025
Don.K@aecoal.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Chief Administrative Law Judge Glenn Voisin
Federal Mine Safety & Health Review
Commission 1331 Pennsylvania Avenue, NW,
Suite 520N Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

January 13, 2021

JONES BROTHERS INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2016-0218-RM Citation No. 8817595; 04/06/2016 Docket No. SE 2016-0219-RM Citation No. 8817596; 04/06/2016 Mine: S.R. 141 Project, Dekalb Co. Mine ID: 40-03454
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JONES BROTHERS INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-0246 A.C. No. 40-03454-410595 Mine: S.R. 141 Project, Dekalb Co.

ORDER GRANTING IN PART THE SECRETARY'S MOTION IN LIMINE AND INSTRUCTIONS FROM THE COURT

On January 11, 2021, the Secretary of Labor ("Secretary") filed an Objection to the Scope of Expected Testimony and Motion in Limine ("Secretary's Motion") where the Secretary objected to the expected testimony of Respondent's witnesses Martin McCullough, Kevin Hinson, Anthony Williams, Joey Odom, Ben Coleman, and Steve Wright as "irrelevant and impermissibly exceed[ing] the scope of testimony permitted by lay witnesses," and further objected to the expected testimony of Wright as not expert testimony. Sec'y Mot. at 2.

After reviewing the filing and Respondent's list of witnesses, the court will permit McCullough, Hinson, Williams, Odom, Coleman, and Wright to testify as fact witnesses. However, Wright will not be permitted to testify as an expert.

Respondent has described the scope of Wright's proposed testimony as follows:

> For nearly 40 years [Wright] has seen and operated borrow pits similar to what Jones Bros. did at the SR-141 job to produce solid graded rock in Tennessee and other states and although MSHA would be aware of these borrow pits, on both private land near a road project right of way or on the right of way itself, MSHA never sought to exercise jurisdiction over them unless the rock was being processed substantially more than by use of a slotted bucket. Mr. Wright may offer both factual and expert testimony concerning how the Interagency Agreement has been interpreted and/or applied.

Witness List for Jones Brothers, Inc. at 3. Wright does not qualify as an expert, per Rule 702 of the Federal Rules of Evidence, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Wright's purported knowledge of borrow pits unrelated to this matter and prior MSHA enforcement practices will not help this Court "understand the evidence or determine a fact in issue"—specifically whether Respondent's operation falls under the jurisdiction of the Mine Act in this specific instance. Further, Wright's proposed testimony consists of legal conclusions, including that "MSHA never sought to exercise jurisdiction . . . unless the rock was being processed substantially more than by use of a slotted bucket" and testimony regarding "how the Interagency Agreement has been interpreted and/or applied." Witness List for Jones Brothers, Inc. at 3. "Expert testimony that consists of legal conclusions" is not admissible under Rule 702 because it "cannot properly assist the trier of fact" in "understand[ing] the evidence" or "determin[ing] a fact in issue." *Burkhart v. WMATA*, 112 F.3d 1207, 1212 (D.C. Cir. 1997). Therefore, this Court will not permit Wright to testify as an expert.

Additionally, the parties have submitted proposed exhibits in this matter. The Court has reviewed the documents and issues the following guidelines with respect to introduction of

exhibits at trial. The Secretary has submitted what is identified as exhibit S-26, which is the 86-page contract between the Tennessee Department of Transportation and Respondent. The document contains many pages of information pertaining to the hiring of illegal immigrants, prevailing wage pay scales and classification of workers, fuel adjustment worksheet forms (blank), non-discrimination provisions, certificate of liability insurance forms, surety bond forms (unsigned), information regarding traffic control, road markings and signage, and other extraneous information. The Secretary is directed to redact any extraneous pages not intended for use at trial from the exhibit before offering it into evidence. Similarly, any drawings contained in exhibit S-27 that the Secretary does not intend to rely on shall be redacted from the exhibit when offered at trial.

Respondent has submitted exhibit R-1, which is a copy of responses provided by the Secretary to propounded discovery. My Prehearing Order specifically states that discovery responses shall not be submitted to the Court. Additionally, the Court finds, as it did with respect to the Secretary's proffer of deposition transcripts, that it is not proper to offer the document as an exhibit in the Respondent's case in chief. It may be used by the parties for refreshing recollection, past recollection recorded, and for impeachment.

The Court recognizes that the Respondent has not submitted any proposed witnesses to testify to the underlying violations cited against it. The Court informed the parties at the inception of this matter that the hearing would encompass the jurisdiction issue as well as an adjudication of all related violations. The Respondent is directed to either inform the Court whether it intends to accept the violations as written, or confirm that they are prepared to litigate the violations at the January 26, 2021 hearing. This matter will not be bifurcated.

It is so **ORDERED** this thirteenth day of January 2021**.**

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

Distribution:

Willow Eden Fort, Attorney, Office of the Solicitor, 618 Church Street, Suite 230 Nashville, TN 37219 (Fort.Willow@dol.gov)

Michael D. Oesterle, Esq., KING & BALLOW, 1100 Union Street Plaza 315 Union Street Nashville, TN 37201 (moesterle@kingballow.com)

Douglas R. Pierce, Esq., KING & BALLOW, 1100 Union Street Plaza 315 Union Street Nashville, TN 37201 (dpierce@kingballow.com)