January and February 2018

TABLE OF CONTENTS

COMMISSION DECISIONS

01-18-18	MACH MINING, LLC	LAKE 2014-0746	Page 1
02-02-18	KENTUCKY FUEL CORPORATION	KENT 2015-383	Page 28
02-08-18	SEC. OF LABOR O/B/O KEVIN SHAFFER v. THE MARION COUNTY COAL COMPANY	WEVA 2018-117-D	Page 39

COMMISSION ORDERS

02-15-18	WHITE COUNTY COAL, LLC	LAKE 2017-0148	Page 51
02-15-18	WILLITS COMPANY, INC.	WEST 2015-525-M	Page 52

ADMINISTRATIVE LAW JUDGE DECISIONS

01-11-18	SEC. OF LABOR O/B/O ANTHONY VEGA v. SYAR INDUSTRIES, INC.	WEST 2018-0135-DM	Page 55
01-11-18	SEC. OF LABOR O/B/O CARL EBERT v. MARSHALL COUNTY COAL CO.	WEVA 2016-565-D	Page 67
01-26-18	PEABODY MIDWEST MINING, LLC	LAKE 2016-0232	Page 87
02-01-18	STAKER & PARSON COMPANIES	WEST 2017-134-M	Page 156

02-05-18	HANSON AGGREGATES SOUTHEAST, LLC	SE 2017-0062	Page 168
02-07-18	GCC RIO GRANDE, INC.	WEST 2017-327-M	Page 174
02-20-18	PEABODY MIDWEST MINING, LLC	LAKE 2016-0120	Page 182

ADMINISTRATIVE LAW JUDGE ORDERS

01-09-18	BLANCHARD MACHINERY COMPANY	SE 2017-236-M	Page 207
01-09-18	CARTER MACHINERY CO INC	VA 2017-0104	Page 211
01-10-18	MICHAEL WILSON v. ARMSTRONG COAL COMPANY, INC.	KENT 2016-0319-D	Page 221
01-16-18	SEC. OF LABOR O/B/O KEVIN R. SHAFFER v. THE MARION COUNTY COAL COMPANY	WEVA 2018-117-D	Page 238
01-24-18	PEABODY TWENTYMILE MINING, LLC	WEST 2017-553	Page 242
01-31-18	MARSHALL JUSTICE v. ROCKWELL MINING, LLC	WEVA 2018-48-D	Page 245
02-22-18	ORIGINAL SIXTEEN TO ONE MINE INC	WEST 2017-0546	Page 257

Review was granted in the following case during the months of January and February 2018:

Michael K. McNary v. Alcoa World Alumina, Inc., Docket No. CENT 2015-279 DM (Judge Moran, December 21, 2017)

Review was denied in the following cases during the months of January and February 2018:

Thomas Lee Kremier v. Coeur Alaska, Inc., Docket No. WEST 2017-80 DM (Judge Bulluck, November 29, 2017)

Secretary of Labor v. KenAmerican Resources, Inc., Docket No. KENT 2017-183 (Judge McCarthy, December 19, 2017) (Interlocutory Review)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 18, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2014-0746
MACH MINING, LLC	

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

DECISION

BY: Jordan, Young, and Cohen, Commissioners

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves two citations issued to Mach Mining, LLC, by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation alleges that the operator violated 30 C.F.R. § 75.400 because loose coal had accumulated along the side of the slope coal belt. The second citation alleges that Mach failed to record the nature and location of the hazardous conditions along the slope coal belt in the mine's examination book as required by 30 C.F.R. § 75.363(b).

After a hearing on the citations, the Judge issued a written decision affirming both violations[1] and finding that the violations were significant and substantial ("S&S")[2] and the result of Mach's high negligence. 38 FMSHRC 2229 (Aug. 2016) (ALJ).

Mach filed a petition to review the Judge's decision, which we granted. On review, Mach contends that the Judge erred in affirming the S&S and high negligence designations associated with the violation of section 75.400. Mach also asserts that the Judge erred in finding a violation of section 75.363(b) and that it lacked notice of the Secretary's interpretation of that safety standard. In addition, Mach maintains that the Judge erred in finding the violation of section 75.363(b) to be S&S and the result of high negligence. For the reasons that follow, we affirm the decision of the Judge.

[1] Mach did not contest before the Judge that it violated section 75.400.

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

I.

Factual and Procedural Background

The citations were issued at the Mach Number One Mine, an underground coal mine located in Illinois. The citations concern the approximately 3,500 foot beltline known as the "slope coal belt," which runs down into the mine between a 12-foot wide travelway and a four-foot wide walkway. The conveyor belt itself is about seven feet wide.

On July 14, 2014, sometime after 8:00 a.m., MSHA Inspector Bernard Reynolds and a Mach foreman, Guy Webster, started to drive down the travelway to conduct a regular quarterly inspection. Almost immediately upon their entrance, a miner approached the truck and informed Webster of hazardous conditions near the slope belt. Inspector Reynolds left the vehicle and walked to the belt, where he saw extensive accumulations of coal. He decided to walk the length of the belt to check for additional problems. Along the way, he documented his observations, noting that coal was generally more prevalent on the far side of the belt (along the walkway).[3] He observed six discrete locations where coal had piled in extensive enough quantities to contact the belt and its component parts. These six locations totaled about 105 feet of beltline and involved 14 rollers contacting coal. Tr. 99-100.

Based on the quantity of coal he observed, Inspector Reynolds believed that the accumulations had existed for several shifts. He also noted where a misaligned portion of the belt had cut about one-eighth of an inch into a steel beam supporting the roof. The damage suggested that the belt had been misaligned for several shifts. Tr. 78-79. Although Reynolds witnessed approximately six miners shoveling coal at the top of the belt, the areas where he had seen coal in contact with the belt were not being addressed at the time of the inspection.

Inspector Reynolds issued Citation No. 8450924 alleging a violation of 30 C.F.R. § 75.400, which provides that "loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate . . . ." Reynolds designated the violation as S&S and resulting from high negligence. After the issuance of the citation, a total of 27 miners were dispatched to address the beltline. Tr. 107-08.

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[3] Specifically, at 100 feet inby Inspector Reynolds observed accumulations measuring about 12 inches deep. Tr. 65. At 200 feet, he observed coal measuring approximately 14 inches deep and at 250 feet, about 16 inches. Tr. 66. At 570 feet, coal up to 30 inches deep was contacting three idle rollers. Tr. 69-70, 72. From 650 feet to 1050 feet, accumulations were eight to 20 inches deep. Tr. 79. In addition, there were three hot bottom roller brackets. Tr. 74. At 1100 feet, about 50 feet of the belt and five rollers were running in coal. Tr. 80. Reynolds testified that he saw dust in the air near this location, which led him to believe that the area was fairly dry. Tr. 82-84. From 1600 feet to approximately 2000 feet, 15 feet of belt and two rollers were turning in coal. Tr. 87-88. From 2000 to 2200 feet, accumulations up to 30 inches deep were contacting two rollers and ten feet of belt. Tr. 88. At 2300 feet, a roller and ten feet of belt were turning in accumulations. Tr. 89. At the bottom portion of the belt accumulations ranged up to 24 inches deep. Tr. 90.

When Inspector Reynolds returned to the surface, he reviewed the mine's examination book, including the examiner's records for each belt. Inspector Reynolds considered the most recent notation for the slope coal belt — "needs cleaned - work in progress" — to be insufficient to address the nature and location of the hazardous conditions that he recently observed. Accordingly, he issued Citation No. 8450926, alleging a violation of the examination recording requirements of 30 C.F.R. § 75.363(b). Reynolds designated the citation as S&S and resulting from high negligence.

Earlier that morning, at around 6:00 a.m., David Adams had performed an examination for Mach while driving up the travelway in a vehicle. He testified that he observed some coal accumulated along both sides of the belt, but did not observe any coal in contact with the belt or its components. Adams noted that the panel being mined at the time was very wet. As a result, water would often accumulate on the belt, causing a large quantity of coal to spill off both sides in a short period of time — a phenomenon he referred to as "washback."[4] Tr. 227. He wrote the subject recording in the examination book, and testified that the entire belt needed to be cleaned. The mine manager, Shane Rorer, testified that he too drove the travelway earlier that morning, around 7:15 a.m., and did not observe coal in contact with the belt. Tr. 340-42.

II.

Disposition

A. Citation No. 8450924 (The Accumulations Violation)

1. The Significant and Substantial Designation

a. Commission Case Law

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission further explained:

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

[4] Guy Webster likened the occurrence of a "washback" to the occurrence of "a small tsunami." Tr. 290, 300.

> and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574-75 (July 1984); *see also U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). The second step of *Mathies* requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037-38 (Aug. 2016).[5]

In cases that involve violations which may contribute to the hazard of an ignition or explosion, the likelihood of an injury resulting depends on the existence of a "confluence of factors" that could trigger the ignition or explosion. *McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1992 (Aug. 2014). Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. *See Utah Power & Light Co., Mining Div*., 12 FMSHRC 965, 971 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

b. The Judge's Decision

The Judge concluded that the Secretary had demonstrated that a confluence of factors was present and thus the accumulations violation was S&S. Specifically, the Judge found that the second step of *Mathies* was satisfied in that the violation contributed to the hazard of a belt fire.[6] Coal was in contact with the belt and rollers in numerous locations, which was an ignition source. 38 FMSHRC at 2242. Furthermore, three of the bottom roller brackets were hot to the touch. *Id*. The Judge recognized that wet coal remains a danger because frictional heat sources, like the rollers rolling in coal and the "frozen" rollers at issue, can cause the coal to dry out. 38 FMSHRC at 2242 (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013) (citations omitted)); Tr. 60. In addition, the mine was on a five-day spot inspection because of

[5] Commissioners Jordan and Cohen reiterate their belief that the proper standard of proof under *Mathies* Step 2 is an "at least somewhat likely" standard. *See Newtown,* 38 FMSHRC at 2051-53 (Comm'rs Jordan and Cohen concurring in part and dissenting in part). In contrast, Commissioner Young believes that *Newtown* was correctly decided.

[6] The Judge repeatedly stated that the Secretary demonstrated that "the accumulations were reasonably likely to ignite" and, accordingly, concluded that the violation contributed to the hazard of a belt fire. 38 FMSHRC at 2242; *see also id*. at 2243 ("ignition would likely result") ("the reasonable likelihood of an ignition risk remained"). Accordingly, his *Mathies* Step 2 analysis was consistent with *Newtown*, 38 FMSHRC at 2033.

the mine's excessive liberation of methane and, therefore, accumulations in contact with the belt represented a "dangerous combination that was reasonably likely to cause an ignition." 38 FMSHRC at 2243.

The Judge further concluded that a belt fire was reasonably likely to result in serious injuries such as smoke inhalation or burns. The Judge rejected the operator's claim that its redundant and required safety measures would prevent any serious injury. *See Buck Creek Coal* v. *FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (treating redundant mandatory safety protections as a defense to S&S findings would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made).

c. Analysis

On review, Mach contends that the Judge's decision lacks the support of substantial evidence and that the Judge's analysis regarding the confluence of factors is flawed. For the reasons that follow, we conclude that the Judge's decision is supported by substantial evidence[7] and that Mach's other arguments lack merit.

We find that the record is sufficient to demonstrate that the coal accumulations here substantially contributed to the hazard of a belt fire and reasonably serious injuries.[8] It is undisputed that the coal that accumulated around the beltline was extensive at the time of the inspection and was in contact with the belt and 14 rollers at six locations, totaling 105 feet of beltline. Three of the rollers contacting coal were hot to the touch. The Judge credited Inspector Reynolds' testimony that an ignition would likely result if the accumulations were left unabated and in contact with ignition sources. The likelihood of an ignition was compounded because the mine had a history of methane liberation. Although the coal was wet at the time of inspection, friction through contact with the beltline can cause wet coal to dry. Tr. 70, 100. In fact, the inspector testified that he observed visible coal dust in the air in at least one location (around the 1000-foot mark), which indicated that the coal was fairly dry there. At least six miners were working along the slope belt at the time of the inspection, and would be at risk of injuries associated with a belt fire such as smoke inhalation or burns.

We also reject Mach's contentions that the Judge's analysis was otherwise flawed. For instance, Mach argues that the Judge failed to consider that the loose coal was intermixed with a large amount of rock and, therefore, it was unlikely that the coal would ignite. However, Mach

[7] The Commission requires that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Res., Inc*., 16 FMSHRC 1218, 1222 (Jun. 1994). When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] Acting Chairman Althen joins the majority in concluding that the Judge's decision on S&S is supported by substantial evidence.

previously did not contest that the material that fell from the beltline was combustible and thus prohibited from accumulating in active workings. M. Post-Hearing Br. at 15. Therefore, Mach has conceded that although the coal was mixed with some rock, it was capable of igniting in conditions which could propagate a fire or explosion.

Mach further argues that because the coal that was present was wet, the likelihood of a fire was further reduced. Yet, the Commission has long held that "wet coal accumulations pose a significant danger in underground coal mines." *Consolidation Coal Co*., 35 FMSHRC at 2329-30; *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985) (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion). Accordingly, wet coal accumulations in the presence of ignition sources may be found to be a S&S violation. *See Mid-Continent Res. Inc*., 16 FMSHRC 1226, 1230-32 (June 1994) (affirming a S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite"). Mach has ignored this established Commission jurisprudence in its argument that the Judge erred. We find that the Judge's analysis was consistent with the Commission's approach to wet coal accumulations.[9]

Mach also contends that the Judge erred when he failed to assume that the conditions would be soon addressed because miners were shoveling in the area. We disagree. An S&S determination must be made at the time the citation is issued "without any assumptions as to abatement"" and in the context of "continued normal mining operations." *Paramont Coal Co*., 37 FMSRHC 981, 985 (May 2015); *U.S. Steel Mining Co*., 6 FMSHRC at 1574.

We recognize that a violation of section 75.400 may not contribute to the hazard of a belt fire if active abatement of those accumulations is underway. *See generally Knox Creek Coal Co. v. Sec'y of Labor*, 811 F.3d 148, 165-66 (4th Cir. 2016). However, the evidence in this case clearly establishes that the miners shoveling the belt at the time of the inspection were but a small fraction of the manpower required to effectively abate the violation. No more than ten miners were shoveling the belt when the inspector arrived. It took 27 miners up to three days to completely abate the violative conditions. 38 FMSHRC at 2249 (citing Sec'y Ex. 2). Therefore, the miners shoveling the belt at the time of the inspection would not and could not have abated the violation on their own. Given the paucity of the efforts underway at the time of the inspection, as compared to the abatement efforts ultimately required, substantial evidence supports the Judge's finding.

Mach maintains that due to the location of the accumulations and the strength of the ventilation system, smoke from a belt fire would be carried out of the mine and miners would not be exposed to the associated hazards. This argument has no merit. The slope coal belt is proximate to a designated escapeway. Therefore, in the event of a fire, miners working along the slope coal belt or exiting via that escapeway would be exposed to smoke.

[9] Further, some of the coal was indeed dry, as shown by the inspector's testimony that he saw coal dust in the air at the transfer point of the belt. Tr. 81-85.

Finally, Mach asserts that the Judge's finding that the mine's history of methane liberation compounded the risk of ignition is not supported by substantial evidence. We conclude that the recurrent five day spot inspections conducted by MSHA pursuant to 30 U.S.C. § 813(i)[10] support a finding that the mine is at heightened risk for dangerous methane liberation.

Accordingly, for the aforementioned reasons, we affirm the Judge's decision that the violation was S&S.

2. <u>High Negligence</u>

a. Commission Case Law

The Commission evaluates the degree of negligence associated with a violation using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). The operator has a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs. *A.H. Smith Stone Co*., 5 FMSHRC 13, 15 (Jan. 1983). To determine whether an operator has met its duty of care, the Commission considers what actions a reasonably prudent person who is familiar with the mining industry and the protective purpose of the regulation would have taken under the same circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). High negligence "suggests an aggravated lack of care that is more than ordinary negligence" and "an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co*., 20 FMSHRC 344, 350 (Apr. 1998) (internal quotation omitted).

b. The Judge's Decision

The Judge concluded that Mach was highly negligent. Mach "failed to address serious and largely self-imposed accumulations hazards that developed over the course of several shifts." 38 FMSHRC at 2245. The Judge credited Inspector Reynolds' testimony that the extent of the accumulations should have led mine examiners and managers to recognize and ameliorate the problem. *Id*. at 2244.

The Judge determined that Mach failed to take adequate measures to keep the area clear. The crew of miners assigned to shovel the belt was clearly insufficient. Furthermore, Mach was using the belt to dewater the mining face and, as a result, coal frequently washed off the steeply inclined slope coal belt. Despite the foreseeability of these "washbacks," Mach failed to take actions that were consistent with those of a reasonably prudent mine operator to address the situation. Mach finally installed an adequate dewatering system about two months after the issuance of the subject citation. The Judge characterized this action as "belated," as Mach was aware of "washbacks" along the slope belt since at least 2011. *See Mach Mining, LLC*, 33

[10] "Whenever the Secretary finds that a coal . . . mine liberates excessive quantities of methane . . . or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals." 30 U.S.C. § 813(i).

FMSHRC 763, 769 (Mar. 2011) (ALJ). Furthermore, in the 15 months preceding the issuance of the present citation, Mach had a history of 58 violations of section 75.400. Sec'y Ex. 1. The Judge noted that the mine received yet another section 75.400 citation for the slope belt only two weeks later (July 28). 38 FMSHRC at 2244. Based on the totality of the circumstances the Judge concluded that Mach did not take measures consistent with those of a reasonably prudent mine operator.

c. Analysis

We conclude that the Judge's high negligence determination is supported by substantial evidence. The operator had actual notice of a longstanding condition that produced violative and potentially hazardous accumulations, and failed to take appropriate actions.[11]

Although Mach maintains that the Judge erred in concluding that the accumulations had been present for several shifts, we find that the Judge appropriately exercised his discretion in crediting the testimony of the inspector. 38 FMSHRC at 2246.[12] In part, the Judge relied on the depth of the cut into the steel beam to corroborate the inspector's likely timeline of the conditions. The Judge credited the testimony of Inspector Reynolds, corroborated by Mach foreman Webster, that it would take at least 24 hours for the rubber belt rubbing into the steel I-beam to cause a cut into the steel of one-eighth of an inch. *Id*. at 2233-34 n.10, 2246. While Mach argues that the overwhelming majority of the coal accumulations occurred after 7:15 a.m. (the time when the mine manager last drove the travelway), we, like the Judge, find it unlikely that such extensive amounts of coal would have accumulated over the next hour, just prior to the arrival of an MSHA inspector.

Mach also argues that the Judge erred in relying on a prior decision, *Mach Mining, LLC*, 33 FMSHRC 763 (Mar. 2011) (ALJ), to establish that the operator was on notice that the slope belt was prone to accumulated coal as a result of "washbacks." We disagree. The prior case involved almost the exact same factual circumstances: At the same mine the slope coal belt had been running in accumulations which occurred as a result of "washbacks." The operator was aware of the "washback" issue at this mine.

Mach also asserts that the Judge failed to explain how any of the noted prior citations placed Mach on notice that greater efforts were necessary for compliance. We conclude that 58 violations in a 15-month period is enough to put a reasonable mine operator on notice that greater efforts to comply with the standard were required.

Mach argues that the Judge erred in concluding that only about six miners were shoveling the belt at the time of the inspection. Mach asserts that in addition to the five to seven miners who Reynolds saw shoveling near the top of the slope belt, Reynolds also encountered another

[11] Acting Chairman Althen joins the majority in affirming the decision of the Judge with respect to negligence.

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

miner at the 570 foot mark. Additionally, Webster saw another two or three miners at 2700 to 2900 feet, and another two or three miners at the bottom. PDR at 3, 27; Tr. 289. But even if there were more than six miners shoveling along the belt at the time of the inspection, none of these miners (except possibly for one at 570 feet) were shoveling in the six separate locations — the most hazardous locations — where Reynolds encountered 14 rollers turning in coal. Tr. 69-89, 100. In any event, the number of miners who Mach had shoveling at the time of the inspection was grossly inadequate given that it took 27 miners up to three days to completely clean up the accumulations. Tr. 107-08; Sec'y Ex. 2.

Mach additionally contends that the Judge erred in finding that a reasonably prudent mine operator would have installed an alternative dewatering system earlier. We conclude that the Judge's determination is grounded in the facts and is reasonable. The slope coal belt had experienced problems with coal accumulations caused by "washbacks" since at least 2011. The panel currently being mined was particularly wet. Parker Phipps, the general manager, testified that the existing dewatering system was insufficient to control the water, which was constantly transferred to the belt. Tr. 385. Mach maintains that it would have been unsafe and impractical to shut the longwall down to install a new dewatering system. Yet, Phipps himself testified that a new dewatering system was installed over a long weekend (while the longwall was shut down), and that the new system virtually eliminated the "washback" problem. Tr. 389.

Mach asserts that the Judge erred when he considered that the mine received an additional citation alleging a violation of section 75.400 for the slope coal belt two weeks later (July 28) as part of his negligence analysis. We agree with Mach on this point. The July 28 citation is irrelevant for purposes of the operator's negligence on July 14. While a history of violations of a safety standard can place an operator on notice that a greater effort at compliance is necessary (*see Big Ridge*, *Inc*., 35 FMSHRC 1525, 1536 (Jun. 2013)), the Commission does not consider the particular factual circumstances of a subsequently issued citation when evaluating negligence for past conduct. On balance, however, we consider this error to be harmless. The Judge's erroneous consideration of the July 28 citation does not detract from the weight of the other evidence.

Accordingly, we affirm the Judge's high negligence decision as supported by substantial evidence. The water problems that contributed to the coal accumulations were foreseeable, yet Mach took inadequate measures to ensure that the requirements of section 75.400 were complied with.

B. Citation No. 8450926 (The On-Shift Recording Violation)

1. The Violation

The Judge ruled that Mach failed to comply with the recording requirements of section 75.363(b)[13] which provides that the operator must identify "the nature and location of the hazardous condition . . . ." 38 FMSHRC at 2249. The Judge concluded that Adams' recording — "slope [belt] - needs cleaned - work in progress" — failed to convey the nature of the hazardous conditions that were present, such as accumulations contacting a potential ignition source like the beltline, and their respective locations. *Id*. at 2247. The Judge also concluded that Adams' vague notation undermined the purpose of the safety standard, which includes the right of miners to review examination books to discover the nature and location of underground hazards. *Id*. at 2250.

Mach contends that its recording complied with the standard. It maintains that there is no additional requirement in the language of the standard requiring any degree of specificity.

We categorically reject this argument and agree with the Judge that Mach violated the standard. Section 75.363(b) requires an examiner to record "the nature and location of the hazardous condition[s]." At a minimum, the examination notation at issue — "slope [belt] - needs cleaned - work in progress" — fails to comply with the standard's mandate to state the "nature" of the hazards and where these hazards are located along the beltline.

There is no reference in the examination book to the multiple locations where coal was contacting ignition sources. Over the 3,500 feet of the slope belt, extensive accumulations of coal were in contact with the belt in six separate locations for a total distance of 105 feet, which included 14 rollers, three of which were hot to the touch. It is well established that coal in contact with an ignition source is a particularly serious hazard. In addition, the belt was misaligned and was contacting a steel I-beam. 38 FMSHRC 2233-34, 2242. There is no mention of this hazard in the report.

The mine examiner's attempt to account for these conditions, which included particular and localized hazards, was to summarily write that the slope belt "needs cleaned" in the examination book. This generic notation communicates nothing regarding the locations of the ignition hazards, and provides no useful information about the hazard except that it involved

[13] The standard states that:

> A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner . . . . The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include *the nature and location of the hazardous condition* or violation and the corrective action taken . . . .

30 C.F.R. § 75.363(b) (emphasis added).

coal, especially considering that the slope belt suffered known frequent problems with coal spillage. This examination record failed to meet the "reasonably prudent miner" test.

The Commission has consistently applied this test to broadly worded standards. *See U.S. Steel Mining Co*., 27 FMSHRC 435, 439 (May 2005). In fact, we recently used it to determine the adequacy of a workplace examination. *Sunbelt Rentals, Inc*., 38 FMSHRC 1619 (Jul. 2016). In *Sunbelt Rentals*, we held that an examination performed pursuant to 30 C.F.R. § 56.18002(a) (the workplace examination standard for metal and nonmetal mines)[14] must be adequate, and it must identify conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize. *Id*. at 1627.[15] In the case before us, the "nature" of the

[14] 30 C.F.R. § 56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

[15] In *Sunbelt*, we emphatically rejected the notion that an "operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all." 38 FMSHRC at 1625. Similarly, we reject the operator's argument here that its examination notation need only slightly surpass not writing down anything at all.

Our dissenting colleague's effort to distinguish *Sunbelt* is unavailing. Both cases involve broadly worded examination standards which can be applied more meaningfully by the use of the "reasonably prudent miner" test. Chairman Althen's attempt to distinguish *Sunbelt* stems from the fundamentally different way in which he views the case before us. We apply the reasonably prudent miner standard to provide clarification and guidance for the terms "nature and location of the hazardous condition" — language we consider part of a broadly worded standard. He finds section 75.363(b) "plain" and "clear," and consequently is satisfied that along the entire beltline" sufficiently defines the location of the hazardous condition. Slip op. at 20.

Acting Chairman Althen distinguishes *Sunbelt* in other ways, but we fail to find the differences he identifies relevant to the question of whether the reasonably prudent miner test should be applied. First, he asserts that the standard at issue in Sunbelt did not involve the record of an examination. He states that it involved the competence of the examiner. We read the case to involve the quality of the examination. *See Sunbelt Rentals*, 38 FMSHRC at 1627, 1627 n.18. Despite our colleague's concerns, for the purpose of deciding whether the reasonably prudent miner test is applicable to an examination standard, it doesn't matter whether the issue is the quality of the examination, the competence of the examination, or the specificity of the examination report. *See id.* (relying on *FMC Wyoming Corp*., 11 FMSHRC 1622 (Sept. 1989), as a basis for the use of the reasonably prudent miner test, even though the issue in *FMC Wyoming* was the competence of the examiner rather than the quality of the examination). Rather, all of these concepts are found in examination standards that are, in our view, "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine." *Id.*, (quoting *FMC Wyoming Corp*., 11 FMSHRC at 1629). It is therefore appropriate to apply the reasonably prudent miner test to all of them.

(continued…)

hazardous condition and the "location" must be recorded in such a way that those who read the examination record will know how and where to address the problem.[16]

As the Judge noted, the inspector testified that the "slope [belt] - needs cleaned – work in progress" notation was deficient because the slope belt needed cleaning every shift. 38 FMSHRC at 2247, citing Tr. 117. Indeed, when the inspector reviewed the examination books for the month preceding his inspection, he found that the same notation of "slope [belts] needs cleaned, cleaning in progress" (and nothing more) appeared for 81 of the 90 preceding examinations. Tr. 121, 124; R. Ex. 2. Moreover, the insufficiency of this recording is evidenced by the fact that none of the miners who were actively working to address the accumulations at the time of the inspection were addressing locations where the beltline was contacting coal.[17] 38 FMSHRC at 2247.

MSHA has recognized that "[a] record of all hazards found, as well as the required corrective action, serves as a history of the types of conditions that can be expected in the mine.

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[15] (…continued)
The similarity between the standard at issue in *Sunbelt* and the standard in this case also overrides the other distinction Acting Chairman Althen identifies (that the *Sunbelt* standard governed metal and nonmetal mines while the standard here involves an underground mine, which is the subject of more numerous regulations).

[16] The dissent contends that construing the standard as we have "will cause confusion, ambiguity, and errors, perhaps even dangerous ones, in the prioritization and recording of hazards.'" Slip op. at 23. However, the standard requires that examiners note the "location" of hazards. Furthermore, we believe the "dangerous errors" our colleague fears are less likely to be made when an examiner notes the location of hazards than when — as here — the examiner ignores mention of six hazardous areas over a 3,500 foot belt line, resulting in the clean-up crew not prioritizing the areas of greatest hazards.

[17] We understand that "needs cleaned" is a reference to the presence of coal accumulations. However, like the inspector, we conclude that merely reporting the presence of coal accumulations was insufficiently descriptive to comply with the safety standard's reporting requirements in this instance. *See* Tr. 140-41. This is especially true in light of the context here: The belt being referenced was nearly two-thirds of a mile long. Slip op. at 2. The inspector noted six discreet locations where the accumulations had grown so deep that they were in contact with the belt and its components along 105 feet of beltline. *Id*. at 2, 5. Further, Mach had been aware for years — since 2011 — that the belt was prone to "washbacks" that created a chronic accumulations problem. *Id*. at 7.

We agree that in some contexts, "needs cleaned" might be an adequate description. But the area in question here is so large, and the nature of the accumulations so dangerous in certain discreet locations, that the rote invocation "needs cleaned" is practically meaningless. The ineffectiveness of this communication is evinced by the fact that the operator did nothing to indicate that it was prioritizing the clean-up of accumulations that posed the greatest threat, i.e., there was no plan in place to comprehensively address a problem that was only abated by more than a score of miners working over three days.

When the records are properly completed and reviewed, mine management can use them to determine if the same hazardous conditions are recurring and if the corrective action being taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (Mar. 11, 1996). Thus, the purpose of the standard is frustrated when, as here, the operator fails to include any identifying details in a recording, because the record created cannot help identify and correct reoccurring or chronic problems.[18] Moreover, as the Judge pointed out, and other Commission Judges have also recognized,[19] one of the purposes of the standard is to enable miners to know of dangerous conditions before they go underground.

We recognize that in other circumstances the specificity with which a reasonably prudent miner would record the nature of a hazardous condition and its location pursuant to this standard may vary based on context. Here, however, the recording is so vague that it omits information needed to properly identify the nature and location of the hazardous conditions. Regarding Mach's "fair notice" argument, any reasonably prudent miner would understand that the notation in question does not adequately identify the "nature and location of the hazardous conditions." *See Ideal Cement Co*., 12 FMSRHC 2409, 2416 (Nov. 1990) (In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."). Accordingly, we affirm the Judge's finding of a violation.

2. <u>Significant and Substantial</u>

The Judge concluded that the violation was appropriately designated as S&S. Specifically, he found that the recording violation contributed to the hazard of a fire occurring because miners would be unaware of the nature and location of the hazardous conditions, and if an ignition resulted there would be a reasonable likelihood that miners would suffer serious injuries such as smoke inhalation and burns. 38 FMSHRC at 2249-50. We conclude that this finding is supported by substantial evidence.

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[18] We note the marked difference between the location written in this examination notation ("slope [belt]") and the locations described in the July 9 and July 10 examinations ("rollers from 3 to 8" and "7A flowthrough"). R. Ex. 2.

[19] *See, e.g*., *Rosebud Mining Co*., 34 FMSHRC 2734, 2755-56 (Oct. 2012) (ALJ Andrews) ("The Secretary argues that the [recording] violation is S&S because . . . miners were exposed to potential hazards that would have been discovered by examinations; that oncoming shifts rely on examination books to prepare for hazards . . . . The designation of S&S was found correct . . . . The miners were not alerted in advance, and were unnecessarily exposed to danger."); *Big Ridge, Inc*., 33 FMSHRC 689, 713 (Mar. 2011) (ALJ Miller) ("[M]iners rely on the preshift examiner to look for hazardous conditions prior to their entry into the mine. Relying upon an inadequate examination may engender a false sense of security and cause the miners to pay less attention to their surroundings as they travel the roadway."); *Consolidation Coal Co*., 21 FMSHRC 1404, 1408 (Dec. 1999) (ALJ Melick) ("By not reporting the hazardous accumulations of coal in the preshift book, the miners on the day shift were not placed on notice of these hazardous conditions . . . .).

The first step of the *Mathies* test is met, as we affirm the Judge's finding of a violation. As to the second step, the Judge found that the failure to properly record the slope belt accumulations contributed to the discrete safety hazard that management and miners would be unaware of the nature and location of the ignition hazards, and they would not be able to immediately address the accumulations most likely to result in ignition. *Id*. at 2249; Tr. 129-30. It is undisputed that at the time of the inspection, miners were shoveling where ignition hazards were not present, constituting substantial evidence supporting the Judge's finding. The third and fourth steps of the *Mathies* test are met for the same reasons described *supra* with regard to the accumulations violation.

On review, Mach argues that the Judge's underlying factual findings regarding the conditions on the beltline lack the support of substantial evidence. We disagree. The Judge credited the testimony of Inspector Reynolds to support his findings. 38 FMSHRC at 2246. After hearing from all the witnesses and studying the record evidence, he found that the conditions that the inspector observed were present at the time of Adams' morning examination. As stated, *supra*, the Commission recognizes that a Judge's credibility determination is entitled to great weight and may not be overturned lightly. We see no compelling reason to disturb the credibility determinations of the Judge on this point.

Mach presents other allegations of error by the Judge, similar to those we rejected in our analysis of the S&S nature of the accumulations violation, none of which is compelling. For instance, Mach maintains that the Judge erred by failing to account for the dampness of the coal accumulations, the relatively low recovery rate, and its active abatement efforts. For the reasons previously articulated, we believe that these arguments lack merit.

3. <u>High Negligence</u>

The Judge concluded that Mach exhibited a high degree of negligence. He reiterated that the extensive accumulations were present for multiple shifts and found that Adams' decision to perform an examination while driving likely precluded Adams from observing coal that had accumulated on the walkway. The Judge further found that Adams' practice of supplementing his written record of examination in personal meetings with mine managers did not alter his duty to comply with the plain requirements of the safety standard.[20] 38 FMSHRC at 2250.

Mach asserts that the Judge erred in his negligence analysis. First, Mach maintains that it was error for the Judge to consider Adams' use of a vehicle during the examination as

[20] As part of its negligence argument, Mach attempts to demonstrate that the Judge failed to consider mitigating circumstances justifying a lower degree of negligence in accordance with the Secretary's Part 100 definitions. *See, e.g*., 30 C.F.R. § 100.3(d) ("High negligence — The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances."). However, the Commission is not bound by the Secretary's Part 100 definitions of degrees of negligence. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015); *Mach Mining, LLC* v. *Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (The Commission evaluates the degree of negligence using "a traditional negligence analysis."). Accordingly, the Judge may assess negligence as "high" despite a demonstration of some mitigating circumstances. *Id*.

exacerbating its negligence. We disagree. The Judge simply inferred that performing an examination from the travelway, while driving, made it more difficult to observe coal that accumulated along the walkway. The inference is based in fact. Inspector Reynolds walked the belt and noted that the majority of the accumulations he observed were on the far side of the belt. In contrast, Adams testified that he did not observe any coal contacting the belt or rollers when he drove up the travelway earlier that morning. It was reasonable for the Judge to infer that the difference in their observations was, at least in part, the result of differences in examination methods. Nothing in the Judge's decision suggests that the use of a vehicle during a belt examination is impermissible to the extent that an examiner is able to observe and record hazardous conditions that are present. In this case, though, the operator should have at least ensured that a closer examination was made in areas more prone to accumulations, especially in light of what the operator acknowledged as an ongoing problem with "washback." *See* Tr. 227, 290, 300, 304, 391.

In addition, Mach asserts that the Judge erred by comingling the requirement to perform an on-shift examination (30 C.F.R. § 75.362(a)(1)) with the more precise recording requirements of section 75.363(b). He did not. The more specific requirements of an examination are not designed to be read in isolation from the more general requirements of an examination; instead they should be read as "interconnected provisions." *See Jim Walter Res., Inc*., 28 FMSHRC 579, 602 n.28 (Aug. 2006) (citation omitted). We recognize that in this case, the failure to properly record a hazardous condition may have arisen from the inadequacy of the required on-shift examination. Nevertheless, the issuing inspector acted within his discretion when he chose to charge Mach with a violation of the more specific safety standard, section 75.363(b), as opposed to a more general requirement.

Mach further contends that the Judge erred by comparing the more substantive notations for the July 9 and July 10 examinations to the July 14 record because no evidence was elicited as to the conditions that were actually present on those days.[21] We agree that the relevance of the previous examination records, taken alone, is somewhat limited. The mere record of a previous examination does not provide the necessary context by which to judge whether the operator acted with a reasonable degree of prudence in making that recording. Yet, the prior recordings do in fact list locations of hazardous conditions, indicating that Mach understood that it was required to provide some additional detail as to the location of accumulations when making a record. Moreover, the more specific recordings of conditions on the slope belt just a few days earlier should have prompted Adams to more closely inspect those areas for recurring or ongoing problems during his examination.

In summation, we conclude that the complete failure to document extensive accumulations that were in contact with the belt and its moving parts, combined with the failure to document that the belt was misaligned, supports a high negligence determination.

[21] As previously mentioned, a July 9 day shift entry reads: "Need to clean under rollers from 3 to 8" and a July 10 examination record for a belt reads: "Need to clean 7A flowthrough."

III.

Conclusion

We hereby affirm the decision of the Judge in all respects. The violation of section 75.400 cited in Citation No. 8450924 is affirmed as S&S and the result of high negligence. The violation of section 75.363(b) cited in Citation No. 8450926 is upheld and affirmed as S&S and the result of high negligence.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Acting Chairman Althen, concurring in part and dissenting in part,

I concur with my colleagues in affirming the violation identified in Citation No. 8450924 as exhibiting high negligence and as being significant and substantial. With respect to Citation No. 8450926, I would find that the pre-shift examination report complied with the requirements of section 75.363(b). Therefore, I would vacate that citation.

Citation No. 8450924

The operator conceded that a violative accumulation of mined material existed along the entire slope belt operating in the main entryway to the mine — that is, an entry 26 feet wide and 10 feet high with a paved roadway for vehicular traffic. Testimony established that due to the problems created by the flow of water, cleaning mined material that washed along the beltline was an ongoing, everyday activity with contract labor employed to perform that task.[1]

From an S&S perspective, the case rests upon the reasonably likely effect of the violation under normal mining conditions.[2] Normal mining conditions at that time were belt transportation of mined material of 55% rock and 45% coal, a continuing flow of substantial water on the belt, cleaning actions at the top and at one other point along the belt, and rubbing of the mined material on at least 14 rollers and 105 feet of belt until the already initiated abatement reached those areas.[3]

Operator witnesses testified that with a continual flow of water the accumulation was too damp/wet to ignite — one witness testified colorfully that "[w]ith all due respect, sir, if you could have seen how wet this material was, you couldn't light it with a blow torch, let alone let it rub with the belt rub and have a hazard." Tr. 317. The inspector testified that the material was a

[1] I concur in the finding of high negligence. Although the operator was addressing the problem of substantial accumulations along the slope belt, the accumulations were a known and ongoing problem. The operator did not devote sufficient efforts to prevent significant accumulations along the entire 3,500-foot belt on the morning of the citation.

[2] Although the Commission's standard of S&S determinations is not an issue in this case, in footnote 5 Commissioners Jordan and Cohen express continuing dissent from the Commission's decision in *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016). In *Newtown Energy*, the Commission announced an authoritative and binding rule for making S&S determinations: (1) has there been a violation of a mandatory safety standard; (2) based upon the particular facts surrounding the violation, is there a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed; (3) based upon the particular facts surrounding the violation, is the occurrence of that hazard reasonably likely to result in an injury; and (4) is any resultant injury reasonably likely to be reasonably serious. *Id.* at 2038-39. This standard, which resolved confusion that had arisen regarding the relationship between steps two and three of the venerable *Mathies* standard, now governs all S&S determinations.

[3] Although MSHA cited the conditions as S&S, it did not require a shutdown of the belt during abatement.

soupy mess saying, "This case is water and rock and coal all souped together, you know, [] they're traveling together." Tr. 169. However, the inspector identified short but distinct areas where the mined material was touching the belt and/or rollers. He also testified that frictional heat of a belt or roller on the accumulation could cause the material to dry and ignite. Although he did not test the temperature of the rollers, he said some rollers were warm or hot. He agreed the materials were at least damp and 55% rock. Nonetheless, he believed that sufficient drying could occur before abatement to create an ignition hazard.

The Judge accepted the inspector's testimony. Thus, he found an ignition reasonably likely because frictional rubbing could dry the accumulated material. The substantial evidence test is not what the trial judge could have found or what an appellate judge would have found, but whether there is sufficient relevant evidence that a reasonable mind would accept as adequate to support the Judge's conclusion. Here, the Judge credited the inspector's evaluation of the effect of continual rubbing of the material. This meets the substantial evidence standard. I, therefore, must concur in affirming the Judge's significant and substantial determination.[4]

[4] The majority finds that "58 violations in a 15-month period is enough to put a reasonable mine operator on notice that greater efforts to comply with the standard were required." Slip op. at 8. According to MSHA records introduced as Sec'y Ex. 2, 58 citations for violation of section 75.400 at the subject mine became final in the months between December 12, 2012 and July 28, 2014. According to other MSHA records, in the calendar year in which this accumulation violation occurred (2014), the Mach No. 1 mine produced 6,482,276 tons of underground coal that was about 1.8% of the total underground coal production in 2014 of 354,709,128 tons. *Compare* data from MSHA, *Mine Data Retrieval System*, https://arlweb.msha.gov/drs/drshome.htm (Jan. 17, 2018) *with* MSHA, *Coal Production*, https://www.msha.gov/sites/default/files/Data_Reports/DEC_15_2016_Historical_MIWQ_Employment_and_Production.pdf (page three) (Jan. 17, 2018).

In 2014, MSHA issued 4,938 citations for violations of section 75.400. MSHA, *Most Frequently Cited Standards by Mine Type*, https://arlweb.msha.gov/stats/top20viols/top20home.asp (Jan. 9, 2018). Fifty-eight violations is 1.2% of 4,938. Although the periods do not match exactly, it is clear that this mine was doing better than average. I note this fact to express my doubts regarding the usefulness of raw numbers standing alone in MSHA adjudications. Perhaps it is understandable for general circulation newspapers that may be unfamiliar with the intensity of inspections and vast number of citations issued annually to castigate operators based upon raw numbers of violations. It is another thing for knowledgeable persons to use raw numbers to draw important and perhaps outcome-determinative conclusions. I disagree with use of an unexamined raw number of violations without consideration of the mine's size, its history of violations relative to industrywide performance, and many other circumstances surrounding the previous violations that may be gleaned from the regulatory record.

Citation No. 8450926

MSHA Inspector Reynolds cited the operator for a violation of 30 C.F.R. 75.363(b) for an alleged failure to make a record of a hazardous condition. The standard is brief, plain, and unambiguous. In relevant part, section 75.363(b) requires, "A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner." I agree with my colleagues that the standard requires that the record identify the nature of a hazard found by the examiner and its location. Simply stated, when an examiner sees a hazard, he must report what the hazard is and where it is located so that management and miners are alerted and may address and abate it. That is exactly what the examiner did here. Therefore, I respectfully dissent.

I need not extensively discuss the plain meaning rule. In recent years, circuit courts have had several occasions to explain the plain meaning standard to the Commission. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1162 (D.C. Cir. 2016) ("[A]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014)); *Performance Coal Co.*, 642 F.3d 234, 239 (D.C. Cir. 2011) ("[T]he language Congress selected [is] plain, clear, and simple and we refuse to muddy it by finding ambiguity where none exists."); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012) ("[T]he unambiguous language of the statute requires that temporary reinstatement end when the Secretary's involvement ends.").

The present controversy, therefore, is actually quite limited. Did the examiner violate section 75.363(b) by reporting a hazardous accumulation of mined material located along the entire beltline without finding and noting sub-locations of particular accumulations along that beltline? Stated differently, did the examiner fail to report the nature and location of an accumulations hazard that extended the length of the beltline by not including a subset report specifying specific locations within that one hazard/violation that, after hearing, caused the one violation to be S&S?[5]

Although idiomatically terse, Adams' record clearly communicated a systemic problem that everyone in the mine already knew — that mined material was washing from the belt and accumulating along the beltline. This was a hazard that had to be abated along the length of the belt. The report fulfilled the standard by telling miners and mine management the nature and location of the hazard requiring abatement.

As the examiner and a mine supervisor testified, although the washback and spillage of material along the beltline was a particular problem on the day of the violation due to the resumption of longwall mining after a weekend shutdown, such accumulations had been a constant and well-known problem. Tr. 228, 252, 284. Moreover, the report is for the "slope" — that is, observations affecting the slope without any limitations, the entire slope. Thus, the report of a need to clean material is an indication of accumulations along the entire slope. Further, the "needs cleaned" together with "work in progress" (a reference to miners already shoveling the

[5] The Judge did not base his decision on a purported failure to report a purported 1/8 inch cut in a support beam.

accumulations) demonstrates that the examiner's record identified that accumulations of mined material along the belt needed to be and were being cleaned. R. Ex. 1.

Indeed, my colleagues admit that the record did report the nature of an accumulation of mined material (the hazard) and its location — along the slope belt. Slip op. at 12 n.17. In sum, all Commissioners agree that the examiner communicated to management and miners at this mine the presence of a hazard of accumulated mined material located along the entire beltline. Thus, they virtually concede the record complied with the plain and literal language of the standard.

The only case cited by the majority is *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619 (Jul. 2016). That case is wholly inapposite. In fact, that case strengthens the plain meaning of the standard involved in this case. The *Sunbelt* standard did not involve the record of an examination but rather the competence of the examiner. 30 C.F.R. § 56.18002 is in the standards governing metal and nonmetal mines and is the only general provision on examinations of workplaces in those regulations, which are far briefer and less inclusive than the regulations governing underground coal mines. Part 56 is 56 pages long in the paperback printed copy of the Code of Federal Regulations as compared to the 183 pages in Part 75 governing underground coal mines.

Section 56.18002(a) requires that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." In *Sunbelt*, the administrative law judge held that the requirement for a "competent" examiner did not imply that the examination even had to be "adequate." Thus, the ALJ interpreted the examination standard in the regulations to permit inadequate examinations. The Commission rejected that notion and held that an examination by a competent examiner had to identify "conditions which may adversely affect safety and health." *Id.* at 1627.

Absent the Commission reading, which itself is rather vague and only implies an obligation to note a location, there would have been no general standard requiring any level of adequacy. In *Sunbelt*, the Commission interpreted an otherwise ambiguous and effectively meaningless standard in a manner that gave it form and content, albeit less form and content than section 75.363. Here, my colleagues go in an opposite direction: they take a plain, clear, and meaningful standard and misinterpret it creating ambiguity and uncertainty. The *Sunbelt* decision is far different from imposing a policy directive to dissect a clear and compliant hazard report in order to find that it fails to note or delineate one hazard or different hazards within a group of hazards.[6]

[6] In an attempt to bolster their one citation to *Sunbelt*, my colleagues assert that the operator, and presumably by reference this dissent, argues that the examination record need only surpass not writing down anything. Slip op. at 11 n.15. Obviously, that is incorrect. To comply with section 75.363(b) an examiner must do exactly what the standard requires — namely, write down any hazardous condition he finds. That is what the examiner did here. Starting with their incorrect premise, the majority then posits a false symmetry between the standard at issue in *Sunbelt* (30 C.F.R. § 56.18002(a)) and the standard at issue here, 30 C.F.R. § 75.363(b). In *Sunbelt*, the administrative law judge found that an examination by a "competent" examiner did

(continued…)

Here, a long-existing regulation fully and plainly expresses the requirement of the standard. The record in this case fully informed management of the hazard and its location. It was then management's job to provide for abatement in a suitable manner. With a continuing water flow, management needed to clean the entire belt and believed they could do so safely with the belt operational. MSHA subsequently allowed the belt to run throughout the abatement period.

Based upon the sui generis facts of this case, my colleagues find a violation in a failure to report specific locations within one reported accumulation hazard. The outcome of this one case is not so much a problem as the confusion and dissonance created for other cases by the imposition of a new rule without a basis for judging its fulfillment. Thus, the majority would create a new rule, albeit sharply limited by the exceptional facts of this case, in which reporting the nature and location of a hazard is not compliant with section 75.363(b).[7] In their view, the clearly understandable record of an accumulation hazard and its location is not sufficient unless the examiner reports any particular places (or presumably particular hazards) where an inspector asserts the examiner should have observed greater or lesser danger, to some unknown and unarticulated extent, within the reported hazard(s).

The problem for the majority's analysis is that the examiner did precisely what the standard requires. We may frame the dispute between my colleagues and myself by reviewing the citation issued by the inspector for the violation of section 75.400. The citation stated as follows:

> Loose coal was allowed to accumulate in excessive amounts along the slope belt, from approximately 100 feet below the slope collar to the bottom. These accumulations were in continuous windows along both sides of the belt (the majority of instances were along the back side of the belt), which ranged from 4" to 30" deep & from 16" to 72" wide, and occasionally up to the full width of the

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[6] (…continued)
not require that the examination even be "adequate." 38 FMSHRC at 1619. Effectively, that meant the requirement for a "competent" examiner had no meaning. The Commission's decision gave meaning to an otherwise empty standard, but that decision does not inform this decision. Section 75.363(b) is plain, requiring that "[a] record shall be made of any hazardous condition . . . found by the mine examiner." There is no similarity between the two standards regarding ambiguity or correcting the nugatory interpretation of the competent examiner standard in *Sunbelt*. The majority does not stop with that incorrect assertion but goes on to state that section 75.363(b) must be broadly adaptable to varying circumstances in the mine. Slip op. at 11 n.15. They find no settled meaning to this decades-old standard and, to them, its meaning may vary from circumstance to circumstance. This further illustrates the confusion and mischief that would result from the attachment of any importance to the majority's erroneous and sui generis interpretation in this case.

[7] Due to the unique facts of this case, the majority's opinion appears to be one of those occasional decisions that, at first glance appears possibly significant, but that is so wholly an outlier as to fade quickly from memory. It is a letter written on the wet sand of an ocean shoreline. Seen for a moment, then swept away by tide and time.

belt. Additionally, the accumulations were in contact with the moving belt and bottom rollers at the following approximate locations: 570' station; 1100' station; 1900' station; 2100' station; 2200' station; 2300' station.

Sec'y Ex. 5.

In the context of this mine and the known ongoing flooding problem due to the longwall, the examiner's report notified the operator and miners of the conditions cited in the first two sentences of the citation. As understood by everyone at the mine and the majority, he reported the nature and location of the hazard cited by the inspector — an accumulation of mined material along the entire beltline.

The majority's complaint is the failure of the examiner to add language similar to the language the inspector added in the fourth sentence of the citation — that is, the examiner did not expressly identify discrete areas in which he should have seen mined material touching the belt or rollers.

The plain words of the standard, our case law, or the sound adjudication of the standard do not create a duty for an examiner to break out certain areas of one hazard by the degree of danger or to prioritize among a number of reported hazards by the degree of danger. Examiners regularly note multiple separate hazards on one examination report. Some may be S&S and others of far lesser danger.

Nothing in the standard requires the examiner to identify a hazard that he might think is S&S, to opine on a particular hazard within a group, or to opine on where abatement must start. An examiner's identification of a hazard is notice to miners but, importantly, it also is notice to mine management of a hazard that management must address and abate. It is not the examiner's duty to prioritize abatement for management. In fact, it is easy to see that in some circumstances, an effort by an examiner to set abatement priorities actually might redound to the detriment of an overall abatement effort because the examiner may not know the actual danger or imminence of harm created among different hazards. The majority takes a unique case and suggests an unworkable and potentially dangerous standard.

This is a textbook example of the maxim "hard cases make bad law." The majority looks at an unusual, to say the least, circumstance of a 3,500-foot long accumulation. All agree that in this specific case, had the examiner actually seen the beltline or rollers on the mined material, it would have been beneficial for him to have reported such places in addition to the hazard of the accumulations. Indeed, the examiner testified that if he had seen mined material touching a belt he would have reported it. Tr. 230. That is not the question. The question for us is a legal one: What does the standard require? Based on a desire to advance safety, my colleagues interpret the standard in a novel and unwarranted manner to impose a new obligation created by them and not found in the language of the standard or in past enforcement activities. One exceptional fact

pattern should not lead to a skewed interpretation of a general standard and certainly must not do so when the interpretation is inconsistent with the plain terms of the standard.[8]

My colleagues essentially admit that a requirement for identifying specific sub-locations or specific hazards within a group of reported hazards would create ambiguities in the application and in enforcement — that is, whether a particular location within a hazard or a particular hazard within a group of hazards is sufficiently serious to require a subset record. Slip op. at 13. This is one case. Perhaps the majority can gaze into a crystal ball and foresee the full effect of its novel misinterpretation of this plain standard in this narrow and atypical case. I cannot, other than to know that, if applied, it will cause confusion, ambiguity, and errors, perhaps even dangerous ones, in the prioritization and recording of hazards.

If MSHA, as the agency charged with establishing safety policies, desires to mandate subset reports despite the ambiguities such a rule would produce, MSHA may propose a mandatory standard. Such a proposal would then be subject to public comment and refinement regarding the workability and effect of such a standard. A blundering blunderbuss approach of Commission rulemaking is not the proper or prudent means for rulemaking.

Here, the examiner did what the standard requires. Based upon the plain language of section 75.363(b), the examination report identified the nature of a hazard and its location.

I find further difficulty with the majority's rationale in this case. My colleagues find that the mine examiner's description of the accumulations as needing to be cleaned to be insufficient under section 75.363(b), because it did not explicitly identify locations where coal was touching the belt or rollers. Slip op. at 10. They then go on to cite the regulatory preamble related to section 75.363(b) for MSHA's recognition that "[a] record of all hazards *found* . . . serves as a history of the types of conditions that can be expected in a mine," and conclude that "the purpose

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[8] The majority's desire to enhance safety is understandable but inconsistent with the duty to apply the words of a standard as they are written rather than as we might wish they were written for purposes of a particular case. Perhaps judicial restraint is even more difficult in safety cases than in cases in which courts have been constrained to permit grossly repugnant activities such as the protests at funerals for slain service members or KKK marches through American cities. Nonetheless, we should remain mindful of and faithful to the words of the inestimable Justice Cardozo:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).

of the standard is frustrated when, as here, the operator fails to include any identifying details in a recording." *Id*. at 12 (emphasis added) (alteration in original).

The Judge's decision plainly explains why the report did not mention the conditions the majority finds so important: the mine examiner, Adams, did not observe the conditions. 38 FMSHRC at 2246. As the preamble clearly states — not to mention the text of the standard itself — a prerequisite to reporting a mine hazard with *any* degree of specificity is to first observe the condition. Not surprisingly, the majority entirely avoids explaining how Adams was to have reported on conditions he did not observe. MSHA did not charge the operator with an inadequate inspection under 30 C.F.R. § 75.362. Instead, MSHA cited the operator for a violation it could not have committed because no one disputes that the mine examiner did not "find" the particular locations that are the gravamen of the majority decision. The majority flees to the refuge of "reasonably prudent miner," but even the most prudent miner cannot report a hazard he did not see. Here, MSHA charged a violation of a standard that, by its very terms, does not apply to the examiner's conduct. For that separate reason, the citation is invalid.[9]

Attempting to define the parameters of the reporting requirement in a case where the examiner did not observe the specific points the majority laments makes no sense on its face, and thus greatly undercuts any precedent the majority may believe it is setting. For that reason and the plain language of the standard, I cannot join in the majority opinion and dissent from the finding of a violation.

I find it necessary to go even further. The majority does not attempt to identify any discernable standard or set forth meaningful guidance for when a mine examiner should report more than the nature and location of a hazard. Instead, the majority waves its collective hand and says only that any required specificity "may vary based on context." Slip op. at 13. The majority's inability to articulate the meaning of their decision serves to emphasize the importance of proposing a clear standard, accepting public comments, and finalizing an understandable standard.

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[9] The Judge concluded that during his examination Adams *should have seen* at least the contact between the misaligned belt and the steel I-beam. 38 FMSHRC at 2246. If the Secretary established that, it may have constituted a violation of separate standards, sections 75.362(a) and (b) (requiring that an examiner "check for hazardous conditions," including "along each belt conveyor haulageway where a belt conveyor is operated" and for "accumulations of combustible materials"). The inspector, however, did not cite the operator for an inadequate examination and the Secretary did not present any issue under sections 75.362(a) and (b). Finally, section 75.363(a) is not just a specific restatement of section 75.362(a) as my colleagues suggest. Slip op. at 15. It is a different section with a distinct and different duty. Surely, failure to report a found hazard is different from not finding the hazard in the first place. The inspector cited the wrong standard because he faults the examiner for not reporting "found" conditions that the examiner actually did not find. The Judge and majority assume that, despite the ongoing dynamics of a continuously flooding running belt, the conditions must have existed in the same locations and to the same extent as when the examiner passed through the area hours ahead of the inspector. However, what the inspector saw sheds no light on what the examiner actually found. Because the Judge did not discredit the examiner's testimony that he did not find any instances of a rubbing belt or rollers, there is no basis to find a violation of section 75.363(b).

Their comment that the meaning of the decision is unclear demonstrates the lack of fair notice to this operator of a purported obligation to report particular sub-locations within a hazard. The issue of fair notice is determined under an objective standard of whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Hecla Ltd.*, 38 FMSHRC 2117, 2121-26 (Aug. 2016).

In *Hecla*, the Commission considered the imposition of a requirement for some sort of geomechanical testing. The theory was novel: MSHA had never required such testing under the cited standard. Although the Commission majority accepted the interpretation, it found the operator lacked fair notice, stating:

> Because the standard had consistently been applied in a more limited fashion, we hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis.

Hecla, 38 FMSHRC at 2125.[10]

The fair notice question here is whether a reasonably prudent person familiar with the mining industry would have recognized a requirement that a report identifying an accumulation hazard along the entire length of a beltline had a regulatory obligation to go further and specify particular sub-locations within the hazard that an MSHA inspector later identifies as more serious.

Nothing in the language of the standard, MSHA advisories, or our case law suggests a requirement that a record that identifies the nature and location of a hazard must go further and comment upon particular sub-locations within the hazard. The language of the standard would not give any clue as to how much more serious a sub-location would have to be to require specific reporting. There is no reason why a reasonable person who reported the nature and location of a hazard could know he/she was required to do more. Consequently, I also disagree with and dissent from my colleagues' finding regarding the fair notice issue. I would find that the operator, in this case, did not have fair notice of any requirement to note sub-locations within a hazard.

[10] *Hecla* is another case where sui generis facts resulted in a strained, policy-driven interpretation. At least there, however, the majority recognized that the operator did not have fair notice that the Commission could arrive at the strained interpretation it adopted.

The majority itself does not discuss how much "more hazardous" a sub-location must be to require separate reporting. Neither I nor anyone else knows whether the majority decision for the reporting of sub-locations is dependent upon the sub-locations being S&S as compared to the remainder of the identified hazard.[11]

Whether a condition is S&S is more complex than whether it is a hazard. The S&S determination requires an evaluation of the four factors of *Mathies*/*Newtown*. The majority, for example, does not consider the effect of a good faith objectively reasonable belief that a particular sub-location was not S&S (or "more dangerous") upon an alleged section 75.363(b) violation for not identifying a sub-location within a properly recorded hazard. (Of course, as noted above, obligations under section 75.363(b) come into play only if an examiner sees a hazard.)

In the event of another set of highly atypical facts, I do not see how other operators will have notice of the scope of any obligation to go beyond the long-accepted scope of section 75.363(b) and the examiner's view of the hazard as he/she finds it. The majority decision does not recognize or discuss that an operator's mine examiner may well have an objectively reasonable good faith belief that the particular location does not create a significantly greater hazard than another location. Does such an objectively reasonable belief constitute a defense to a violation alleging a failure to identify some subset hazard within the legally reported hazard?

In this case, for example, significant testimony supported the proposition that the violation was not reasonably likely to cause a significant danger due to the composition of the material, continuing flood of water, ongoing abatement, etc. Although the examiner rightly said he would have reported any areas of rubbing as such rubbing is undesirable from a safety and a maintenance standpoint, neither he nor other miners thought the rubbing created a reasonable likelihood of ignition. There certainly was sufficient evidence to support a finding that the operator had an objectively reasonable belief that the accumulation was not reasonably likely to ignite before the ongoing abatement reached the area. The majority's overzealous willingness to interpret a plain and effective substantive rule in an overbroad manner, without a full discussion of the dimensions or understanding of their decision, is deeply troubling.

[11] I assume that if the Judge in this case had found the separate locations did not make the section 75.400 violation S&S, he would not, or at least should not, have found a violation for not separately reporting such places. However, I readily admit this is an assumption, and the majority, having decided to create a new, ambiguous, factually limited policy out of whole cloth, may disagree.

Conclusion

In my view, the Commission makes a policy-based decision to find an obligation not present in the plain words of the standard and of which the operator did not have fair notice. Further, it fails to define in a comprehensible manner the contours of this purported obligation enforced through governmental fines. I respectfully dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 2, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KENTUCKY FUEL CORPORATION	Docket No. KENT 2015-383

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

DECISION

BY: Althen, Acting Chairman; Jordan and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The case involves an accident at Kentucky Fuel Corporation's Beech Creek Surface Mine, in which a truck rolled backward and injured a mechanic who was working on the vehicle. The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Kentucky Fuel a citation alleging a failure to block machinery against motion while conducting repairs, in violation of 30 C.F.R. § 77.404(c).[1]

MSHA designated the alleged violation as significant and substantial ("S&S")[2] and the result of high negligence, and the Secretary of Labor ("Secretary") proposed a specially assessed penalty of $52,500. After a hearing on the merits, an Administrative Law Judge issued a decision affirming the citation as issued and assessing the proposed penalty. 38 FMSHRC 2905 (Dec. 2016) (ALJ).

[1] The standard states: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 77.404(c).

Docket No. KENT 2015-383 also contains a second citation related to these events, issued pursuant to section 103(k) of the Mine Act. 30 U.S.C. § 813(k). This second citation was affirmed by the Judge and is not contested on appeal.

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

The only issue before the Commission is the negligence determination.[3] We affirm in result the Judge's finding of high negligence. The Judge reasonably found that Kentucky Fuel failed to provide materials necessary for the miner to comply with the mandatory safety standard.

I.

Factual and Procedural Background

A. Accident and Subsequent MSHA Investigation

On the evening of September 23, 2014, the driver of an autocar grease truck at Kentucky Fuel's Beech Creek Mine discovered that the vehicle would not start and called for a mechanic. When the mechanic arrived, he lay down under the truck behind the driver's side front wheel and asked the driver (who was still in the cab) to try starting the truck. Although crib blocks apparently were available, the miner did not place any between or on either side of the tires. The starter would not turn over, so the mechanic hit the starter with a hammer to move it into a better position. The truck immediately started, and rolled back approximately two feet; the front tire rolled into the mechanic, causing several broken ribs and a punctured lung. The mechanic was airlifted to a hospital. He eventually recovered fully and returned to work. Only the driver and the mechanic were present at the time of the accident. Tr. 19-24, 30.

Kentucky Fuel conceded that the truck was not blocked against motion when the accident occurred. Tr. 21. Shortly afterward, foreman Steve Ritz placed wooden crib blocks between the truck's rear tires. Kentucky Fuel's Vice President of Health and Safety, Pat Graham, visited the accident site later that evening to preserve the scene, leaving the crib blocks in place. MSHA Inspectors arrived on site the next day and replaced the crib blocks with wheel chocks. Tr. 19-24, 30.

After an investigation, MSHA Inspector Brian Robinson issued Citation No. 8299655. The citation alleges that the mechanic failed to block the truck against motion before conducting repairs, and designates the violation as highly negligent. The citation notes that suitable wheel chocks were not available at the mine and had to be provided by MSHA. Gov. Ex. 3. At the hearing, Robinson testified that the high negligence designation was due to Kentucky Fuel's failure to provide proper blocking materials, i.e., wheel chocks. He conceded that crib blocks may be sufficient for certain types of vehicles, but stated that wheel chocks were required to properly block this type of truck against motion. The truck at issue had large tires and a gross weight vehicle rating of 48,000 pounds. Robinson explained that curved wheel chocks better distribute weight and energy, while crib blocks (which have 90 degree angles) are "apt to scoot" when used to block a truck of this weight and tire diameter. Tr. 30-32, 45-46; *see* Gov. Exs. 6, 9 (photographs of crib blocks and wheel chocks).

[3] Kentucky Fuel petitioned for review of the specially assessed penalty, as well as the Judge's negligence determination. The Commission accepted review of the negligence issue, but denied review of the penalty issue.

Robinson testified that wheel chocks are extremely common on surface mines, yet were not available at this mine. He did not see any wheel chocks on-site, and when interviewed, mine personnel did not know where wheel chocks were located. He concluded that, since the necessary tools to properly block the truck (wheel chocks) were not available, Kentucky Fuel should have foreseen the mechanic's failure to properly block the truck. Tr. 30-31, 41-42, 49, 59. He stated that the citation was intended to "get [miners] the supplies they need to do the jobs properly." Tr. 44-45.

Mark Huffman, Kentucky Fuel's Director of Health and Safety, did not confirm or deny the absence of wheel chocks; instead, he stated that wooden crib blocks were available at the mine and can effectively block trucks against motion when deployed properly. Tr. 149, 152, 161. He also testified that the foreman had no reason to expect the mechanic to fail to block the truck against motion, because the mechanic was properly trained. Tr. 147-48.

Meanwhile, MSHA Inspector Melvin Wolford examined the truck. He testified that the brakes set and released properly, but had several deficiencies that would have prevented the truck from stopping under accident conditions, as well as an inoperative backup alarm.[4] Wolford conducted a "function" test of the truck and found that when the conditions of the accident were replicated, the brakes did not hold. Tr. 64-71. Conversely, Huffman testified that Kentucky Fuel's own inspection of the truck revealed only a broken spring on a brake canister, and that a "pull-through" test established that the brakes were working properly. Tr. 139-40, 151.

B. Judge's Decision and Arguments on Appeal

The Judge affirmed the citation in its entirety. He noted that Kentucky Fuel stipulated to the violation, and found that the violation was S&S because the failure to block against motion increased the likelihood of a fatal crushing injury. 38 FMSHRC at 2916, 2918. Kentucky Fuel does not contest the violation or S&S designation.

The Judge also concluded that the violation was attributable to high negligence. Crediting Inspector Robinson's testimony, the Judge found that wooden crib blocks were insufficient for this type of vehicle, and that proper blocking materials (wheel chocks) were not readily available. He also found that Ritz and Graham's reliance on crib blocks rather than wheel chocks was persuasive evidence that mine personnel were not trained in proper blocking techniques. Finding that the training and materials supplied by Kentucky Fuel were plainly inadequate to meet the requirements of the safety standard, the Judge concluded that Kentucky Fuel's conduct fell far short of its duty of care. *Id.* at 2919-22. The Judge also credited the inspectors' testimony regarding the condition of the truck's braking system and found that Kentucky Fuel failed to meet its duty of care by failing to remedy these defects. Taking the deficiencies of the truck together with the inadequate training and materials, the Judge concluded that the mechanic's conduct was reasonably foreseeable and that Kentucky Fuel had been highly

[4] These deficiencies were documented in a citation (not contested here) which alleges a failure to maintain the truck in safe operating condition. Tr. 25-26. The deficiencies included malfunctioning brake canisters, grease contamination on two of the brake drums, and an air leak in a brake chamber. Tr. 64-65.

negligent. *Id.* at 2923-25. Based on aggravating factors including high negligence and high gravity, the Judge assessed a penalty of $52,500, the amount proposed by the Secretary.

In its petition for discretionary review, Kentucky Fuel claims that the record shows no evidence of improper training, supervision, or discipline, and therefore the Judge's finding of high negligence is not supported by substantial evidence. PDR at 3-6. Kentucky Fuel also contests the Judge's factual finding regarding the insufficiency of crib blocks and states that the issue of blocking material is irrelevant to the negligence analysis. *Id.* at 6.

II.

Disposition

The issue in this matter is whether the Judge erred in concluding that the mechanic's failure to block the truck against motion while conducting repairs was attributable to high negligence on the part of Kentucky Fuel. The Commission applies the substantial evidence test when reviewing a Judge's conclusion regarding an operator's negligence. *See, e.g.*, *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976 (Aug. 2014). "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)). As discussed further below, the record supports a finding that Kentucky Fuel's failure to provide effective blocking materials constituted a significant breach of its duty of care in this instance.[5] Accordingly, we affirm the Judge's high negligence determination.

The Commission employs a traditional negligence analysis, under which an operator is negligent if it fails to meet the requisite standard of care accompanying the mandatory standard at issue. The Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2367 (Sept. 2016), *citing Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-65 (D.C. Cir. 2016). The "gravamen of high negligence is that it 'suggests an aggravated lack of care.'" *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (citation omitted).

Although the conduct of a rank-and-file miner is not imputable to the operator for negligence purposes, "[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15-16 (Jan. 1983). To determine whether the operator has met its duty of care in such circumstances, we look at whether the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. *Knight Hawk*, 38 FMSHRC at 2369. For example, "we

[5] An inherent element of the standard at issue is that the machinery be *effectively* blocked against motion. To hold otherwise would run contrary to the plain meaning and purpose of the standard, which is to prevent motion while repairs are conducted. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (holding that a statute that requires conveyor belts to be "equipped" with slippage and sequence switches plainly requires that the switches be functional).

look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue." *A.H. Smith Stone*, 5 FMSHRC at 15-16.

Here, the Judge determined based on the record that the materials needed to properly block the vehicle against motion were not available at the mine site, mine personnel had not been adequately trained in blocking techniques, and the truck's brake system was not adequately maintained. Based on these findings, he concluded that the mechanic's violative conduct was foreseeable, and that Kentucky Fuel's conduct fell far short of its duty of care. 38 FMSHRC at 2919-25. Without addressing the issues of truck maintenance or training, we find that the record supports the Judge's findings regarding the unavailability of effective blocking materials and the foreseeability of the mechanic's conduct.[6] On these narrow grounds, we conclude that substantial evidence supports a finding of high negligence.[7]

The record supports the Judge's factual finding that materials necessary for compliance were not available to the mechanic. Inspector Robinson testified that the truck was too large (in both weight and tire diameter) to be effectively blocked against motion by a crib block. He explained that, given the difference in shape and resulting difference in weight distribution, a crib block would be "apt to scoot" while a wheel chock would hold the vehicle. Tr. 31-32. The Judge found that a crib block could not effectively block a truck of this type. 38 FMSHRC at 2921. The Judge found Inspector Robinson's testimony in this regard to be "persuasive." *Id.* Conversely, Safety Director Huffman stated more generally that properly configured crib blocks can be very effective at blocking vehicles against motion. Tr. 149. A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). There is no basis here to overturn the Judge's decision to credit Inspector Robinson regarding the efficacy of various blocking materials.

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[6] While there may be some question as to whether the Judge properly considered the condition of the truck in his negligence analysis, we need not address that issue. On appeal, Kentucky Fuel has not challenged (or indeed mentioned) the Judge's finding regarding the truck's condition and its effect on the negligence determination. Regardless, the issue is not determinative.

[7] Commissioner Cohen agrees with Commissioner Young's concurring opinion that in analyzing the foreseeability of the accident, the Judge considered the condition of the truck's braking system. Commissioner Cohen further agrees with Commissioner Young's conclusion that the very poor condition of the brakes made it more likely that the truck would move because the brakes were incapable of holding it. Hence, Commissioner Cohen agrees that the inadequate maintenance of the truck's brakes was relevant to the citation issued for failing to block the truck against motion, and to the degree of Kentucky Fuel's negligence in this matter. Nevertheless, Commissioner Cohen joins the majority opinion because Kentucky Fuel's failure to provide adequate materials to block the truck against motion in the form of wheel chocks is sufficient, by itself, to establish high negligence.

Substantial evidence supports the Judge's finding that wheel chocks (or something more than crib blocks) were necessary to effectively block this type of vehicle against motion.[8]

The Judge also found that wheel chocks were not available to the mechanic, and substantial evidence supports that finding. Inspector Robinson testified that wheel chocks were not present at the mine; he did not see any on-site, and mine personnel interviewed by the inspector did not know where wheel chocks were located. Tr. 30-31, 41-42, 49, 59. When Safety Director Huffman was asked whether there were wheel chocks on the property, he did not answer directly, stating only that crib blocks were available. Tr. 152-53. Considering the testimony of Inspector Robinson and Safety Director Huffman, the record reasonably supports a finding that wheel chocks were not available.

Taken together, these facts support a finding that Kentucky Fuel was highly negligent. As Inspector Robinson noted, operators are responsible for supplying miners with safety equipment. Tr. 49. We look to the actions of a reasonably prudent operator to determine duty of care. *Knight Hawk*, 38 FMSHRC at 2367. A reasonably prudent operator would provide materials necessary for compliance with safety standards; the record here shows that Kentucky Fuel failed to do so. Moreover, this was a particularly significant breach of the operator's duty of care. Failing to provide materials necessary for compliance means that a miner *cannot* comply with the safety standard. Kentucky Fuel's failure to ensure that proper blocking materials were available rendered the mechanic's violative conduct reasonably foreseeable. This reasonably supports a finding that Kentucky Fuel was highly negligent in failing to provide materials necessary for compliance with the standard.

We reject Kentucky Fuel's argument that the issue of blocking material is irrelevant to the negligence analysis. PDR at 6. The standard requires vehicles to be *effectively* blocked against motion while repairs are conducted. *See supra* note 5. The availability of proper materials to comply with the standard, i.e., materials adequate to effectively block the vehicle against motion, is clearly relevant to whether the operator met its duty of care. If an operator fails to supply the materials that a reasonably prudent operator would have supplied to ensure the truck

[8] The Judge explicitly *did not* find that crib blocks are always inadequate to block a truck against motion. 38 FMSHRC at 2921. Neither do we. As Inspector Robinson and the Judge acknowledged, properly configured crib blocks may be sufficient to satisfy the requirements of the standard in some situations. *Id.*; Tr. 46. We affirm the Judge's finding that wooden crib blocks were insufficient *in this instance*, given the type of truck at issue and the inspector's persuasive testimony.

is performing safely, it cannot avoid responsibility when a miner uses inadequate or no materials.[1]

With respect to Kentucky Fuel's argument that there is no specific evidence to support a finding of inadequate training, supervision, or discipline, the outcome in this case flows naturally from the absence of sufficient blocking materials and is not dependent upon adverse findings on these issues.[2] Considering the totality of circumstances, Kentucky Fuel's failure to provide effective blocking materials is fully sufficient under the substantial evidence test to sustain a finding of high negligence. In light of the absence of materials the Judge reasonably found essential for safe performance of the work, the best trained and supervised mechanic could not have performed the job safely.[3]

As a final matter, we acknowledge the seriousness of the mechanic's actions in failing to use any material to block the truck against motion while conducting repairs. However, that does not negate Kentucky Fuel's failure to meet its duty of care. The issue in this matter is whether Kentucky Fuel was highly negligent in failing to take reasonable steps to prevent the mechanic's violative conduct. The record supports a finding that due to Kentucky Fuel's actions, the mechanic *could not have* properly blocked the truck against motion, regardless of his intentions.

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[1] Acting Chairman Althen observes that in this case the Judge was persuaded by the inspector's testimony that "wheel chocks are on nearly every mine site he visits," 38 FMSHRC at 2922 (quoting Tr. 49), and Kentucky Fuel did not argue in its PDR that a reasonable operator would not have known that wheel chocks were necessary to block the autocar grease truck against motion. Therefore, we do not deal with an argument that supplying chocks for blocking movement of this type of truck was not an action that would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. One may imagine a case in which an operator would argue that it reasonably did not and reasonably should not have known that certain material or equipment was necessary. Such circumstances would raise different negligence and/or fair notice issues. *Cf., e.g.*, *Hecla Ltd.*, 38 FMSHRC 2117, 2126 (Aug. 2016) (holding that an operator's failure to perform a geomechanical analysis was not a violation where a reasonably prudent operator would not have known that such an analysis was required).

[2] Kentucky Fuel suggests that direct evidence such as training records was required. However, the Commission has held that the substantial evidence standard "may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Black Beauty Coal Co.*, 703 F.3d 553, 560-62 (D.C. Cir. 2012) (finding inadequate training based solely on indirect evidence). Inferences are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res.*, 6 FMSHRC at 1138.

[3] The evidence regarding supervision was essentially limited to an observation that the foreman was not present when the accident occurred, which the Judge found to be an inadequate defense. Regarding discipline, although Kentucky Fuel's Post-Hearing Brief claimed that the mechanic was admonished, there was no actual evidence of this in the record. 38 FMSHRC at 2923.

In sum, substantial evidence supports the Judge's factual findings that wheel chocks were necessary for compliance with the safety standard in this instance, yet Kentucky Fuel failed to ensure that they were available. This failure rendered the mechanic's violative conduct reasonably foreseeable. Given the importance of providing materials necessary for compliance, the record reasonably supports the Judge's finding that Kentucky Fuel fell far short of its duty of care, i.e., it displayed the "aggravated" lack of care required for high negligence. Based on the evidence regarding Kentucky Fuel's failure to provide proper blocking materials, we find that substantial evidence supports the Judge's conclusion regarding high negligence.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that Citation No. 8299655 was attributable to high negligence.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Young, concurring in the result:

I agree that the Judge's decision should be affirmed, but I disagree with the reasoning. We have noted that negligence is determined holistically. Having approved of that formulation, we cannot unbundle the Judge's decision from his reasoning, as the majority has done, because the Judge has given no specific weight to any of the conditions he found noteworthy in finding high negligence here.

The Judge properly noted that the Commission is not bound by MSHA's Part 100 negligence formula. 38 FMSHRC at 2919-20. However, the Judge's high negligence determination did not rest on the sole basis asserted by the majority, the failure to provide proper materials for blocking truck wheels during maintenance. Instead, the Judge relied upon a variety of factors to support his conclusion.

If the mere failure to provide wheel chocks was sufficient to persuade the Judge, one assumes he would have said so, rather than expounding for several pages on other conditions that he deemed relevant. In particular, the Judge dedicates nearly half of his negligence discussion to the condition of the truck and its impact on the "foreseeability" of the rank-and-file miner's violation of the standard requiring the equipment to be braked against movement.

The Judge's focus is on the foreseeability of the accident. But the negligence adheres to the violation itself—i.e., the failure to block the truck against movement. This does not mean that the condition of the truck is irrelevant to the violation. But the Judge—in a departure from an otherwise exemplary opinion—appears to have misunderstood the Secretary's rationale for including the truck's condition in its argument on this violation.

In fact, the Judge himself questioned the relevance of the Secretary's evidence about the condition of the truck, which was the subject of a distinct and uncontested citation for failure to properly maintain the truck. Tr. 26-27. In response, counsel for the Secretary explained that the condition of the truck made it more likely that the truck would move because the brakes were incapable of holding it. Tr. 27. Counsel for the Secretary said that "because the truck was in bad condition to begin with, that it wasn't just the—the failure to block it was maybe the last step in the chain which caused the injury." Tr. 27.

Thus, the Secretary made clear that the condition of the brakes was a factor in the accident. However, the failure of the brakes in the accident also materially contributed to the violation. We know that the standard was violated here—not merely because the operator conceded the violation, but because the truck was demonstrably not blocked from unsafe movement when it rolled onto the mechanic working beneath it.

Thus, the brakes and their condition were integral to the standard, and their poor maintenance and condition contributed to the violation. This is the point the Secretary was trying to make. The evidence of record supported the theory. The inspector testified that if the brakes had been properly maintained, they would have held the truck, and that testing of the same model under similar conditions confirmed this. The inspector also tested the brakes of the truck at issue and found that they would not hold the truck.

The very purpose of the truck's braking system is to prevent the truck from moving—to "block it against movement." *See* U.S. Dep't of the Interior, *Dictionary of Mining, Mineral and Related Terms* 133 (1968) ("Brake" defined as a "device (as a block or band applied to the rim of a wheel) to arrest the motion of a vehicle, a machine, or other mechanism and usually employing some form of friction. A device for slowing, stopping, and holding an object.") (internal citations omitted). The failure of the brakes to do so here is evidence of a violation of the standard.

This is crucial because the failure to properly maintain or inspect the brakes reflected a broader and more troubling lack of regard for safety. The majority focuses exclusively on the behavior of the rank-and-file mechanic, but the condition of the brakes and the absence of proper training and supervision are failures attributable to mine management.

Just as important, the condition of the brakes greatly amplified the danger to anyone working beneath the truck, in combination with the failure to use wheel chocks, a secondary device that would become relevant only if the brakes failed to hold the vehicle. It is the convergence of these failures that created a foreseeable deadly hazard here, and while the Judge does not say that, the Secretary argued it distinctly. This convergence is essential to the finding of high negligence, because without all of the elements it might not be possible to discern the boundary between moderate and high negligence here. We are essentially finding *de novo* that the failure to provide necessary safety equipment is itself enough to constitute high negligence without any consideration of the other circumstances cited by the Judge.

I therefore also disagree with the majority's exclusion of training and supervision as relevant factors in the negligence assessment. Again, the Judge found them relevant, and the record supports his decision to consider an apparent lack of supervision and training. The record fails to provide any evidence concerning the operator's training, supervision, or familiarity with wheel chocks—despite the fact that the inspector testified that chocks are used at nearly every mine he inspects.

While the operator argues that the Secretary introduced no evidence concerning its training or supervision in the use of wheel chocks, it is noteworthy that a member of mine management used a crib block and a large rock to block the truck's wheels after the accident, and the operator's own representatives doggedly insisted at hearing that crib blocks would have been sufficient. The operator cannot logically insist that the Secretary further prove something it has essentially admitted, by deed and by word, in the aftermath of the accident and on the record at the hearing.[4]

[4] In this regard, I generally agree with Acting Chairman Althen's observations in footnote 9, *supra*, concerning the availability of wheel chocks and the operator's neglect in failing to provide them. I further note that Inspector Robinson testified that crib blocks might be adequate in some circumstances (Tr. 45-46), but would have been insufficient here due to the size and weight of the truck (Tr. 31-32). The suitability of available materials that may be used to block trucks against motion during maintenance should be evaluated on a case-by-case basis, and that was properly done here by the inspector and the Judge.

Taking all of the circumstances into account, then, the conclusion of high negligence is supported by both the relative indifference to the condition of the truck's brakes and the general carelessness regarding the proper use of materials to ensure the truck would be blocked against movement. The operator's imputable actions include not only the failure to provide rank-and-file miners with the tools needed to work safely, but a lack of focus on conditions such as the inspection and maintenance of the truck's brakes and the provision of training and supervision in proper maintenance techniques, which were generally within management's scope of control.

The distinction between moderate and high negligence is often legally significant. The fact that the operator not only failed to properly maintain the primary system designed to prevent the truck here from moving while miners worked beneath it, but also failed to provide or ensure the use of proper secondary devices, created a high degree of danger and evinces high negligence. While the Judge did not perfectly express the relationship between the distinct breaches in the operator's duty, he did account for all of them in holding the operator to be highly negligent. We should affirm him on that basis.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of KEVIN SHAFFER	
v.	Docket No. WEVA 2018-117-D
THE MARION COUNTY COAL COMPANY	

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012) ("Mine Act").[1] On January 22, 2018, the Commission received from the Marion County Coal Company ("Marion County Coal") a petition for review of an Administrative Law Judge's January 16, 2018 order temporarily reinstating Kevin Shaffer. The operator has also requested a stay of the temporary reinstatement order. On January 29, 2018, the Commission received the Secretary of Labor's

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

opposition to the petition and motion to stay.[2] For the reasons that follow, we grant the petition for review, deny the operator's motion for a stay, and affirm the Judge's order requiring the temporary reinstatement of Mr. Shaffer.

While all Commissioners reach this result, Commissioners have stated differing rationales for the result in two separate opinions. The separate opinions of the Commissioners follow.

Factual and Procedural Background

Mr. Shaffer's employment with Marion County Coal began in June 2010. His assigned duties included working as a mobile equipment operator at the Marion County Mine to haul refuse from a refuse bin to the refuse disposal area.

On October 18, 2017, Shaffer made safety complaints regarding the condition of mobile equipment he was operating, referred to as the No. 4 truck, and requested alternative work. Shaffer alleges that he complained to his supervisor, Adam Bond, that the transmission of the truck was not working, and that the truck had twice jumped out of neutral into reverse. Supervisor Bond instructed Shaffer to use a different truck. A mechanic, Paul Dixon, was called to the mine to repair the No. 4 truck. 40 FMSHRC ___, slip op. at 3, No. WEVA 2018-117-D (Jan. 16, 2018) (ALJ) ("slip op.").

Later that shift, Bond informed Shaffer that the mechanic, Dixon, had seen Shaffer driving without his headlights turned on. According to Shaffer, he responded by denying Dixon's claim, and Supervisor Bond, in turn, responded, "I'm tired of this f___ing sh__ on this equipment." *Id.* According to Bond, when Bond confronted Shaffer about the mechanic's claim, Shaffer responded by stating repeatedly, "f__ you," and told Bond, "I'm going to whip your ass; I'm going to take you to the gate." *Id.*

The next day, Supervisor Bond recounted the confrontation to the human resources office at Marion County Coal. *Id.* Later that day, Marion County Coal suspended Shaffer pending an investigation and, on October 23, suspended him with intent to discharge. *Id.* The United Mine Workers of America instituted a grievance process on behalf of Shaffer.

Shaffer filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discharged in violation of section 105(c) of the Mine Act. MSHA Special Investigator Clarence Moore concluded that Shaffer's complaint, alleging that he had been discharged for engaging in protected activity, was not frivolously brought. The Secretary of Labor filed an Application for Temporary Reinstatement.

[2] On January 29, 2018, the Secretary electronically filed a motion for leave to file a corrected response to the operator's petition and the corrected response. The corrected response was timely and not substantially different from the initial response filed earlier that date. *See* 29 C.F.R. § 2700.8(d) ("For filing by electronic means . . . the due date ends at midnight Washington, D.C. local time."). We hereby grant the motion and accept the corrected response for filing.

The operator elected to brief the issue in lieu of a hearing on the application, and attached to its brief various exhibits including an arbitration transcript and associated arbitration decision resulting from the grievance process. Marion County Coal contended before the Judge that it terminated Shaffer because he threatened Bond in violation of its insubordination policy, and because he had similar discipline in his personnel record.

The Judge ordered Marion County Coal to temporarily reinstate Shaffer. She concluded that it was undisputed that Shaffer had engaged in protected activity by complaining about the No. 4 truck on October 18. Slip op. at 4. The Judge further stated that the Secretary had alleged adverse action close in proximity to the protected activity, and that it was undisputed that Bond had knowledge of Shaffer's protected activity. She noted that, at best, the operator has shown its intent to defend its actions on the basis of legitimate, business-related, non-discriminatory reasons. The Judge concluded that because the allegations of discrimination set forth in the Secretary's Application had not been shown to be clearly lacking in merit, the Secretary had sufficiently established that Shaffer's discrimination complaint was non-frivolous. *Id.* at 4-5.

Marion County Coal filed a petition for review of the Judge's temporary reinstatement order pursuant to Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). It argues that the Secretary failed to establish any non-frivolous nexus between Shaffer's termination and his safety complaint through evidence that Shaffer had suffered disparate treatment or that the operator demonstrated hostility toward Shaffer's protected activity. It asserts that the evidence demonstrates that the only reason for Shaffer's termination was his improper and physically threatening behavior, which violated company policies. Finally, it requests that the Commission stay Shaffer's reinstatement until a ruling has been issued on the merits because it contends that Shaffer's "reentry into the workforce would create a potentially unsafe work environment for other miners and members of management." Mot. to Stay at 3.

The Secretary opposed the petition and motion to stay.

Separate Opinion of Commissioner Jordan and Commissioner Cohen:

A. Petition for Review of Temporary Reinstatement

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the [J]udge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

Courts and the Commission have likened the "not frivolously brought" standard set forth in section 105(c)(2) with the "reasonable cause to believe" standard applied in other statutes. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) ("there is virtually no rational

basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012) (other citations omitted). The Commission has noted that in the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing "reasonable cause to believe" that a violation of the statute has occurred is a "relatively insubstantial" burden. *Argus Energy*, 34 FMSHRC at 1878 (citing *Schaub v. W. MI Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). The Commission stated that in *Schaub*, "the Court explained that the proponent 'need not prove a violation of the NLRA nor even convince the district court of the validity of the Board's theory of liability; instead he need only show that the Board's legal theory is substantial and not frivolous.'" *Id.* (citations omitted). It noted that the Court cautioned:

> An important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting evidence between the parties. *See Fleischut [v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988)] (stating that the appellant's appeal did not seriously challenge whether reasonable cause exists; instead it simply showed that a conflict in the evidence exists); *Gottfried [v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987)] (same). Rather, so long as facts exist which could support the Board's theory of liability, the district court's findings cannot be clearly erroneous. *Fleischut*, 859 F.2d at 29; *Gottfried*, 818 F.2d at 494.

Id. (citations omitted).

Similarly, at a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d 744. As the Commission has recognized, "[i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The Commission applies the substantial evidence standard in reviewing the Judge's determination.[3] *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co*., 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of

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

establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 19080), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *CAM Mining*, 31 FMSHRC at 1089 (other citations omitted).

We conclude that substantial evidence supports the Judge's determination that Shaffer's application for temporary reinstatement was not frivolously brought. As stated by the Judge, it is undisputed that Shaffer engaged in protected activity when he made safety complaints to his supervisor about the No. 4 truck on October 18, 2017. Slip op. at 3; Opp'n to PTR at 6. In addition, there is no dispute that Shaffer's termination from employment was an adverse action. *Id.* Rather, the issue on review is whether there is substantial evidence to support the Judge's determination that there is a sufficient nexus between the protected activity and adverse action to support temporary reinstatement.

As the Judge found, Marion County Coal has explicitly acknowledged that Shaffer engaged in protected activity and that Bond had knowledge of it. Slip op. at 4. Moreover, there is proximity in time between Shaffer's protected activity and adverse action in that Shaffer made safety complaints to Bond about the No. 4 truck on October 18, Shaffer was suspended pending an investigation the next day, and Shaffer's employment was terminated on October 23. Slip op. at 3.

There is disputed evidence in the record regarding the operator's hostility or animus toward the protected activity. Shaffer alleges that Bond told Shaffer, "I'm tired of this f___ing sh__ on this equipment." Slip op. at 3. The operator alleges that the record does not contain substantial evidence of hostility, and that when Shaffer made the complaints to Bond, Bond told Shaffer to stop using the equipment and called a mechanic to repair the truck. PTR at 3, 6. It maintains that the only reason Shaffer was terminated was because of his improper and threatening behavior, which violated company policies.

Evidence that Shaffer was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. The Judge will need to resolve the conflicting evidence in the context of the full discrimination proceeding. *See Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). At the temporary reinstatement stage, however, the Judge does not resolve conflicts in the evidence.[4] "'[R]esolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case' are simply not appropriate" in a temporary reinstatement proceeding. *Id.* (citations omitted). The Commission has recognized that "[r]equiring the Judge to resolve conflicts in testimony between [the alleged discriminatee] and the operator's witnesses, when the parties have not yet completed discovery, would improperly transform the temporary reinstatement hearing into a hearing on the merits."[5] *Argus Energy*, 34 FMSHRC at 1879.

The Judge did not consider whether Shaffer suffered disparate treatment. However, given the evidence discussed above, we conclude that substantial evidence exists in the record to support the Judge's conclusion that Shaffer's application for temporary reinstatement was not

[4] In support of its position Marion County Coal asserts that "violating an established company policy has consistently been found to undermine a viable claim under Section 105(c) of the Act, even in the context of a temporary reinstatement proceeding." PTR at 7. In support of this argument, the operator cites a number of decisions that are not relevant to temporary reinstatement proceedings, do not involve disputed facts, are non-precedential ALJ decisions, or a combination of the above. Three cases the operator relies upon – (1) *Sec'y of Labor on behalf of McKinsey v. Pretty Good Sand Co.*, 36 FMSHRC 2843, 2869-70 (Nov. 2014) (ALJ), (2) *Sec'y of Labor on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168, 172 (Feb. 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990), and (3) *Pollock v. Kennecott Barney's Canyon Mining Co.*, 22 FMSHRC 419 (Mar. 2000) (ALJ) – involve decisions on the merits of discrimination proceedings, not temporary reinstatements. In the fourth case – *Sec'y on behalf of Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ) – the Judge determined that, unlike this case, the relevant facts establishing the non-existence of hostility toward protected activity were not in dispute.

[5] Our colleagues have recognized that Shaffer and Bond gave conflicting testimony as to who said what to whom and when during the critical conversation. This conflicting evidence goes to the heart of whether Shaffer's discharge was in violation of section 105(c) of the Mine Act. Our colleagues further recognize that substantial evidence supports the Judge's finding that the complaint was non-frivolous. We decline to discuss, as our colleagues do, the nature and quantum of evidence which may be sufficient to weigh against a claimant's evidence. Commission precedent rejects the weighing of evidence in temporary reinstatement proceedings.

We are mindful that a temporary reinstatement hearing occurs in the preliminary stages of a proceeding, often before discovery has been completed, in recognition that "temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending resolution of the discrimination complaint." S. Rep. No. 95-181, at 37, *reprinted in* Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978). At this preliminary stage of the proceedings, we do not have before us the full record that will be developed in any proceeding on the merits.

frivolous. *Cf. Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000) (affirming temporary reinstatement based upon a nexus shown by knowledge and proximity in time between the protected activity and adverse action).

B. Motion to Stay

Commission Procedural Rule 45(f) provides that, with respect to an order granting temporary reinstatement, "[t]he filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances." 29 C.F.R. § 2700.45(f). When a party requests that the Commission stay a temporary reinstatement order, the Commission applies the test set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1312 (Aug. 1987); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812 (Apr. 2013). The burden is on the movant to provide sufficient substantiation of the requirements for the stay. *North Fork Coal Corp.*, 33 FMSHRC 589, 596 (Mar. 2011); *JWR*, 9 FMSHRC at 1312.

The operator argues that a stay is appropriate because having Shaffer re-enter the work force would create a potentially unsafe work environment for other miners and management given his past conduct. Mot. at 3. The operator does not cite or apply the factors in *Virginia Petroleum Jobbers.* Nor does the operator state why its concerns regarding Shaffer could not be addressed through economic reinstatement. Accordingly, the operator has failed to meet its burden of showing the "extraordinary circumstances" warranting a stay.

Conclusion

For the reasons discussed above, we join our colleagues in granting the petition for review, denying the operator's motion for a stay, and affirming the Judge's order requiring the temporary reinstatement of Shaffer. We intimate no view as to the ultimate merits of this case.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Separate Opinion of Acting Chairman Althen and Commissioner Young:

We join in granting the petition for review of the Judge's order temporarily reinstating Kevin Shaffer, affirming the Judge's order, and denying the operator's motion for a stay.

There is no presumptive right to temporary reinstatement. Rather, the complainant's entitlement must be established by substantial evidence, as in any other proceeding. Only the standard that the evidence must meet is diminished. Thus, in a discrimination case, the complainant bears the burden of proving discrimination by a preponderance of the evidence. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980*)*, *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, at this early stage of the proceedings, the Secretary has the burden of proving by a preponderance of the evidence only that the claim is not frivolous.[1] *Sec'y of Labor on behalf of Pappas*, 38 FMSHRC 137, 154 (Feb. 2016), *rev'd on other grounds*, *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016).

Preponderance of the evidence means the greater weight of the evidence, such that the Secretary has demonstrated that it is more probable than not that the claim is not frivolous. The burden of proof in a temporary reinstatement case, therefore, contains two legal standards: "preponderance of the evidence" and "non-frivolous."

[1] The legislative history of the Mine Act states that, under the not frivolously brought standard, the complaint must "appear to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3436. The Eleventh Circuit equated the Mine Act's "not frivolously brought" standard to the "reasonable cause to believe standard" applied in another statute's temporary reinstatement proceedings. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990).

The Commission has repeatedly approved this standard. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1326 (June 2016); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012); *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 158 (Feb. 2000); *Sec'y of Labor on behalf of Markovich v. Minn. Ore Operations, USX Corp.,* 18 FMSHRC 1349, 1350 (Aug. 1996) ("The judge cited the correct legal test in reviewing the Secretary's application. He cited the decision of the Eleventh Circuit Court of Appeals, in which that court concluded the standard for review of an application for reinstatement was a 'reasonable cause to believe standard.'" (citations omitted)); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 9 FMSHRC 1305, 1306 (Aug. 1987).

As with all disputed claims, the outcome depends upon the evidence presented. If the operator requests a hearing, the hearing is a full judicial proceeding.[2] In *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), the Commission quoted with approval the decision of the Eleventh Circuit regarding the nature of a temporary reinstatement hearing:

> At [the temporary reinstatement hearing], the employer has the opportunity to test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement. . . . [T]he statute grants [the employer] the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal.

Id. at 42 (quoting *Jim Walter Res.*, 920 F.2d at 747-748).

We glean two points. First, a temporary reinstatement hearing or proceeding is a full evidentiary process, albeit a greatly expedited one. The opportunity for such a hearing satisfies the operator's due process rights.

Second, the opportunity to test credibility identified by the Commission in *Gray* would be meaningless without a genuine exposition of the evidence presented. If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.[3]

Thus, all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding — even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve. It is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.

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[2] Respondent, Marion County Coal, agreed to forgo a hearing. The parties relied instead upon attachments to their briefs in support of their respective positions. The Secretary attached the declaration of Special Investigator Clarence Moore to his brief. Marion County Coal attached a transcript of an arbitration proceeding resulting from a grievance filed by the United Mine Worker of America on Shaffer's behalf and other affidavits. The Judge necessarily drew the background information from those sources; she gave no weight to the arbitration decision.

[3] We do not read our colleagues' opinion as suggesting a Judge must credit testimony if the other party demonstrates that such testimony is false or erroneous, or that a Judge must grant reinstatement if the claim does not have a legitimate chance of succeeding because its basis is shown to be false or erroneous.

In this case, the two principal witnesses, Shaffer and Bond, gave conflicting testimony as to who said what to whom and when during the critical conversation. Finding that she could not determine that the allegations in the application for reinstatement clearly lacked merit, the Judge reinstated Shaffer.

We may define a "non-frivolous" case as one that is "viable." At the conclusion of a temporary reinstatement proceeding, the Secretary must have shown by a preponderance of the evidence the existence a claim of discrimination or interference that is capable of succeeding — that is, a case which is not foreclosed by the evidence available and one for which there is a reasonable cause to believe the complainant may prevail.

In this case, a witness, without rebuttal, testified at the arbitration hearing about Shaffer's abusive conduct during a company trip. He said that when water was not working at a mine rescue team's motel during a company trip in which Shaffer participated, Shaffer "called the hotel manager – he was of Hispanic origin. He called him Jose and also called him the Sand N____r and also was creating a ruckus out in the parking lot when there were other guests out in the parking lot at the time." Arb. Tr. 174. Shaffer did not disclaim this conduct in the arbitration hearing or in the pleadings before the Judge. There was further testimony that Shaffer "was abusive to the team captain and to fellow members" and that "when the team vacated his [Shaffer's] particular room had additional damage that was investigated after they had left and moved to another hotel." *Id.* at 170, 174.

The operator removed Shaffer from the mine rescue team and suspended him for five days for his actions. *Id.* at 170-71. There is no evidence Shaffer or the UMWA filed any complaint or grievance for such discipline. Vile, racist language is reprehensible in itself; destructive rage carries misconduct to an even higher level. These are important contextual details that an employer would be expected to take into account in determining whether or not to retain an employee.

Testimony also established without dispute that two months before the conflict leading to his discharge occurred, Shaffer said "f___ you" to his supervisor Adam Bond when Bond simply told Shaffer that he would need to work overtime. Arb. Tr. 79-81. Bond testified that Shaffer repeated it and then said, "I am going to f___ your eyeballs out." *Id.* at 81. Shaffer admitted that he used "f___" toward Bond on that day. *Id.* at 263.

The critical confrontation for this case was also between Shaffer and Bond. Shaffer testified that Bond cursed at him for raising problems with the equipment. Bond testified that Shaffer swore at him for reprimanding Shaffer for driving with his lights out, and that Shaffer threatened to take him to the gate — that is, from the mine site — and beat him.[4] Paul Dixon, a mechanic for a subcontractor testified he could hear some of the conversation, although some equipment moving nearby partially affected his hearing. He testified that he heard Shaffer "hollering at [Bond], 'F___ you' repeatedly." *Id.* at 139. Clarifying, Dixon stated, "I mean he

[4] There also was an earlier conversation. Shaffer asserted that at that separate time he asserted safety rights and requested a safety representative. Bond said Shaffer only said the truck was defective and that he (Bond) directed him to park the truck and use a different one. There were no witnesses.

was literally screaming 'F___ you' and he was right up – I mean he was right up against him." *Id.* at 141. Dixon heard Shaffer "holler[] out, 'The gate,' and pointed down towards the main gate." *Id.* at 139. During the exchange, Dixon could tell that Bond seemed calm, but he "could definitely hear [Shaffer] screaming." *Id.* at 140. Dixon did not count how many times Shaffer said "f___ you" to Bond, but he said he was sure it was 10 to 15 times. *Id.* at 142.

This evidence is relevant, and the Bond testimony, confirmed to some extent by Dixon, supports a rebuttal and/or affirmative defense. But at this stage, there has been no discovery. The Secretary had no opportunity to cross-examine Dixon about his perception or motivations. And there is little evidence about the context surrounding the confrontation between Shaffer and Bond. But we note that at some point, a claimant's testimony may be rendered inherently incredible by the weight of evidence against it.

At that point, the Judge would not be making a "credibility determination," but a finding that evidence offered by the claimant is so unreliable that a reasonable person could not choose to believe it. Had Dixon's account been more clear and corroborated by other disinterested witnesses or a recording of the conversation, the Judge might well have concluded substantial evidence established that Shaffer profanely and repeatedly threatened to take Bond to the gate and beat him and that such conduct was intolerable regardless of the context.

In the absence of a disparate-impact component or, perhaps, severe provocation,[5] there can be no doubt that vulgar threats to a supervisor to take him off-site and beat him, especially in light of prior unrebutted bad conduct, would constitute a separate and sufficient reason for discharge[6] because there would not be reasonable cause to believe the claimant could prevail on his claim. In short, if testimony or evidence for a claimant is conclusively disproved by other evidence (video or audio tapes, evidence of a criminal conviction for the underlying misconduct, etc.), it is not necessary to accept such refuted testimony or evidence in deciding whether there is

[5] Due to the outcome in this proceeding and the fact that Shaffer has denied making the statement rather than claiming provocation, we need not consider the dubious proposition that wrongfully reprimanding an employee for complaining about the safety of equipment would be sufficiently provocative to justify a miner with a history of misconduct threatening to beat his supervisor.

[6] At MSHA's 2016 Annual Training Resources Applied to Mining Conference, Charlie Moore of Catamount Consulting LLC cited a survey by Business Wire Magazine that found that "[w]orkplace [v]iolence is considered the most significant threat to American Business." Charlie Moore, Workplace Violence – Who is At Risk and How to Reduce It, 2016 TRAM Conference, https://arlweb.msha.gov/Training/materials/tram/2016/WorkplaceViolence&Prevention.pdf (emphasis in original). The presentation identified 14 signs of impending violence. Among them were (1) "persons who make veiled or clear threats," (2) "persons who attempt to intimidate or instill fear in others," (3) "persons who cannot calmly accept criticism," (4) "persons who hold grudges, silently or with ongoing talk," and (5) "[persons who are] easily agitated and take longer to 'wind down' each time." Separately, it is regrettable that MSHA has missed the ninety-day statutory deadline for completing its investigation in this case. The ninety-day requirement is not jurisdictional but MSHA should not treat it as a mere suggestion, especially in cases dealing with alleged threats of physical violence.

a reasonable cause to believe a claim may succeed, because the miner's testimony, alone, would not rise to the level of substantial evidence necessary to support a viable claim.

Here, it is Shaffer's version against Bond's version, except to the extent Dixon supports Bond. Determining that there was a genuine conflict between the version of events presented by Shaffer and that offered by Bond, and corroborated to some extent by Dixon, was within the Judge's discretion. Substantial evidence supports the Judge's finding, and we concur in affirming reinstatement.

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WHITE COUNTY COAL, LLC	Docket No. LAKE 2017-0148

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

ORDER

BY THE COMMISSION:

On February 9, 2018, Administrative Law Judge Priscilla Rae requested leave of the Commission to amend her Decision Approving Settlement, issued in this proceeding on October 24, 2017, in order to correct a clerical error. Under section 113(d)(1) of the Act, the Judge's decision became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). However, pursuant to Commission Procedural Rule 69(c), a Judge may correct clerical errors in a final decision with leave of the Commission. 29 C.F.R. § 2700.69(c).

Upon consideration of the Judge's request, it is **GRANTED**. We reopen the case, remand the matter to the Judge, and grant her leave to correct the error as requested.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WILLITS COMPANY, INC.	Docket No. WEST 2015-525-M A.C. No. 05-04745-377565

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). 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). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we 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. 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.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 11, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ANTHONY VEGA, Complainant, v. SYAR INDUSTRIES, INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2018-0135-DM MSHA Case No: WE MD 18-02 Mine: Napa Quarry Mine ID: 04-00023

DECISION AND ORDER TEMPORARILY REINSTATING ANTHONY VEGA

Appearances: Abigail G. Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Complainant;

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson LLP, Sacramento, California, for Respondent.

Before: Judge L. Zane Gill

This case involves an Application for Temporary Reinstatement filed on December 11, 2017, by the Secretary of Labor ("Secretary") on behalf of Anthony Vega ("Vega" or "Complainant"), pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815(c)(2), and 29 C.F.R. § 2700.45. Vega filed a Discrimination Complaint with the Mine Safety and Health Administration ("MSHA") in its Western District Office on November 8, 2017. The complaint alleged that Vega was terminated for activity protected under the Mine Act. In his Application for Temporary Reinstatement, the Secretary contends that Vega's complaint was not frivolously brought and seeks an order temporarily reinstating Vega to his former position as a mobile equipment technician for the Respondent, Syar Industries, Inc. ("Syar"), at the Syar Napa shop pending the final hearing and disposition of this case. Syar filed a Request for Hearing on December 22, 2017. An expedited hearing on the application was held on January 4, 2018, in Vacaville, California.

On January 2, 2018, two days prior to the hearing, the Secretary filed a motion in limine to exclude evidence extending beyond the limited scope of the hearing. Syar's counsel stated that Syar did not oppose the Secretary's motion. (Tr.6:11–15) During the hearing I ruled on ad hoc objections by counsel with the Secretary's limine motion in mind, but did not otherwise rule on it.

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

I. SUMMARY OF THE EVIDENCE

Syar is a mine operator in northern California, primarily involved in the rock quarrying, asphalt mining, and concrete businesses. (Tr.12:1–10) The mine at issue is divided by a freeway into two parts: the Napa shop and the Napa quarry. (Tr.16:23–17:5) The Napa shop does maintenance work, while the Napa quarry is where the extraction is done. (Tr.17:2–5)

Vega started working at Syar in 1995 while in college. (Tr.14:24–15:3) While at Syar, he worked in various positions: first as a parts runner (Tr.15:8–9), then in the machine shop for six months (Tr.15:10–11), and next as a mechanic, after completing an apprenticeship with the journeyman mechanics. (Tr.15:12–17) Before being terminated by Syar, Vega was most recently employed as a heavy duty repairman. (Tr.15:18–20) Vega primarily worked at the Napa shop site and reported directly to Foreman Ken Calvin. (Tr.17:6–7, 11–13; 19:15; 43:10–11) In addition to his work as a heavy duty repairman, Vega was a Cal/OSHA representative, MSHA miners' representative, and a steward with the Operating Engineers Local 3 Union. (Tr.15:21–22) As a union steward, Vega was tasked with referring other members' complaints to management. (Tr.46:16–18)

Smoke in the Hose Repair Room

The hose repair room is a metal shed measuring approximately 12 feet by 12 feet (Tr.18:20), constructed approximately ten years ago for the purpose of cutting wire-braided hydraulic hoses.[1] (Tr.49:23–24; 50:2–11) Vega testified that although an ordinary "knife blade" would cut a regular rubber hose and up to two wires, most of Syar's hoses are high-pressure hydraulic hoses, which contain four to six wires and cannot be severed by a knife blade. (Tr.18:3–8) Miners were therefore told to cut the hydraulic hoses with an abrasive wheel, which "basically just grinds the rubber and billows out a lot of smoke." (Tr.18:8–11)

Vega wondered if the smoke was toxic and subsequently reported the issue to Napa shop safety director James Kerr sometime in January 2017. (Tr.16:18–20; 41:20–42:2; 51:8–18) Vega testified that Kerr was unable to find any information on the toxicity of the smoke and advised Vega to wear a respirator if the smoke was an issue. (Tr.18:15–17; 42:3–7) Vega testified that the smoke problem had been ongoing since the hose repair room was constructed ten years prior. (Tr.49:16–24) However, until the January 2017 complaint to Kerr, Vega had not reported this smoke issue on his workplace exam forms nor did he raise the issue during safety meetings. (Tr.50:21–51:3)

In July 2017, Bob Hayes, a co-worker, complained to Vega about the hose repair room smoke while they were working on changing out a hydraulic hose that had blown. (Tr.19:1–4; 42:23–43:4) Hayes told Vega that he wanted to see if they could order a hose cutter machine that could cut hoses without producing smoke. (Tr.19:4–7) Vega was skeptical that Syar would buy a

[1] The hoses being cut in the hose repair room are very large, measuring approximately 30 feet in length, 2.5 inches in diameter, and weighing 300 pounds. (Tr.20:12–25; 50:14–20)

new machine, and suggested that they should instead look for a better blade. (Tr.19:7–9) Vega subsequently searched online and found a blade that would fit the old chop saw machine. (Tr.19:9–10) Vega believed that management did not like him (Tr.19:13–14; 33:12–24). He suggested that Hayes make the request for the new part because he felt that management would reject the request if they knew it came from Vega. (Tr.19:11–14) Hayes made the request to their direct supervisor and foreman, Ken Calvin, and received permission to go ahead with the order. (Tr.19:14–16; 43:8–11; 62:10–11) Hayes then submitted the order to Randy Novack, the parts specialist. (Tr.19:17–18)

A week later, Vega followed up with Novack and was told that the parts request was put on hold by Napa shop superintendent James Irvine while he looked for cheaper alternatives. (Tr.19:20–23; 21:11–18) Vega did a second follow-up with Novack the next week but was again told that Irvine was waiting to see what other companies were using to cut their hoses. (Tr.19:24–20:6) Vega testified he told Novack that if Irvine continued to stall, and if the smoke continued to be an issue, Vega would call MSHA. (Tr.20:7–16; 44:7–9) Vega testified that he did not hear anything more about the status of the chop saw or requested part from that point on. (Tr.21:5–8)

Near-Miss Incident on Quarry Haul Road

In July 2017, Vega was working in the quarry when a fellow miner told him of a recent, near-miss incident involving two vehicles on a haul road. (Tr.21:21–22:13) Vega told the miner he would talk to Napa shop safety director Kerr to see what the legal requirements were for the width of a two-way haul road and if warning signs were necessary. (Tr.22:14–18) When he returned to the Napa shop, Vega spoke with Kerr and asked him what the legal width of a haul road was for two-way traffic. (Tr.22:19–20; 53:1–4) Kerr was unable to immediately find an answer. (Tr.22:22–24) Rather than wait, Vega asked Kerr to keep him updated and to relay any findings to Jamal Grayson, the Napa quarry safety director. (Tr.22:25–23:7)

A few days later, Vega spoke again with Kerr. (Tr.23:13–18) Kerr stated that he could not find any information, so he spoke with Irvine about the issue. (Tr.23:17–20) Vega testified that Kerr indicated that Irvine was upset with Vega for involving himself with Napa quarry issues, since Vega was a miners' representative for the Napa shop, not the quarry. (Tr.23:21–24:1; 61:4–7) To Vega's knowledge, nothing further was done about the haul road issue. (Tr.23:8–10)

Writing on Pay Envelopes & Investigation by Management

In mid-July 2017, Vega noticed that people were drawing smiley faces and writing "Hello" or "Good job" on co-workers' pay envelopes left at the front counter. (Tr.25:15–18; 54:12–16) Vega also began writing complimentary notes like "Great job today" or "glad to have you on board" on his co-workers' pay envelopes. (Tr.25:19–20) In one case, Vega wrote, "There is nothing more pleasing than hearing the sound of your voice over the radio in the morning." (Tr.40:10–13) Vega testified that he only wrote complimentary notes on the envelopes and sometimes signed them with "RT"—the initials of quarry manager Rick Tranchina. (Tr.25:24–

26:1; 40:3–5; 75:13–16) Vega thought some of his notes were funny. (Tr.40:17–19) This practice continued for approximately four to six weeks. (Tr.25:23; 74:3–4)

In the first week of August, Tranchina raised the envelope issue with HR Manager Ann Pearson. (Tr.67:15–18; 75:10–16) No other employee, including those who received the envelopes with notes, raised the issue with Pearson. (Tr.75:17–24) Syar subsequently installed a camera near the front counter and hired a handwriting analyst to catch the perpetrators. (Tr.26:22–25; 71:10–15; 76:12–13; 79:5–6) Vega was not told to stop writing on the envelopes or warned in any way by management. (Tr.27:1–5; 32:12–15; 75:25–76:6) Vega was made aware of the camera around September 9, 2017, when a co-worker pointed it out to him. (Tr.29:1–8; 32:2–8; 36:8–17) Vega immediately stopped writing notes on the envelopes when he learned about the camera and management's attempt to catch the perpetrator. (Tr.29:2–3; 32:10–11)

To his knowledge, Vega was the only employee videotaped writing on the envelopes. (Tr.37:14–19) Tom Vella, a co-worker, was also observed on camera standing with Vega as Vega wrote on the envelopes. (Tr.70:19–24; 71:5–7) Vella did not actually write on the envelopes. (Tr.71:22–23)

Termination

On September 11, 2017, Vega and Vella were called into the main office. (Tr.24:9–15; 56:9–16) When Vega arrived, Jesse Espinoza, Vega's business representative, was waiting in the lobby. (Tr.24:18–20) Vega, Vella, and Espinoza went to the conference room, where Irvine, Pearson, and Lance Stevenson were waiting. (Tr.25:8–9) Pearson handed Vega a letter of termination for impersonating a quarry manager. (Tr.25:10–11; 56:18–19) Vella was suspended for two days without pay and given a written warning in his file. (Tr.72:2–3)

Vega testified that Espinoza said they would grieve Vega's termination. (Tr.26:16–17) The grievance was initiated the same day. (Tr.57:14–16) A board of adjustment (grievance) hearing was held in mid to late October. (Tr.58:3–11) At the hearing, two company representatives, including James Irvine, and two union representatives, including Bran Eubanks, met to resolve Vega's contest of his termination. (Tr.58:15–17; 59:10–20; 62:15–18; 64:23–65:5; 66:13–18) Ultimately, the grievance board was unable to reach an agreement—both company representatives sided with the company; both union representatives sided with Vega. (Tr.66:9–10; 66:18–23)

Animus & Disparate Treatment

Vega testified he felt there was "bad blood" with Irvine ever since Irvine's promotion to superintendent in 2014. (Tr.32:24–25; 33:12–24) As a Union Steward, Vega had a history of bringing complaints to Irvine, which were not resolved. (Tr.34:1–4) Vega testified that he would have to "go the union route" to deal with these issues, resulting in his having to "battle it out" with human resources. (Tr.34:5–9) Vega also testified that he never experienced hostility or animus toward himself in his role as a miner's rep. (Tr.46:1–3)

Vega contends that after he was terminated, he learned that Tranchina had warned other miners to stop writing on the envelopes. (Tr.31:14–18; 31:23–32:1; 37:21–38:2) Vega testified that he would have stopped writing on the envelopes had Tranchina given him the same warning he gave to the other miners. (Tr.31:18–20) Vega testified that this discrepancy in treatment made him feel that he was being singled out. (Tr.32:16–21)

Vega also testified about an incident in 2015, when management tried to suspend him for failing to show up for work, although he had already received permission to take leave from Bob Schwab, the human resources manager at the time. (Tr.34:15–35:18) Vega believes this was another example of management singling him out. (Tr.34:12–15)

II. DISCUSSION OF RELEVANT LAW

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

Congress created temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 624–25.

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

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

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

29 C.F.R. § 2700.45(d)

The scope of a temporary reinstatement hearing is narrow, being limited to a determination whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

The legislative history for section 105(c) reveals that Congress discussed the term "frivolous" with the understanding that a complaint is not frivolous if it "appears to have merit." S. Rep. No. 95-181, at 36–37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard has also been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Res., Inc.*, 920 F.2d. at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

When determining whether a miner's discrimination claim is not frivolous, the Court is essentially required to consider the facts in the light most favorable to the claimant. When presented with conflicting evidence, the judge and the Commission are not required to resolve conflicts in testimony at the temporary reinstatement stage of a discrimination proceeding. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999), *citing Jim Walter Res., Inc.*, 920 F.2d at 744. Indeed, the Commission has determined that it is inappropriate for the Judge to make credibility determinations or resolve conflicts in testimony during a temporary reinstatement hearing. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). Rather, "[a] non-frivolous issue may be shown where there is both supporting and detracting evidence in the record." *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252, 1255 (June 2012), *citing Chicopee Coal Co.*, 21 FMSHRC at 718–19. Where there is conflicting evidence in the record, there must be facts in the record that support the Secretary's theory of liability in order to meet the "not frivolously brought" standard. *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1878–79 (Aug. 2012).

To prove a prima facie case of discrimination under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner engaged in protected activity; and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla–Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

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

Regarding the nexus requirement, judges and the Commission have adopted elements of the full prima facie case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in bridging the sometimes difficult gap between alleged actions and the intentions behind them. *See, e.g.*, *CAM Mining, LLC*, 31 FMSHRC at 1088 ("While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test."). In recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510–12.

III. CONTENTIONS

The Secretary of Labor on behalf of Complainant argues that he has met his burden of establishing that the discrimination complaint is non-frivolous, and, as a result, Vega should be temporarily reinstated. The Secretary asserts that Vega's complaints to his supervisors in January, July, and August of 2017 constituted protected activity and that his termination on September 11, 2017, was an adverse action, for which Syar is liable under the Act.

Respondent argues that no nexus exists between Vega's alleged protected activity and the subsequent termination because Vega was terminated for tampering with employee pay checks and forging a manager's initials.

IV. APPLICATION OF LAW TO THE EVIDENCE

The scope of this temporary reinstatement proceeding is narrow. For the reasons set forth below, I find that Vega's discrimination complaint was not frivolously brought.

a. Vega Engaged in Protected Activity

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Protected activity under the Act can include making a complaint to an operator or its agent about unsafe equipment, *see, e.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1995), or an alleged danger or safety or health violation. *See, e.g.*, *Sec'y of Labor on behalf of Davis v. Smasal Aggregates & Asphalt, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ).

Vega testified that he made three safety complaints. The first was made to shop safety director Kerr in January 2017, regarding the heavy smoke in the hose repair room.[2] The second, also regarding the smoke in the hose repair room, was brought to the attention of Vega's direct supervisor Calvin and parts specialist Novack in July 2017. The third safety complaint was made to Kerr in July or August 2017, regarding a near-miss incident on the quarry haul road and the type of signs legally required on a road with the haul road's width. I note that Respondent has not disputed that Vega made these complaints.

I conclude that the Secretary has presented sufficient evidence at this temporary reinstatement stage to establish that Vega's safety complaints are protected activities under the Act.

b. Vega Suffered an Adverse Employment Action

According to the Act and well-settled Commission precedent, suffering a discharge or demotion is an adverse employment action. 30 U.S.C. § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Vega was terminated on September 11, 2017. His termination constitutes an adverse employment action. The Secretary has presented sufficient evidence to satisfy this element of the test at this temporary reinstatement stage.

c. A Nexus can be Reasonably Alleged Between the Protected Activity and the Adverse Employment Action

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Circumstantial evidence may include: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and (4) disparate treatment. *Id*. at 2510–12. I will discuss each factor in turn below.

1. Knowledge of the Protected Activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC*, 31 FMSHRC at 1090, *citing Chicopee Coal Co.*, 21 FMSHRC at 718.

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), *citing Chacon*, 3 FMSHRC at 2510. Whether the operator had knowledge of the protected activity may be "proved by circumstantial evidence and reasonable inferences." *Id.* Additionally, the Commission has held

[2] Although Vega testified numerous times at hearing that he complained to Kerr about the smoke in January 2017, he failed to mention this event in his Discrimination Complaint. *See* Ex. S–A.

that a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment. *See Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1067–68 (May 2011) (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions."); *see also Bos. Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–18 (6th Cir. 1987) (imputing plant manager's knowledge of, and animus against, employee's protected activity based on his involvement in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted).

Vega testified that he spoke directly with Napa shop safety director Kerr about the smoke in the hose repair room in January 2017. In July 2017, Vega discussed the smoke issue with parts specialist Novack when he inquired why the part was put on hold. Vega allegedly stated that MSHA might have to get involved if the smoke continued to be an issue.

Vega also testified that he spoke directly about the haul road incident with Kerr in either July or August 2017. According to Vega, Kerr later told him that Napa shop superintendent Irvine was upset that Vega was involving himself with quarry safety issues. At the hearing, Irvine admitted knowing that safety complaints had been made regarding both the Napa quarry haul road and the smoke in the hose repair room, but he denied knowing who specifically made the complaints. (Tr.64:14–22)

Nonetheless, a credibility determination is proscribed at this juncture. The allegation by Vega that he spoke directly with Napa shop safety director Kerr in January 2017 and parts specialist Novack in July 2017, regarding the smoke issue in the Hose Repair Room, and with Kerr again in July or August 2017, regarding the near-miss incident at the haul road, is sufficient at this stage to establish a non-frivolous issue as to Respondent's knowledge of Vega's safety complaints.

2. Coincidence in Time

The Commission has stated that "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive [. . .]." *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, "[W]e 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time."' *Sec'y of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Often, improper motivation is found "where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge." *Baier*, 21 FMSHRC at 958 (citing *Knotts*, 19 FMSHRC at 837).

Improper motive has been found in cases with varying periods between the protected activity and the adverse action, ranging from a few hours to a few months. *See, e.g.*, *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986–87 (holding that the ALJ was correct in inferring a discriminatory motive from adverse action taken less than two hours after complainant's safety complaints); *Sec'y of Labor on behalf of Houston v. Highland Mining Co.*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (holding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of a nexus); *Baier*, 21 FMSHRC at 959 n.7 (holding that two weeks between complainant's discussion with MSHA inspector and discharge was sufficiently coincidental in time to support a finding of discriminatory motive); *see also CAM Mining, LLC*, 31 FMSHRC at 1090 (holding that three weeks between the protected activity and adverse action was sufficient to find discriminatory motive); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (holding that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity); *Hyles*, 21 FMSHRC at 42, 46–47 (finding temporal proximity despite 15-month gap between miners' contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA's issuance of penalty as a result of the miners' notification of the violations and given evidence of intervening acts of hostility, animus, and disparate treatment).

In this case, Complainant's protected activities occurred approximately eight months, two months, and one month before the adverse action. I determine that this proximity in time, especially in light of Vega's contention that Irvine was aware of Vega's role in at least one of his safety complaints, establishes a non-frivolous claim that a nexus exists.

3. Hostility Toward the Protected Activity

The Commission has held, "[h]ostility towards protected activity—sometimes referred to as 'animus'— is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon*, 3 FMSHRC at 2511 (citations omitted).

Vega testified that he felt there was "bad blood" with Irvine, that Irvine put a stop to the blade part request, and that Irvine was upset with Vega for involving himself with safety issues at the Napa quarry. I find that the Secretary has presented sufficient evidence to establish a non-frivolous claim that management may have harbored hostility or animus about Vega's alleged protected activities.

4. Disparate Treatment

Disparate or inconsistent treatment is another, indirect indicium of discrimination. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls

the latter." *Chacon*, 3 FMSHRC at 2512. It has been recognized that "precise equivalence in culpability between employees" is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.*

While disparate treatment is most often analyzed by comparing disciplinary fates of similarly situated individuals, Vega's testimony that he was not afforded the same warning to stop writing on the envelopes that Tranchina gave to other miners establishes a non-frivolous issue as to Vega's inconsistent, and possibly disparate treatment.

d. Conclusion

The Secretary has established a non-frivolous claim that: (1) Vega engaged in protected activities; (2) Vega suffered an adverse employment action; and, (3) there was a nexus between the protected activities and the adverse employment action. Vega is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

V. ORDER

It is **ORDERED** that **ANTHONY VEGA** be immediately **TEMPORARILY REINSTATED** to his former job with Syar Industries, Inc. at the Syar Napa shop at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint within **30 days**. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Respondent did not violate Section 105(c) of the Act.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710

January 11, 2018

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of CARL EBERT, Complainant v. MARSHALL COUNTY COAL CO., Respondent	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-565-D MSHA No. MORG-CD-2016-19 Mine: Marshall County Mine Mine ID: 46-01437

DECISION

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Complainant;[1]
Philip K. Kontul, Esq., Daniel D. Fassio, Esq., Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., Pittsburgh, Pennsylvania for Respondent

Before: Judge Feldman

This case is before me based on an August 19, 2016, discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2006) ("the Act") by the Secretary of Labor ("the Secretary") on behalf of Carl Ebert against Marshall County Coal Co. ("Marshall County"). The hearing was conducted in Wheeling, West Virginia, on May 23 and May 24, 2017.[2] The parties have filed post-hearing briefs that have been considered in the disposition of this matter.

[1] The United Mine Workers of America ("UMWA") filed an unopposed post-hearing Entry of Appearance on September 29, 2017. However, the UMWA has not filed any briefs in this matter. A copy of this decision has been provided to the UMWA.

[2] There is an error in the pagination of the two-volume hearing transcript. Volume 1 ends at page 262. However, Volume 2 begins at page 163, instead of page 263. Consequently, in citing Volume 2 in this decision, the number 100 has been added to each of the numbered pages in Volume 2 so that the transcript pages can be cited consecutively. By way of illustration, page 164 in Volume 2 would be cited as page 264.

I. Statement of the Case

The Secretary alleges that Marshall County violated the provisions of section 105(c)(1) of the Act,[3] 30 U.S.C. § 815(c)(1), when it suspended Ebert for two-and-a-half days for allegedly failing to timely complete a pre-operational ("pre-op")[4] examination of his shuttle car on March 7, 2016, at the Marshall County Mine ("the mine"). The Secretary contends that Ebert's suspension was motivated, at least in part, by Ebert's safety related complaints that occurred in the weeks preceding Ebert's suspension. Marshall County seeks dismissal of the subject discrimination complaint as untimely. Alternatively, Marshall County asserts that Ebert's suspension was motivated by an independent business justification, and not by Ebert's protected activity.

Activities on the subject shift at the working section began at approximately 9:05 a.m. on March 7, 2016. At that time, foreman Grant Paugh completed his pre-shift meeting with the section crew, at which time Paugh departed the power center to conduct his fire boss duties. After completing his fire boss duties, Paugh returned to the section power center at approximately 9:55 a.m. at which time he determined that Ebert had not begun the pre-op examination of his shuttle car. The evidence reflects it took Ebert approximately 30 additional minutes to complete his pre-op examination. Thus, Ebert was not available to begin his assigned routine mining activities, such as operation of his shuttle car, until approximately 10:25 a.m. Believing that Ebert did not have an adequate justification for the delay in his pre-op inspection, Paugh had Ebert removed from the mine, which ultimately resulted in the imposition of a two-and-a-half day suspension.

A mine operator has a legitimate business interest in ensuring that pre-op examinations are completed in a timely manner. Marshall County's rejection of Ebert's explanation for the significant delay in completing his pre-op duties is a reasonable exercise of its administrative prerogatives. Thus, Marshall County has demonstrated a credible business justification for Ebert's suspension. Although Ebert did communicate several safety related concerns to Paugh in the weeks preceding Ebert's suspension, Paugh took actions that reasonably addressed each of Ebert's concerns. The Secretary has failed to demonstrate, through adequate direct or indirect evidence, that Ebert's suspension was also motivated, in any part, by his protected activity. Consequently, Ebert's discrimination complaint must be denied.

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[3] Section 105(c)(1), provides, in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator … of an alleged danger or safety or health violation in a coal or other mine, … or because of the exercise by such miner … of any statutory right afforded by [the Act].

[4] For the purposes of this decision, the term "pre-op" examination is synonymous with the term "pre-shift" examination.

II. Timeliness

Section 105(c)(3) of the Act provides that "[w]ithin 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred." Section 105(c)(2) further provides that "[i]f upon [the] investigation [of a complaint], the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination." 30 U.S.C. § 815(c)(2). Commission Rule 41(a) has interpreted the statutory provision to "immediately file a complaint with the Commission" to mean that the Secretary is required to file a complaint with the Commission "within 30 days after his written determination that a [105(c)] violation has occurred." 29 C.F.R. § 2700.41(a).

Thus, the operative time period for the Secretary's filing of a discrimination complaint, as contemplated by Section 105(c) of the Act and Commission Rule 41(a), is 120 days (a total of 90 days in the Act plus 30 days in Rule 41(a), after the filing of the underlying complaint with the Mine Safety and Health Administration ("MSHA")). Ebert's complaint was filed with MSHA on March 17, 2016.

Relying on the operative 120 day filing period, Marshall County argues that the Secretary was required to file the subject 105(c)(2) complaint on or before July 15, 2016. Resp't Br. at 14-15. However, the Secretary did not file the complaint until August 19, 2016, approximately 155 days after the filing of Ebert's original complaint. Thus, Marshall County seeks the dismissal of the complaint as untimely because it was not filed within 120 days. I construe Marshall County's untimeliness claim as a motion to dismiss.

The Commission has stated that "[w]hile the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these timeframes are not jurisdictional." *Sec'y of Labor on behalf of Hale v. 4-A Coal Co., Inc.,* 8 FMSHRC 905, 908 (June 1986). Thus, a late-filed complaint "is subject to dismissal [only] if the operator demonstrates material legal prejudice attributable to the delay," and "absen[t this] requisite foundation, the judge [would] err[] in granting [a] motion to dismiss" on untimeliness grounds. *Id.* at 908-909. Specifically, the legislative history states that:

> The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under section 10[5](c)(3) to notify the complainant within 90 days whether a violation has occurred. *It should be emphasized, however, that these time-frames are not intended to be jurisdictional.* The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should

not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added).

Having filed the subject 105(c)(2) complaint on August 19, 2016, instead of on or before July 15, 2016, the Secretary's filing is approximately one month late. Given the Secretary's rather brief filing delay, Marshall County does not assert that it has suffered actual prejudice. However, Marshall County seeks to support its request for dismissal on two theories. First, Marshall County asserts that the Secretary must justify the reason for the filing delay to successfully defeat a motion to dismiss for untimeliness. Resp't Br. at 16-17. While an explanation by the Secretary may be relevant in cases where there is a lengthy filing delay, the legislative history makes clear that the relatively brief one month delay in this case "should not [prejudice a complainant] because of the failure of the Government to meet its time obligations." S. Rep. NO. 95-181, *supra*.

The second assertion raised by Marshall County is that the Secretary's failure to abide by the relevant filing deadline is inherently prejudicial. Resp't Br. at 16-17. In support of this proposition, Marshall County notes that Commission Judge Manning has held that the Secretary's delay in filing a 105(c)(2) complaint may be viewed as prejudicial per se. Respt. Br. at 16 (citing *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 793, 795 (June 2000) (ALJ)). However, unlike this case where the filing delay is approximately one month, the filing delay in Judge Manning's case was more than 36 months. The approximate 35 month differential is a distinction with a difference. Consequently, Marshall County's reliance on Judge Manning's decision is misplaced. Having failed to demonstrate any meaningful prejudice, Marshall County's motion for dismissal of the subject complaint as untimely **shall be denied**.

III. Findings of Fact

a. Background

Carl Ebert has been employed at the Marshall County Mine for approximately seven years. Tr. 17. Grant Paugh began working at the mine as a section foreman in November 2015 and became Ebert's supervisor shortly thereafter. Tr. 55, 99, 282, 285. Paugh conceded that Ebert has a reputation at the mine as "a safety advocate," who does not hesitate to "bring safety issues he observes to" his supervisors. Tr. 340.

Ebert has worked at the mine as a shuttle car operator for the last five years. Tr. 17-18. A shuttle car is used to transport coal from the vicinity of the face to the dumping point ("tail piece") of a belt line, where it is then carried to the surface through a series of conveyers. Tr. 18.

With the exception of one incident that occurred in March 2015 that did not involve Paugh, for which Ebert received a verbal warning, there is no evidence that Ebert had been the victim of any disciplinary action as a consequence of his safety related advocacy. The March

2015 incident occurred when Ebert detected methane in the explosive range after noticing that there was no line curtain ventilating the section face. Tr. 93. Consequently, Ebert de-energized his shuttle car. Tr. 94. Although Ebert's supervisor Shannon Looney initially disagreed that there was methane at potentially hazardous levels, he eventually allowed Ebert to retrieve and install line curtains at the face. Tr. 94. Disappointed by Looney's reaction, at the end of his shift Ebert asked his section coordinator, Justin Miller, if he could be transferred to a different crew with a different foreman. Tr. 95. Looney approached Ebert and Miller and disputed Ebert's version of events. Upon being challenged, and in the presence of Looney, Ebert told Miller that Looney "did not have enough brains to blow his own nose." Tr. 95, 146. Although Ebert was informally counseled as a result of this incident, there was no disciplinary action taken, nor was there any documentation placed in Ebert's personnel file. Tr. 163-66; Resp't Ex. 9.

Although there is no history of relevant adverse action suffered by Ebert prior to Paugh's employment at the mine, the Secretary asserts in his brief that "Ebert's safety efforts earned him the particular ire of Foreman Paugh, who viewed his safety complaints as delaying production." Sec'y Br. at 2. Roof bolter Todd Cross equivocally opined that he "never really had that much problems with [Paugh's response to safety complaints], but, I mean, on some of the safety issues, he's not the best." Tr. 222-23.

The Secretary relies on five instances of protected activity that are related to safety concerns communicated to Paugh in the weeks preceding Ebert's March 2016 suspension. Sec'y Br. at 10. The occurrence of these incidents is not challenged by Marshall County. Ebert testified that Paugh addressed each of the five concerns raised by Ebert that are enumerated below. Tr. 134-35.

b. History of Protected Activity

i. Unbolted Cuts

During the weeks preceding Ebert's March 2016 suspension, roof-bolter Cross informed Ebert that the mine had four unbolted cuts at the face and that the company's roof control plan required installation of a first row of roof bolts before a fifth cut could be taken. Tr. 113; Sec'y Ex. 4 at 5. Paugh took the necessary action to ensure that the first row of roof bolts was installed. Ebert testified that Paugh was unhappy because it took an hour to install the necessary bolts, which interfered with production. Tr. 113.

ii. Emergency Ride Brake

Several days prior to Ebert's suspension, a mechanic from the previous shift informed Ebert's crew that there was a problem with the section's emergency ride brakes. Tr. 108; Sec'y Ex. 4 at 5. Ebert asked Paugh to have the emergency ride brakes replaced. Tr. 108. Ebert testified that the mine's mechanic, Dean Williams, examined the problem and concluded that there was a leak in the brakes. Tr. 108. According to Ebert, Paugh told Williams, "Fill it with fluid, and let's go." Tr. 108. Ebert does not contend that mechanic Williams concluded that the brakes needed to be replaced. Ebert testified that he questioned Paugh's decision because he still did not think the

emergency ride vehicle was safe. Ebert further testified that Paugh became upset when Ebert expressed his opinion. Tr. 108.

iii. Loading Supplies

Prior to Ebert's suspension, Paugh requested Ebert and his crew to retrieve supplies that were located at the end of a track. However, there was a roof bolter on a flat car, used to transport equipment, that was chained to the flat car in a crooked manner, causing a blockage of the walkway. Paugh requested the crew to retrieve the supplies by having some individuals on one side of the flat car hand over the supplies to individuals positioned on the other side of the flat car by passing the supplies over the top of the bolter. Ebert suggested to Paugh that if a pile of trash, consisting of old mangled rib straps, bolts, cardboard, and oil cans, located on the side of the track where the supplies were located, was removed, it would provide a safer, direct path to the supplies. Paugh adopted Ebert's suggestion to remove the trash. However, Ebert testified that Paugh "became very irritated." Tr. 102-03; Sec'y Ex. 4 at 6.

iv. Shuttle Car Cable

On March 4, 2016, Ebert observed that a shuttle car power cable was tied to a rib strap by a tow rope. Tr. 104; Sec'y Ex. 4 at 4. Ebert believed this was not a safe method of securing the power cable because the rib strap was sharp and could slice through the cable's rubber jacket, creating a shock hazard. Ebert told Paugh that a proper anchor bolt was needed to secure the power cable. Cross testified that Paugh was not happy about having to install an anchor bolt instead of using the rib strap as an anchor. Tr. 222. However, after initially disagreeing, Paugh acquiesced to Ebert's suggestion that an anchor bolt was required. It took approximately 20-25 minutes to install the anchor bolt. Tr. 104.

v. Excessive Rail Cars

On March 5, 2016, Marshall County attempted to bring an additional rail car to the end of the mine section's track. At that time, there were already 10 supply cars on the track. Ebert believed West Virginia mine regulations only permitted a maximum of seven cars at the end of the track. Ebert testified that when he raised this issue, Paugh reportedly "became very irritated with [him]" and asked, "'Why are you always trying to shut me down?'"[5] Tr. 99-100.

Paugh had been Ebert's foreman since December 2015. During the approximate three month period preceding his March 2016 suspension, Ebert continued to raise safety issues when appropriate, despite his testimony that Paugh was resentful. Ebert testified that although the safety issues he raised were always addressed, he claimed they were done so reluctantly. There is no evidence that Ebert was the victim of any adverse action as a result of his safety concerns

[5] Ebert raised an additional safety related concern expressed to Paugh regarding the location of a refuge chamber during a March 2016 interview with an MSHA special investigator at MSHA's District 3 Field Office in Clairsville, Ohio. *See* Sec'y Ex. 4 at 6. This incident was not addressed during testimony.

during the months preceding his March 2016 suspension. Tr. 134-35. Paugh continued to be Ebert's supervisor for an uneventful eight month period following Ebert's March 2016 suspension. Tr. 182.

c. March 7, 2016 Incident

On March 7, 2016, there were three operational shifts at Marshall County's mine: a morning shift, from 8:00 a.m. to 4:00 p.m.; an afternoon shift, from 4:00 p.m. to midnight; and a midnight shift, from midnight to 8:00 a.m. Tr. 47-48. On that day, Paugh's crew of approximately 10 miners, including Ebert, was assigned to work the morning shift in a continuous mining section driving entries in preparation for setting up the 14 East longwall section. Tr. 35, 55, 282-83. Each shift for a continuous mining section has two shuttle car operators. On March 7, Ebert and John Harris were partnered together as the two shuttle car operators for the morning shift. Tr. 30-31.

On March 7, 2016, Paugh's crew reported to the mine at 8:00 a.m. and traveled underground via elevator, whereupon they traveled to the working section via a mantrip, arriving at the 14 East power center at approximately 9:00 a.m. Tr. 305. Beginning shortly after 9:00 a.m, Paugh conducted a routine "safety talk" with the crew at the power center, during which he provided general information about the roof control plan and the layout of the section. Tr. 55-56, 288; Resp't Ex. 7.

Upon completion of the safety talk at approximately 9:05 a.m., Paugh left the crew to perform his fire boss duties and returned to the section at approximately 9:55 a.m. Tr. 293; Resp't Ex. 7. During this time, Paugh traveled to each section face and to the track where the mine's charger was located. In addition, he took air and methane readings, checked the refuge alternatives, and inspected for violations of mandatory health and safety standards. Tr. 292-93. In the meantime, Ebert was required to conduct a pre-operational check on his shuttle car, after which he was expected to start loading supplies on the continuous miner. Tr. 56, 291. Ebert's shuttle car was used on the previous shift without evidence of any reported problems. Tr. 48-50, 197-98.

Paugh testified that a typical pre-operational examination of a shuttle car takes approximately 10-15 minutes. Tr. 307. For example, Paugh testified that Ebert's partner Harris routinely took 5-10 minutes to perform the part of the pre-op that involved inspecting the shuttle car and that it would then take him roughly another 5 minutes to perform the rest of his pre-op duties, which would include watering the roads. Tr. 356. In contrast, Ebert testified that the pre-operational examination of his shuttle car on a typical day with no major problems took him approximately 40-45 minutes. Tr. 33.

The right of a miner to perform a thorough pre-op examination is protected by section 105(c)(1) of the Act. Sec'y Br. at 12. Although Paugh was aware that it normally took Ebert up to 45 minutes to complete a pre-op inspection, there is no evidence that Paugh had expressed any objections or concerns over the length of time Ebert took to complete his pre-op responsibilities. Tr. 356.

Ebert testified that he began his pre-op duties by assisting his partner Harris in watering the tram road as required. Tr. 56-57. The hose used to accomplish watering the road is the equivalent of a three-quarter inch garden hose. Tr. 390. Ebert claims the hose was tangled with other cables along the mine's ribs. Tr. 59. Therefore, while Harris watered approximately 300 feet of the tram road, Ebert reportedly assisted him by untangling the water hose to create the slack necessary for Harris to water the entire length of the road. Tr. 60-61.

In his initial interview with MSHA, Ebert claimed that it took him only a few minutes to untangle the hose from around the shuttle car cable. Gov't Ex. 4 at 2. At trial, Ebert initially testified that untangling the hose and providing the requisite slack for watering the roadway took approximately 10-15 minutes that day. Tr. 60-61. On cross-examination, he stated that it took him 15-20 minutes. Tr. 118-119. Minutes later, after further deliberation, Ebert stated that it took him half an hour. Tr. 120-121.

Next, Ebert testified that before proceeding to his shuttle car to complete his pre-op duties, he was stopped by two mechanics, Kirk Roth and Tim Black, who sought information concerning the layout of the section and directions to the tool car, as they did not normally work on the 14 East Longwall setup section. Tr. 61-62, 243. Black was a union mechanic, and Roth was a company maintenance foreman. Tr. 62. Ebert claims this conversation lasted 10-15 minutes. Tr. 119. Black testified that the conversation lasted around 7-10 minutes. Tr. 245.

Having completed his fireboss duties, Paugh returned to the power center at approximately 9:55 a.m. and noticed Ebert talking to Roth and Black, in the same vicinity at which he had last seen Ebert at 9:05 a.m. Tr. 295-96; Resp't Ex. 7. Paugh instructed Ebert to begin helping the crew supply the continuous miner. However, Ebert responded that he could not do so because he had not yet completed his pre-op. Tr. 295. Paugh told him that "quite a bit of time had [e]lapsed," somewhere between 45-50 minutes by his estimation, and then "asked him why he hadn't completed his pre-op [in] that time." Tr. 296. Ebert testified he explained that he had some difficulty untangling the hose earlier and that he was then interrupted by Roth and Black, who needed assistance. Tr. 63, 196. In response, Paugh told Ebert to finish his pre-op. Tr. 64. Consequently, Ebert continued to his shuttle car and completed the remaining tasks for his pre-op examination, which he estimated required another 30 minutes. Tr. 64, 82-84.

The evidence with respect to the extent that Ebert assisted Harris in watering the road is equivocal. Paugh testified that he immediately sought out Harris to confirm whether Ebert had been assisting him with his tasks. At that time, he observed Harris still watering the road. Tr. 300. However, Paugh did not notice any entanglement of the hose. Tr. 302-03. Paugh testified that Harris responded he had watered the roads himself, "just like always." Tr. 300. Paugh testified that although this job was the responsibility of both Harris and Ebert, Harris did the job himself on the majority of occasions. Tr. 301. Paugh claimed to have spoken to Ebert about this problem before. Tr. 301-02. Tim Black testified that when he first observed Ebert before engaging him in conversation, he believed Ebert "was dragging a hose or something." Tr. 249.

Paugh testified that, after speaking to Harris, Paugh returned to Ebert and told him that it was "ridiculous" and "unacceptable" that Ebert did not finish his pre-op and assist with other

tasks as needed during the preceding approximate 45 minute interval when Paugh was conducting his fire boss examination. Tr. 308-09. Paugh sought a further explanation from Ebert to account for Ebert's apparent inactivity during this period, but did not receive any. Tr. 308-09. Paugh testified that he told Ebert that his insubordinate behavior would not be tolerated. Tr. 309. According to Paugh, Ebert responded, "You do what you got to do." Tr. 309. Ebert denies that this conversation took place. Tr. 129-130. However, Ebert does not deny that he was significantly delayed in completing his pre-op examination duties. Tr. 82-83.

Paugh testified that after failing to get an adequate explanation from Ebert, he called his own supervisor, Brad Racer, to request Ebert's removal from the section. Tr. 310. Paugh testified that he wanted someone else to remove Ebert from the mine because he wanted to avoid a confrontation. Tr. 312.

At around 10:20 a.m., after unsuccessfully attempting to reach the mine superintendent, Paugh called the mine's general manager, Eric Grimm, to inform him that he was removing Ebert from the mine. Tr. 313-314. Then, Paugh took notes to record his version of these events. Tr. 318; Resp't Ex. 7.

After completing the pre-op of his shuttle car, at approximately 10:25 a.m., Ebert proceeded to walk to the continuous miner where he helped load supplies on a bolter. *See* Tr. 64, 69, 82-84. The operable 10:25 a.m. time is consistent with Ebert's testimony that he needed an additional 30 minutes to complete the pre-op of his shuttle car after speaking to Paugh, who had returned to the power center at approximately 9:55 a.m. Tr. 84, 294. Thus, the evidence reflects Ebert was not available to engage in production activities for at least a one hour and 20 minute period, beginning the calculation from approximately 9:05 a.m. when Paugh completed his safety meeting at the power center.

After Ebert completed loading the supplies on the bolter, he asked Paugh if there was anything else Paugh wanted him to do. Tr. 70. Paugh told him to go to retrieve his shuttle car. Tr. 70. When Ebert reached the shuttle car, he was greeted by Racer, who informed him that Paugh had requested Ebert's removal from the mine. Tr. 70. Ebert testified that Racer told him that he was being removed for refusing a direct order and being argumentative. Tr. 71. Ebert testified that he disputed these charges and told Racer that Roth could corroborate his account. Tr. 71.

When Ebert reached the surface, he clocked out and went to the human resources ("HR") department to seek clarification from Amy Bailey, an HR employee, about his next course of action. Tr. 73-74. Ebert was paid for the time he worked that day. Tr. 75-76.

Later that day, Paugh spoke with General Manager Grimm, who ultimately was responsible for disciplining miners. Tr. 319-20, 358-59. Paugh related to Grimm what had occurred with Ebert and explained his reasons for removing him from the mine. Tr. 319-20. Paugh also provided Grimm with his notes. Tr. 362-63; *see* Resp't Ex. 7. In addition, Paugh related to Grimm what Harris reportedly had told him. However, Grimm did not seek to verify this information from Harris. Tr. 367-68.

Ebert was later contacted by telephone and asked to appear for a meeting with mine management. Tr. 75-76. The meeting took place several days after the March 7, 2016, incident. Tr. 265; Resp't Ex. 10 at 2. At the meeting, Ebert was accompanied by two union officials. Tr. 75; 172-73. During the meeting, Grimm asked Ebert to account for his time during the "47 minute" period Paugh was absent from the face while conducting his fire boss duties. Tr. 367. Grimm concluded that Ebert did not offer a "credible" and "satisfactory explanation" for "what he did for 47 minutes when he should have been pre-oping his shuttle car." Tr. 367.

Following the meeting, Grimm decided to suspend Ebert for two and a half days for insubordination. Tr. 367-71; Sec'y Ex. 9. Insubordination is defined, under Marshall County Coal's Employee Conduct Rule Number 4, as "refusal or failure to perform work assigned or to comply with supervisory direction." Resp't Ex. 16. Ebert returned to the mine to resume work on March 15, 2016. Tr. 75-76.

IV. Further Findings and Conclusions

a. Analytical Framework

Section 105(c) prohibits retaliating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act," recognizing that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted in Legis. Hist.* at 623. It is the intent of Congress that, "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id*. at 624.

The Secretary has the burden of demonstrating a prima facie case of discrimination. In order to establish a prima facie case, the Secretary must establish that Ebert engaged in protected activity, and that Ebert's March 2016 two-and-a-half day suspension was motivated, in some part, by that activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

Marshall County may rebut a prima facie case by demonstrating, either that no protected activity occurred, or, that Ebert's suspension was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Consequently, Marshall County seeks to challenge Ebert's discrimination complaint by asserting that his suspension was solely predicated on a legitimate business justification. Specifically, Marshall County contends that Ebert's March 7, 2016, failure to timely perform the pre-op duties required of a shuttle car operator was the sole basis for his suspension.

Marshall County may also affirmatively defend against a prima facie case by establishing that it was also motivated by unprotected activity, i.e., a failure to timely perform pre-op examination duties, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d 738, 750 (11th Cir. 1990), *citing with approval*

E. Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

The Secretary contends that Ebert's protected activities were a motivating factor in Marshall County's decision to suspend Ebert. It is undisputed that Ebert had a reputation for being a safety advocate during his seven year employment at the mine. In addition, the Secretary relies on a series of safety related concerns communicated by Ebert to Paugh during the weeks preceding his March 2016 suspension.

When viewed in a vacuum, given the undisputed knowledge and coincidence in time of the protected activities relied upon by the Secretary, the Secretary has presented sufficient prima facie evidence "'from which the trier of fact *could infer* retaliation.'" *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1824 (Aug. 2012) (quoting *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011)). (Emphasis added).

Marshall County has not disputed this series of safety related complaints voiced shortly before Ebert's suspension. Despite Ebert's history of expressing safety concerns, Marshall County seeks to rebut Ebert's proffered prima facie case by contending that Ebert's safety related activities played no role in its decision to suspend him.

b. Alleged Business Justification

The evidence reflects that during the day-shift beginning at 8:00 a.m. on March 7, 2016, Paugh and his crew traveled to the 14 East Longwall setup section, arriving at the power center at approximately 9:00 a.m., at which time Paugh conducted his daily roof control meeting with his crew. Tr. 305. At approximately 9:08 a.m., Paugh left the power center to perform his fireboss duties, returning to the power center at approximately 9:55 a.m. Tr. 292-93. During this approximate 47 minute interval, Paugh expected Ebert and Harris to water the relevant roadway and perform pre-operational examinations for each of their respective shuttle cars. Tr. 56, 291.

Upon his return to the power center at approximately 9:55 a.m., Paugh observed Ebert talking to Roth and Black. Tr. 294-96. Black testified that the conversation with Ebert was about the layout of the section and directions to the tool car. Tr. 243. Upon approaching them, Paugh requested that Ebert help supply the continuous miner. Tr. 295. At that time, Ebert informed Paugh that he was unable to assist because he had not yet performed a pre-op examination of his shuttle car. Tr. 63. Ebert estimated that he needed an additional 30 minutes to perform the pre-op on his shuttle car. Tr. 64, 82-84.

To account for his failure to pre-op his shuttle car, Ebert told Paugh that he was delayed because he had some difficulty untangling the hose in preparation for assisting Harris with watering the tram roadway. He also told Paugh that his pre-op was further delayed because of his conversation with Roth and Black. Tr. 63-64.

Paugh questioned Harris to determine if Ebert's explanation for failing to pre-op his shuttle car during the 47 minute interval that had elapsed was justified. Paugh testified that he

asked Harris if Ebert had helped him water the road. Paugh testified that Harris responded that he had done the watering by himself, "just like always." Tr. 300.

Paugh's recollection at trial is somewhat inconsistent with his March 7, 2016, contemporaneous notes for the disciplinary action taken that day with respect to the degree that Ebert did, or did not, participate in watering the tram roadway. The notes, when read in conjunction with Paugh's testimony, reflect that when Paugh returned from his fireboss duties at 9:55 a.m., he found Ebert talking to Roth and Black at the power center. Tr. 295-96; Resp't Ex. 7. It is not difficult to imagine Paugh's state of mind when he found Ebert at the power center at 9:55 a.m., the very same location in which he had last seen him at approximately 9:05 a.m., when Paugh had departed to conduct his fireboss duties. When asked why Ebert did not complete the pre-op of his shuttle car, the notes reflect that Ebert replied that he "had to help stretch out [the] wash down hose." The notes further reflect that Harris stated that "this only took a couple minutes to do." Resp't Ex. 7.

In any event, both Paugh's testimony and his contemporaneous notes reflect that Paugh did not believe the "tangled hose" explanation was an adequate justification for the pre-op delay. In this regard, Paugh's contemporaneous notes further reflect that Paugh concluded that if it took five minutes to stretch the hose, "that leaves 42 minutes to complete [the] pre-op, which was not done." *Id*.

Although Ebert denies that this conversation occurred, Paugh testified that, given Harris's failure to corroborate Ebert's story, Paugh told Ebert that it was "ridiculous" and "unacceptable" that Ebert had not performed his shuttle car pre-op or assisted with other pre-op duties, and that Ebert's insubordination would not be tolerated. Tr. 129-30, 308-09. Paugh further testified that Ebert responded, "'You do what you got to do.'" Tr. 309.

To avoid a confrontation with Ebert, Paugh asked Racer, Paugh's immediate supervisor, to remove Ebert from the mine. Tr. 310-12. A disciplinary meeting was conducted by Mine Manager Grimm on March 9, 2016. Resp't Ex. 10. Participants at the meeting included members of mine management, Ebert, and union President Thomas McGary as well as union Vice-President Ryan Sparks. *Id.* Paugh was not present at the meeting and did not have the authority to suspend Ebert. *Id.*; Tr. 283. After hearing Ebert's account of the events of March 7, 2016, Grimm concluded that Ebert did not adequately explain why he had not begun the pre-op examination of his shuttle car for 47 minutes. Tr. 367. Consequently, Grimm imposed a two-and-a-half day suspension as a sanction against Ebert. Tr. 367-71.

The parameters for analyzing a claimed business justification for disciplining a miner who has brought a discrimination claim before this Commission are well settled. The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line

> with normal practice that it was mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission subsequently further explained that it is not the role of the judge to substitute his or her judgment for that of the mine operator if the proffered business justification is facially reasonable. The Commission stated:

> [A] judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

The Commission has addressed the parameters for showing that a mine operator's explanation for the adverse action complained of is not credible. Consistent with *Turner*, the Secretary must demonstrate that Marshall County's reasons for suspending Ebert either: (1) had no basis *in fact*; (2) did not *actually* motivate his suspension; or (3) were *insufficient* to motivate his suspension. *See Turner*, 33 FMSHRC at 1073 (citing *Madden v. Chattanooga City Wide Service Dep't.*, 549 F.3d 666, 675 (6th Cir. 2008)) (additional citations omitted) (emphasis in original).

The first and third showings addressed in *Turner* are inextricably intertwined. With respect to (1) basis in fact and (3) sufficient motivation, obviously mine operators have a legitimate interest in requiring their employees to complete their pre-op examinations in a timely manner. The evidence reflects that Ebert had not begun the pre-op examination of his shuttle car during the 47 minute period following the termination of Paugh's roof control meeting at the power center. Ebert testified that he needed approximately 30 additional minutes to complete his pre-op examination when Paugh requested, at 9:55 a.m., that he help load the continuous miner. Tr. 82-84. Thus, by his own admission, Ebert would not have been able to place his shuttle car in service or perform other routine activities as assigned until approximately 10:25 a.m.

Determining whether the 47 minute delay provides a reasonable justification for Marshall County's suspension of Ebert requires consideration of the chronology of the March 7, 2016, events. Ebert testified that his conversation with Roth and Black lasted approximately 10-15 minutes. Tr. 119. Black testified that the conversation took 7-10 minutes. Tr. 245. Thus, I conclude that the conversation with Roth and Black took no more than 15 minutes. This leaves approximately 32-37 minutes during which time Ebert failed to perform a pre-op examination of his shuttle car. In justifying this failure, Ebert, in effect, claims that it took him and Harris this period of time to jointly untangle the equivalent of a garden hose and water the roadway. Tr. 66. Thus, Ebert would have Marshall County believe that it took the equivalent of between 64 and 74 man minutes to water the roadway.

While it is true that the right to conduct a thorough pre-op examination is protected, it is also true that operators retain the authority to ensure that pre-op examinations are not unjustifiably delayed. The evidence reflects, when viewed in context, that Ebert's "tangled hose" explanation for the significant delay in the completion of his pre-op examination duties is not credible. It is noteworthy that Ebert has not adequately explained how long his reported attempts to untangle the hose delayed completion of his pre-op duties. In this regard, as previously noted, Ebert initially testified that this task took 10-15 minutes that day. Tr. 61. On cross-examination, he stated that it took him 15-20 minutes. Tr. 118-119. Minutes later, after further deliberation, Ebert stated that it took him half an hour. Tr. 120-121. In his initial interview with MSHA, Ebert claimed that the task took him only a few minutes. Gov't Ex. 4 at 2. Consequently, I find that Marshall County's rejection of Ebert's claimed justification for the delay in performing his pre-op examination on March 7, 2016, must be viewed as a legitimate exercise of its business judgment. Therefore, the record, on balance, reflects that Marshall County had a reasonable business justification for disciplining Ebert.

c. Alleged Discriminatory Motive

Having determined that the reasons advanced by Marshall County for Ebert's suspension were both factual and sufficient to motivate its disciplinary action, the first and third elements contemplated by *Turner* support Marshall County's claimed business rationale. We now turn to the second element in *Turner*: whether Ebert's untimely pre-op examination actually was the sole motivation for his suspension. Ebert's suspension was consistent with Marshall County's permissible conduct rule that prohibits "refusal or failure to perform work assigned or to comply with supervisory direction." Resp't Ex. 16. The rationale given to Ebert at the time of his suspension is consistent with the rationale proffered by Marshall County during the course of this proceeding. However, Marshall County does not simply prevail by showing that its justification for suspending Ebert was not implausible or otherwise pretexual. The Secretary may still prevail by showing that the operator was motivated, at least in part, by Ebert's protected activities.

As noted, the Commission has recognized that it is not uncommon for operators to attempt to mask discriminatory motivation by asserting that unprotected activity is the sole justification for the adverse action complained of. *Chacon*, 3 FMSHRC at 2516-17. In evaluating whether an operator's claimed business justification is disingenuous, the Commission has noted that direct evidence of a discriminatory motive is rare. As such, discrimination can usually only

be demonstrated through circumstantial evidence. *Id.* at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)).

The Commission has identified that some of the more common circumstantial indicia of discriminatory intent are: 1) knowledge of the protected activity and coincidence in time between the adverse action and that protected activity; 2) hostility or animus towards the protected activity; and 3) disparate treatment of the complainant. *Id.*

To successfully demonstrate a discriminatory motive by indirect evidence requires a rational connection between the indirect evidence and the fact in issue, i.e., the motivation for Ebert's suspension. *See Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) (citing *Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138 (May 1984)) (noting that there must be a rational connection between the evidentiary facts and the adverse action complained of). An evaluation of whether there is sufficient indirect evidence of discriminatory intent follows.

i. Knowledge and Coincidence in Time

Marshall County does not dispute that Ebert had a reputation as a safety advocate who frequently brought safety related issues to his supervisors' attention. Tr. 340. It is also undisputed that Ebert communicated at least five safety related concerns to Paugh in the weeks preceding his March 2016 suspension. Paugh's knowledge of Ebert's expressed safety concerns is imputed to Grimm. *See Turner*, 33 FMSHRC at 1068 (holding that a supervisor's knowledge of protected activity may be imputed to a decision maker without such knowledge, who nonetheless relied on the supervisor's recommendation). Moreover, there is a coincidence in time between these expressed safety related concerns and Ebert's suspension. Thus, two of the circumstantial elements identified in *Chacon* have been demonstrated. However, in apparent recognition that coincidence in time and knowledge, alone, may be inadequate to infer a discriminatory motive, the Secretary also asserts an animus toward Ebert's safety related activities, and, that Ebert was the victim of disparate treatment. Whether the Secretary has adequately demonstrated that these two elements of *Chacon* played a role in Ebert's suspension is discussed below.

ii. Animus

The Secretary alleges that Paugh exhibited hostility toward Ebert as a consequence of the following safety related concerns which were communicated to Paugh in the weeks preceding his suspension: (1) Ebert's insistence on ensuring adequate roof bolting before continuing production in a working section; (2) Ebert's concern regarding a defect in the brakes on an emergency ride; (3) Ebert's suggested safer alternative method for retrieving supplies from the end of a track; (4) Ebert's insistence that the safe anchoring of a power cable required installation of an anchor bolt rather than reliance on a rib strap; and (5) Ebert's concern regarding an excessive number of supply cars at the end of a section track. Sec'y Br. at 10, 14.

In evaluating whether there is sufficient evidence to infer animus toward protected activity, it is helpful to consider, by analogy, the Commission's longstanding case law with respect to a protected work refusal. In this regard, once a miner expresses a good faith,

reasonable belief in a hazard, the focus shifts to whether the mine operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Significantly, Ebert's testimony reflects that Paugh adequately responded to each of Ebert's enumerated safety related concerns by taking appropriate remedial actions.

Despite Paugh's responses to Ebert's complaints, the Secretary relies on Ebert's self-serving assertion that these complaints were not welcomed by Paugh. In this regard, Ebert testified that he perceived Paugh as being "angry," "irritated," and "upset" over Ebert's expressions of safety related concerns. Tr. 103, 108, 113. Ebert also alleges that Paugh accused Ebert of "always trying to shut [him] down." Tr. 100.

On balance, the evidence is insufficient to infer hostility on the part of Paugh based on Ebert's self-serving accounts without sufficient supporting evidence by a witness, or, objective evidence of discriminatory intent, such as relevant past verbal or written disciplinary actions. It is true that Cross testified that Paugh was "not happy" about having to install a roof bolt instead of using a rib strap as an anchor for a power cable because Paugh apparently believed that the rib strap did not jeopardize the integrity of the cable's outer jacket. Tr. 222. It would be naïve to think that a mine foreman will always welcome a subordinate miner's insistence on an alleged safety related remedy which the foreman believes is unnecessary. Of course, operators should err on the side of caution when deciding whether to address reasonable safety related concerns expressed by miners. Thus, it is the totality of the foreman's response which is dispositive of the issue of animus.

I am cognizant that hostility to safety related complaints can cause a chilling effect. However, the record does not reflect objective evidence of hostility in this case. There is no evidence of any adverse action suffered by Ebert at the hands of Paugh, either before or after his March 7, 2016, suspension, as a result of Ebert's practice of performing thorough pre-op examinations or because of his expressed safety related concerns. To assume animus as a motivating factor requires the conclusion that Marshall County implemented a "lying in wait" strategy by disingenuously seizing upon Ebert's failure to adequately explain the reason for the delay in completing his pre-op examination duties. Such an assumption is a bridge too far based on the evidence of record.

Although Cross testified that Paugh was "not the best" about responding to safety complaints, Cross also testified that he never personally experienced a problem with Paugh with respect to any of his safety related concerns. Tr. 222-23. Cross's equivocal testimony is insufficient to satisfy the Secretary's burden of demonstrating animus.

Notwithstanding the Secretary's claimed animus toward Ebert's history of protected activity, the Secretary relies on general concerns about a loss of productivity as additional indirect evidence of animus. In this regard, the Secretary sought to elicit testimony from Paugh that Paugh resented Ebert's safety complaints because they resulted in an interruption of

production. The following testimony elicited from Paugh by the Secretary's counsel is illustrative:

> Q. Okay. Now, Mr. Paugh, Mr. Ebert is clearly a safety advocate; is that fair to say?
> [A]: Yes. . . .
> Q. And he'll bring safety issues he observes to you, correct?
> A. Yes.
> Q. And when those issues have to be addressed, they can slow down production?
> A. Not always.
> Q. But sometimes, right?
> A. Yes.
> Q. So, for example, . . . [d]id [the] roof control plan for the mine only allow for you to have four unbolted entries, right?
> A. Yes.
> Q. And before you can begin mining a fifth, you have to roof bolt the first, right?
> A. Yes.
> Q. So if Mr. Ebert was to bring that issue to your attention, it would certainly slow down production?
> A. Yes.
> Q. And it would take probably over an hour to bolt an entire entry, right?
> A. An entire entry?
> Q. Yes.
> A. It could.
> Q. And it is your job to try to maximize production, right?
> A. Yes.

Tr. 340-42.

The Commission has concluded that the goal of maximizing production is a legitimate business motivation as long as it does not interfere with a miner's statutory right to engage in protected activity. *Sec'y of Labor on behalf of Zecco v. Consolidation Coal Co.*, 2 FMSHRC 985, 994 (Sept. 1999). Consequently, management's desire to "maximize production" is not, in and of itself, evidence of a discriminatory motive as long as safety related concerns are not subordinated. To hold otherwise would be tantamount to concluding that an operator's interest in maximizing production is discriminatory per se.

Finally, the Secretary seeks to infer animus by asserting that Grimm's inquiry into the facts surrounding Paugh's suspension was inadequate by virtue of the fact that Grimm "did not interview Harris, Black, or Roth, all of whom could have confirmed either Paugh or Ebert's version of events." Sec'y Br. at 15. Grimm testified that he did not find Ebert's explanation for the significant delay in the completion of Ebert's pre-op examination duties to be plausible. Grimm's inquiry afforded Ebert significant procedural protections, in that Grimm's fact-finding was conducted in the presence of union officials. Tr. 75. As previously noted, the Commission and its judges do not sit as a super grievance or arbitration board. *Chacon*, 3 FMSHRC at 2516-17. It is not within the purview of a Commission judge to substitute how the judge would have

conducted the inquiry, provided that the inquiry was not so perfunctory or otherwise procedurally deficient to suggest an underlying animus.

In the final analysis, the reported self-serving perceived hostility of Paugh, a general company goal of maximizing production, and the claimed insufficiency of Grimm's inquiry, do not provide an adequate basis for inferring animus.

iii. Disparate Treatment

In order to prevail with respect to a claim of disparate treatment, the Secretary must show that a similarly situated employee who committed the same or a more serious offense did not suffer the same disciplinary fate as the complainant. *See Dreissen v. Nevada Goldfields, Inc.,* 20 FMSHRC 324, 331 n.14 (Apr. 1998) (citing *Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon,* 3 FMSHRC at 2512).

The Secretary alleges that Paugh treated Ebert differently from shuttle car operator John Harris, who was still watering the road when Paugh returned from his fireboss run at 9:55 a.m. By virtue of Harris's watering activities, the Secretary asserts that Harris, like Ebert, had not completed his pre-op duties by 9:55 a.m. Therefore, the Secretary alleges that Paugh's failure to discipline or even question Harris constitutes disparate treatment. Sec'y Br. at 16-17.

Paugh testified that when he saw Harris watering the road at approximately 9:55 a.m., he assumed Harris had already completed his pre-operational inspection of his shuttle car, which Paugh testified routinely took Harris 10-15 minutes. Tr. 346-47. Paugh further testified that Harris informed him that Ebert had not assisted him in watering the roads that morning. Tr. 300. Consequently, Paugh testified that Harris refuted Ebert's claim that he was busy helping Harris water the road. *See* Tr. 300.

In any event, at approximately 9:55 a.m., Paugh observed Harris fulfilling his watering duties and actively working. Tr. 302. At that time, in contrast, Paugh observed Ebert near the power center, where he had last seen him, talking with Roth and Black. Tr. 294-95, 298. When Paugh broke up that conversation by requesting that Ebert help supply the continuous miner, he first learned that Ebert had not yet begun the pre-op of his shuttle car, which Ebert estimated would take approximately an additional 30 minutes. Tr. 82-84; 295. Consequently, as previously noted, the record reflects that Ebert was not available to perform his routine shift duties, such as supplying the continuous miner and operating his shuttle car, until approximately 10:25 a.m.

The Secretary's assertion that Harris was similarly situated is speculative. It is unclear whether Harris, like Ebert, would not have been available until later that morning to resume his operational duties. It is equally unclear whether Ebert had done any meaningful work that morning prior to his encounter with Paugh at 9:55 a.m. While it is true that Marshall County could have called Harris to support Paugh's testimony, it is also true that the Secretary could have called Harris to support Ebert's testimony. Neither having availed themselves of Harris's testimony, on balance the weight of the evidence must be given to Paugh, given that the Secretary bears the burden of proof in this discrimination proceeding. Thus, the evidence

presented by the Secretary is insufficient to warrant the conclusion that Ebert was the victim of disparate treatment.

In sum, the Secretary has demonstrated indirect evidence consisting of knowledge and coincidence in time. However, the Secretary has failed to demonstrate animus and disparate treatment. As previously noted, successfully relying on indirect evidence to prove a discriminatory motive requires a rational connection between the indirect evidence and Ebert's suspension. *Garden Creek Pocahontas*, 11 FMSHRC at 2153. Reliance solely on Marshall County's knowledge of Ebert's protected activity that occurred shortly before his suspension to infer discriminatory motive is inadequate in this case, when Ebert's transgression was sufficiently serious in nature to warrant a reasonable disciplinary response. Simply put, a miner's exercise of protected activity shortly before the disciplinary action complained of does not insulate the miner from the consequences of conduct that an operator reasonably views as unacceptable. Significantly, the two-and-a-half day suspension imposed on Ebert was not disproportionate or overly harsh, and, thus is not indicative of a discriminatory motive.

Having determined that Marshall County has successfully rebutted the Secretary's case by adequately demonstrating that Ebert's suspension was not motivated, in any part, by his protected activity, I need not address the alternative affirmative defense raised by Marshall County.

ORDER

In view of the above, **IT IS ORDERED** that Marshall County's motion to dismiss the subject discrimination complaint as untimely **IS DENIED**.

The Secretary has failed to present sufficient circumstantial evidence to demonstrate that Ebert's March 2016 suspension was motivated, in any part, by his protected activity. Consequently, **IT IS FURTHER ORDERED** that the discrimination complaint filed by the Secretary of Labor on behalf of Carl Ebert **IS DENIED**.

As such, **IT IS FUTHER ORDERED** that Docket No. WEVA 2016-565-D **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0269[1] A.C. No. 12-02295-406669
v.	Docket No. LAKE 2016-0232 A.C. No. 12-02295-404287
PEABODY MIDWEST MINING, LLC, Respondent.	Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Daniel J. Colbert, Esq., Anthony Fassano, Esq[2]., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Henderson, Kentucky, commencing on August 24, 2017. For the reasons which follow, all of the violations are upheld but, save one, the unwarrantable failure designations are removed, and those are therefore modified to section 104(a) citations, with appropriate modifications to the penalties.

[1] Docket No. LAKE 2016-0268 was consolidated with the other dockets in the caption. On November 18, 2016, the parties submitted a proposed settlement motion for the three 104(a) citations within that docket. That Motion is **HEREBY APPROVED** and the Decision Approving Settlement appears in the Appendix for this decision and is also separately issued today.

[2] Attorney Fassano was the Secretary's trial attorney for Docket Nos. LAKE 2016-0269 and LAKE 2016-0232. Attorney Colbert submitted the Secretary's post-hearing briefs.

Violations at Issue in Docket No. LAKE 2016-0269

At issue in Docket No. LAKE 2016-0269 are two section 104(d)(2) orders: Order No. 9036922 and Order No. 9036663. Order No. 9036922 was specially assessed at $70,000. Had it been regularly assessed, the proposed penalty would have been $44,645. Order No. 9036663was regularly assessed at $38,503.

Order No. 9036922

Order No. 9036922, issued on December 22, 2015, alleged a violation of 30 C.F.R. § 75.202(a). The cited standard, titled "Protection from falls of roof, face and ribs," provides "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The condition or practice was identified as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs. Loose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections measuring approximately 8 inches to 24 inches in thickness by 5 1/2 to 6 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.220(a)(1) was cited 21 times in two years at mine 1202295 (21 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.202(a) was cited 32 times in two years at mine 1202295 (32 to the operator, 0 to a contractor).

Order No. 9036922.

The inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and the violation as S&S, with 14 persons affected.

Order No. 9036663

Order No. 9036663, issued on February 3, 2016, alleged a violation of 30 C.F.R. § 75.360(a)(1). The cited standard, titled "Preshift examination at fixed intervals," provides, "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations."

The condition or practice was identified as follows:

> A preshift exam was not conducted on the intake aircourse South West Main seals prior to the afternoon shift miners entering the mine on 2-3-2016. There were not DT&Is at the seals for the oncoming afternoon shift. Inby of this location was Unit #3 Maintenance crew, Unit #2 production crew as well as other miners working inby this location. In order to abate this order, training must be conducted on the importance of examining seals and how to correctly fill out the required books. Standard 75.360(a)(1) was cited 1 time in two years at mine 1202295 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036663.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be fatal, the negligence as high, and the violation as S&S, with 31 persons affected.

Violations at Issue in Docket No. LAKE 2016-0232

At issue in Docket No. LAKE 2016-0232 are five 104(d)(2) orders, with a total proposed penalty of $86,000.00.

Three of the (d)(2) orders, Order Nos. 9036654, 9036656, and 9036657 invoke the same standard, 30 C.F.R. § 75.1731(a). That standard, titled, "Maintenance of belt conveyors and belt conveyor entries" provides, at subsection (a) "Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced." Each of these three orders proposed a penalty of $4,000.00.

Order No. 9036654

In citing an alleged violation of 30 C.F.R. § 75.1731(a), the inspector listed the condition or practice as:

> The Operating 1C (4th Southeast Mains) Belt is being allowed to operate with damaged rollers. There are two top rollers that are hanging out of the bottom bracket at crosscuts 42-43, causing the rollers to be frozen and allowing the belt to rub them. Also in this area there is a top outside roller that is missing. There is also a frozen top center roller at crosscut 13-14, and a frozen top center roller at crosscut #35. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036654.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected. The Secretary proposed a civil penalty of $4,000.00.

Order No. 9036656

The inspector listed the condition or practice as:

> The Operating 1B (2nd Main South) Belt is being allowed to operate with damaged rollers. There is a frozen top center roller at crosscut #14 and a frozen top outside roller at crosscut #10-11. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036656.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected.

Order No. 9036657

The inspector listed the condition or practice as:

> The Operating 1A Belt (3rd Southeast Mains) is being allowed to operate with damaged rollers. There are frozen top center rollers at crosscuts # 26,21, and 13. Also there is a frozen top outside roller at crosscut 19-20. There is a top center roller missing at crosscut #8-9 allowing the belt to rub the structure when loaded. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036657.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected.

Order No. 9036658

Order No. 9036658 invoked standard 30 C.F.R. § 75.360(b)(11)(vi). That standard, titled, "Preshift examination at fixed intervals," provides, in relevant part, "(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and

oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: … (11) Preshift examinations shall include examinations to identify violations of the standards listed below: … (vi) § 75.1731(a) - maintenance of belt conveyor components."

30 C.F.R. § 75.360(b)(11)(vi)

The inspector listed the condition or practice as:

> The exam conducted on The 1A, 1B, and 1C belts has been found to be inadequate. Upon inspection there are 12 rollers that were damaged or missing on these three belts. This area had been examined prior to inspection by approximately 3.5 hrs. Standard 75.360(a)(1) was cited 1 time in two years at mine 1202295 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036658.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected.

The proposed a penalty for this Order was $4,000.00.

Order No. 9036924

Order No. 9036924 alleged a violation of 30 C.F.R. § 75.360(a)(1).[3] The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and the violation as S&S, with 14 persons affected. The condition or practice is:

> An inadequate preshift examination was performed on the midnight shift (12/22/2015, 4:00 a.m. to 7:00 a.m.). A hazardous condition (inadequately supported ribs) located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts. This condition was not posted in or recorded in a book maintained for the purpose on the surface at the mine. This hazardous condition was obvious and extensive and condition had existed for a significant period of time. Order #9036922 was issued in conjunction with this 104(d)(2) order. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036924.

As a subsequent action, the operator "held an examination training with all mine management and examiners on standard 75.202(a). The main emphases [sic] was on rib control

[3] The text of this standard has been set forth above

which also included hazards related to the roof and face." *Id*. The Secretary proposed a civil penalty of $70,000.00.

Findings of Fact[4]

MSHA inspector Glenn Fishback is a roof control specialist, a position he has held for the past four years. VI Tr. 26-27. Fishback began working in mines when he was 18 years old. VI Tr. 30. Prior to becoming an MSHA roof control specialist, Fishback was a regular MSHA coal mine inspector for six years. VI Tr. 27. It is noteworthy that Fishback had 28 years of mining experience in the private sector before joining MSHA. VI Tr. 28. Part of that private experience included about six months working at the Francisco Underground, the same mine involved with the matters in these dockets. At the Francisco Underground he was a section foreman. VI Tr. 30.

Fishback affirmed that loose ribs are a relevant consideration for roof control plans. VI Tr. 31. Among other reasons, this is so because "loose ribs have contributed to many fatalities and disabling injuries and should be taken into great consideration just as much as the roof . . ." *Id.* As explained further, below, a noteworthy aspect for these citations is that there was a "mud seam" present. In Unit 2, the split in the seam was in the middle of it and was made up of mud, rock, and coal. VI Tr. 194. The inspector informed that this refers to a seam of mud that's placed within the coal seam itself, which can range from as little as a quarter inch to two or three feet. Fishback has seen such seams, noting that their size can vary depending on the particular strata involved. VI Tr. 31-32. The significance of the presence of mud seams is that "[t]hey [can] deteriorate [roof conditions] very fast, very quickly, and allow for them to slide out without warning." VI Tr. 32. Mud seams can be present both on ribs and roofs. *Id.*

Fishback spoke to the alleged violations as the Francisco Underground Pit, arising from his inspection on December 22, 2015. He was at the mine at that time for a spot inspection.[5] The inspector was aware that the mine has a history of falls and he had investigated prior falls at the mine in his capacity as a roof control specialist. VI Tr. 38. He had issued roof violations at the mine prior to December 22nd and in the summer of that year he had put the mine on notice of the need for greater diligence in controlling roof conditions. VI Tr. 39. Prior to his December 22nd inspection, Fishback spoke with his supervisor, Phillip, "Doug," Herndon. VI Tr. 40. He and Herndon discussed the rib conditions that another MSHA inspector had observed at the mine. Herndon also accompanied Fishback on his December 22nd inspection of the Francisco Underground Pit. VI Tr. 41. When Fishback arrived that day, the mine was on the day shift and he informed that he was there on an E02 spot inspection. *Id*. He inspected the mine's Unit 2 on that day. *Id.*

[4] The testimony for these dockets was taken over three days. Unfortunately, the transcript pagination began anew for each day. For that reason, transcript cites begin by identifying the volume involved; VI designating the first day, VII the second and VIII the third day of testimony.

[5] Spot inspections are related to inspection for methane liberation and, depending on the amount of such liberation, the inspections can be on five, ten or 15 day intervals. VI Tr. 35. These inspections cover the entire mine. VI Tr. 37.

Fishback identified Gov. Ex. P 6 as the on-shift and pre-shift records for December 22, 2015. VI Tr. 42. Page 2, of Ex. P 6, reflects the pre-shift from the third shift, done for the day shift coming on. *Id*. Thus it was the pre-shift exam that occurred immediately prior to his arriving that day. The inspector stated that the pre-shift did not record that the mine was experiencing any adverse roof conditions. VI Tr. 43.

After examining those records, the inspector went underground with Eric Carter, the mine escort for that day and they proceeded to Unit 2. At that time, Unit 2 had 11 entries and approximately three crosscuts. VI Tr. 44. Upon leaving the mantrip he went to the left side of the section, walked about two crosscuts and then encountered "a very adverse rib." VI Tr. 45-45. Fishback stated that when he found the condition, "it had been rock dusted over." VI Tr. 45. This meant the condition had to have "been there prior to the shift starting." *Id.* He then returned to the mantrip, retrieved his camera, and took pictures of the condition. *Id.*

For context, Fishback informed that in the course of conducting an inspection, each time an inspector enters a working section, he conducts an imminent danger examination, also called an imminent danger run, on each working face. On this occasion, to do this run, Fishback started on the far left entry and then worked his way across the section. On the working section itself, at the stopping line, he would take air readings on each side of the section. VI Tr.46. When Fishback conducted his imminent danger run, he found "[t]he whole section had adverse rib conditions." *Id.* By the "whole section," Fishback stated he found adverse rib conditions in "[e]very entry, every crosscut we encountered." *Id.* By "we" Fishback informed that at that time he was with his supervisor, Herndon, and the mine's Mr. Carter. *Id.* The inspector asserted that all of the adverse rib conditions he found were inby the loading point. *Id.* Fishback then issued a 104(d)(2) order for those rib conditions he had just observed across the whole working section. VI Tr. 47. Gov. Ex. P 1 and Ex. P 2, the inspector's notes relating to that order.

Fishback identified Gov. Ex P 3 as the photographs he took on that date.[6] VI Tr. 48. Some of the photos within that exhibit were taken by Fishback when he arrived on the section and others were taken after he completed his imminent danger run and advised Carter that he was going to issue a closure order. VI Tr. 48-49. All the pictures were taken on the same unit, that is, Unit 2. VI Tr. 49. He was unable to provide exactitude for locations of the photos he took within Unit 2. *Id.* The Court asked additional questions about the locations of the photographs. Fishback confirmed they were all taken "within the entry area of the loading point." VI Tr. 56. All the photos were within the same entries.[7] *Id.* The inspector acknowledged that all of the photos have

[6] Respondent objected to the introduction of Exhibit P 3 because, in its view, there was insufficient specificity as to the location of the photographs. Regarding this issue, the Court ruled against the Respondent's Motion in Limine prior to the commencement of the hearing. Respondent renewed and preserved the objection at the hearing. VI Tr. 55. The issue is discussed further *infra.*

[7] An issue of no consequence, the times reflected on the photos are accurate, but they reflect the time zone of the inspector's office, in Vincennes, Indiana, which office was on eastern time. However, the mine was then on central time, an hour earlier. Therefore while the camera recorded the time as 11:21 a.m., it was actually 10:21 at the mine. VI Tr. 50-51.

the same "Location/bolter description." VI Tr. 54. This general description was provided, because it was not an isolated area – it "was across the whole room and section entries and cross space." *Id.* Unit 2 had 11 entries.[8] *Id.*

The Court finds it noteworthy that, when the inspector was taking these photos, Eric Carter was the mine's escort with him on that day and Carter was present for nearly each photo the inspector took. [9] VI Tr. 77. In addition, as mentioned earlier, the inspector's supervisor was with him. *Id.* When the Court inquired if any mine official challenged the inspector's observations, the inspector responded no one did so and that, to the contrary, Carter, was concerned about it "and had been trying to address it but hadn't had any luck with it yet." VI Tr. 78.

Several of the photographs taken by Fishback were enlarged to poster board size.[10] Exhibit P 3A, an enlargement of photo 39 from Exhibit P 3, was one of those. VI Tr. 67. The inspector, referring to the enlargement, advised that both ribs were "leaning in, …bent coming down." VI Tr. 58. Ribs, he noted, are supposed to be vertical but these ribs were leaning. By that description, the inspector affirmed that he meant that the ribs were coming into the entry. VI Tr. 59. Some of the ribs had already fallen off. This is evidenced by the presence of dark, shiny, coal. VI Tr. 58-59. The roof in this area was about six and a half to seven feet high. VI Tr. 59. Referring again to the enlargement of photo 39, the inspector marked areas[11] on that enlargement showing a dark blackish hue, which he stated reflected areas that had already sloughed off the rib. VI Tr. 62. Those blackish areas revealed that the rib was deteriorating and about to fall off the solid pillar. *Id.* At the bottom of the same photo, the inspector marked another area where the

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[8] Also of no consequence, the inspector informed that he had incorrectly listed the number of entries as 10, when it actually had 11. VI Tr. 54.

[9] Respondent's Counsel inquired, generally, to these photographic exhibits, asking what they were being offered to represent. The Court responded that its understanding was that each of these photos were enlargements of the photos which are part of Ex. P 3. The Secretary's Counsel agreed with the Court's description; each photo, both those enlarged and those non-enlarged, represent the conditions the inspector observed during his inspection on December 22. VI Tr. 80.

[10] There was an unfortunate development regarding the poster-board enlargements, as they were never received at the Commission. The Secretary maintained that he sent them to the Commission, but had no tracking information to support that claim. A search of the Commission docket office found no such submissions. The record made it clear that the Secretary was to deliver the photo enlargements to the Commission. They were, after all, the Secretary's admitted exhibits. VI Tr. 67-68. Fortunately, digital copies of the exhibits were made and sent to the Commission via email, to the Court, and by overnight mail to the Commission. Respondent's Counsel, Attorney Arthur M. Wolfson was also very helpful in overcoming this evidentiary deficiency, created by the Secretary of Labor, sending scanned digital copies to the Court and overnighting them to the Commission. The parties agreed that the digital copies would suffice.

[11] The inspector's initials, "GF" coupled with numbers, matched the areas marked on the photographs with his testimony. VI Tr. 64.

rib had gapped away from the solid pillar. VI Tr. 63, and the number 3 on P 3A. The roof is about 6 ½ to 7 feet high in this area. VI Tr. 65. The inspector asserted that all of the areas of concern with the ribs were above his head level. VI Tr. 65-66. The crack he identified in the photo P 3A extended from the floor all the way to the roof. VI Tr. 66.

The inspector then spoke to page 34 of Ex. P 3 and the enlargement of that exhibit, which was marked as P 3 B.[12] VI Tr. 68. The color in the enlargement reflects that the rock dust there was wet. VI Tr. 69. As with the prior photo enlargement, the inspector identified areas located at the top of the photo where the rib was starting to fall off. He also noted there was no rock dust at those locations, another indicator that the rib was deteriorating and falling off. VI Tr. 70. Marking a separate area on P 3 B with the number 2, the inspector stated it showed the same problem but that it was more adverse, as more rib was falling off. VI Tr. 71. Another similar problem area was identified and marked by the inspector on Exhibit P 3 B with the number 4. VI Tr. 72. The presence of "joints," also described as "gaps," in the ribs informs that there is separation from them. VI Tr. 75-76. The inspector marked the number "6" in an area to the right of the photograph. VI Tr. 76. He informed they were the same as those on the left side, though on the right lower side it was separated more and they were "stacked," an indication that "[t]hey're going to start separating and fall out." *Id.* Another one, marked with the number "7," reflects an area where the gap was going up. *Id.*

Exhibit P 3 C is another photo enlargement from Ex. P 3, photo 4 of 20. On the enlargement the inspector circled the top portion of the photo where there is a bright pink or red area and also marked that with the number 1. VI Tr. 81. The red or pink marking represents the time that someone did a preshift or onshift exam. VI Tr. 81-82. Referring to the bottom left quadrant of the photo, towards the center, the inspector drew an arrow to that area, marking it with the number 2. VI Tr. 83. The top portion of the photo is whitish in color, a feature that the inspector informed is from rock dust. *Id.* Below the white area, he stated that the darker area is "an adverse parting that was in the coal seam across the whole section." VI Tr. 83-84. The area with an arrow to GF 2 reflects that "a previous either initial or time that was there before it was rock dusted last time after it had already fallen off." VI Tr. 84. The red spray painted area, part white and part black, shows that it was dusted and the date and initials were made after it was dusted, or the condition existed prior to the examination. *Id.* At the bottom left quadrant, and the area within that with red paint, the inspector marked that as GF 3. The inspector informed that there were areas where the spray paint was applied after part of the rib had fallen, marking that area as GF 4. *Id.*

Exhibit P 3, at photo 19 of 20, and the enlargement of that photo, designated as P 3D is another photo taken in the area. The inspector marked the right and middle portion of the enlarged photo including the spray painted number 60, adding the number 1 and his initials to that marked area. VI Tr. 86, 87. The inspector stated that the spray painted numbers had been written right over the adverse rib and that the rib was ready to fall. *Id*. Thus, at the areas marked number 1 and number 60, the inspector stated that the paint had been applied right over the adverse condition. VI Tr. 88 and the number 4 and initials on the exhibit, indicating that area. He

[12] In response to the Court's inquiry, the inspector stated that the colors in the enlargement, P 3B, are more accurate than the binder copy of the exhibit, at page 34. VI Tr. 69.

also identified that area, reflecting the adverse condition of the ribs, marking it as E F2. VI Tr. 87. That area had portions that had already fallen out and showed cracks that had parted off across the rib. The absence of rock dust meant that it had already starting falling out. *Id.*

For photograph 13 of 20 from Exhibit P 3 and the enlargement of that photo, P 3 E, the inspector identified the roof and circled that area with the number 1. VI Tr. 89-90. That area also reflects screen wiring on the roof, which the inspector marked with an X and the number 2. VI Tr. 90. The area marked with the number 3 on that photo is the portion of the rib that came away from the solid color and Fishback stated that it was on the verge of falling. He added that, in the remainder of the photo, the rib was already falling out underneath. VI Tr. 90-91. The black color in the photo shows that the condition had not lasted long because the rib had not had a chance to absorb the moisture. VI Tr. 91. The area marked with "3" on the photo, was six and a half to seven feet in height. *Id.* The area where the rib had already fallen out was marked with the number 4. *Id*. This was marked on the lower portion of the exhibit by a continuous line across one end of the photo to the other. VI Tr. 91-92.

Upon admission of Gov. Exhibits P 3A through P 3E, the Respondent reasserted its objection, which objection, as noted, was based upon the inspector's inability to precisely identify the location for each photo. VI Tr. 92. The Court noted that it had already ruled upon the Respondent's objection, adding that while the inspector could not be precise about the location of each photo, they were all taken within the same section at Unit 2. VI Tr. 92-93. However, in light of the renewed objection, the Court then asked some follow-up questions of the inspector, inquiring, "And the photographs – the various photographs within [Petitioner's Exhibit 3] would there – by representative, you mean they're typical of what you encounter[ed]?" The inspector confirmed that was true. VI Tr. 94. The Court also asked of the inspector if the admitted photos represented the only areas where he saw a problem within the section. VI Tr. 95. The inspector responded that the photos were not the only areas, expressing, "[e]verywhere I walked had adverse rib conditions. I just did not take a picture of every location." *Id.*

This is an appropriate time to note that the Court finds that, while the particulars identified by the inspector are of note and useful, the more important point to keep in mind, so as not to miss the forest for the trees, so to speak, is that there were multiple areas of concern with the ribs credibly identified by the inspector.

Upon making his observations, as described above, Fishback then issued his Order and informed Carter that he wanted a meeting with the crew about the conditions he found. VI Tr. 95-96. He then met with the section foreman, Zach Hudson, advising that the section was being shut down until the adverse roof conditions were corrected. The purpose of the crew meeting was to advise them of the danger posed by the conditions. VI Tr. 96.

Referring to Gov. Ex. 21, Fishback's Order, and to Section 8 of that Order, which pertains to the condition or practice, the inspector modified the order to note that the MMU was 022, not MMU 12. VI Tr.100, Gov. Ex. P1, at page 4. The condition or practice also records 300 feet, which is the approximate distance from the face outby the affected areas. This figure was derived by the center to the crosscuts. *Id.* The Court observes that this is another factor identifying the location of the ribs in issue. Another measurement, the thickness, is listed as 8 to

24 inches. VI Tr. 101. That figure was derived from the average measurement of the thickness of the ribs that the inspector observed on the ground. *Id.* The inspector did not measure all the problematic ribs he observed. A five and half to six foot measurement, which was an approximation, was also listed as was a measurement of 30 to 40 feet. That figure was derived from the measurements of the height of the walls of the areas. *Id.* This too was an approximation, arrived at by the length to the total. VI Tr. 102. The inspector added that he was looking at areas "gapped away from the solid filler approximately three to six inches." By that, he meant "areas of the ribs that [he] measured being gapped from the solid filler." *Id.*

Testimony then turned to Gov. Ex. P 4, which pertains to the inspector's 104(d)(2) order for an inaccurate pre-shift exam.[13] VI Tr. 103. The inaccurate pre-shift exam order was issued in conjunction with the adverse rib conditions, as just described, next above. *Id*., Gov. Ex. P 5, the inspector's notes associated with these orders. Those notes reflect that the miners were retrained on the cited standard, section 202(a).[14]

An objection was raised when Fishback was asked for his opinion as to the length of time the adverse rib conditions had existed. The Court held that, as the inspector had 39 years of mining experience, he was qualified to offer such an opinion. Fishback stated that the condition had existed for "a substantial amount of time." VI Tr. 109-110. With more particularity, he was then asked for his opinion as to the period of time that the adverse roof conditions he observed on the December 22nd had existed in Unit 2. His response was that "[i]t existed for a substantial amount of time, several shifts." VI Tr. 110. His support for that view was "[b]ecause the condition [he] found and the area that had been rock dusted over with the adverse conditions present, which [the] photographs already represent." VI Tr. 111. The inspector confirmed that the number of problematic ribs he found also informed his view as to how long the conditions had existed. *Id.* This view was "[b]ecause of the condition they were in and -- and how many there was and that the agent of the operator is a pre-shift examiner or the section foreman. Their initials were on the adverse conditions, and they did not occur in that short -- you know, [a] time." *Id.*

There was some unhappiness expressed by the mine foreman about the inspector's determinations, with the inspector stating that the section foreman "was very disgruntled toward me and my supervisor both. He didn't want to talk." *Id.* The section was shut down after the order was issued and work scaling the ribs then began. That work was required in order to have the orders terminated. VI Tr. 113.

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[13] Because it is a potential source for confusion for one reviewing the record, if the case is appealed, it is pointed out that Gov. Ex. P 4, which as noted pertains to the inspector's 104(d)(2) order for an inaccurate pre-shift exam, Order No. 9036924, is from Docket No. LAKE 2016-0232. By contrast, the rib violation itself, Order No. 9036922, is within Docket No. LAKE 2016-0269.

[14] Gov. Ex. P 5, at pages N through 12, represents "all these responsible people who are agents of the operator on this section on all three shifts had been previously trained on rib conditions on 10-28 of '15." VI Tr. 106. That retraining occurred two months prior to the cited conditions in this case. *Id.*

Addressing the hazards presented by adverse rib conditions, the inspector stated that the potential injury can range from permanently disabling to a fatality, depending upon the thickness and length of the rib which falls, how tall the rib is, and how far it falls. VI Tr. 113-114. As for the inadequate exam of these ribs, the inspector noted that the examiner is exposed to the same hazards as the crew working in the area. By not reporting the hazard, and taking no action to address it, the section foreman endangered the whole crew. Instead, the crew began mining in the section and they were mining when the inspector arrived. VI Tr. 115. The section foreman was Zach Hudson and the pre-shift examiner was Matt Benjamin. VI Tr. 116.

The inspector marked the injury aspect of gravity for both violations as "highly likely," and it was his view that if an injury were to occur, at a minimum, it would be permanently disabling. VI Tr. 116. The Court notes that in the citation/order form, 7000-3, for gravity, only "occurred" is above "highly likely" and "Reasonably likely" is just below "highly likely." The inspector maintained that all 14 miners on the active section were exposed to the hazard. *Id.* He added that the breadth of the condition increased the exposure, because "the condition existed across the whole section. So everywhere you walked, you were exposed to that." VI Tr. 117. The inspector also considered that the violations were of high negligence and unwarrantable failure, on the grounds that: the agent of the operator was involved; the extensiveness of the condition; and the length of time that it had been allowed to exist, and that many should have known of the conditions' existence. *Id.*

Fishback considered that the mine should have known of the condition, because "the examiner [as] an agent of the operator, [ ] should have reported it in the record book and called it out to the previous section foreman that was coming off shift." VI Tr. 117. The mine's history, with multiple roof rib violations, and its roof fall history, were also factors that should have made them more alert. VI Tr. 117-118. That history included the inspector having called these issues to the mine's attention during the preceding summer, speaking to John Hughes, who is part of upper management, and to others at the mine. VI Tr. 118. The inspector asserted that the conditions supporting his determination of unwarrantable failure and high negligence applied equally to the pre-shift violation. VI Tr. 119. The Court notes that its analysis takes the same approach in evaluating those claims.

Per cross-examination, Inspector Fishback agreed that to have the title of roof control specialist one need not have a degree nor a certification. VI Tr. 120-121. However, annually, the inspector does receive a notification upon completing his annual roof control training. VI Tr. 123.

Fishback agreed that, for a short time, some five or six months, he worked at the Francisco Mine, but he disputed the suggestion that he left the mine because of a disagreement. VI Tr. 124. However, when shown his deposition of January 2017, he agreed that he left employment with the mine because he did not get along with the mine superintendent. VI Tr. 126. However, he added that he also left because he found a better job. *Id.* Fishback also agreed that during his employment with Air Quality, that mine was acquired by Peabody and that he had issues with mine management at Air Quality as well. VI Tr. 127-128. The Court notes that it is fair to state that Fishback was reluctant to admit his past disagreements with the management at those two Peabody mines. For example, during his testimony at the hearing, he was evasive

about the individuals at those mines with whom he had issues. Yet, during his deposition he named the individuals – Maynard and Campbell. Further, in his deposition, Fishback agreed that he liked working at Air Quality better when it was run by Black Beauty than when Peabody took it over. VI Tr. 129. However, the Court also notes that those prior employment issues were in 2000 whereas the citations in this proceeding were issued in late 2015. VI Tr. 130. Nevertheless, when testifying, MSHA inspectors should be direct and not elusive when under cross-examination. Anything less potentially puts their credibility at risk.

Fishback stated that, prior to his December 2015 inspection, another inspector had told him about rib conditions at the mine, but he could not recall which inspector told him that nor could he recall the particular locations named by that inspector. VI Tr. 131-132. However he recalled that the other inspector had mentioned Unit 2 and that was the reason he inspected that area. VI Tr. 132-133.

This mine was on a five day spot inspection because of its methane liberation. Such inspections check violation controls but that is not all that occurs. VI Tr. 134. As part of that spot inspection process, MSHA keeps a log of the areas that have been inspected and that is how MSHA decides to go or not go to a particular area. *Id.* The log is used so that one doesn't return to the same unit again. VI Tr. 135-136. However, contrary to his earlier statement, at his deposition, Fishback stated that Unit 2 was the next up, although he did not contend that it had not been inspected before. VI Tr. 136. Respondent inquired about the inspector's remark during direct that he had previously put the mine on notice. Fishback responded that it was during the summer of 2015. VI Tr. 138. He added that he issued a citation at the time he put them on notice, but was he was unsure if it was for rib conditions, as it could have been for excessive entry widths. VI Tr. 138-139.

The inspector stated that, while he considered the mine's history regarding roof falls violations, per 75.202(a), and that he also considered the mine's roof fall history to be "extensive," he maintained that when he issued the order in this matter, it was based on the conditions he observed the day he was there. VI Tr. 142-143.

Continuing with the subject of the mine's violation history, when shown Exhibit R 8 and directed to the repeat violation points the mine was given for the alleged section 75.202(a) violation, the inspector read that two (2) points had been assigned. VI Tr.146. However Table 8 of 30 C.F.R. section 100.3 allows for a range of zero to 20 points for repeat violations. VI Tr. 146-147. The Court takes note that, obviously, two points is on the low end of repeat violations scale, given that as many as 20 points can be applied. The Court observes that, if a violation is established, it looks at the history of violations, not the Part 100 penalty point system for that category, as penalties are determined by evaluating the evidence against the statutory criteria.

Respondent revisited its issue with the photographs Fishback took in support of his order concerning the condition of the ribs. As before, the inspector could not identify the precise location of any of the photos, other than to say that they were all on that section, Unit 2. VI Tr. 157. Nor could he give the entry and/or crosscut where the photos were taken. *Id.* The Court continues to not think much of limited basis of the Respondent's assault. After all, the inspector was under no obligation to take any photos of the ribs at all. The absence of photos would not be

a basis to dismiss such an order. Absent a contention that the photographs were not taken in Unit 2 at all, a claim not made by the Respondent, or worse – that they were fabrications, unrelated to the mine entirely, it would be odd indeed to have photographic evidence of the conditions observed work against an alleged violation, at least on the grounds asserted by the Respondent. Further, as a practical matter, it would be unrealistic to impose exactitude for the photos' locations, beyond the area, identified by the inspector.[15]

The Court asked the inspector to put aside his interest in having the mine do a better job in controlling the roof and rib, and therefore to put aside the mine's future actions, and also to put aside the mine's past conduct, and instead to focus only on what he observed the day he issued the order. With that limited focus in mind, the Court asked if the inspector just looked at what he observed that day and forgot what happened before and ignored what he speculated might happen in the future, would he still have arrived at the same conclusions that he marked in these two matters. Fishback responded he still would have still reached the same conclusions. VI Tr. 190.

Directing Inspector Fishback to Ex. P 3, he was able to identify the first area that he called to Carter's attention that needed abatement, identifying photo 7 of 20 within Exhibit P 3. VI Tr. 159. The inspector could only surmise, reasonably in the Court's view, that the date, time and initials appearing on Exhibit 3D, which he had previously labeled with the number 4, were from that day because otherwise one should not be able to see them, as they would've been rock dusted over. VI Tr. 160.

The inspector informed that, within his mining experience as a section foreman, he has worked on a section that had a mud seam, and also that a mud seam can result in conditions which require one to scale, and that scaling is an acceptable means for controlling ribs. VI Tr. 161. Further, he agreed that if a rib had been rock dusted, and then scaled, the scaled area will then be black. VI Tr. 162. However, he pointed out that it is not simply scaling that is required, but *continuous* scaling that is needed. *Id.*

Fishback agreed that Hudson was unhappy about the order being issued, and that he inquired of Fishback how long the inspector and his supervisor had worked in the mines. Fishback also recalled Hudson telling him about the efforts the mine was making to control the ribs. VI Tr. 163.

Regarding Ex. P1, Fishback acknowledged that the measurements listed in that exhibit reflect the average thickness. VI Tr. 165. He affirmed that in Unit 2 the height of the entry was about five and a half to six feet, but as with the rib conditions, he could not precisely identify where he made those measurements. VI Tr. 166. Speaking to Ex. P 4, the inadequate pre-shift

[15] The Court asked about the practicality of measuring or otherwise determining the exact locations of the cited ribs, asking, "[w]as there a practical and reasonable, and by that I mean, not excessively time-consuming way by which you could have more particularly identified the location for each of the photos that you took?" Fishback answered, "With the number of entries and crosscuts, I think it would have been very difficult to do." VI Tr. 186. However, the entry number would have been an additional means of identification. VI Tr. 187.

examination order, Fishback stated that order referenced crosscuts one to five in all entries, and by that he meant the affected area, with five being the first crosscut inby the last open crosscut. VI Tr. 168-169.

As part of the Secretary's case, the contention was made that the inspector had previously put the mine on notice that they had to exercise greater oversight as a consequence of the adverse rib conditions found in the summer of 2015. The Secretary also contended that the mine had a history of standard 75.202 violations. That standard addresses roof control. During the summer of 2015 Fishback issued a 75.202 violation to the mine. At that time he told the mine they would have to do a better job of controlling the ribs. VI Tr. 173. However, while the inspector asserted that the prior citations he had issued for 75.202(a) violations at the mine were an additional reason for putting the mine on notice, he could not independently recall the details of those prior events. VI Tr. 184. The Court observes that a history of violations may not be necessary to support the seriousness associated a citation or order. That is to say, the special findings in an order or citation can be upheld apart from any prior history of violations.

As noted, Fishback's order, shutting down the section, was issued on December 22nd. Unit 2 was in its second day of mining at that time. VI Tr. 177-178. Fishback stated that at that time the mine was running coal but he saw no signs that scaling had occurred. VI Tr. 178.

Also, informative in the Court's estimation, Fishback stated it is not his common practice to close a section when he encounters loose ribs. VI Tr. 187. Asked what made this instance different, prompting him to shut down the section, the inspector answered, "Because of the extensiveness. It was in every entry, every crosscut I went through. The seam had a split in it itself. The picture illustrated that." VI Tr. 188. Fishback also stated that he saw no "other side" of the story to the conditions he observed and therefore did not approach the pre-shift examiner to hear his views. *Id.*

The Court also addressed the issue of whether Fishback had an animus towards Peabody Midwest, as he had been employed by that entity at one time. The essence of the question was, because of that prior employment, whether the inspector brought a predisposition against the mine. Fishback responded, "No, sir. I don't get any joy out of writing an order. It contains a lot of paperwork for me to write that." VI Tr. 191. The Court continued, "So are you telling me you had no predisposition against Peabody? You didn't go in there with a chip on your shoulder towards them?" The Inspector answered, "No, sir." *Id.* The Court finds that Fishback's testimony was not biased. His observations were based on the conditions he viewed that day, and those observations were also supported by Inspector Herndon's firsthand views of the same areas.

The termination of the order is reflected at Ex. P 1 at page 5. This involved installing supplemental roof support with "tall panels to retain loose coal and rock away from the mine, and it was mechanically dusted before production resumed."[16] VI Tr. 193.

Phillip Douglas Herndon, MSHA inspector, also testified for the Secretary. Herndon is the district roof control supervisor, a position he has held for about three years. VI Tr. 197. His

[16] Another inspector, Keith Dunham, issued the termination order. VI Tr. 193.

mining experience in private industry began around 1982 and continued until 1989. He stated that his inspectors are to take photos of roof related citations, but that such photos are to be representative of the conditions observed. They are not to take a voluminous amount of photos. VI Tr. 201-202.

Turning to the orders in this litigation, that is, those issued during the December 22, 2015 inspection, Herndon stated that he was aware of the rib conditions at the mine. As noted, Herndon accompanied Fishback during the latter's December 22nd inspection of the Francisco Underground Pit. VI Tr. 206. They were there for an E02 ventilation spot inspection. Part of the reason he accompanied Fishback on that date was that the mine had violations going on for rib-related conditions and he had been informed that such conditions were really bad in one general area. VI Tr. 207. On that date Herndon and Fishback were only at the Unit 2 section. VI Tr. 209. When they arrived on the section that day, it was a new setup, as mining had just moved from a different location. *Id.* At that time Herndon observed that the "ribs were poor in condition, not adhered to each other, rashing[17] in various different sizes basically from the mine floor all the way to the mine roof." *Id.*

Herndon confirmed that he observed Fishback taking pictures of the ribs and that they were in the company of the mine's Eric Carter. VI Tr. 210. Herndon did not claim that the three were next to one another the entire time, but they were all together on the section, as they were close enough to be able to carry on a conversation by raising their voices. *Id.* According to Herndon, Carter agreed "that the roof control plan, you know, needed to be addressed, conditions that was not mentioned in there for this area of mining. ... [and that he] was in safety compliance, I believe, and mentioned stuff about wanting some bigger plates or seam control and stuff like that so he really spoke about stuff he needed." VI Tr. 212.

Herndon also recalled speaking with the foreman on that shift, Hudson, asserting that the foreman "was on the verge of being irate at the time of their conversation. I never met the young man before, and he approached -- or we approached him, I'm not for sure, but whenever we met up, he seemed to be extremely upset with us having to shut down to fix these." VI Tr. 213. As with Fishback's account, Herndon asserted that Hudson was not very professional, questioned how long the inspectors had been experienced with mining and then suggested that the inspectors "ought to know that you have to do what you got to do to run coal or something like that." *Id.* Later, after the inspectors required a safety talk with the entire crew, another miner came to them and apologized for Hudson's earlier attitude in the prior conversation. VI Tr. 214.

Herndon made it clear that the decision to shut down the section was Fishback's call, but that he agreed with it. VI Tr. 215. He also confirmed that at the time the order was issued, the mine was producing coal. VI Tr. 216. The Court used the same approach it applied to Fishback, asking that Herndon put aside his "prior knowledge of this mine and the problems or alleged problems with roof control, rib -- roof and rib control. . . . [and it also asked that he] discard any of [his] concerns looking forward, that is beyond December 22, 2015, and [the Court asked him]

[17] "Rashing," Herndon explained is "like, scaling that is falling off, like chunks up in the -- slip off, like sloughing." VI Tr. 210. This exists not because of anything the mine did. Rather it is a consequence of the "geological configuration." *Id*.

to focus solely on the conditions that [he] observed along with Inspector Fishback on December 22, 2015." VI Tr. 230.

With that focus in mind, the Court then inquired, "had [he, i.e. Herndon] been the issuing inspector, would [he] have issued – looking at the conditions which were cited by the inspector [Fishback], would [he] have also issued this as a 104(d) order?" VI Tr. 230-231. Herndon responded, "Yes," and affirmed that he had "no doubt at all" about that. VI Tr. 231. So too, Herndon responded that he would have marked the citation's findings the same as Fishback did. Thus, looking at Ex. P 1, when the Court asked, where Inspector Fishback marked on the Order under gravity, that the injury was highly likely, permanently disabling, significant and substantial and with 14 persons affected, and the negligence as high, if Herndon, as one who was there, had been the issuing inspector, would he have marked the evaluation differently, Herndon responded, he would not have. That is, he would have marked the evaluation the same as Fishback. *Id.*

Respondent's defense began with Barry McKinnon. He is a scoop operator at the Francisco Mine. VI Tr. 235. Working on the A crew, occasionally he will fill in as a section foreman. *Id.* The A crew is the idle shift. The other two crews were producing coal. VI Tr. 236-237. On the December date in issue in this litigation, McKinnon was working in Unit 2. While the A and B crews rotate every two weeks, the A continues to be the idle shift. VI Tr. 237. The idle shift does what one might expect; clean, rock dust and perform equipment maintenance. *Id.* Seven to eight miners make up the A crew. By comparison, a production crew has about 15 people. *Id.* McKinnon described the specific jobs the A crew would perform as "scoop operator, which cleaned, dusted the units, cleaned for walls, set them up. You would have two or three guys building walls. One man doing ventilation. We got one guy that washes." VI Tr. 238. McKinnon is usually the scoop operator.

When prompted by Respondent's Counsel, McKinnon then added that prying ribs is a common activity for the A crew. He also asserted that everyone on the A crew pries ribs during their shift. Discerning a conflict with that response, Respondent's Counsel inquired, "[b]ut if you're the section foreman or if you're the scoop man, in the normal course of mining operations, how will the scoop man have an opportunity to pry ribs?" VI Tr. 238. McKinnon responded, "Well, he [i.e. the scoop man] would -- *if he did any prying*, he would basically what he did, he pried them down. If it was something that was out of control for a pry bar, he would use a scoop bucket and take down the excess or whatever." VI Tr. 238-239 (emphasis added). A similar question arose regarding the roof bolters, with Counsel asking, "What about the roof bolters? In what context would they pry ribs?" VI Tr. 239. McKinnon answered, "They would pry ribs down as they advance in, scaling them, normal things like that when they would advance in on the bolt." *Id.* He informed that there is a pry bar on the roof bolter. *Id.* So too, it was appropriately asked how miners building walls (i.e. stoppings) would have an opportunity to scale ribs. McKinnon answered they would scale ribs around the work area. *Id.* The Court finds that McKinnon's testimony on this subject lacked some credibility. Accordingly, the Court finds that the A crew members' focus was on jobs other than prying ribs.

McKinnon stated that, before his shift began the crew would meet at the command center, which is underground. There they would "get [their] game plan for the day and put out jobs and send them on their way." VI Tr. 240. Only upon prompting did McKinnon assert that rib control

would come up as a topic at those meetings. VI Tr. 241. However, when asked how that subject would come up, he answered, "[w]ell it was -- it was everybody's job to pry ribs. Everybody knows it, and that's what -- when you have the meeting at the school, that's just one of the topics that was brought up." *Id.* The Court did not find McKinnon to be completely credible on this topic either.

Turning to the violations alleged in this litigation, McKinnon was asked, "[i]n December 2015, do you think you and your crew were successful in managing the ribs on Unit 2?" VI Tr. 241. McKinnon responded, "[y]es," but his support for that assertion, was that "[b]ecause no one got hurt." *Id.* Later, McKinnon would affirm that his test was whether someone got hurt. VI Tr. 257-258. The Court finds that McKinnon's response was both a revealing and a disappointing standard for safety that he applied.

McKinnon's duties, when acting as a section foreman required him to do examinations. These include an on-shift report and a pre-shift report. As before, when asked what he looks for when doing his pre-shift, McKinnon answered, "are you looking for? "Well, pre-shift you -- you walk the faces, check for gases, air readings, adverse conditions on ribs, top, loose bolts, et cetera." VI Tr. 242. Not picking up from what his responses were lacking in his earlier testimony, he was specifically asked, "[w]hile doing the pre-shift examination, would you -- would you -- would you have pried ribs?" McKinnon responded, with an uninspiring, "[y]eah. As needed." *Id.* The Court finds that McKinnon's response speaks for itself.

McKinnon was directed to Respondent's Ex. R 2 P, which he identified as the on-shift report for second shift, Unit 2, on December 21st. VI Tr. 243. On that day he was acting as the shift foreman. The second page of that exhibit records the pre-shift exam for the same day. *Id.* Activities and corrective actions are listed on the on-shift exam. That report reflects "[p]rying ribs down in by the tail." VI Tr. 244. McKinnon stated that was done by the "whole crew," an indication, in the Court's estimation, that this was a situation needing attention. *Id.*

Next, McKinnon was asked about R 2S, the on-shift report for Unit 2, second shift, on December 22nd. That report pertained to the shift after the order was issued and the unit was still shut down at that time. V I Tr. 244-245. Ribs were pried down, bolts spotted and timbers were set across the unit and these things were done on the 2A roadway too. That roadway is outby the loading point and "technically" is not on the working section. VI Tr. 245. The 2A is also a travelway. Work was being done there because it had been "red flagged" and shut down. The Court observes that the report does not present a picture in conflict with the earlier testimony of MSHA inspectors Fishback and Herndon.

McKinnon stated that most of the rib prying had been done before his crew came in on their shift and that more of the activity involved bolting, and timber setting, a condition that developed after the rib prying resulted in too wide an entry. VI Tr. 246-247. As has been noted, the mining occurring where the orders were issued was on Unit 2, but previously they were on a different panel, which ran parallel to the panel where the miners had been working. VI Tr. 247. McKinnon stated that the previous panel had the same problem with the ribs, requiring that they be pried. VI Tr. 248.

On cross-examination by the Secretary, McKinnon was directed to Ex. P 5, at page 4, and further identified as "examination training," and dated October 28, 2015. VI Tr. 251-252. McKinnon agreed that it reflects that he was among those receiving retraining on standard 75.202(a), regarding loose rib maintenance. VI Tr. 253. McKinnon affirmed his earlier testimony that, when acting as a scoop operator, he would take down loose ribs when encountered and that he could do this without first notifying his foreman of this action. VI Tr. 253-254. However, when asked by the Court, McKinnon qualified his testimony, stating that, prior notification to the foreman about prying a rib would depend on the size of the rib to be pried down. VI Tr. 254. The concern is associated with whether such prying makes the bolt spacing too wide. VI Tr. 255.

McKinnon affirmed that, on December 22nd, the second shift was the shift he was working, *after* the orders in issue had been issued. VI Tr. 258. Therefore, at that time, he was dealing with the conditions that Fishback had cited. *Id.* The crew's action of abating the cited conditions continued the entire shift. VI Tr. 259. McKinnon believed that, by the end of his shift, there was still more work to be done abating the conditions. VI Tr. 260.

McKinnon was also asked about Ex. R 2 S, which pertained to the on-shift exam that he conducted on December 22nd and he agreed that the exhibit reflects that the crew was dealing solely with the conditions cited by the inspector. VI Tr. 260-261. Asked about R 2 I, R 2 F, R 2 C, and R 2 P, McKinnon agreed that each reflect that ribs were pried down.[18] VI Tr. 261-262.

At the start of the day two of the hearing Matthew Benjamin, who is an underground miner and a mine examiner at Respondent's mine, testified for the Respondent. VII at Tr. 8. Benjamin used to fill in as a section foreman (aka a "face boss") frequently, but does not do that anymore. VII Tr. 9. In his former role as a fill-in, that included filling in on Unit 2. *Id.* He worked the third shift, the "C-crew," which had hours from 11 p.m. to 7 a.m., and was a production shift. VII Tr. 10. Unit 2 was a "split air" unit, a term which refers to air which comes up the intake and then splits to the left and right sides of the unit, allowing both units to run at the same time. VII Tr. 10-11. Under this arrangement there would be a continuous miner, coal

[18] The Secretary inquired why the wording was different for R 2 S. McKinnon agreed that R 2 S reflects that, in addition to prying ribs down in the tail, they also spotted bolts "across unit, spot bolts on 2A, 23 crosscut, 14 crosscut, set timbers nine through 20." VI Tr. 262. The Secretary's Counsel asked why none of the other exams required spot bolting. VI Tr. 263. McKinnon responded only that "[i]t's because they pried all their ribs down." Id. Pressed, he said, they "could have" done some spot bolting but did not record it, though they should have recorded it. *Id*. Directed to Ex. R 2 S, McKinnon agreed that the spot bolting referenced in that exhibit indicates that the mine had been spot bolting for at least nine crosscuts, from 23 to 13. VI Tr. 265. On redirect, Respondent returned to Ex P1, McKinnon affirmed that the area on the 2A travelway is not on the unit, but outby it. VI Tr. 267. The crosscuts 23 to 14, referred to in R2 S, are on two-way travel, outby the working section. *Id.* Distinct from the travelway, the reference in P1, to "MMU- 002 and MMU-012, are at the active working sections, and refer to the unit. Id. McKinnon also stated that not everyone on the crew stayed on the working section to address the conditions, as some were on the roadway spotting bolts. VI Tr. 268. The Court considered this testimony to be tangential. It is included only to reflect completeness, regarding McKinnon's testimony.

haulers and a roof bolter on each side, although typically a single scoop covered both sides. *Id.* The belt entry is at entry five and the travelway was usually at entry four. VII Tr. 11. This was the situation in December 2015. VII Tr. 12.

Benjamin recalled that at that time there was a mud seam or mud vein, which term he also described as a "parting." VII Tr. 13-14. He estimated the mud seam size to be about 4 to 8 inches in width. VII Tr. 14. The mud seam material is softer than coal, it is also wet and a few days after the mine is set up in the area there would be a "slough." *Id.* That is to say, material would come off the rib. This occurred because the seam would dry out and then slough off. VII Tr. 15. However, he did not view it as a "challenge," because they knew of the condition and they would take care of it. VII Tr. 14. The issue was addressed by prying the ribs down. VII Tr. 15. He asserted that, when working in Unit 2, prying the ribs was done frequently and that it was a subject of the crew in safety meetings "to make sure we're taking care of them." VII Tr. 16. Benjamin agreed, when asked, that the miners were encouraged to take steps to control the ribs on Unit 2. VII Tr. 17. Elaborating, Benjamin stated, "The guys that -- like I said, they knew about the conditions. They knew about the ribs. They would pry the ribs. They were encouraged to pry the ribs. A really good crew. You didn't have to encourage them very much at all. They -- they would take it upon themselves to take care of the ribs." VII Tr. 17. Benjamin stated that his continuous miner operator, Nathan Sumner, would use his equipment to "knock down the ribs." VII Tr. 19. He added that Tim Loveless and Stuart Davis, both hauler drivers, also would use their equipment to "hit ribs, pry down ribs, knock any -- pull the slough off or anything like that." *Id.* He considered it safer to use equipment, rather than a pry bar, to pry down the ribs, as one would be farther away from the ribs during that task. *Id.* By "equipment" Benjamin meant coal haulers and continuous mining machines, the latter described in shorthand as "miners". VII Tr. 20. Benjamin stated that he would use a "red bar," which he described as similar to a "big screwdriver," to pry down loose ribs and he affirmed that he would use the red bar on every shift up on Unit 2. VII Tr. 24.

Benjamin was directed to Gov. Ex. P 1, which is Order No. 9036922, issued on December 22, 2015 on the day shift. VII Tr. 24- 25. He informed that he worked the midnight shift immediately preceding the shift for which that order was issued. He was then presented with Ex. R 2, Q which is the on-shift report for that midnight shift. Benjamin described the conditions he encountered for his on shift as "The conditions we had were -- we had the loose material, slough, around the parting that, like I said, I -- I believe the -- we were only there for a -- a day or two. Like I said, that's when we pulled in and those were the conditions that [we] had." VII Tr. 26. He added that steps were taken to control the ribs on his midnight shift, stating, "We had pried -- pried on ribs that day. We'd used equipment, the continuous miner. We used haulers to also pry on the ribs or to scale the ribs." *Id.* He also stated that Nathan Sumner used the continuous miner to pry the ribs on that midnight shift. VII Tr. 27. When Benjamin arrived for his next shift, the evening of December 22nd, he and Sumner were in disbelief that an order had been issued, given the way they had attended to the control of the ribs. *Id.* His fellow miners, Davis and Loveless, had used a hauler, while he had used his red prying tool to deal with the ribs. He did recall one rib that was loose. That rib was too big for a red bar to handle so Loveless used a hauler to deal with it. VII Tr. 28. Benjamin himself used his red bar to deal with the ribs on the shift that preceded the order. Exhibit R 2 Q documents that he pried down ribs. VII Tr. 29. Benjamin confirmed that he did both a pre-shift and an on-shift exam the night prior to the

order's issuance. He added that if rib issues were encountered during those exams he would attend to them. While ribs being pried were noted in those exams, no names were associated with those actions. VII Tr. 32.

Asked whether there were any adverse ribs when he performed his December 22nd pre-shift, Benjamin stated that, according to his report for that shift, per Ex. R2 Q, his answer was "No." VII Tr. 33. Because his answer was qualified, he was then asked what action he would have taken *if* he had found hazardous ribs, and he responded that he would have tried to pry them down. As to the issue *if* he had pried them whether he would still call it out, that is, using the mine's underground phone system, he answered, "sometimes."[19] *Id.*

Upon inquiring if there were any loose ribs uncorrected when he ended his day, Benjamin responded, "We did not leave *any hazardous ribs* uncorrected." VII Tr. 35 (emphasis added). The Court noted that Benjamin seemed to draw a distinction between loose ribs and hazardous ribs. *Id.* Benjamin responded that he did see such a distinction, answering, "A hazardous rib -- a loose rib does not have to be a hazard. A lot of times, a loose rib will just be a -- a small crack that you can knock off. You can take your hand pry -- the -- the prying tool and knock it off. When it does come off, it might come down in little bitty pieces, maybe a inch or two thick." VII Tr. 36. Explaining further, he then added,

> A hazardous rib -- a bigger rib, a rib that would cause injury, a rib that would cause a -- someone to be severely hurt. Lot of times if you do have a -- there's a rib that it's that big, it'd also take -- like I said, there'd be a bigger chunk of rib that would come out to where the bolt spacing would be too wide, to where you actually make other hazards. A loose -- like I said, the -- the loose rib is not a hazardous rib. Like I said, the -- just like slough -- the -- the slough, just a smaller -- smaller piece of the rib that you could -- that you can knock off.

VII Tr. 37.

Thus, the Court observes that Benjamin distinguished between loose ribs and cracks from a hazardous rib or a large crack or a large piece of the rib, with the latter needing attention "right then." VII Tr. 37. Ultimately, however, Benjamin stated that all loose ribs need to be taken down because they could become a bigger problem. VII Tr. 39.

Respondent's Counsel, following up on that subject, asked if Benjamin would pry down loose ribs and he answered that he would. As to whether there were any loose ribs uncorrected that day when he left the section, he responded, "No. Not that I recall. The -- the loose ribs that

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[19] While Benjamin's signature appears on the pre-shift, the report itself reflects another person's writing, which is to reflect Benjamin's oral report using the phone system. VII Tr. 34. In this instance, Benjamin stated, he calls out his report, which he believed was taken by Zach Hudson. Hudson would then sign the report and later Benjamin would review it for accuracy, make any corrections and then he would sign it too. *Id*. The first page of Ex R 2 Q is the on-shift report. VII Tr. 35. The on-shift is not called out ahead, rather it is completed when Benjamin returns to the surface. *Id.*

we encountered we took care of. We take care of the loose -- loose ribs, loose material, slough that we encountered on that shift." VII Tr. 39-40. The Court then inquired further whether the ribs were in "great shape" when Benjamin ended his shift on December 22nd. He responded, "No. … They were not in good shape -- like I said, you -- you -- you pry down the ribs that you see. You don't necessarily see everything." VII Tr. 40. Uncertain about that answer, the Court asked whether, based on what he saw during that shift, if the ribs were in great shape. Benjamin answered, "From what we seen, yes. From the ribs that we encountered on that shift, we took care of, yes." VII Tr. 40-41. He then added that he did look at every rib in the section. VII Tr. 41.

Upon further questioning by the Respondent, Benjamin stated that the presence of the mud vein made it impossible to pry everything there was to pry, stating, "Because that mud vein, you can dig on the -- the parting/mud vein, you could dig on that thing all day long." VII Tr. 41-42. Nevertheless, Benjamin stated that one could distinguish between parting/mud vein issues that needed to be pried down and those that did not. VII Tr. 42. And, according to Benjamin, conditions could change in a short time, noting "Like I said, you could pry on it -- you could leave there and it had been -- it'd look good. Come back a few hours later and you could see from a different angle where that's not the way you left it." *Id*.

Benjamin confirmed to the Court that the mud vein presented a continuing issue, not one that could be addressed and then solved, "In that area, no. I mean, that was part of the geographic of -- of that area. That mud vein was -- it was -- it was there. You couldn't get rid of that mud vein." VII Tr. 43. However, he then amended that answer, stating that "after a couple days is when it kind of will dry out. Well, that coal below it, like I said, right there at that area of the mud vein or the -- the parting itself, it would get dried out, as well. And so that's when it would kind of separate from the rest of the coal." VII Tr. 43. "Usually," Benjamin then stated, they "didn't have to go back and scale that again." VII Tr. 44.

Benjamin was presented with Ex. R 2 D, his on-shift for December 17, 2015, pertaining to the previous panel, which reflects that he did pry down ribs. VII Tr. 48. Similarly, Ex. R 2 G, Benjamin's on-shift for December 18, 2015, also reflects that ribs were pried down. VII Tr. 49.

Of greater significance, in the Court's estimation, was Benjamin's distinction between a large rib and a hazardous rib, "Like I said, what a hazardous rib is to me is something that can hurt somebody, something that could seriously injure somebody." VII Tr. 54. He added that, usually, a small rib problem is what it appears to be, small. That is, they do not turn out to be larger than they seem to be. As for large rib issues, he stated that they are usually harder to remove when one starts prying them down. VII Tr. 55.

Benjamin agreed that, for that section on Unit 2, typically he was prying down ribs on each shift. *Id.* However, he could not state how many such ribs he pried down on average each shift. VII Tr. 56. He acknowledged that Exhibits R 2 Q, G, and D all reflect that he and others on that crew pried down ribs. VII Tr. 56-57. He also recalled that miner Sumner pried down a rib on December 22nd using his continuous miner. VII Tr. 57. However, Benjamin did not consider that rib to be a large rib and he informed that it had no effect on the bolt spacing. VII Tr. 58. He watched Sumner scale that rib using a continuous miner. *Id*. Benjamin confirmed that he and Sumner could not believe that an order had been issued for bad ribs. VII Tr. 58-59.

Benjamin also stated that he observed miner Loveless scaling a rib using his hauler and that rib also did not have an effect on the required bolt spacing. VII Tr. 59. He confirmed that rock dusting is typically done after a rib is scaled. *Id.* Though he could not recall just where the ribs which were scaled were located, they were ribs in the entries and crosscuts which were between the faces and the loading point. VII Tr. 60. If rock dusting was done after such scaling, that action would not necessarily be recorded in his corrective actions in his shift exam. VII Tr. 60-61. In his view, whether a scaled rib needs to be rock dusted is a judgment call. VII Tr. 62. Thus, smaller areas do not need dusting, but if "it's a whole entire 80-foot-long rib from top to bottom, well, . . . you go back and dust." *Id.* Generally, Benjamin agreed that the ribs that were pried, per Exhibits R 2, G, D, and Q, did not then require rock dusting. VII Tr. 63.

Benjamin stated that if he came upon a rib that needed attention, that discovery would be recorded in either the pre-shift or on-shift report. VII Tr. 64-65. He added that after a rib comes down it can still be a hazard if one could be seriously hurt, offering as an example, if after a rib is scaled, a wide bolt space is created. VII Tr. 66. As the foreman on a working section, Benjamin affirmed that he is responsible for the whole working section and that it is his call to determine between a loose rib and a hazardous one. VII Tr. 68.

Benjamin believed that he was taking care of all the ribs that needed attention, that is to say, at least all the loose ribs that they encountered. VII Tr. 75-76. He was also asked about the re-training that the miners had to undergo, in October 2015, for loose ribs. Unable to recall when it occurred, upon being shown Exhibit P 5, dated October 29, 2015, Benjamin agreed that exhibit reflects that the mine's C crew had rib examination training at that time. VII Tr. 77. In fact, the exhibit reflects that "Examiners were re-trained on standard 75.202(a), with emphasis on loose rib maintenance" on that date. *Id.* However, Benjamin stated that he recalled nothing about that training, not even how long it lasted. VII Tr. 78.

On the resumption of direct examination, Benjamin agreed that he calls out hazards that are uncorrected on a pre-shift. VII Tr. 78. The Court then inquired, "in your role as the mine examiner, is it part of your responsibility to examine all ribs on the section as part of your pre-shift." VII Tr. 80. Benjamin responded, "Yes." *Id.* He then qualified that response, adding "[y]ou try to check all of them." He then added that, personally, he does not "feel as threatened from the ribs as I do the -- say, the top." VII Tr. 81. The concerns can vary depending on the time of year. For example, during December or January, because they are dry months, one doesn't have as many rib problems. By contrast, he explained, during the summer, with more humidity, there can be more rib issues. *Id.*

With that response, the Court then asked if it was fair to construe from his [i.e. Benjamin's] answer that "between … the roof and the ribs, [he] provide[s] greater attention to the roof because [he] think[s] that [ ] - presents a greater hazard, personally [he] thinks, than ribs." VII Tr. 81. Benjamin first responded, "Right," but then retracted that answer, stating that he gives "as much attention to the ribs as you do the top." VII Tr. 82. He elaborated, without retreating from his amended answer, that it has been his personal experience that miners have been injured more by roof than ribs. VII Tr. 83.

Benjamin reaffirmed that both he and Sumner were in disbelief that an order was issued. With that answer, the Court then inquired, "would you have had the same reaction if a 104(a) citation was issued instead? Would you see that was fair but an order was too much, or do you feel that neither should've been issued?" VII Tr. 84-85. Benjamin answered, "Honestly, I'd be more upset with an order than a citation, but still in the same -- same time, I would be upset with a citation, as well, just because I thought we were doing the -- the job that needed to be done, taking care of the ribs." VII Tr. 85. Thus, he affirmed that, in his view, there was no hazardous condition from the ribs. VII Tr. 86.

Benjamin also reconfirmed that continuous mining machines and haulers were used to deal with ribs that needed scaling and that in the shift prior to the order being issued, the shift in which he was the foreman, he observed both Sumner and Loveless using, respectively, the miner and the hauler to address ribs there. VII Tr. 87. That response prompted the Court to ask, "is that rather unusual to require not just prying down ribs but using those rather formidable pieces of equipment, haulers, continuous miners, to deal with ribs? Is that unusual or is that not unusual?" *Id.* Benjamin responded that it was not unusual. VII Tr. 87-88.

Benjamin could not recall the number of miners working on his crew on December 22nd, but did inform that typically there would be between 12 to 17 miners on his C crew. As to the number among those miners that were dealing with rib issues on that date, he specifically recalled Sumner, Loveless and Davis doing that work. As to the others on his crew that evening, he couldn't recall what they may have encountered with ribs that evening. VII Tr. 90-91. With it being established that four miners, that is, including Benjamin, were dealing with ribs, he was asked how much of their time during that shift was spent addressing rib issues. He responded that it would be 10 percent or less. VII Tr. 92.

Respondent's Counsel then asked Benjamin if there were any violative conditions concerning ribs, when his shift ended on December 22nd, that he knew of and did not correct. Benjamin responded, "no." VII Tr. 93. As to the use of equipment other than scale bars, Benjamin stated that did not mean that such bars could not have been used, but rather that it was more efficient to use the continuous miner and the hauler. VII Tr. 94. Benjamin agreed that it was common for a continuous miner to scale while tramming from one entry or crosscut to another. VII Tr. 94. He maintained that his crew's use of the miner and hauler was no different on December 22nd than any other day when working on different panels. VII Tr. 95. However, Benjamin allowed that he did spend more time on ribs on that panel than other panels. VII Tr. 96.

Nathan Ryan Sumner also testified for the Respondent. He is a continuous miner operator at the mine and was acting in that role during December 2015, working the C crew, otherwise called the third shift. VII Tr. 101. In that job he remotely operates the continuous miner. This includes tramming the miner through the last open crosscut where the faces are located. VII Tr. 102. Directed to Order No. 9036922, issued December 22, 2015, Sumner stated that he was working on the shift immediately preceding that order's issuance and that he had been working on Unit 2. VII Tr. 103. He agreed there was a mud vein or as also described, a "parting," in Unit 2. That mud vein, he informed, made the ribs softer and that such material was softer than the coal. VII Tr. 104. Sumner informed that they were all aware of the issue and that they would pry

down any loose rib or a rib that needed attention. VII Tr. 105. To do that work, he would use either a pry bar or the continuous miner. *Id*. A pry bar could be used to deal with ribs but he stated that using a miner is more efficient and safer. *Id.*

Hauler[20] operators, i.e. those who haul coal, work in the last open crosscut. VII Tr. 106. They haul coal from the location where the continuous miner operator cuts the coal and transport it to the feeder, which is some three to five breaks from there. VII Tr. 107. When told about the order, Sumner thought that it was prank, especially because, "the panel that [they] came out of beforehand was just like that. The -- the conditions were actually worse in the one we just had." *Id*. They had just moved to the panel for Unit 2, the location of the order. *Id.* In fact, they were not yet ready to produce coal yet. VII Tr. 109-110. Sumner affirmed that they had taken care of the ribs in that previous panel the same way. Thus, he believed that they had done a good job in both panels. VII Tr. 108. It was his view that neither panel's ribs warranted a violation, because they took care of the conditions. VII Tr. 111-112.

Sumner stated that he did not examine the conditions on the left side of the unit as he didn't have occasion to go over there. Primarily, he was working in the last open crosscut. VII Tr. 114. Therefore, he admitted that he rarely had occasion to go to crosscuts outby the last open crosscut, "[o]nly if they needed me to help them with something, but [the] majority of time on my shift, I never leave that -- that miner. That's my area." VII Tr. 114-115. And, he added, he did not have occasion to visit the outby crosscuts on December 22nd. VII Tr. 115.

Zachary Hudson also testified for the Respondent. VII Tr. 119. He is a face boss, also known as a section foreman. In December 2015, he was a section foreman, though he was an hourly employee then and on the B crew. VII Tr. 120. That crew would swap hours every two weeks with the A crew, meaning they alternated working the day and afternoon shifts. *Id.* At the time in issue, he was working in Unit 2, a production shift and he agreed that they were dealing with a mud vein there. *Id.* He informed that the mud would break out but the effect was mostly smaller material would be released. Occasionally larger pieces would come out and these would be attended to by a hauler or a scoop. VII Tr. 121. Hudson asserted that the rib issue was talked about by the crew every day. *Id.* The crew would be told, "watch the ribs." *Id.* Hudson maintained that they were "constantly scaling" things that needed to come down and they took steps such as narrowing the cuts. VII Tr. 122. While cuts were usually 18 or 19 feet, they would be narrowed to 16 or 17. *Id.* This, he said, meant that "your ribs wouldn't pop out as bad." *Id.*

Shown Gov. Ex. P1, which is Order No. 9036922, issued December 22, 2015, Hudson stated that he was the section foreman the day before that order was issued. VII Tr. 124. Presented with Ex. 7 D, Hudson identified it as his section report for December 21, 2015. They ran coal during that shift, doing about 400 feet. *Id.* Shown Ex. 7 C, Hudson identified that as Section Foreman Chris Falls' report for December 21st. That report pertains to the shift *before* Hudson's shift that day. VII Tr. 125. It reflects that Falls' crew was moving the feeder to the setup location at the new panel. *Id.* This meant that Hudson's was the first crew to start mining coal at that new panel. VII Tr. 125-126. Hudson maintained that MSHA inspectors had been present every week when he was working the prior panel and he also asserted that the conditions

[20] A hauler is also called a "car." VII Tr. 106

at that prior panel "were the same," and no MSHA person indicated that their efforts in the prior panel were insufficient. Further, Hudson asserted that there was a mud vein in that prior panel too. VII Tr. 126. Not only did he claim that rib conditions at the prior panel "were the same," he asserted that the mud vein at that prior panel was getting thicker, to the point that they pulled out of that panel and moved to the panel where the order was issued.[21] VII Tr. 127.

Turning his attention to December 22, 2015, Hudson stated that he met MSHA inspectors Fishback and Herndon that day. VII Tr. 127. Hudson asserted that Fishback told him the mine needed "to get people out on the travelway to start prying ribs," and he [Hudson] then "moved three operators out there . . . [and he told his manager] "what was going on so he'd [i.e. Hudson's mine manager would] come up and take a look at [the situation]." VII Tr. 128. Specifically, Hudson agreed that Fishback advised there were some "ribs on the travelway that needed attention." *Id.* That area was outby the working section. *Id.* Hudson sent miners, (he believed he sent three) to address the condition identified by Inspector Fishback. *Id.*

Following that, Hudson then got a call from Carter "about a loose rib in entry two that was between the second-to-last open and last open. By the time [Hudson] got over there, they done moved on and the rib was on the ground." VII Tr. 128-129. Hudson asserted that the rib had been pulled down, but he couldn't tell how big it had been because it was then crumbled coal on the ground. VII Tr. 129. Hudson stated he had never been in that entry two where the rib issue occurred, never having been between the second to last and the last open crosscut in entry two. VII Tr. 130. At that point, Hudson stated he was "pretty sure by that point they done said that the left side would be shut down for loose ribs, and I called on the right side, told them to shut down and back their equipment out, we're going to shut down the unit . . . [b]ecause if they shut the left side down for the loose ribs, more than likely they were going to shut the right side down, so I just shut it down and had people start working on ribs." VII Tr. 131. At that time, Hudson had walked the faces and did air readings through the last open crosscut, but he had not been through the entire unit. *Id.* Hudson's view was that the rib they had just pried down did not present a hazard to anyone, but his attitude was "who's to say they're [i.e. MSHA] not going to go over there and find something like that." VII Tr. 131-132. As implied by his earlier comment, Hudson then stated expressly that shutting down the left side "was too excessive." VII Tr. 132. Therefore, his action in shutting down the right side was anticipatory that MSHA would take similar "excessive action." *Id.*

Shown Exhibit R 7 G, the section report for December 22, 2015, Hudson stated it reflects that production for that shift stopped at 10 a.m. *Id.* After he decided to shut down the whole unit, the miners on that shift then "[w]orked on ribs, roof bolters. As we'd pry ribs down, we measured the bolt spacing. If we had to spot bolts, we spotted bolts. I'm sure. And like right here it says we set some timbers down the travelway, so a couple of them were doing that." VII Tr. 133. His miners were then working both on the section and outby. *Id.* Hudson admitted that was another reason for shutting down the unit, "Yeah. I mean, they brought up the ribs on the travelway. I had to send operators out there. They brought up the ribs on the left side - -" *Id.*

[21] Though he reaffirmed that in the prior panel extra precautions had to be taken because of the mud vein there, the decision was to leave the panel as it was "too costly" to stay. VII Tr. 141.

Nevertheless, Hudson maintained that the decision to shut down the unit was *not* "because of any loose rib that [he] knew hadn't been corrected yet." VII Tr. 134. Hudson stated that the prying was "mainly around the mud vein," and that they were only getting "little chunks of coal," and he did not notice any large ribs being pried down. *Id.*

Hudson agreed that his interaction with Inspector Fishback did not go well, relating that Fishback told him he "was a bad boss for letting [his] workers work in those conditions, which to [Hudson] wasn't a condition, you know. It was something we were working in every day and we dealt with it. We took care of business. He said . . . that the other bosses are bad bosses. He wanted names of who was bossing on the other crews." VII Tr. 135. Hudson maintained that he tried to tell the inspector what they were doing to keep the unit safe, but the inspector simply told him that it wasn't good enough. *Id*. Hudson did not like that the inspector called him a "bad boss." *Id.* He felt that was an unfair label "[b]ecause we were dealing with the problem. We were working safe. Nobody got hurt." *Id.*

Hudson stated that he never saw Inspector Fishback take photographs. Shown Exhibit P 3, government photos, he was directed to photo 39. For that photo, Hudson asserted that it was not taken on a working section, because phone lines and cables are present. Rather, that photo was down the travelway. VII Tr. 136-137. Hudson expressed that phone lines are moved up as mining progresses but they are never inby the loading point. VII Tr. 137. Directed to photo 49, Hudson believed that was a photo of a maintenance ride, which would be used by maintenance opertors. Vehicles such as that, including mantrips, would by parked outby the loading point. VII Tr. 138.

On cross-examination, when asked if he remembered retraining for standard 75.202(a), Hudson stated he did not remember that training. VII Tr. 138. However, upon being shown Ex. P5, dated October 29, 2015, he then admitted that exhibit reflected such retraining, as his signature appears on the exhibit. VII Tr. 139. However, he could not recall anything about the retraining. *Id.*

Regarding the location where a rib did come down, though Hudson couldn't determine how large it was, he did acknowledge that miners could have been in that area on their way to the faces. VII Tr. 146. After the unit was shut down, with the inspector shutting down the left side and Hudson then deciding to shut down the right side, Hudson agreed that "after the unit was shut down [ ] all of the miners on the shift were either taking care of the ribs in the travelway or taking care of ribs on the section." VII Tr. 148. Those miners then did nothing else but attend to the rib conditions. *Id.* Asked if, when his shift ended, all rib issues had been resolved in that area, Hudson responded, he was "not going to say that, because it's all a matter of opinion." VII Tr. 149. Pressed on the issue, Hudson then stated there were no more ribs in need of being scaled or pried. *Id*. However, he did not walk through the entire unit before leaving at the end of his shift, stating, "[n]ot the entire unit. Last open and where my men were working, travelway. I was taking care of all of the hot spots, mainly the travelway and where we were scaling ribs down, you know. We mainly tried to take care of the run, where the coal haulers and everybody's working." VII Tr. 149-150. As to addressing the other entries and crosscuts, he answered, "[w]ell if they're going to travel them a lot we would take care of them. We would walk through them." VII Tr. 150.

Regarding Hudson's issue with the inspector calling him a "bad boss," he maintained that everyone was working safe. VII Tr. 151. However, Hudson admitted that during his deposition he denied that the inspector had any bias against him. VII Tr. 152. He was then asked about Exhibit P 7, a statement that Hudson drafted on December 22, 2015. In that statement, Hudson remarked that, "[s]ome of these ribs weren't that bad. Some of them we had to use equipment to get them down." VII Tr. 153. Based on that response, Hudson was asked if some of the ribs required equipment to get them down. His response was that MSHA wanted them down, but they had to beat on them to do that and a pry bar wasn't useful. In short, he considered them not ready to come down. *Id.* However, he allowed that some could be brought down with a pry bar. VII Tr. 154.

Based on answers which the Court found to be unclear, it inquired if Hudson was contending that the only ribs that need attention are those for which a pry bar is effective. Hudson denied implying that. Rather, his point was that if one has to use a big piece of equipment to bring a rib down, then the rib was not posing a threat. VII Tr. 155. Hudson explained his view further. His position was that, a rib that is removed by a continuous miner or a hauler, as opposed to a pry bar, does not need attention "at that moment." VII Tr. 156. However, to the Court, the distinction he made was not absolute, as he then allowed that "Now, I'm not saying that if -- here *in a couple hours or something*, you know, when the air gets behind it or whatever, it starts drying out, you know, I'm saying there that it's not going to start popping out more, but that's when you could take a pry bar in there and just pry down what needs to come down." *Id.* (emphasis added). Hudson made his position clear – it was his view that by having to use a piece of equipment, "you're making it more -- you're creating more of a problem using a piece of equipment to sit there and knock on the rib line." VII Tr. 156-157. Just as quickly, however, he allowed that there can be circumstances where using a piece of equipment is preferable to using a pry bar. VII Tr. 157.

Eric Carter then testified for the Respondent. At the time of the hearing Carter was a senior manager of production. In December 2015 his title was "continuous improvement [sic] and a mine manager." VII Tr. 163. In that December 2015 role, he "edited production reports, reviewed all the callouts from the shift, as far as maintenance stuff, and then looked for ways to help us cut costs and produce more efficiently." *Id.* The Court notes that production was Carter's focus, not safety. Consistent with that observation, when asked if he had any specific knowledge of rib conditions on Unit 2 in December 2015, he stated "[o]nly what would've been in a production report." *Id.*

Despite the above statements, Carter informed that he accompanied inspectors Fishback and Herndon on December 22, 2015. VII Tr. 164. It was unusual for Carter to accompany inspectors but others were on vacation, so the job fell to him. VII Tr. 165. It is of interest that on their way in to the location to be inspected they came upon a timber that needed to be reset. That was done and when Carter inquired if a citation would issue, the inspectors told him there would not be. VII Tr. 166. Next, they "turned onto first northeast going towards Unit 2 and [they] stopped. [The inspector] said -- there was a bad rib. [Carter then] pried it down." *Id.* Again, Carter inquired if a citation would be issued, and again he was told, no, the inspector just "just wanted to see how bad it was." *Id.* This occurred on the travelway. VII Tr. 166. As the

reasonableness of the inspector has been raised by the defense, the Court believes that Fishback's responses to the problems they encountered with Carter speak, to a degree, to his reasonableness.

Upon arriving at the location of Unit 2, Carter informed that, again with no citations being issued, "[t]here was a couple items there at the feeder that [the inspector] wanted corrected and [Carter] got ahold of Zach [Hudson] to have those guys correct those items -- accumulations, spillage around the feeder controls, fix some back stock around the feeder …" VII Tr. 166-167. The inspectors just wanted those areas cleaned up. *Id.* Then, still in Unit 2, they moved to the number 4 entry. At the second to last open cross cut, the inspector asked if they were scooping on the unit, and told them they needed to do that. Carter called Hudson who informed that he was "already on it." VII Tr. 169.

From there, they then went to the two entry, where the inspector stated there was a bad rib on the left side. Carter described the bad rib as follows: "The rib itself was probably about six-and-a half feet tall. The coal had a parting in it, so there was a -- like a mud vein in that -- in -- in the coal seam, so there would've been three-and-a-half to four feet of coal at the bottom of the mud vein, and another two feet, probably, 18 inches above the mud vein, and then some rock cut out above that." VII Tr. 170. As far as Carter could tell, just the bottom of the rib seemed loose, stating "just the bottom portion underneath the mud seam looked to -- appeared to be loose." VII Tr. 171. In Carter's view, just one side of the ribs was loose, but the inspector told him he wanted both sides pried down. *Id.* This area was on the sides of the entry. Carter had not seen the right side at that point but he poked his head through the curtain and saw the area identified by the inspector. *Id.* Carter stated that it did not involve the whole length of the rib. VII Tr. 173. This time when Carter asked if a citation would be issued, the inspector affirmed that would occur. *Id.* Carter then informed Hudson that he would be getting a citation for a loose rib in the entry. The inspector told them to pry the loose rib down, but the miners did not have a pry bar, only pinner steels. VII Tr. 174. A pinner steel is not the best tool choice to pry down a loose rib. VII Tr. 175. As they could not pry the rib with the pinner steel, Carter told them to use a scoop. *Id.*

Following that discovery, the inspector advised that he was expanding the scope of his citation, informing that both ribs needed to be scaled. VII Tr. 176. Although the inspector pointed to a rib needing scaling, Carter described it as "just flaking along the rib line. Not giant material, just -- it looked football-size material or something." VII Tr. 178. Carter also stated that he observed evidence that scaling had occurred. *Id.* From his testimony of the conditions, Carter expressed that the amount of material was minimal, either football or baseball sized. VII Tr. 179. Then, shown Exhibit P 3 D, Carter agreed that was an example of what he was describing. He characterized it as an area "where they picked out something that they thought was suspect." VII Tr. 180. Shown Exhibit P 3 E, Carter stated this was another example, where "they saw a crack, they put something in and -- and they popped out pieces of material that they could get out." *Id.* Shown Exhibit P 3 C and P 3 E, Carter described those as showing flaking or portions that had been scaled out. VII Tr. 181. However, upon questions from the Court, Carter then explained that he was not present when those photos were taken and beyond that, he couldn't "say that I was ever in that -- I don't know where those came from." VII Tr. 182. Instead, his opinions were based only upon his experience as a miner, as he was unable to "tie those photos to a particular area anywhere in the mine." *Id.*

Carter's testimony suggested that the inspector issued his closure order for the right side of the unit, even though neither he, Carter, nor the inspector had been there yet. VII Tr. 183. In any event, Carter then informed Hudson that "the unit was down until the ribs were scaled and properly re-supported, as per [the inspectors'] criteria, and then the whole unit was to start scaling ribs at that point, from the feeder to the face." VII Tr. 184. The Court inquired of Carter whether, when he was with Inspector Fishback on December 22, 2015, there "were there any areas that [Carter] observed when [he was] accompanying [the inspector], when [there was] evidence of more than flaking." VII Tr. 184. Carter responded, "Four to five crosscut, the last open, the pinner was in five and we approached it and [the inspector] said, "Look at that rib." And at that point, it was ten, 15 foot long and probably two-and-a-half to three foot tall. But we didn't know if – [ ] they pried it out or if a miner hit it when it went across there. We didn't know if it sloughed off and fell out itself …" VII Tr. 184-185. Questioned further, Carter maintained that there were no other such areas, as the rest involved only "flaking." VII Tr. 185. Carter's view was that the areas he described as showing only flaking did not require scaling. VII Tr. 186. However, his view was qualified, as by that he meant that the flaking areas did not require "some kind of *immediate* action." VII Tr. 187 (emphasis added).

On cross-examination, Carter stated that if a citation is issued and he disagrees with it, he will express his view to the inspector, but he does not argue about it. VII Tr. 197. Referred to Exhibit P 8, Carter agreed it reflects that he disagreed with Inspector Fishback's view of the condition of the ribs on Unit 2. VII Tr. 199. Those notes, however, do not contain factual information to support his opinion. VII Tr. 199-200. Although Carter maintained that he does not record such information, so as not to be disrespectful, he admitted that, unless a matter goes to hearing, an inspector would never see such remarks. VII Tr. 200. He did assert that he includes what he witnessed in those notes. VII Tr. 200. However, although on direct Carter asserted that there were ribs which Inspector Fishback claimed were loose but which ribs wouldn't move when he used a tool to try on them, Carter's notes did not reflect that claim. VII Tr. 201. It was not included, he said, because it was not part of the citation that was issued. VII Tr. 202. Upon challenging that claim, Carter then conceded that the citation was for the entire unit. VII Tr. 202. Therefore, his explanation for not including his claim was wanting.

Shown Exhibit P 3 at 39, Carter identified the roof as located "[w]here the hog panel is in the top left corner." VII Tr. 202. Carter then marked that location on the photo, with his initials and the number 6, to show where the rib line meets the roof line. VII Tr. 204, 206. Then, directed to the area on the photo where the inspector marked "6," Carter was asked if he saw any evidence of separation from the rib. Carter answered he saw a crack along the coal seam.[22] Next, directed to his notes, Exhibit P 8, Carter stated that, except for brief intervals, he was with the MSHA inspectors the whole time, that is to say, in close proximity. VII Tr. 209. Carter reaffirmed that inspector Fishback closed parts of the section that the inspector had not yet seen. VII Tr. 210. However, though he asserted it to be a fact, that was not in his notes either. *Id.* His explanation was that he never had an opportunity to complete his notes, as he was "called off to do some other stuff, so [he] never got back to finishing them that day." *Id.* Yet, there were more

[22] However the Court noted that it seemed of questionable value for Carter to mark anything on the exhibit, as Carter admitted he didn't recall that area and therefore his marking was based only on his general experience, not any recollection of it. VII Tr. 206.

chronological notes. The Court finds that, as there were subsequent notes, Carter's reason for not finishing his notes regarding his claim that the inspector closed parts of the section he had never seen, was undercut and therefore less credible.

When questioned about his claim upon viewing another photo and his answer that it displayed flaking or that it had been scaled, Carter admitted that it was also possible that the material could have simply fallen on its own. VII Tr. 212. He then conceded that the materials he saw on December 22nd could've fallen on their own. *Id.*

Violations at Issue in Docket No. LAKE 2016-0232

Five orders are involved with this docket

Inspector Testimony of William Tisdale is an MSHA coal mine inspector.[23] VII Tr. 225. Tisdale is a CMI (coal mine inspector). He has experience inspecting beltlines, both as an inspector and in his prior work as a coal miner. VII Tr. 227. Inspecting beltlines involves "looking for bad rollers. You would look for a belt being misaligned. You would look for hazardous rib conditions. You would look for hazardous roof conditions. You would look for adequate rock dusting. You would look for any accumulations of material that could be combustible. You would make sure that there's an adequate walkway." *Id*. Frozen rollers are another issue. If a belt is "contacting [a frozen roller], it will be rubbed or polished. It could eat right through a roller. It'll eat indentions into it, and sometimes even mud will build up behind them, or they'll be piles of dust under them where it's pulling dust off of a belt." VII Tr. 228. A frozen roller creates several hazards, including frictional heat source, accumulations of fine dust under the roller, with the latter being a particular problem if the roller gets hot enough to become an ignition source and the frozen roller can damage the belt itself. *Id*. Broken rollers and out of bracket rollers also present hazards. VII Tr. 230.

It is helpful to determine roller problems when a belt is running but problems can be identified on a belt when it is not running. This is accomplished by "visually inspecting it, looking for obvious signs of where the rollers had been contacted by the belt and the roller itself is not moving, flat spots, mud built up or coal dust built up behind them where it's obvious that the roller's not turning, grooves cut into the -- the rollers themselves, rollers not being at a proper angle, and obviously if you see one that's broken, it should be obvious as well because it's going to be a different shape, it's going to be a different angle than what a normal intact roller is." VII Tr. 231-232. The duty of examining belts applies to both sides of the belt. VII Tr. 233.

The mine is required to have seals inspected. VII Tr. 234. Seals are subject to regular inspections; some are weekly and some are done each shift. VII Tr. 234-235. Inspector Tisdale demonstrated that he is knowledgeable, explaining, weekly exams apply "[t]ypically to seals that are in the return air course, where the air is being coursed outside, and … seals that are not -- the air is not being coursed to an operating unit, to a running section." VII Tr. 235. Seals that require pre-shift exams apply "where the air is actually ventilating a working section." *Id.* This is required because "the air going across these seals is at more risk to -- to have bad air in it or a --

[23] MSHA coal mine inspectors are sometimes referred to as "CMIs" VII Tr. 225.

have an explosive mixture in it." *Id.* Such air, after passing the seals, goes directly to a working section where miners are working. *Id.* The concern being addressed by seals is methane gas. VII Tr. 236.

Inspector Tisdale inspected the Francisco Underground Pit on January 21, 2016. VII Tr. 237. He examined the 1A, 1B and 1C belts that day. VII Tr. 242. At that time he issued an order on the 1C beltline and also one on the 1B beltline.[24] VII Tr. 238, Exhibits P 9 and P 10. In connection with those orders, Tisdale also issued an order regarding the examination of those belts. VII Tr. 239.

Before going underground that day, the inspector checked the mine's examination book. VII Tr. 241. Exhibit P 14 is the mine's examination record for the two shifts prior to his inspection. *Id*. That exhibit reflects the exam that Randy Hammond conducted for the mine for those belts and the preshift for those belts performed by Kim Moore. *Id.*

Tisdale's inspection began with the 1C belt, then on to the 1 B and the 1A. VII Tr. 243. His direction was from the inby side, and he headed outby, meaning that he was on the left side of the belts. *Id.* The mine's Jeff Brand, accompanied him. *Id.* His first violation was for a misaligned belt on the 1C, citing 30 C.F.R. §75.1731(b). *Id.* He then found damaged rollers on the same belt. Directed to Exhibit P 9, and his Order No. 9036654, it reflects that he found "two top rollers that [were] hanging out of the bottom brackets at crosscut 42 and 43, causing the rollers to be frozen and allowing the belt to rub them." VII Tr. 244. He could tell they were out of their bracket because they had a different angle than the rest of the rollers. *Id.* The belt was then shut down and the rollers were put back in the brackets. Tisdale came upon a number of other rollers with problems, requiring the belt to be shut down. VII Tr. 245. Other roller problems included a top outside roller that was missing, a frozen top center roller at crosscut 35, and a top center roller at crosscut 13 and 14 that was not rolling. VII Tr. 246. Another roller issue was at crosscut 20. Tr. 247, Exhibit P 13 at page 12.

There was an issue between the inspector and the mine's Gotroman, in that the inspector did not want the Gotroman to go ahead of him as the inspector examined the belts. The reason for the inspector's objection was over a concern that belt issues could be corrected before he came upon them. VII Tr. 248.

Turning to Exhibit P 14, Tisdale stated that exhibit shows no indication that any rollers had been changed on the 1C belt during those mine shift exams. VII Tr. 249. When Tisdale worked as a miner and he found a bad roller, he would record that in the examination book. VII Tr. 249. In terms of determining how long the belt problem had existed, Tisdale related that he asked "Chris Robinson on this belt if the shift prior to this was a running shift that they were running the belts, and I believe he told me that they were idle." VII Tr. 249. Tisdale estimated that the conditions existed for two to three weeks. VII Tr. 250. This was based upon his inquiring

[24] Tisdale described the layout of those belts, "operating unit number one, the working section, is dumping on the feeder, which dumps onto the 1-C tail, which then, in turn, dumps onto the 1-B tail, which, in turn, then dumps onto the 1-A tail, which then dumps onto the main south belt, where it exits the mine." VII Tr. 242.

of the mine operator how often they did belt moves. He was told they would move them one to two times per week. VII Tr.250-251. He added that "[t]he two rollers that [he] found that were actually out of their brackets were approximately ten crosscuts from the tail." VII Tr. 251. Given that, "if the mine operator was moving four crosscuts for each belt move, then that would put them at 12 crosscuts," and on that basis he determined the two to three weeks figure. *Id*.

Directed to Exhibit P 10, which pertains to order no. 9036656, and the 1 B belt, Tisdale informed that he "observed a frozen top center roller at crosscut 14 and a frozen top outside roller at crosscut 10 to 11," a condition he noted because the rollers were not rolling when the belt was moving. *Id.* In addition, almost all of the frozen rollers had flat areas on top or polished shiny areas. VII Tr. 252. Those conditions indicate that the rollers had been frozen for a period of time. *Id.*

Regarding Exhibit P 11, order no. 9036657, issued for the 1A belt, Tisdale informed that there "were frozen top center rollers at crosscut 26, 21, and 13[, and the] [t]op outside roller was also frozen at crosscut 19 to 20, and there was a top center roller missing at crosscut 8 to 9." VII Tr. 252-253.

Based on the number of roller issues he found that day, Tisdale stated that he considered it to be an unusually large number. The Court inquired as to the basis for the Inspector's view. He responded, "[b]ecause that many rollers in a short period of time to -- to happen like that would be extremely unlikely. If you had that many bad rollers occurring all the time, you'd never be able to operate. You'd be constantly changing rollers. You'd never have any up time to really produce coal." VII Tr. 253. Tisdale added that the number was also unusual because when he used to examine belts as a miner, he could not recall an instance with so many roller problems, nor had he seen such a situation as an MSHA inspector. VII Tr. 253-254.

Tisdale informed that during his belt inspection he met with miner Lucas Dobbs. He asked Dobbs if he found anything and Dobbs responded that "So far, it looks good." VII Tr. 254. This conflicted with the inspector's observations after Dobbs made that remark as, while Tisdale proceeded outby, he found "another frozen roller at crosscut 13 and a missing roller at crosscut eight to nine." VII Tr. 254-255. At that time, Dobbs was walking from the outby side, heading inby. VII Tr. 255. Thus, going in opposite directions, they passed one another on the same side of the belt. To state the obvious, Dobbs had walked by the problematic rollers that Tisdale found moments later.[25] *Id.*

Tisdale also interacted with the mine's Chris Robinson, the mine manager/ mine foreman for the afternoon shift on that day, who when the inspector asked if there were any mitigating circumstances, responded, "just give us a chance. Let us prove ourselves." VII Tr. 256. Tisdale was not sympathetic, as he informed Robinson that a previous (d) order had been issued

[25] Revisiting his earlier testimony regarding coming across Lucas Dobbs, Tisdale reaffirmed that he was traveling outside and Dobbs inside, but both were on the same side of the belt. Tisdale reaffirmed that after passing Dobbs he found some rollers with problems at crosscuts 13 and 89. VIII Tr. 31. Thus, Tisdale affirmed that Dobbs had missed those problem rollers.

for the same problem with rollers by inspector Josh Gipper. VII Tr. 257. Tisdale considered the three orders he issued to all warrant the same likelihood of injury and persons affected and negligence. *Id.* The hazards created by these roller problems include frictional heat, damage to the belts, and accumulations of combustible material. They present a risk of fire. *Id*. He marked the negligence as high and unwarrantable failures, because "of how many there were in such a short period. … I thought that they were obvious. If -- if you were looking at the belt, if you were to walk up and see that a roller's not turning when the rest of them are, I thought that that would be obvious. As far as the unwarrantable failure, I believe that the mine operator had been already trained on this issue. I believe that they had -- already had many citations issued for this, and they had reason to know about it." VII Tr. 257-258.

Directed to Exhibit P 13, and pages 36-42, retraining is mentioned in Tisdale's notes. They recount, "Subject discussed. Damaged rollers or other damaged belt conveyor components which posed fire hazard must be immediately repaired or replaced. All other damaged rollers or damaged belt conveyor components must be repaired or replaced. … I believe it's the standard straight out of the book." VII Tr. 258. Tisdale then confirmed that when he returned to the surface, he looked at the mine's records and [he] "could not find any rollers being changed for a very long period of time." VII Tr. 259. That record book did not note any bad rollers through January 4, 2016. *Id.* In Tisdale's opinion that was a long period of time to not change rollers. VII Tr. 260.

Moving to Order No. 9036658, Tisdale confirmed that was the order he issued in connection with the three orders on the belts. *Id.* In issuing that order, he had in mind the exam immediately prior to inspecting the belt. This involved Hammond's exam. *Id.* Tisdale rejected the suggestion that the problem rollers he found could've all gone bad after Orr's examination because "of the wear where the operating belt had chewed through on some of these and some of the grooves had -- had cut into some of these, some of the amount of mud that had built up behind them. This is all stuff that doesn't happen in a shift's time, and especially if the belts were idle prior to being inspected." VII Tr. 261. His notes also indicated that they were running coal at that time. *Id.* This conclusion was based upon being told that the belts had been pre-shifted before the unit was idle. From that, Tisdale concluded that the unit was producing coal prior to the day shift. VII Tr. 262. The hazard, he explained, is that belt examiners are not identifying hazards. *Id.* By not correcting the belt problems, things will only get worse. Therefore Tisdale marked the violation as reasonably likely. VII Tr. 263. He marked that violation as high negligence and unwarrantable failure because he "found so many of them that I would've expected them to find some, and yet, nothing was noted in any of the books. On the unwarrantable failure, they had already been retrained for this previously, and yet still, here we are finding several of them." VII Tr. 264

However, evidencing the inspector's reasonableness, he marked the three belt orders as unlikely because there were no combustible materials around those rollers. Thus he did not find an ignition source at the time of his inspection. Also some of the areas were damp and the area was well rock dusted. *Id.*

Accordingly, while all the violations were serious, Tisdale considered the pre-shift to be more concerning because "[b]y not identifying these, you are allowing … - things to build up.

With normal mining practices, we're going to have accumulations. … with normal mining practices, you're going to have … ribs fall out [and] … you're going to have fuel that's going to end up being in the area." VII Tr. 263-264.

Tisdale was then asked about Order No. 9036663,[26] for which the Respondent stipulated to the fact of violation, high negligence and unwarrantable failure. Therefore, the Secretary's inquiry addressed only the reasonably likely, fatal, and number of persons designations. VII Tr. 264-265. That order related to failing to examine the southwest main seals on February 3, 2016. *Id.* Exhibit P 19 reflects the mine's exam records and the inspector's notes for that day. Tisdale took photographs of the DT & I [Date, Time & Initials] boards at the seals. VII Tr. 267, Gov. Exhibits P 18, P 19, and P 20. At that time Tisdale was inspecting the southwest sub-intake air course, but that was not completed because he found the unexamined southwest main seals. VII Tr. 269. The seals are important Tisdale expressed, because they "are on the intake air course, which is putting intake air directly to a working section, and they are adjacent to the primary escapeway." *Id.*

Though perhaps obvious, Tisdale explained that failing to examine seals risks not detecting seals that have deteriorated and could leak bad gas which would then travel to a working section. VII Tr. 270. There is also a risk of an explosive mixture. Problems such an ignition or asphyxiation could occur. *Id.* Those subject to these problems would be "[a]nyone that is inby this area that – that this air is coursed to, which is at least one working section, and if the seals were to blow out, it could -- it could blow out the stocking lines and it can affect the -- the whole air course, which is affecting everyone inby that area." VII Tr. 271. In listing 31 people as affected, Tisdale stated that the mine advised that 31 people would be inby. VII Tr. 271-272. Finding this problem, Tisdale had the mine evacuated. VII Tr. 272. Pre-shift examiners have other responsibilities besides checking the seals. VII Tr. 272-274 and Tisdale's notes at Exhibit P 19A. Referring to the photographs he took, per Ex. P 20, Tisdale took those pictures to show that the seals had not been examined. VII Tr. 275. There were associated problems with this matter, as Tisdale discovered that Matt Walker, for his DT & I, "entered the wrong date, [ ] whenever he was doing his exam the -- the day prior, but he only did half of the seals for that day prior. He did not do both sides." VII Tr. 276-277. Tisdale deduced this from the DT & I boards. VII Tr. 277. The mine operator contacted Walker about the issue and relayed to Tisdale that Walker admitted he had not inspected them. *Id.*

Tisdale, still referring to order number 9036663, Exhibit P 18, marked it as reasonably likely because "without conducting an exam, there's no way to know what hazards may or may not exist in said area, and … in mining, the environments is forever changing, so that's -- that's why we need to make sure they're examined. This particular set of seals is also on a split of air that ventilates a working section. It is upwind of it, which we also recognize that as -- as more of a hazard, and that's why we require it to be examined more often." VII Tr. 278-279. He marked the violation as fatal because "if the seals were to be breached and this air goes inby, … you're

[26] A separate area of potential confusion is noted here. Order No. 9036663 *is* part of Docket No. LAKE 2016-0269, though logically, in terms of the date of the Order's issuance, it would have made more sense for it to be part of Docket No. LAKE 2016-232. Footnote 12, *supra*, also notes this oddity.

putting bad air, low-oxygen air, directly onto a working section, and potentially an explosive mixture, which can also cause an ignition, and -- and you're going to blow out ventilation. … [a]nd without ventilation in a mine, especially with fires, you're going to be in a really bad situation." VII Tr. 279. The Court then inquired, and the inspector confirmed that, in this particular situation, the unexamined seals were determined to be fine. VII Tr. 280.

On cross-examination, Tisdale was asked about the difference between top and bottom rollers. As the names imply, top rollers support the top of the belt while bottoms support the bottom portion. VII Tr. 281. A "cam" refers to an individual roller.[27] *Id.* A top set of rollers will have three cams while the bottom will have one. Tisdale agreed that for his order not all three top rollers had issues; only one of the three was problematic. VII Tr. 281-282. Tisdale agreed that a "frozen" roller refers to a roller that is not turning. VII Tr. 282.

Tisdale acknowledged that his view that the problems with the rollers had existed for two to three weeks was based on the scheduled belt moves and he affirmed that his view of the duration of the problem applied to the out of bracket rollers and the one roller that was completely missing. VII Tr. 285. Tisdale did not believe that the problems he found could have occurred after the belt move. VII Tr. 286.

Referring to Inspector Tisdale's view that he considered the number of problem rollers to be large, Tisdale was asked to consider only the 1 C belt, where he found five problem rollers. He confirmed his view that this was a large number of rollers. VII Tr. 287. He also considered the two problem rollers he found on the 1B belt to be a large number because it was a short belt. *Id.* Tisdale could not recall, nor calculate, the length of the shorter belt. VIII Tr. 9. He agreed that when he worked at a mine, prior to becoming an inspector, the mine would use both reclaimed and new belt structures.[28] *Id.*

Questioned about Orr's examination on the third (i.e. night) shift on December 21st and Hammond's exam on the day shift, Respondent pointed out, and the inspector agreed, that Orr's report noted that there were areas along the 1C belt that were dirty or clean. VIII Tr. 11. The inspector also agreed that the report states "Clean 10 to 11, 12 to 14, 16 to 17, 51 to 52," as areas needing to be cleaned and that they were cleaned. VIII Tr. 11-12. As for Hammond's exam dealing with the 1 C belt, the inspector agreed that some areas needing to be broomed were listed. VIII Tr. 12. While the inspector made reference in earlier testimony about a previous

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[27] Although transcribed as a "can," the correct term is "cam." VIII Tr. 57-58. Witness Hammond described a cam as "a component of the belt. There's three top rollers, mainly consists of four components -- or two different components, the frame and then three cams. The cams are -- the best analogy … is very similar to a roll of paper towels, as far as physical size. So there's two of them. One of them in the center is horizontal. And then the two on the 3 outsides, they're at an angle, anywhere from like 25 to 33 degrees." VIII Tr. 58.

[28] Subsequently, when directed to his notes, per Exhibit P 13, Tisdale saw they reflected 56 crosscuts long for the 1C belt. VIII Tr. 29. Those notes also informed that the 1 B belt was approximately 19 crosscuts long and that the total number of crosscuts was 103. VIII Tr. 30-31. That meant the 1A belt was 28 crosscuts. VIII Tr. 31.

104(d) enforcement for blowers, he could not provide any additional detail about that matter. VIII Tr. 12-13.

The inspector was asked why, for the three roller orders, he listed them as "non-accident likely." His response, as he stated earlier, was the areas were well rock-dusted, no accumulations were present and areas were damp. VIII Tr. 13. Tisdale agreed that the conditions he found on 1A and 1C influenced his decision to make the 1B belt a 104(d). VIII Tr.14. Similarly, the conditions he found on 1C . . . influenced his decision to issue the violation as a 104(d). *Id.*

Asked if, under 30 C.F.R. §75.1731(a)[29], it is true that under certain circumstances, damaged rollers do not need to be replaced immediately, as the standard provides that only where a fire hazard is posed do they need immediate replacement and that all other damaged rollers must be replaced or repaired, Tisdale agreed. VIII Tr. 14-15. Further, he agreed that when he used to work in mines, he replaced rollers on weekends and that such problems had been found by examiners during the week but not replaced until the weekend. *Id.*

Directed to the seals violation, Turner stated that he had an occasion when he observed a 120 PSI seal that had .5 percent methane output in front of the seal. He was the examiner for that circumstance and he agreed that he was not required to take any action for that methane level. VIII Tr. 15-16.

Tisdale confirmed that he considered certain hazards in marking the violation as S&S. One such hazard he identified is when "the seal itself becomes compromised with damage, and starts leaking air if it allows [ ] the air to come out in a large amount." VIII Tr. 17-18. Whether that is reasonably likely to occur, Tisdale could not say. VIII Tr. 18. While the inspector acknowledged that he considered asphyxiation to be another possible related hazard, he admitted to having no way of knowing if that was reasonably likely to occur. *Id.* While that hazard would come about through a lack of oxygen, Tisdale also agreed that oxygen is checked throughout the mine where persons work. *Id.* Asked if there were other hazards from the condition, he stated his view that "it creates an ignition source or an explosive mixture of gases, as well. It is going to be in the working section, and the miners are going to be working. It can also disrupt ventilation if the ignition is large enough where it would blow out any of the ventilation controls for that area where the ignition happens." VIII Tr. 19. He admitted that for that to occur there would need to be an explosive level of methane. *Id.* However, when challenged about the reasonable likelihood that one would encounter the 5 to 15 percent explosive level for methane, Tisdale informed, "Without ventilation controls, [he] ha[s] encountered it." *Id.*

Tisdale stated that there were other hazards considered by him in marking the order as S&S, identifying the roof and ribs as not having been examined. VIII Tr. 21. Although Respondent's Counsel noted that only the examiner would be going to the seals, the Court is of the view that such an observation misses the point of the hazard Tisdale was identifying. VIII Tr.

[29] The cited subsection provides, "Damaged rollers or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers or other damaged belt conveyor components, must be repaired or replaced. 30 C.F.R. §75.1731(a)

22. Tisdale's prior mine experience included pre-shift exams of seals, which he described as "inspect[ing] all the seals to make sure that they're intact. I check for gas levels at each of the seals, and the entry that they are being aired by. I check for roof conditions. I check for rib conditions. I check for proper rock dusting, and I look for any other signs of hazards or soon to be hazards that are in the area." *Id.* Asked if he did those things on February 3, 2016 when he was inspecting the southwest seals, he responded, "I believe I did." VIII Tr. 23. In this instance, again in the Court's view, the question from Respondent's Counsel misses the point of conducting the pre-shift exam. Tisdale affirmed that the things he listed as concerns, such as methane, rock dusting, roof and ribs, turned out to not be present in that instance. VIII Tr. 23. Consistent with the Court's conclusion that Tisdale was a credible witness, he acknowledged that the hazards he identified turned out not to be reasonably likely to occur. However, this too, in the Court's estimation, misses the point of the prophylactic purpose behind a preshift exam.

Tisdale's company escort that day was Nathan Courtney, a certified examiner. However, Tisdale informed that Courtney did not do everything that is expected during the seal examination during the inspection because he did not look at all the seals nor did he take gas checks. VIII Tr. 24. While Courtney requested that Tisdale allow him to perform an exam in order to terminate the violation, Tisdale denied the request because Courtney was escorting him. VIII Tr. 25. When Tisdale came to the surface he met Greg North who told him "Sir, I just want to tell you that I did sign the book, but I did not examine those seals. Matt Walker was supposed to examine those seals." VIII Tr. 26. Tisdale's order was terminated after the examiners were retrained in the importance of exams and examining seals. *Id.*

Asked if he considered all examination violations for seals to be S&S, Tisdale responded he did not view them all as S&S, though he was unable to give an example of a non-S&S seal scenario, adding that he had not yet encountered a non-S&S seal violation in his experience.[30] VIII Tr. 27. The Court understands that the point of the question was to show that the inspector reflexively considered all seal violations to be S&S, but it views the question as a distraction because the issue is whether *this violation was S&S.*

Regarding Tisdale's remark that he had not decided whether to issue an order until after he finished his inspection, he explained that reasoning, "The reason why is because that many rollers, and the different ways of those rollers were oriented could mean a lot of different things, in the way of that we see that they were there or we -- that we just miss this one. There's a lot of different things. But whenever I start looking at the big picture of things, and I see that there's that many rollers that are damaged or missing, it tells me that we just aren't looking for them." VIII Tr. 33.

Tisdale also confirmed that the same person examined all three belts, the 1A, 1B and 1C. VIII Tr. 34. He was then asked about his acknowledgment that the action to be taken for rollers distinguishes between those rollers which create a fire hazard and those that do not. For the latter category, Tisdale agreed that such rollers do not require immediate replacement but they still must be replaced. *Id.* However, it was his view that upon being detected through the

[30] However, in Tisdale's deposition he stated that he considered all seal exam violations to be S&S. VII Tr. 28.

examination, such other rollers would need to be noted *by the mine examiner* and then replaced. VIII Tr. 35. In this matter, none of the problem rollers had been noted. *Id.*

Further regarding the seal violation of February 3rd, while Tisdale encountered no methane, he only knew that by using his spotter device to measure the air. VIII Tr. 36. The Court notes that one has to be conducting the seal exam to learn the methane content. Further, as he focused on the absence of the seal *examination*, Tisdale did not issue any violation for the seals themselves. If he had discovered an inadequate seal itself, a separate violation would have been issued. *Id.*

Regarding the roof and rib in the area of the seals, Tisdale confirmed that he factored them into his evaluation of the hazard, noting that the primary escapeway was adjacent to the entry next to the seals. VIII Tr. 37, 43. In Tisdale's view it was possible that adverse roof conditions near the seals could affect people using the escapeway, "[b]ecause if the roof conditions deteriorate in a cross-cut that are in the seal entries where they would have been examined, for instance, if that roof deterioration oftentimes will carry on through other entries. And that is why we, typically, require breaker props[31] to be set around falls that are adjacent to trap walls." VIII Tr. 37-38.

At the conclusion of his testimony on direct and cross-examination, the Court inquired if anyone with the mine challenged his findings, contending that the order was incorrect. Tisdale informed there was no such challenge. VIII Tr. 44.

Respondent called Randy Hammond. VIII Tr. 45. Hammond is employed at the Francisco Pit. He has had 30 years of coal mining experience. VIII Tr. 47. He is now with service support, which entails the respirable dust sampling program at the mine, but at the time of these matters, he was in compliance as an examiner. *Id.* In January 2016 he performed examinations. Part of his duties at that time included pre-shift examinations. Hammond described the process of examining belts; his description revealed that the task is detailed, thorough and time consuming. VIII Tr. 48-51. He did state that examining the rollers as part of the belt exam is more effective when the belt is running, not only visually, but also by using one's hearing and smell. VIII Tr. 51-52. Similarly, the rollers are easier to evaluate when coal is running on the belts. VIII Tr. 53. When coal is not running, by design of the belt, many rollers are not in contact with the belt. VIII Tr. 54. The MSHA safety standard requires that the pre-shift exam is to be done three hours before the oncoming shift. VIII Tr. 53.

Hammond was asked about his examination of January 21, 2016 for which he examined the 1A, 1B and 1C belts on the day shift. VIII Tr. 55. As noted earlier, the mined coal moves from the 1C to the 1B and then to the 1A belt. Exhibit R 21 is the production report from supervisor Hayden for the day shift on Unit 1 on January 21, 2016. VIII Tr. 58. It reflects that Unit 1 did not produce coal on that shift. VIII Tr. 59. It was on that shift that Hammond performed his exam. Shown Exhibit R 22, Hammond identified it as the production report for the afternoon shift that same day. *Id.* Coal was produced on that shift. VIII Tr. 60. Exhibit R 23

[31] Breaker props are props that are set to help prevent more roof failure to keep progressing through entries or cross-cuts, should a roof fall occur. VIII Tr. 38.

provides data about "the three belts in question, and the length of the belts in feet, and the number of top roller frames, and the number of top roller cams per frame."[32] VIII Tr. 60-61. It reflects that for the three belts there were 8,000 feet in total and 4,782 cams. VIII Tr. 61-62.

Regarding his exam that day, Hammond began with the 1C belt, traveling outby, and on the travelway, the right side, with the belt being on his left. He found no "hazards" on the 1C but he distinguished that from "conditions … that needed to be addressed." VIII Tr. 62-63. Referring to Exhibit P 14, Hammond noticed the following conditions, "four on the 1C, I had that brooming needed to be done in four spots. It was 52 to 56 – or 52 to the tail piece. Then I found stock from 26 to, I think, 32, and 14 to 17 cross-cut. And then I had them -- one at the belt through from … the crown roller or head roller inby to the end of the take up." Tr. 63.

Hammond stated that when doing his exam the belt was only running for a short time and intermittently at that. VIII Tr. 64. Referencing Exhibit P 9, Order No. 9036654, Hammond stated that the belt not running would "negate" his ability to detect the conditions cited. VIII Tr. 65. Next, Hammond was asked about the 1B belt. That belt was running but not transporting coal. However, he added that if the 1C was not running, the 1B would not be running either. VIII Tr. 66. Again, at the time of his exam, he was proceeding outby, as he was when on the 1C. When on the 1B, the belt was to his right. He found no hazards or conditions when he examined that belt. VIII Tr. 67. Directed to Order no. 9036656, Exhibit P 10, in which two frozen top center rollers were discovered by the inspector, Hammond stated that belt was not conveying coal, a situation, as he noted earlier, which impacted his ability to inspect the belt. With no weight on the belt, "the majority of the belt could be up in the air above the rollers, and not contacting the rollers, so therefore, the rollers are not turning for me to see if they're frozen." *Id.*

Turning to Order No. 9036657, which pertained to the 1A belt, this was the belt for which the inspector found three frozen top side rollers, one frozen top outside roller and a missing top center roller. VIII Tr. 68. Hammond stated that while the belt was running, it was not then transporting coal. At that time he was on the left side of the belt. Again, he found no hazards or conditions on that belt. *Id.* Thus, because the running belt was not carrying coal, he wasn't able to see the frozen rollers. As for the missing roller, Hammond conceded he simply missed it. VIII Tr. 69. Hammond added that it has been his experience that MSHA inspectors do not inspect a belt *unless* it is running. VIII Tr. 70. Part of the reason for that is that, if a belt isn't running, there is no ignition source. *Id.*

On cross-examination by the Secretary, Hammond admitted that the shift when he conducted his exam *was* a production shift, but he explained that the particular unit was not a production shift for that unit. VIII Tr. 72-73. At the time these orders were issued, the midnight shift examiners could walk whichever side of the belt they chose. Now, following the orders which were issued in the wake of this litigation, each shift rotates the side examined. VIII Tr. 74-75. Hammond also stated that the ability to identify a roller out of the bracket can be diminished if belt is not running and by which belt side one is walking on. VIII Tr. 80.

[32] On redirect, referring to Exhibit R 23, Hammond stated that the reference in that exhibit was to top rollers only, as bottom rollers were not involved. VIII Tr. 96-97.

In defending the problematic rollers that he missed, Hammond requested data from the engineering department about the belts' length and learning that, it was calculated that .02 percent of the rollers were missed by him. Asked for the percentage of bad rollers that he found, Hammond admitted that was zero. VIII Tr. 81. The Court notes that there were, undeniably, a lot of rollers along the three belts. As Hammond stated, "[t]he number of top roller frames was 1,594, of which each frame consists of three cams. So, therefore, there's 4,782 cams in these belt systems." VIII Tr. 82. Asked if that meant that the rollers he missed, 12, was excusable, given that large number, Hammond responded that it was not an excuse.[33] VIII Tr. 83.

Although Hammond had stated that one detects frozen rollers by seeing that they are not turning, he agreed that there are other signs of detecting this problem, as the rollers may have a shiny spot on them where the belt has been rubbing the frozen roller. VIII Tr. 87. However, he expressed that such shiny spots are harder to detect than when the belt is running. VIII Tr. 88.

When asked about required retraining, earlier in 2015, for identifying rollers that need to be changed, Hammond agreed that he participated in that training. *Id*. He stated that the retraining "was probably as a result of a citation or something to mandate from MSHA, and we were instructed to basically enhance our inspections, and try to find the bad rollers to make sure we adhere to federal regulations." *Id.* Referred to the Exhibit P 13 and the inspector's notes at page 37, Hammond agreed that exhibit refers to the 2015 retraining. VIII Tr. 89-90. In fact, Hammond had earlier stated that he had taught some of that retraining, but that the trainer was Todd Seilhemer.[34] *Id.*

The Court inquiring of Hammond, just what was involved in the retraining, learned that such training is usually "predicated on the fact that we received a citation."[35] VIII Tr. 92. Hammond maintained throughout his testimony that he did a good job with his belt examinations. *Id.* The Court remarked that it believed Hammond's testimony was candid and

[33] Hammond was also asked about a notation within Ex. P 14, the belt examination for his shift and the one before his, which remarked "Belt rubbing chains." Hammond stated he did not write that in the report, and did not know who did, and further that it was appropriate for someone, other than him, to have written that into the exam report. VIII Tr. 85-87.

[34] Post the issuance of the orders in this litigation, Hammond agreed that in addition to changing the mine's procedure for alternating belt sides during exams, that it also posts the time frame, in order to better address the conditions cited by Tisdale. VIII Tr. 90. If the Court were to consider this information at all, perhaps under a broad application of "good faith," such consideration would only be for the benefit of the Respondent, and not, for example as reflecting the Respondent's negligence. This is because it is inappropriate to consider such post-citation actions, as such an approach would discourage improved procedures if they could later be raised against a mine operator.

[35] The Court also inquired how long it took him to walk these belts and Hammond's response was an hour and twenty minutes to an hour and a half, covering 7,970 feet. VIII Tr. 95.

complemented him for that. VIII Tr. 92-93, 99. However that Court learned, through Hammond, that the training is quite brief, "normally … two to three minutes." VIII Tr. 93.

As will be discussed in more detail later, the Court notes that, while Hammond offered several reasons for not detecting the belt roller issues, it can't be completely overlooked that the inspector found them.

Miguel Gonterman was also called by the Respondent. VIII Tr. 100. Gonterman is an outby foreman or "lead man." He is therefore in charge of outby activities, and is in charge of the A crew. VIII Tr. 101. Gonterman is "responsible to maintain the roadways, belt lines, the pump. Also the sport units for supplies, anything else they may need, personnel for the A crew." VIII Tr. 102. His experience includes conducting examinations of belt lines. *Id.* If a bad roller is found, at times Gonterman is involved in fixing it. He stated that a frozen roller can develop quickly. VIII Tr. 104. As with Hammond's testimony, Gonterman stated that if a belt is not operating, it impacts his ability to detect roller problems. VIII Tr.105.

Directed to January 21, 2016, Gonterman was called to the 1A, B, and C belts during his shift by Chris, "Bert," Robinson. He was called to deal with a missing or bad roller on the 1C belt. VIII Tr.107. Then, speaking to Exhibit P 9, Order No. 9036654, he agreed he was to attend to the two top rollers that were hanging out of the bottom bracket at cross-cuts 42 and 43. *Id.* He found one end of the roller out of the bracket, adding that, if the belt is not running , it is difficult to see a problem of that nature. VIII Tr. 108. He also stated that such a condition can occur quickly. *Id.* The fix for such a problem, he asserted, takes only seconds to achieve. VIII Tr. 109. Next, he was asked about a missing roller at the top outside and two frozen top rollers. Gonterman believed that he attended to those too, replacing the cams and rollers. VIII Tr. 110.

Gonterman was then directed to Order No. 9036656, which pertained to the 1B belt and two frozen rollers there. He repaired these too, changing out the rollers to make the inspector "happy." VIII Tr. 110-111. Changing out is not always necessary, because, he contended, simply by spinning the rollers, they may be fine. When changing out is needed, it is a two-person task. *Id.* Turning to Exhibit P 11, relating to the order on the 1A belt, and the three frozen top center rollers present on the outside, and a missing top center roller, Gonterman stated that he attended to those too. Those were also changed out. VIII Tr.112.

While at the 1A belt Gonterman saw Lucas Dobbs, who was walking down the travelway side, which was the same side he was on. *Id.* Dobbs was going inby, while Gonterman was heading outby. Gonterman was able to see the missing top roller. He contended that it was easier to see that problem when heading outby than if going inby. Thus, he asserted that such a condition is "easily missed." VIII Tr. 113. However, when questioned by the Court, Gonterman acknowledged that one is supposed to "try to look for everything." VIII Tr. 114. This requires bending and looking back. *Id.*

Following the issuance of the Order, Respondent's Counsel inquired if the mine changed its policy regarding the number of belt examinations. Gonterman advised,

> [y]es, sir. Since we had so many rollers on this -- you know, these citations, they had us walk at the beginning of each shift, which every four hours, because we would do it at the beginning of our shift at our pre-shift, and then the next group comes in and it's every four hours to monitor to make sure we were catching all these rollers, because, you know, you would examine this, and you would have nothing. And the next guy would come in, and he could find one, you know. But they were just -- it was a huge structure, and, you know, they would go bad. You know, and in no time. So, yes, we did change that. And we seemed to get a better handle on it.

VIII Tr. 115.

This new practice exceeds MSHA's requirements. VIII Tr. 115-116. Yet, even with that change, Gonterman agreed they were still finding rollers that needed to be changed. VIII Tr. 116. Gonterman believed the problem stemmed from the use of "used structure[s]," though that is a common industry practice. *Id.* Pursuant to their change in practice, rollers were thereafter replaced with new rollers, not with used rollers and this helped. VIII Tr. 117.

Upon cross-examination, Gonterman reaffirmed that it's more difficult to detect problems when the belt is not running. VIII Tr. 118. However, he also conceded that his belt exam responsibilities are the same, regardless of whether a belt is running. *Id.* He also agreed that some of the rollers were out of the bracket, some were frozen and some just missing. *Id.* For missing rollers at least, he conceded that the ability to detect that problem is unaffected by the belt running or not. VIII Tr.119. However, he did not concede that a roller that is out of its bracket is always easy to see. For the cited out of bracket rollers, he could not recall whether they were of the difficult to detect category. *Id.* Gonterman also informed that the first belt he attended to was the 1C. For that belt, he recalled finding one additional roller in need of replacement beyond those identified by the inspector. VIII Tr. 120-121.

Exhibit P16, an email created by Gonterman on January 22, 2016, was admitted. VIII Tr. 129. Gonterman agreed that he sent his boss the email and that his boss would want to know if there were any facts about the Order that he, Gonterman, was disputing. This was particularly true because his boss wasn't present to see the conditions but Gonterman had such firsthand knowledge. VIII Tr. 131. Yet, Gonterman admitted that he did not include in his email any comment that some rollers did not need to be changed, nor did he contest whether there was a violation. *Id.* Gonterman's excuse for the omission was that he was "pretty new" and there were "a lot of things [he] didn't put in there that [he] should have." *Id.* The Court was not impressed with the excuse, because, he had been an outby foreman for two years and therefore was not really "pretty new." He then essentially conceded that there was no record that he had ever written anything down that reflected his view that at least some of the rollers didn't need to be changed. VIII Tr. 132.

Gonterman was also asked about his interaction with Dobbs. As noted, he stated that they passed one another that day, as Gonterman was walking outby and Dobbs outby. VIII Tr. 132. Shortly after that, Tisdale discovered a missing roller, which Dobbs did not perceive. Gonterman asserted that Dobbs direction of travel made it harder to see the absent roller. VIII Tr. 133. Gonterman acknowledged that, direction of travel or not, it was still Dobbs' job see such problems, even if harder to detect. *Id.*

Asked about his retraining for belt problems, per Exhibit P13, Gonterman agreed that his signature appears on the document for the July 10, 2015 retraining. VIII Tr. 139. However, Gonterman seemed to see the problem as less of an issue than the inspector. When asked, "did the events on January 21st strike [him] as odd given the number of rollers that [he] had to change," he responded, "[t]hat -- I mean, that day -- but there were frozen or missing. They *weren't bad*, you know." VIII Tr. 141-142. (emphasis added). Still, he admitted that frozen, out of bracket or missing rollers require action. *Id.* On redirect, offered to show that rollers with issues can be missed, Gonterman reaffirmed that the MSHA inspection itself had missed one such problem. VIII Tr. 143.

The issue of the seals was then addressed. This involves Order No. 9036663. Respondent stipulated to this violation. VIII Tr. 151. Nathan Courtney was called by the Respondent. Courtney is the outby boss for the B crew. VIII Tr. 145. Thus, his job is the same as Gonterman's, but for the B crew. He has about seven years of coal mine experience. VIII Tr. 146. Courtney has performed pre-shift exams for seals, doing that task well over 100 times. Intake seals are located in the intake air corridors and they are required to be greased. VIII Tr. 146-147. He described what is involved in such an exam,

> [y]ou're mainly looking for -- at the seal face, and any conditions at the seal area, as far as your roof, and your ribs, any timbers that are in that area. You're looking for a way that it could be being taken by the timbers, making sure that the area is adequately rock dusted. And you, actually, look at the face of the seal itself to make sure there are no changes or any kind of cracks or abrasions in the seal, and then take gas readings to make sure that there are no gases leaking from them.

VIII Tr. 147.

The term "set of seals" refers to the set which seals or isolates a given area. For example, the southwest main seals, the area cited, is one set. There are eight faces associated with that set of seals. VIII Tr. 147-148. A pre-shift exam is to examine each face of the seal. VIII Tr. 148. The time it takes to examine each seal is not long, requiring about two minutes per seal. VIII Tr. 149. Directed to February 3, 2016, Courtney stated he was on the second shift, the afternoon shift, that day, and was accompanying inspector Tisdale at that time. VIII Tr. 150. The cited seal-related violation was located on the intake air course, at its beginning. *Id*. Courtney was quite

familiar with that set of seals on the southwest main. VIII Tr. 151. Courtney stated there was not a history of adverse roof or rib conditions at these seals.[36] *Id.*

Upon cross-examination, Courtney stated that his examination of the seals was included among his pre-shift exam duties and that it involved about 20 minutes of his time within the three hours allotted for that exam to occur. VIII Tr. 158. Courtney confirmed that there are tags and in some places chalkboards at the seals, which are for one to put initials, date and time of the seals' examination. *Id.* During the February 3rd inspection, Courtney realized there had not been an exam performed, upon not finding any DTIs anywhere. VIII Tr. 159. Regarding his request of the inspector to allow him to inspect the seals, Courtney's aim was to prevent an evacuation of the mine. *Id.* Courtney admitted that at the time of discovering the seal inspection issue he did not then know how much of a pre-shift had actually been done. VIII Tr. 160. Upon Courtney's returning to the surface, the mine had two examiners go underground to examine the seals and there is no dispute that, in terms of the conditions, nothing adverse was found. That is, no hazards were found. VIII Tr. 161. While that exam had to occur, because it's required, Courtney believed it was likely for one to assume that if a set of seals had been examined 100 times and no hazard found, he would assume that the 101st time would yield the same result – no hazard. VIII Tr. 162.

Richard Reisinger then testified for the Respondent. A professional engineer, he is the engineering manager at the Francisco underground mine. VIII Tr. 164-165. Reisinger testified at length about seals, including the southwest main seals. VIII Tr. 166 – 175. Still, despite all of the above history and information about seals, none of that dispels that weekly exams are required to check for convergence[37] on the seals. VIII Tr. 176. Further, because they are on the intake, the seals cited here are required to be pre-shifted and they also must be examined weekly. *Id.*

Reisinger, directed to Exhibit R 39, identified the exhibit as the process for constructing seals, as well as for certifying that they are installed correctly. VIII Tr. 177. Reisinger opined that the quality specifications were met for the construction of that seal. VIII Tr. 178.

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[36] The testimony then veered off on a tangent regarding Courtney's request to then examine the seals so that an evacuation of the mine could be avoided. VIII Tr. 152. Courtney did then examine the seals but the inspector would not allow that to impact the citation's abatement, which required that the mine first be evacuated. *Id.* As noted, upon making the examination, Courtney found nothing adverse. VIII Tr. 153-154. Thus, the Respondent has suggested that the inspector was unreasonable in requiring "that the seals would have to be examined by a certified examiner, and that that examiner would have to come back out of the mine after examination, and sign the books". …and by the inspector's requirement that the books be signed before miners could re-enter the mine. VIII Tr. 155.

[37] "Convergence" is "the allowing of the movement between the roof, and floor at the seal, at each individual seal site." VIII Tr. 175. It is monitored by a measuring stick to evaluate movement between the rib and the floor at each seal site. VIII Tr. 175-176. Convergence levels do not fluctuate quickly. VIII Tr. 176.

Cross-examination pointed out that this violation involves the *examination of seals,* not their construction or tests, or how seals have performed since they were installed.[38] VIII Tr. 185. Reisinger then admitted that he doesn't do pre-shift exams, though he may do an on-shift exam. VIII Tr. 186. Further, the location evaluation in constructing seals does not affect the types of exams for which a seal will be subject, nor does the PSI level impact the type of required exams. Instead, the type of required exams is determined by the nature of the air going across such seals. VIII Tr. 188.

After Reisinger's lengthy testimony about the seals and seal construction generally, the Court asked if he agreed that it was his view that "these seals that were identified in R39, they were thoughtfully planned, approved by MSHA, and then properly constructed." VIII Tr. 192. Reisinger agreed with that summation. *Id.* He also agreed that all of that construction occurred some four years before the citation in issue in this proceeding. *Id.* Further, Reisinger agreed that, even with all the effort in constructing such seals carefully, it is still important to conduct pre-shift exams. The importance, in his view, is because it is required and also for the safety and health of the miners. VIII Tr. 193. Thus, he was not suggesting that it is unnecessary to continue to monitor the seals by conducting pre-shift exams. *Id.* And, he agreed the importance is because something bad may happen. *Id.* This is because, in Reisinger's words, "[seals] can leak and, typically, they do." *Id.* This results because seals "breathe," so they leak as the atmosphere changes. VIII Tr. 193-194.

In the Court's estimation, Reisinger's testimony bolstered the Secretary's case. Trying to undo the damage, Respondent's Counsel asked Reisinger if seals fluctuate and was told there would be only minor fluctuations and that he would not expect those to affect the seals' integrity. VIII Tr. 196. Further, he opined that, if problems did develop, he would expect them to develop gradually, not quickly. *Id.* Those answers to those questions did assist the Respondent's position.

Peabody employee Chad Barras then testified for the Respondent. VIII Tr. 198. He is the director of safety and compliance for the Respondent. VIII Tr. 199. His responsibility covers all of Peabody's mines "in the Americas." *Id.* Before that, he was employed by MSHA, where he was a ventilation engineer. *Id.* He is familiar with the MSHA standard that requires pre-shift exams of intake seals. VIII Tr. 200. As with the previous witness, Barras provided historical information. In this instance, relating his knowledge of the standard's promulgation in 1996. VIII Tr. 200-201. At that time, according to Barras, MSHA overhauled its ventilation regulations. VIII Tr. 201. In that context, he spoke of the old seals versus the new ones, with of course the new ones being an improvement. Barras then expressed his view that MSHA should've updated the standard for the pre-shift requirement of seals to reflect the advances in seal technology. VIII Tr. 206.

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[38] Over the Respondent's objection, the Court allowed the Secretary's question, and essentially repeated the question, inquiring if Reisinger understood "that we are not here today to understand about thoughtful process, and the efforts that went into -- were involved in the construction of these various seals [that Mr. Reisinger] just testified about, but rather that we're testifying about the condition of the seals in February of 2016." Tr. 186. Reisinger responded that he did understand that. *Id*.

Turning to the matter at hand, Order No. 9036663, Barras stated that he is familiar with the main seals at the mine, as he examined them prior to a settlement conference in connection with this violation. His visit to those seals, however, was in the fall of 2016, that is, at a considerable time after the order had been issued. VIII Tr. 209. He also looked at six months of methane readings for the southwest seals and found little or no methane was present. VIII Tr. 213. Further, he examined barometer data in connection with assessing leakage and determined that over a six month review, there was little or no transfer of gas in either direction, from the inside out or outside in. VIII Tr. 214.

In response to the Court, Barras informed that the mine is on the five day spot inspection for methane, the highest inspection level for methane liberation. VIII Tr. 215. Barras agreed with the Court's characterization that there are some limited circumstances where one could have an S&S violation involving seals at this location but that the only possible source, in his view, for an S&S situation to arise at the southwest main seal would be to have a water issue, and at that, there would have to be a large amount of water. VIII Tr. 217. Asked if water was an issue at the mine, Barras answered that there is water at Francisco Underground Pit, but it's on a separate side of the mine, which is about two miles from this seal. VIII Tr. 217-218.

Moving to Barras' implication, from his testimony, the Court inquired if he believed that there should not be a pre-shift exam for these seals. Barras' answer was only that it be lessened from a pre-shift to a daily exam or perhaps to a weekly exam, as he believed that frequency would be sufficient. VIII Tr. 219. The Court would comment that the difference in opinion as to the appropriate frequency of exams was not extreme, with Barras urging a daily exam as compared with the present requirement for a preshift exam.

On cross-examination Barras agreed that part of his job is ensure compliance with MSHA standards, including those he disagrees with. VIII Tr. 223. Again, the essence of Barras' testimony was that, due to technology advances, the rule which was promulgated in 1996 needs to be modified now. VIII Tr. 223.

The Court notes that it must be observed that revisions to the existing standard are outside of the realm of the issues for this violation. That said, the Court understands that the perspective offered by Barras was for the limited purpose of defeating the S&S designation. In fact, Barras stated that he was at the mine, albeit long after the citation had been issued, to figure out how the violation could be deemed S&S. VIII Tr. 226. In that regard, he stated he was

> trying to figure out how is the S&S come about on this citation. That's why I went over there, and I'm trying to figure out what could happen here, because I know that if the roof falls, they don't propagate out to the side from where they start. So I'm thinking how can that get over the seal, because the seal is holding the roof up to an extent. It's cementitious foam in them. I'm looking at the ribs to say, how can this rib bust open or fall out? Well, the cement's poured on them. So it can't come out. It's there. So then I'm thinking about the floor, because that's the only way I can come up with this hazard of getting gas to the men inby. And I'm looking at the floor. The floors are dry. I'm not seeing anything coming out of those. I don't see any, you know, I've seen floor heat before, and you can, actually,

> see the floor crack a little as it -- as a pillar goes down, the floor can move to the inside and up. And it opens up in the middle. That's kind of why we put bigger pillars in there to minimize that effect. I was just trying to come up with a way to say, hey, I can get gas out of here somehow, where is it? And I walked away, still shaking my head, trying to figure out what it is.

Tr. 226.[39]

Significant and Substantial and Unwarrantable Failure Designations

As the citations and orders involved in these dockets allege that the violations were Significant and Substantial and involved Unwarrantable Failures, the basics of those terms are set forth here:

> A significant and substantial ("S&S") violation is described in section 104(d) (1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d) (1) (emphasis added). The four-part test long applied to establish the S&S nature of a violation examines: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc*., 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).
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> In addition to the *Mathies* criteria, the Commission has established that the S&S determination must be based on the particular facts surrounding the violation, *Texasgulf, Inc*., 10 FMSHRC 498, 500 (Apr. 1988), and should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co*., 1 FMSHRC 1125, 1130 (Aug. 1985)). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984). The Commission has also established that the operator may not rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *Buck Creek Coal, Inc., v. FMSHRC* 52 F.3d 133 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

[39] On cross-examination it was then pointed out that the citation was for failure to do the pre-shift. VIII Tr. 227. However, the focus of the Respondent is the S&S designation, as it conceded the violation.

The Commission has clarified that "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." and "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S" *Cumberland Coal Resources, LP*, 33 FMSHRC 2351 (October 5, 2011), (citing *Musser Engineering, Inc. and PBS Coals, Inc*., 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co*., 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996)).

In 2014 the Seventh Circuit held that "A violation is significant and substantial if it could lead to some discrete hazard, the hazard was reasonably likely to result in injury, and the injury was reasonably likely to be reasonably serious." *Peabody Midwest Mining, LLC v. FMSHRC* 762 F.3d 611, 616 (7th Cir. 2014) (emphasis added). The Circuit Court's use of the term 'could' is the same term embodied in section 104(d) (1) of the Act, set forth above. In *Knox Creek Coal Corp., v. Secretary of Labor*, 811 F.3d 148, 160 (4th Cir. 2016), the Circuit Court recognized that the *Mathies* test had been consistently applied by the Commission and ALJs for decades and adopted *518 by Federal Appellate Courts. However, in analyzing the second *Mathies* element which primarily accounted for the concern with the likelihood that a given violation may cause harm, the Court found "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Id*., at 162 (emphasis added). The Court reasoned that 'the second prong of *Mathies* requires proof that the violation in question contributes to a 'discrete safety hazard,' which implicitly requires a showing that the violation is at least somewhat likely to result in harm.'" *Id*., at 613.

Recently, a majority of three Commissioners revisited the "reasonable likelihood" standard finding that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed". *Sec'y of Labor v. Newtown Energy, Inc*., 38 FMSHRC 2033, 2038 (Aug. 2016).22 To establish this element, a clear description of the hazard at issue is required in order to determine whether the violation sufficiently contributed to that hazard. *Id*.

Warrior Coal, 39 FMSHRC 509, 517-518 (March 2017) (ALJ Andrews)

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with…mandatory health or safety standards." The term is not defined by the Act, but the Commission has established that "unwarrantable Failure" is "aggravated conduct constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act". *Emery Mining Corp*., 9 FMSHRC 1997, 2004 (Dec. 1987). And further, that unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or the 'serious lack of reasonable care.'"

Id. at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94 (Feb. 1991); *see also Buck Creek Coal*, 52 F3d 133, 136 (7th Cir 1995).

> The Commission has also established that the aggravating factors to be examined are the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000). Although all seven of the factors must be considered, some factors may be irrelevant to a particular factual scenario. *Id*, at 353; *Wolf Run Mining Co*., 35 FMSHRC 3512, 3520-21 (Dec. 2013). Further, some factors may be less important than other factors under the factual circumstances. *IO Coal Company, Inc*., 31 FMSHRC 1346, 1351 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. Id, at 1351; *Eastern Associated Coal Corp*., 32 FMSHRC 1189, 1193 (Oct. 2010). Therefore, it is not necessary to find that all factors are relevant or deserving of equal weight.

Id. at 547

Discussion[40]

Docket No. LAKE 2016-0269

As noted**,** at issue in this docket are two section 104(d)(2) orders: Order No. 9036922 and Order No. 9036663.

Order No. 9036922; the alleged rib control violation, issued December 22, 2015.

The cited standard, 30 C.F.R. § 75.202(a), titled "Protection from falls of roof, face and ribs," provides "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Referencing the reasonably prudent person test and the preponderance of the evidence standard, the Secretary contends that the operator failed to support the ribs in the cited area, an area where persons work or travel, and therefore the violation was established. Sec. Br. at 9-10. Regarding the inspector's associated findings, including his unwarrantable failure and S&S determinations, the Secretary contends they are supported based on Fishback's testimony that "the falling ribs were immediately obvious upon entering the mine." *Id.* at 14. Therefore, "only a

[40] The findings of fact have been listed *supra*. The Court read and considered the parties' post-hearing briefs in their entirety.

high degree of negligence could explain Respondent's failure to correct the rib conditions." *Id.* The inspector's "testimony that large sections of the ribs could fall established that it was highly likely that 1 of the 14 miners on the working section could receive a permanently disabling injury." *Id.* Supporting the unwarrantable failure designation was Fishback's testimony that the violation had likely existed for several shifts, that the ribs' condition was poor throughout the mine, that Respondent should have been on notice that the ribs were a concern, and that the ribs' condition was obvious. *Id.*

The S&S finding, the Secretary contends, is also supported. To establish that the violation was S&S, the Secretary acknowledges that he "must prove that any miner on any shift would have been exposed to the hazard created by the unsupported rib if normal mining operations continued, so as to create a reasonable likelihood of injury. *Id.* Fishback's testimony, the Secretary contends, establishes that. The Secretary also notes that "an inspector's judgment is an important element in making S&S findings," and that it should be credited when such testimony "is reasonable, logical, and credible; and specific [,] based on the first-hand observations of the inspector. . ." *Id.* at 14-15. That burden, the Secretary urges, has been met here. The Secretary also asserts that the Respondent's witnesses, all of whom were employees of the Respondent, corroborated parts of Fishback's testimony. As for those elements of their testimony that contradicted Fishback's account, the Secretary describes those as "self-serving to their employer and [such testimony] offered only speculation that the dark areas in [Fishback's] photographs could be evidence of scaling instead of falling ribs." *Id.* at 15. Accordingly, the Secretary contends that the employees' testimony is only "entitled to little weight" and that the violation should be affirmed as issued. *Id.*

Respondent, revisiting its motion in limine on the same issue, contends that "the photographs that Mr. Fishback claims to have taken of the cited area and measurements referenced in Order No. 9036922 should not be admitted because the Secretary is unable to identify the specific entry and crosscut at which each was taken." R's Br. at 13. Noting that the Court rejected its motion, advising that its objections go to the weight, not the admissibility of those photos, Respondent urges that the photos should be "afforded no weight." *Id*. at 14. Apart from its overall objection concerning the lack of location specificity for the 20 photographs Fishback took, it contends that photo P 3(a) could not have been taken on the working section because there are phone lines in it and such lines are never inby the loading point. Further, that photo includes screen wire, and "[a]s a practice, Peabody only installed screen wire on the roof of Entry Nos. 4 and 5 in a panel." *Id.* From these observations, Respondent contends that "the photo referenced by Mr. Fishback could not have been of the condition he purported to observe in Entry No. 2." *Id.*

The theme of Respondent's objection is that the photos "should be afforded no weight both because Peabody continues to be prejudiced by the Secretary's reliance on them and because they are of no probative value in resolving this matter." *Id.* Respondent adds that "[w]ithout the specific location, it cannot be determined whether anyone was present in these areas, whether scaling or any other measures had been taken in these areas, the scope of the

alleged condition relative to the context of the area, or any other important factors to consider."[41] *Id.*

In its Reply Brief, the Secretary states that it did not use Fishback's photos to establish *particular* areas of the mine. Rather, the photos reflect the conditions the inspector found in the mine that day, including the working section, as noted in the order.[42] The Secretary adds that the evidence was not simply about the photos, but included the consistent testimony from Fishback's supervisor, Herndon, and even some of the Respondent's witnesses. Sec. Reply at 1-2. The Secretary essentially makes the same response to the Respondent's objection that the measurements in the order were only estimates. So too, Respondent's focusing on whether there were five crosscuts in Unit 2 or actually three, overlooks the point that adverse rib conditions were present throughout the working section. *Id.* at 3. The Court finds that, by far, the Secretary has the better side of the argument. Accordingly, the Court finds that the photos do support the violation.

The Secretary also challenges the Respondent's claim that the rib violation was based on hindsight.[43] Instead, the Secretary asserts that the order was based on "Fishback's observations and what a reasonably prudent operator should have done based on what Respondent knew at the time." *Id.* at 4. Last, while the Secretary notes that *Fishback acknowledged that the Respondent may have made some efforts to control the ribs*, he counters that such efforts must be adequate. *Id.* As discussed *infra*, and as noted in the findings of fact, the Court takes into account that the Respondent made some efforts at controlling the ribs.

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[41] Apparently, one of those "other important factors" is that "there was conflicting testimony as to whether [the photos] represented areas where ribs had rashed or had been pried [and consequently] [a]bsent information about the specific location of the photographs, that conflict cannot be resolved definitively." R's Br. at 15. The problem with the Respondent's argument is, as mentioned above, that issues such as whether an area had been rashed or pried do not depend exclusively upon the photos. Such matters are for the Court to resolve upon weighing conflicts in the testimony. Further, the focus upon the "trees," so to speak, misses the overall contention of the Secretary that the rib conditions were widespread and required a shutdown of the cited area.

[42] The Court notes that the order stated: "[l]oose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections."

[43] In making that challenge, the Secretary takes issue with the cases cited by the Respondent on multiple grounds, but foremost, the Secretary contends that the inspector's order was not based on hindsight. The order was not created in the wake of an accident but rather on the inspector's finding that the rib conditions throughout the section were hazardous. Sec's. Reply at 3-4. The Court agrees that the cases cited by the Respondent, *Jim Walker Resources, Inc*., 30 FMSHRC 872, 879 (ALJ Zielinski Aug. 2008), *Harlan Cumberland Coal Co.*, 22 FMSHRC 672, 681 (ALJ Cetti May 2000); *Energy West Mining Co.*, 18 FMSHRC 1628, 1639 (ALJ Cetti Sept. 1996), are distinguishable and not useful to the resolution of the issues in this matter.

Respondent's Reply[44] challenges the Secretary's claim that he met the preponderance of the evidence standard, contending that "[t]he Secretary's 'evidence' amounts to nothing more than a naked reliance on the inspectors' unsupported statements." R's Reply at 5. From the Respondent's perspective the Secretary's case relies upon the testimony of the two inspectors but that "testimony was nonspecific, unsupported by any verifiable physical evidence and belied by the facts …" *Id.* at 6. As to the Secretary's assertion that heightened negligence and unwarrantable failure were involved, the Respondent again contends that claim rests upon the inspector's testimony, while the Respondent presented testimony contradicting such testimony. *Id.* at 7. Respondent's overarching point is that the Secretary's case rests upon the inspector's "naked assertion that adverse conditions existed across 'the whole section' because he said so."[45] *Id.* at 8.

The Court's conclusions as to Order No. 9036922

As applied here, the essence of the cited standard requires that ribs be supported or otherwise controlled where persons work or travel to protect them from falls of the ribs. The Order asserts that such loose ribs were observed in multiple entries in the MMU-002 and 012 active working sections. The conditions continued for an approximate distance of 300 feet and

[44] Respondent's Reply also notes that the Secretary inaccurately asserts: that the Order involved two working sections, whereas it was a single section with two MMUs and a split-air arrangement; that the issuing inspector *immediately* observed the rib conditions – but Peabody notes that the observation was not made until the inspector arrived on the section and that the rib conditions were limited to that Unit and that outby areas are of no relevance to the order; that, referring to exhibits P 3c and P 3d, the initials on a rib where material had fallen demonstrate that the examiner saw a violative condition and did nothing about it, but that in fact the initials were painted *after* the rib had fallen; that Respondent's witness Benjamin stated that there would not have been enough time for the mud seam to dry and create separation in the time between the last production shifts in the area that Fishback inspected and the date of the inspection is inaccurate because Benjamin limited that remark to the faces, not the entire unit; that the Secretary's remark that Benjamin's standard for dealing with the ribs is that no one got hurt, is incomplete and therefore an unfair characterization; and that, for one of the photos, that was not on the working section; and finally that Hudson's remark that miners could've entered the area, sidesteps that it was not on a route miners would normally travel. R's Reply at 2-5. The Court would note that, inevitably, there will be aspects of testimony, from both sides, that can be picked apart. The Court's task is not to get bogged down in such details where they do not substantially impact the issues, but rather it is to assess the entirety of the evidence, make credibility determinations when necessary and to then determine whether a given citation or order was established by the preponderance of the evidence. Where a violation has been established, it then applies the same approach to resolve the issues of gravity, negligence, the other statutory criteria and any special findings that may be involved such as whether a violation involved an unwarrantable failure and significant and substantial aspects.

[45] It is noted that the Respondent applies these contentions to Order No. 9036924, the related inadequate preshift claim, as well. R's Reply at 8.

approximate measurements of the loose ribs were listed. As set forth below, and in the findings of fact, supra, the Court finds that the violation was clearly established.

There is no genuine dispute that loose ribs can present a risk of disabling injuries and fatalities and therefore must be taken seriously. Another aspect about which there is no genuine dispute is that the mine was dealing with a mud seam in this area. On December 22, 2015, the day of the inspection in issue by Inspector Fishback, in the cited unit, there was a mud seam in the middle of the coal seam. Mud seams are a safety concern because they can deteriorate quickly and cause a rib to slide out without warning. Fishback is a roof control specialist and had 29 years of coal mining experience before becoming an inspector for MSHA. Prior to the issuance of this Order, Fishback had issued roof control violations for this mine and put them on notice of the need for greater diligence in matters of roof control. Fishback was not the only inspector to view the conditions cited in this Order, as his supervisor, Herndon was with him at that time. The preshift exam immediately before the inspector viewed the rib conditions prompting his order did not record any problems with the ribs. Fishback encountered "a very adverse rib" almost immediately upon arriving at the section, and this rib had been rock dusted. That meant that the rib condition had to have existed before the shift of Fishback's inspection. The rib condition was serious enough that it prompted Fishback to return to the mantrip and retrieve his camera. Thus, when he began his inspection, Fishback did not have his camera on his person. That is a strong indication that Fishback had come upon a concerning condition, sufficient enough that he decided photos were in order. Fishback stated, credibly, in the Court's estimation, that upon conducting his imminent danger run at the working section, he found adverse rib conditions in every entry and crosscut. Further, the Court has found that Fishback testified credibly that all of the photos he took that day were within Unit 2 and that the rib problems he found were across the whole room and section entries and cross space. Fishback took nearly all the photos in the company of the mine's Eric Carter. According to Fishback, Carter did not contest his findings. To the contrary, Fishback stated that Carter told him they had been trying to deal with the issue, but had not been successful yet.

Carter testified and, as noted by the Court earlier in this decision, Carter disclosed that Fishback was not trigger happy about issuing citations. It was only upon seeing these rib conditions that Fishback issued paper. Though Carter's and Fishback's estimations of the bad rib they came upon at the two entry differed, even Carter admitted there was a rib issue there and he admitted to the Court that there were other areas with rib issues, though again his estimation of the degree of the problem differed from Fishback's assessment. In addition, overall, as detailed in the findings of fact, the Court finds that Fishback's testimony was more credible than Carter's. Though Fishback had a prior employment history with Peabody, the Court finds that, at least for this Order, (and for the order involving an inadequate pre-shift) it did not cause him to overstate his view of the rib conditions.

The Court cannot buy into the Respondent's objections to the photos. They are afforded some weight because they support the inspectors' testimony. It makes no sense to suggest that the lack of specificity as to the location should result in *no* weight being given to them. There is also an element of impracticality as to the Respondent's argument that more specificity was essential to its ability to defend against them. It is not as if the inspector merely stated that the

photos were taken *somewhere* in the mine. The inspector provided sufficient specificity, though not on a granular level, as Respondent urges is necessary.

In addition to the above considerations, as noted, Inspector Herndon saw the same ribs as Fishback. His testimony supported Fishback's accounting of the conditions. By contrast, overall, the Court did not find McKinnon's testimony to be as credible and his test for compliance with the standard was, in the Court's view, problematic. Further, in the big picture, McKinnon's testimony supports the view that ribs were an issue at Unit 2.

In evaluating the testimony of the witnesses on this issue, a factor which was also considered was the relatively recent retraining on rib maintenance. Listening to the testimony from those who took that retraining did not leave the Court with the impression that it was taken seriously by the miners.

However, not to be discounted was the testimony of Respondent's other witnesses, Benjamin, Sumner and Hudson, each of whom the Court found to be generally credible. Those individuals were not ignoring the ribs but they could have done more. Benjamin's testimony supported the testimony of every other witness in the sense that there was an issue with the ribs, exacerbated by the mud seam, and that time was required to deal with the problem. Sumner's and Hudson's testimony did not dispel that the ribs were a problem requiring attention. Thus, with no one denying that there was a problem with the ribs, the question is whether the mine was doing enough to address it.

The Court finds that the testimony of Fishback and Herndon, the photographic examples of the conditions and, in a very real sense, the Respondent's own witnesses, all establish that, although the mine was making efforts to address the ribs, it was not doing enough to deal with them. One of the themes that came through from the Respondent's witnesses was the perspective that some ribs issues did not require immediate attention, a view which seemed to rest upon the test that if no one was injured, sufficient attention was being made. That perspective is rejected. The Respondent's witnesses seemed to take issue less with whether there was a violation and more with the fact that an order, as opposed to a citation, was issued. Further, it was an ironic defense to effectively assert that the previous section was worse than the area cited.

With the above remarks in mind, though the violation was established, the Court finds that the Respondent was making some good faith efforts to address the ribs. To be fair, the mud seam was a bedeviling situation; the conditions could change as that seam dried out and it was not entirely unreasonable for miners to reach different conclusions about the timing of the need for action to control the ribs. As discussed below, the Court believes that this bears upon the unwarrantable failure claim.

Overview of Penalty Assessments

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator

charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. … If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. [*The American Coal Co.*, 38 FMSHRC 1987, 1993-1994 (Aug. 2016)], (citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984))." *Consolidation Coal Co.* 38 FMSHRC 2624, 2643-2644 (Oct. 2016) (ALJ Moran)

Penalty Assessment for Order No. 9036922

Order No. 9036922 was specially assessed at $70,000. As noted, had Order No. 9036922 been regularly assessed, the proposed penalty would have been $44,645. For the following reasons, *upon application of the statutory penalty criteria*, the Court imposes a penalty of $30,000 for this violation, an amount which the Court considers to be both an appropriate, and significant, penalty under the circumstances.

The Narrative Findings for a Special Assessment shed little additional light in support of the reason for employing that provision of Part 100 beyond the information asserted in the Order itself. Nor did the Secretary, at the hearing, or in the post-hearing briefs present particular reasoning in support of the Special Assessment. Further, the Court does not agree with assertion that "[m]anagement failed to support or otherwise control the coal ribs," as the Court finds that the Respondent made some efforts to address the ribs, albeit insufficient ones. Accordingly, the Court does not agree with the Narrative's statement that "[m]anagement made no attempt to correct the violations."

It is noted that the Special Assessment's point valuation did not differ from the Regular Assessment's points on the criteria of size, good faith, or violation history, including repeat violation points. Pursuant to the parties' stipulations, presented at the hearing, payment of the total proposed penalty in this matter will not affect Respondent's ability to continue in business and the Respondent demonstrated good faith in the abatement of the alleged violations.

Therefore, the negligence and gravity, and the related issues of unwarrantable failure and significant and substantial, remained in issue.

The Court's assessment of the negligence and gravity associated with the violation is not restricted to the boxes in the Mine Citation/Order form, MSHA Form 7000-3. Evidence does not always fit neatly into the choices that form offers. Instead, based on the overall testimony, the Court concludes that the gravity was between reasonably likely and highly likely, that the injuries could include lost workdays or restricted duty and *possibly* permanently disabling ones. While the S&S finding is upheld, the diminished expected injury evaluation impacts the reasonably serious injury aspect of that finding. Similarly, the negligence, in the Court's estimation, falls between moderate and high. While it is a close call, the Court finds that there was not an unwarrantable failure, because there were efforts, insufficient though they were, to address the ribs. It would be inaccurate to characterize the Respondent as having engaged in reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Accordingly, with the unwarrantable failure designation not justified, this order is modified to a section 104(a) citation. *Lodestar Energy, Inc*., 25 FMSHRC 343 (July 2003) *Cyprus Cumberland Res. Corp*., 21 FMSHRC 722, 725 (July 1999).

The remaining statutory criteria were duly considered in arriving at the penalty imposed. The Commission has "recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case. *Lopke Quarries, Inc*., 23 FMSHRC 705, 713 (July 2001). … Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 485 (Mar. 2015)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016).

Upon consideration of the above, the entire record, as set forth in some detail per the Findings of Fact, the Court's credibility determinations and the statutory criteria, the Court imposes a civil penalty of $30,000 for former Order No. 9036922, now modified to a section 104(a) citation.

Order No. 9036663; the admitted preshift examination violation, issued February 3, 2016, which Order is ***not*** related to Order 9036922.

Given the Respondent's concessions about this order, the Secretary addressed the limited subjects of controversy. However, the Secretary said little that actually supports his view of those subjects.[46]

For the Respondent's part, it acknowledges that an ineffective intake seal, leaking gases, or seal failure, presents the hazard of such contaminated air being carried to the working face. R's Br. at 74. Respondent contends that the S&S determination must be viewed in the context of the failure to conduct *a single* missed preshift exam in this location, the Southwest Main Seals. With that focus, the Respondent asserts "the Secretary has adduced no particular facts to support that the potential for leakage of gases that would affect the working section was reasonably likely to occur. Mr. Tisdale could not establish that the hazards he identified as associated with the hazardous release of gases were reasonably likely …. To the contrary, the Mr. Tisdale agreed that at the time of the subject inspection, there were no hazards present at the Southwest Main Seals that would indicate a leakage of methane was reasonably likely." R's Br. at 74-75. Respondent also notes that "[t]he seals are evaluated weekly for convergence, and have exhibit[ed] levels well within the allowable limits[;] [that] [s]ix months of weekly methane readings prior to the issuance of the Order show no more than de minimis levels of methane[;] [and that] [n]o geologic anomalies have developed." *Id*. at 76. In addition, Respondent observes that its witnesses, Barras and Reisinger, stated that for these seals a change in conditions would not occur quickly, and because the Southwest Main Seals have historically exhibited stable convergence levels, it is exceedingly unlikely that their condition would have changed in the time covered by a single preshift examination.[47] *Id.*

[46] In its entirety, on these limited issues, the Secretary stated only, "Tisdale's credible testimony that daily preshift examinations are the only way to identify potentially dangerous issues with seals established that a failure to do so was reasonably likely to cause injury and that the violation was S&S. His testimony established that if an intake air course seal were to be breached, it would put bad air directly onto a working section and could cause an explosive gas mixture. These issues could cause death by asphyxiation or explosion. Respondent's argument is that it does not believe the preshift examinations required by MSHA are necessary, because its seals have performed well so far. However, not only are intake air course seals required to be examined, Tisdale's testimony established that without the required examinations, it was impossible to determine how well the seals were performing. He testified that the failure to examine the seals created a reasonable likelihood of explosion or asphyxiation. His reasonable, logical, credible, and specific testimony regarding the S&S assessment is entitled to substantial weight." Sec. Br. at 24. However, little of this actually addresses the S&S considerations and, as explained *infra*, those aspects which do speak to the issue are found to be unpersuasive considering the evidence as a whole.

[47] Although the Court read and considered the parties' reply briefs, it has determined that no additional comments were needed regarding the issues surrounding the preshift violation for the seals.

The Court's conclusions as to Order No. 9036663, the admitted preshift violation

As noted, the Respondent stipulated to the fact of violation, to high negligence and to unwarrantable failure. Therefore, the Secretary had only to deal with the gravity designations of reasonably likely, and fatal, and number of persons affected designation. The standard violated requires preshift examinations. Involved in this instance was the failure to preshift the intake aircourse South West Main seals prior to the afternoon shift miners entering the mine on February 3, 2016. The violation was regularly assessed under Part 100 at $38,503.00. For the reasons which follow, **the Court finds that the appropriate penalty is $10,000.00 and it imposes that sum.**

No one disputes the importance of this admitted violation. After all, the southwest main seal, which was not preshifted, was on the intake air course, and delivered air directly to a working section, which was adjacent to the primary escapeway. However, having taken into account the admitted violation, that it involved high negligence and an unwarrantable failure in the penalty determination, the analysis must then focus on the likelihood, the fatal designation and the accuracy of the number of persons affected, listed at 31 in the Order. Once those determinations are made, they are folded into the admitted aspects, to arrive at the penalty.

Therefore, while the admitted hazard is that a leaking seal could allow bad gas to a working section, the likelihood of that occurring under continued normal mining operations must be determined. Inspector Tisdale stated that without performing the preshift exam, one cannot know what hazards may or may not exist in that area. Though Tisdale addressed his S&S finding, and the underlying hazard, he could not speak to the reasonable likelihood that air leaking from a seal will come out in a large amount, nor could he speak to the reasonable likelihood of asphyxiation occurring. He also conceded that while asphyxiation would come about through lack of oxygen, oxygen is checked throughout the mine. As to the likelihood that an explosive mixture of methane could occur, the inspector stated that, without ventilation controls, seals being one of those controls, he has encountered it. While the Court acknowledges that Tisdale viewed the failure to preshift the seals as just one element of that exam, which is to include the roof and ribs and gas levels, he admitted that those concerns turned out not to be present in this instance. He then conceded that the hazards he identified turned out not to be reasonably likely to occur. It is also fair to conclude that Tisdale effectively viewed all such failures to preshift a seal as S&S.

Addressing the aspects of the inspector's evaluation with which it took issue, Respondent's witness Courtney stated, without contradiction, that there was not a history of adverse roof or rib conditions at these seals. Respondent's witness Reisinger also testified on the seal issue. In many respects he did not advance the Respondent's defense, but as to the issues that Respondent was challenging, he did state that seal fluctuations would only be minor, that he would not expect that those fluctuations would affect the seals' integrity, and that if problems did develop, they would likely develop gradually, not quickly.

Respondent's witness Barras also testified about the seals.[48] Barras reviewed methane and barometer readings for a six month period, finding little or no methane present at the seals in issue and little or no gas transfer in either direction. A significant and substantial scenario could develop, in his view, only if there was a significant water issue, an unlikely occurrence because there is no nearby water issue to those seals. Barras gave the S&S issue some serious thought and, as his testimony revealed, it is not reasonably likely that an injury would occur. The Court found Barras' reasoning to be sound and persuasive on the likelihood issue. This finding does not directly impact the fatal nor number of persons affected designations but, with the occurrence not being reasonably likely, it has an indirect effect on them. **Accordingly, upon consideration of all the evidence on this matter, it imposes the above-stated penalty of $10,000, an amount the Court still considers to be a significant, and warranted, civil penalty assessment**.

Docket No. LAKE 2016-0232

Violations at Issue in Docket No. LAKE 2016-0232

Order Numbers 9036654, 9036656, and 9036657 each alleged a violation of 30 C.F.R. § 75.1731(a). That standard, titled, "Maintenance of belt conveyors and belt conveyor entries" provides, at subsection (a) "Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced." The Secretary proposed a penalty of $4,000.00 for each of these alleged violations (i.e. $12,000.00 in total for the three). **The conditions prompting the issuance of all three orders were found on the same day, January 21, 2016.**

Because many aspects of the testimony for these three violations spoke of common problems, the parties dealt with them collectively. The Court takes the same approach.

Order No. 9036654; alleged damaged rollers violation

The conditions found by the inspector have been set forth in the findings of fact but, in sum, for the 1C belt the inspector found two top rollers out of bracket, allowing the belt to rub them, a missing top outside roller and two frozen top center rollers. Based on his calculations of belt move frequency, the inspector believed the conditions had existed for two to three weeks.

The inspector stated that these conditions were "obvious to the most casual observer." He marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected.

[48] Mr. Barras's expressed view that the cited standard needs to be updated in order to catch up with advances in seal construction is beside the point, as the standard is enforced as written until amended. However, one can compartmentalize his remarks as informative on the likelihood factor and that is the approach the Court took here.

Order No. 9036656; alleged damaged rollers violation

For this Order, applying to the 1B belt, the inspector found a frozen top center roller and a frozen top outside roller. As with Order No. 9036654, the inspector stated that the problems were "obvious to the most casual observer." He marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected. Stating that almost all of the frozen rollers had flat areas on top or polished shiny areas, the inspector opined that the rollers had been frozen for a period of time.

Order No. 9036657; alleged damaged rollers violation

For this Order, applying to the 1A belt, the inspector found frozen top center rollers at three locations, a single frozen top outside roller, and a missing top center roller, allowing the belt to rub when loaded. As with Order Nos. 9036654 and 9036656 the inspector marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected. Again, he stated that the problems were "obvious to the most casual observer."

Taken together, the inspector believed that the number of problem rollers he found was an unusually large number. It was perplexing to the inspector and indicative of the inadequate belt examination for these three belts that he met the belt examiner as they passed one another, traveling in opposite directions along the belt line. The problem was that, shortly after their meeting, the inspector came upon a frozen and a missing roller in the direction that the belt examiner had just traveled but without observing the twin problems. The inspector, upon checking the mine records, found that no bad rollers had been noted through January 4, 2016. He considered that an unusual length of time to not discover rollers needing attention. Another issue of concern for the inspector was that the miners had already been trained on this issue.

Speaking to the three damaged roller orders, Order Nos. 9036654, 9036656, and 9036657, the Secretary notes that rollers, as part of the belt haulage system, can present an ignition hazard. However, implicitly, the Secretary concedes that the task is daunting as "[t]here are thousands of rollers along the belt" and, as any number of them can malfunction, such problems "are not uncommon." Sec. Br. at 17. The Secretary points out the even rollers that don't present a fire hazard must still be replaced under the standard and argues that the "Respondent did not change out bad rollers as often as would be expected and had left the bad rollers in place for a long period of time." *Id.* at 20. The Respondent's failure to identify the bad rollers supports the inspector's high negligence finding. *Id.*

For its part, the Respondent, also addressing the three conveyor belts/roller issues collectively, notes that "the 1A, 1B and 1C belts consisted of 7,970 feet of belt line, and had 4,782 top roller cans." R's Br. at 47. Respondent further states that the belt examiner has several other tasks to perform while examining the belts in addition to the rollers. Beyond that, there was testimony that it is more challenging to detect roller issues when the belt is not running, which was the case in large measure, at least for the 1C belt. *Id* at 48.

The Respondent challenges the unwarrantable failure and high negligence findings for each of the three orders; No. 9036654, 9036656, and 9036657. If the Respondent's perspective were to be upheld for either of those findings, obviously it would impact the penalty assessment. Respondent contends that there were mitigating circumstances. For the 1C belt, the rollers were not readily observable, as Hammond had walked the opposite side of the belt than the inspector, the belt was running when the inspector detected two frozen rollers, but Hammond's exam occurred when coal was not running. For the 1B belt, involving two frozen rollers, the inspector observed the condition when the belt was running. Similarly, the belt was not running coal when Hammond did his exam. While conceding that a single missing roller was not detected by Hammond, Respondent notes that this must be viewed in the context of 7,970 feet of belt line. R's Br. at 59-60.

As for the unwarrantable designation, Respondent notes that the words used to describe that term – words like aggravated conduct, reckless disregard, intentional misconduct, indifference and a serious lack of reasonable care – simply do not apply to the facts involved with these three orders. Respondent points to the conditions not being "extensive," under any reasonable interpretation of that word. The Respondent also asks if it is fair for the inspector to have issued three separate orders, one for each belt, when his determination of unwarrantability was based on his collective view of all three belts. The Court believes that the Respondent's arguments have merit.

Recognizing that there is a $4,000 statutory minimum for 104(d)(2) orders, Respondent contends that the elements needed to sustain such an order were absent for Order Nos. 9036654, 9036656, and 9036657.[49]

The Court finds that the Respondent's arguments carry the day and accordingly that none of these three orders were unwarrantable failures. Further, it does not adopt the characterization that all of the roller issues were obvious to the most casual observer. Consequently, it modifies each of the orders to section 104(a) citations. *Lodestar Energy*, 25 FMSHRC 343 (July 2003).

Based on the foregoing, and each of the statutory factors, the Court imposes a civil penalty of $1,000 for now modified Citations 9036654 and 9036657 and $500.00 for now modified Citation 9036656.

[49] As discussed below, the Respondent makes a similar claim for Order No. 9036658

Order No. 9036658; alleged inadequate belt exam

For this Order, No. 9036658, alleging a violation of 30 C.F.R. § 75.360(b)(11)(vi), and the attendant duty to preshift for violations involving belt conveyor components,[50] the inspector stated that "[t]he exam conducted on [t]he 1A, 1B, and 1C belts has been found to be inadequate. Upon inspection there are 12 rollers that were damaged or missing on these three belts. This area had been examined prior to inspection by approximately 3.5 hrs."

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, constituting an unwarrantable failure to comply with a mandatory standard, and S&S, with one person affected. As with the orders for the belt issues, Order Nos. 9036654, 9036656 and 9036657, this belt-related violation had a proposed penalty of $4,000.00.

Respondent challenges the fact of violation, whether it was S&S, and whether it was properly deemed an unwarrantable failure.

Given the Court's findings and conclusions for former Order Nos. 9036654, 9036656, and 9036657, each modified to section 104(a) citations, a similar result obtains for Order No. 9036658. Accordingly, that Order is also modified to a 104(a) citation. However, because that former Order applied collectively to all three belts, as identified in now Citations Nos. 9036654, 9036656, and 9036657, **a penalty of $2,500.00 is imposed for now-Citation No. 9036658**.

Order No. 9036924; alleged inadequate preshift exam

Order No. 9036924, issued December 23, 2015, alleged a violation of 30 C.F.R. § 75.360(a)(1). As noted, it is actually associated with former Order, now section 104(a) citation, No. 9036922 which is part of Docket No. LAKE 2016-0269. The Secretary specially assessed this alleged violation, proposing a civil penalty of $70,000.00. Accordingly, though it would be understandable to think of this Order as related, time-wise, to the other four orders in this docket, all issued on January 21, 2016, this alleged violation was cited nearly a month earlier.

As previously stated, the cited standard, titled Preshift examination at fixed intervals, as applicable here, provides at (a)(1): "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations."

[50] The text of the relevant portions of the cited standard provides: "The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:… (11) Preshift examinations shall include examinations to identify violations of the standards listed below: … (vi) § 75.1731(a) - maintenance of belt conveyor components."

Because of the special assessment, the text of the (d) order is repeated here. The inspector described the condition or practice as follows:

> An inadequate preshift examination was performed on the midnight shift (12/22/2015, 4:00 a.m. to 7:00 a.m.). A hazardous condition (inadequately supported ribs) located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts. This condition was not posted in or recorded in a book maintained for the purpose on the surface at the mine. This hazardous condition was obvious and extensive and condition had existed for a significant period of time. Order #9036922 was issued in conjunction with this 104(d)(2) order. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036924.

The inspector assessed the gravity of the injury or illness as highly likely to occur, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and an unwarrantable failure and as S&S, with 14 persons affected.

The Secretary's post-hearing brief notes that the inspector found nothing in the preshift exam reflecting issues with the ribs. Further, the inspector believed that the rib problems existed for several shifts. Sec. Br. at 15. The Secretary states that the violation was established because the preshift exam did not note that the ribs presented a hazardous condition. *Id.* at 16. An adequate preshift exam would have noted the obvious rib conditions. The Secretary also looks to the inspector's testimony for support of the gravity, negligence, unwarrantability and the other designations made in the order, including the S&S determination. That last gravity finding, S&S, is supported, the Secretary states through the inspector's credible testimony "that the hazard caused by Respondent's failure to recognize and correct the poor condition of the ribs exposed all of the miners on the working section to the hazard caused by the violation." *Id.* at 17.

One simply cannot reconcile a finding upholding the violation alleged in Order No. 9036922, that the ribs were not supported or otherwise controlled, as the Court has done, with a finding that the preshift exam requirement was somehow met in Order No. 9036924. Although both violations are upheld, the Court has a similar take on the negligence and gravity elements. Accordingly, it is similarly found that the gravity was between reasonably likely and highly likely, that any injuries would, most likely, involve lost workdays or restricted duty and, less likely, permanently disabling ones. While the S&S finding is upheld, the diminished expected injury evaluation impacts the reasonably serious injury aspect of that finding. Similarly, the negligence, in the Court's estimation, falls between moderate and high. Applying the analysis used in former order No. 9036922, and the Court's conclusion that Benjamin was credible, the Court finds that there was not an unwarrantable failure regarding this Order and therefore it is modified to a section 104(a) citation.

The Court considers this Order, No. 9036924, to be inextricably related with associated Order No. 9036922. These two violations took the majority of the time during the three days of hearing testimony. As set forth above, the Court concluded that the preshift exam should have

noted some of the conditions, and some of the ribs which were not scaled should have been, but the mud seam's presence complicated both the exam and the scaling because a rib might not need attention at a given time, but would need scaling later, as the seam dried out. There was also an honest difference of opinion about the rib conditions. No doubt some ribs should've been acted upon without delay but other conditions, based upon the credible testimony of several of the Respondent's witnesses, involved flaking and small amounts of material, baseball or football sized, and therefore it was questionable whether there was a failure to control the ribs in those instances. At least it may be said that there was enough credible testimony to question whether the unwarrantable failure allegations were established and the Court so finds those designations were not demonstrated under the required burden of proof.

Accordingly, the Court, applying the statutory criteria, finds a civil penalty of $30,000.00 to be appropriate and it therefore imposes that sum for the violation.

It is noted that the two related Orders total $60,000.00 and therefore represent a considerable, but appropriate, penalty.

Summary

Docket No. LAKE 2016-0269

Order No. 9036922 is assessed a civil penalty of $30,000.00 and the unwarrantable failure designation is removed. Accordingly, the section 104(d)(2) order is modified to a section 104(a) citation.

Order No. 9036663 is assessed a civil penalty of $10,000.00

Total penalty assessed for Docket No. LAKE 2016-0269: $40,000.00

Docket No. LAKE 2016-0232

Order No. 9036654 is assessed a civil penalty of $1,000.00

Order No. 9036656 is assessed a civil penalty of $500.00

Order No. 9036657 is assessed a civil penalty of $1,000.00

Order No. 9036658 is assessed a civil penalty of $2,500.00

Order No. 9036924 is assessed a civil penalty of $30,000.00

Total penalty assessed for Docket No. LAKE 2016-0232: $35,000.00

It is ORDERED that, as they lack unwarrantability, Order Nos. 9036654, 9036656, 9036657, 9036658 and 9036924 each be modified to Section 104(a) citations.

It is further ORDERED that, within 30 days of this order: for Docket No. LAKE 2016-0269, Respondent pay a penalty of $40,000.00 and, for Docket No. LAKE 2016-0232, Respondent pay a penalty of $35,000.00.

Upon receipt of the total payment in the sum of $75,000.00 for these two dockets, this case is DISMISSED.

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

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APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
PHONE: (202) 434-9933 | FAX: (202) 434-9949

January 26, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0268 A.C. No. 12-02295-406669 Mine: Francisco Underground Pit

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. The originally assessed amount was $37,420.00, and the proposed settlement is for $20,000.00. The parties also request that Citation Nos. 9036190 and 9036926 be modified, as indicated below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
9036184	$1,111.00	$1,111.00
9036190	$1,657.00	$1,200.00
9036926	$34,652.00	$17,689.00
TOTAL:	**$37,420.00**	**$20,000.00**

The parties present the following bases for the proposed reductions and modifications in this case:

Regarding Citation No. 9036190, which alleged a violation of 30 C.F.R. § 75.601-1:

> At hearing, Respondent would present evidence that the inspector over evaluated the gravity associated with this violation. Respondent contends that this was a

shielded cable. The shielded cable lessens the likelihood of a phase to phase short circuit. Furthermore, the condition was only found on one machine. It is unlikely that six people would be injured by this one trailing cable. Therefore, Respondent requests that the Secretary change the likelihood to unlikely, remove the significant and substantial designation, lower the number of persons affected to 2, and reduce the civil penalty.

The Secretary, in reply to the Respondent's statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary is willing to agree to modify the number of persons affected to 2 and to accept a reduced penalty.

Regarding Citation No. 9036926, which alleged a violation of 30 C.F.R. § 75.223(a)(1):

At hearing, Respondent would present evidence that the violation should be vacated. The operator was following the procedures to address roof plan inadequacies provided in the MSHA Policy Handbook. On April 9, 2014, the operator updated the roof plan and this plan was approved by the District Manager. On May 7, 2014, the District approved the operator's plan revision to address changes in the red zone. On September 15, 2014, the District approved the operator's new portal development as a supplement to the plan. On May 1, 2015, the District approved an action plan to recover a battery and charger. On June 3, 2015, the District approved a plan revision to address additional support in sandstone areas. On July 31, 2015, the District approved a plan supplement to address 3SE Main Portal development. On August 3, 2015, the District approved an action plan for a roof fall. On December 22, 2014, the District approved a plan revision in response to a roof fall and 103(k) requirements. This revision included language for encountering adverse roof conditions. The mine's history of updating the plan demonstrates that it actively proposed revisions when conditions changed underground in the mine. Therefore, Respondent requests that the Secretary vacate this violation.

The Secretary, in reply to the Respondent's statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary is willing to agree to modify the citation to “reasonably likely,” to modify the citation to “moderate negligence,” and to accept a reduced penalty.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9036190 be **MODIFIED** from six to two persons affected.

It is **ORDERED** that Citation No. 9036926 be **MODIFIED** from "highly likely" "reasonably likely" and from high to moderate negligence.

It is further **ORDERED** that Respondent pay a penalty of $20,000.00 within 30 days of this order.[51] Upon receipt of payment, this case is **DISMISSED**.

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

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Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor 211 7th Avenue North, Suite 420, Nashville, Tennessee 37219-1823

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577

February 1, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-134-M A.C. No. 42-00410-423470
v.	Beck Street South
STAKER & PARSON COMPANIES, Respondent	

DECISION

Appearances: Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
M. Craig Hall, Esq., and F. Xavier Balderas, Esq., Oldcastle Law Group, Atlanta, Georgia for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Staker & Parson Companies ("Staker") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. Staker operated the Beck Street South mine, a sand and gravel pit in Salt Lake County, Utah.

The two citations at issue stem from a fatal accident on March 8, 2016 in which a haul truck driver was killed when his truck traveled through a berm, down an embankment and into a partially flooded pit. For reasons set forth below, I **VACATE** Citation No. 8942613 and **MODIFY** Citation No. 8942614 to low negligence. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Beck Street South Mine is a single bench sand and gravel operation. Tr. 25. At the time of the fatal accident mine personnel were removing waste material from one area, loading the material into haul trucks, transporting the material to a dump site, and dumping the material into a pit. Tr. 25, 179. The designated dump site was at the top of an 80 foot embankment between two large piles of material. Tr. 28, 47; PX-15 p. 7. A berm was maintained along the

top edge of the embankment. Tr. 29. The purpose of the berm was to indicate the edge of the highwall and prevent a truck from backing close to the dropoff. Tr. 94, 122. The berm was 44 inches tall and 14 feet wide at its base. Tr. 29, 34-35. The dumping process involved the haul truck operator driving the truck into the dump site area with the berm at the top of the embankment on his left side, making a right turn such that the right-hand side pile of the two large piles of material could be seen in the haul truck's left side mirror, backing the truck into the area between the two large piles of material, and then dumping the truck's load between the two piles just short of the berm.[1] Tr. 27-31, 34-35, 181. The two piles of material (the "guide piles") directed the truck drivers to the correct dumping location but the berm also continued to the right well beyond the second guide pile. After dumping his load, the operator would lower his truck's bed and return for another load. Tr. 31-32.

On March 8, 2016, a fatal accident occurred when a haul truck driven by 54 year old Blaine Linck traveled through a berm, down the 80 foot tall embankment, and into 14 feet of water at the bottom of the pit. Tr. 20-21, 24-25. Linck drowned as a result of the accident.[2] Tr. 54. Jory Argyle[3], the mine's safety manager at the time of the accident, timely reported the accident to MSHA. Tr. 22.

MSHA Inspector Joe Summers[4] was assigned to lead the investigation of the fatality. Tr. 20-21, 24. As the lead investigator he coordinated with two other MSHA employees, Ron Medina[5], from MSHA's Technical Services, and Kent Norton, from MSHA's Educational, Field and Small Mine Services. Tr. 25

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[1] The haul truck operators dumped their loads away from the edge and berm. Tr. 32, 181. Staker had a policy that the trucks were not to hit or disturb the berms at any time. Tr. 194. Once the dumpsite between the two piles became full, a front loader would do a cleanup of the area by pushing the dumped loads over the embankment before ensuring that there was a new berm at the edge. Tr. 32-33.

[2] The autopsy confirmed drowning as the cause of death. Tr. 58-59.

[3] Argyle has been with Staker for twelve and a half years and has experience in the mining and road construction industries. Tr. 199. As the mine safety and health manager he was responsible for oversight of training over a broader area than just this mine and provided service to the mine on an as needed basis. Tr. 200, 212.

[4] Inspector Summers has been with MSHA for 12 years and conducted upwards of 400 metal/non-metal inspections. Tr. 17-18. He is a certified accident investigator and is trained to reconstruct the scene of an accident. Tr. 18, 119. However, he is not trained on how to analyze and draw conclusions based on disturbances of the earth to reconstruct accidents. Tr. 170. Prior to his time with MSHA, he worked at various mines operating equipment, including haul trucks similar in size and power to the one driven by Linck. Tr. 18-19.

[5] Medina is a member of MSHA's technical support department and specializes in equipment and components found on vehicles. He is not a MSHA inspector. Summers testified that MSHA ultimately determined that the truck did not contain any defects that contributed to

(continued…)

Inspector Summers traveled to the mine on March 9, the day after the accident, and met with a group of management officials from Staker. Tr. 40. Over the following weeks the investigation team took photographs and measurements, gathered documents, tested a similar truck, and interviewed employees of the mine. Tr. 41-43, 121.

During interviews, Inspector Summers learned that Linck began his shift at 4:00 PM and mine personnel noticed that the truck went missing at approximately 10:56 PM. Tr. 125. When the truck went missing, Neilo Taylor, the mine foreman, instructed mine personnel to cease operations and locate the truck. Tr. 56, 126. Clint Leek, the loader operator, went to the edge of the dump site, looked over, saw headlights from the truck in the pond below, and called in the accident over the radio. Tr. 56. Taylor, in response, went to the pit and swam to the truck where he found Linck deceased in the operator station face down in the water. Tr. 57, 108. The operable seatbelt for Linck was not secured. Tr. 108.

Inspector Summers testified that, during his time with MSHA, he has never heard of a situation where a seatbelt unlatches as a result of an accident. Tr. 109-110. Inspector Summers stated that Linck could have taken his seatbelt off at any time the evening of the accident and Staker would not have known. Tr. 110.

Inspector Summers testified that, based on records obtained and reviewed by Norton,[6] Staker's task training, training plan, and examinations relevant to the subject truck were all in order.[7] Tr. 54, 81. Further, the MSHA investigative team performed tests on the haul truck and determined that no defects were found with the braking system, backup camera, throttle, pressure in the steering system, or the safety system designed to prevent the truck from backing up while the bed was raised.[8] Tr. 79-81. In addition, the seatbelt in the truck, when tested multiple times,

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[5] (…continued)
the accident. Medina did not testify at hearing, but did provide deposition testimony during discovery. While Medina offered deposition testimony with regard to other topics beyond the issue of whether the truck was a contributing factor, I decline to take that testimony into consideration given the court's inability to weigh his credibility.

[6] At hearing Respondent alleged that the Secretary had failed to produce Kent Norton for deposition and moved the court to infer that Norton's testimony would have been adverse to the Secretary. However, as the Secretary noted, Norton retired during this litigation and was no longer employed by MSHA. Although previous counsel for the Secretary indicated that he would attempt to produce Norton for deposition, current counsel for the Secretary informed counsel for the Respondent that he would not do so and Respondent made no attempt to obtain a subpoena for Norton's deposition testimony. Accordingly, I decline to apply the severe sanction of an adverse inference. Respondent's motion is **DENIED**.

[7] Summers testified that, while records indicate that proper pre and post-operational checks of the truck were done before Linck operated it, the pre-operational check documentation filled out by Linck was destroyed by water. Tr. 81.

[8] Testing of the actual steering was impossible due to damage to the front left of the truck. Tr. 80.

functioned as designed and was properly certified. Tr. 81-82, 110. MSHA determined that the condition of the truck was not a contributing factor to the accident.[9] Tr. 83, 156-158.

Based on his observations and other evidence collected, Inspector Summers determined that Linck drove beyond the two guide piles rather than backing up between the piles where he was required to dump the rock. The inspector believes that Linck's truck, while in reverse, overtraveled the 44 inch high berm to the right side of the pile marking the right edge of the dump site, tumbled down the 80 foot embankment,[10] landed right side up facing the opposite direction in 14 feet of water, causing Linck to drown. Tr. 28-29, 44-45, 58-59; PX-15 p. 1, 3, 5; PX-16 p. 2.[11] Inspector Summers agreed that, while it was dark out at the time of the accident, the lack of lighting in the area was not a contributing factor to the accident. Tr. 115-117. Inspector Summers observed tracks and rubber from the tires on the rocks in the area where the truck traveled through the berm. Tr. 59, 62; PX-15 p. 2. Based on this evidence, he theorized that Linck had pulled up to the berm, felt resistance, pressed the accelerator, which spun the tires and left rubber behind, powered through the berm, and traveled down the embankment into the pond 80 feet below.[12] Tr. 59-62, 152-153, 156. He explained that, while berms can retard the progress of a haul truck, they are designed to warn the driver and cannot stop a truck from going through them. Tr. 94, 122-124. Damage to the operator's station, front of the vehicle, rock guard above the cab, mirrors, walkways, handrails and access ladder on the truck indicated to Inspector Summers that the truck suffered a significant impact. Tr. 48-50, 142, 149; PX- 16 p. 4. The cab itself was beaten up, but intact. Tr. 110.

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[9] Although the truck was equipped with a proximity detector to provide information regarding materials behind the truck, it could not be tested because it had been submerged in water as a result of the accident. Tr. 147-148.

[10] Summers provided detailed testimony as to why he believed the truck traveled backward through the berm and how it traveled down the embankment. Tr. 64-79, 130-144; PX-15 p. 12-14. However, he conceded there was no way to know if the truck was going forwards or backwards when it went through the berm. Tr. 130, 171. Matt Wilson, a Staker witness, also believed that the truck was traveling in reverse when it went over the berm. Tr. 193-194. Although it is possible Summers correctly discerned the exact sequence of events as to how the truck tumbled down the embankment, I decline to credit that testimony given his lack of expertise on the topic. Nevertheless, I find that the photographs of the indentations in the embankment and the fact that the truck landed facing the opposite direction, establish that the truck was violently tossed around as it travelled down the embankment and likely rolled.

[11] Summers testified about and marked an aerial photo of the subject area. PX-12 p. 2. The photo was taken by Staker personnel using a drone. Tr. 36. At hearing, Summers used pink marker to show the road that the trucks travel into the dump site area, blue marker to show the designated dump site, green marker to show where Linck went through the berm outside of the designated dumpsite and down the embankment, and yellow marker to indicate where the truck ultimately came to rest at the bottom of the embankment in the pond. Tr. 35-39.

[12] On cross-examination Summers conceded that he was not capable of calculating the speed that the truck was traveling at the time, nor is he trained to conduct an analysis of what kind of force was required to damage the front of the truck and the attached ladders. Tr. 120-121.

While the cause of death was ultimately determined by the coroner to be drowning, Linck also suffered lacerations, abrasions and contusions to his body. Tr. 102-103; PX-13. Inspector Summers agreed that that these types of injuries are what one would expect a haul truck driver to suffer in an accident of this type. Tr. 102-103. The coroner's report indicated that pharmaceuticals, including antidepressants were found in Linck's system. Tr. 104, PX-13.

At the time of the accident Linck had been operating haul trucks at the mine for approximately four months. Tr. 55, 154, 175, 182. Inspector Summers confirmed that Linck's training, including his task training for operating the truck, was up to date and no deficiencies were noted. Tr. 55-56. Moreover, he agreed that Linck was properly trained by Staker to wear a seatbelt and taking the belt off at any time would have been contrary to his training. Tr. 111. Inspector Summers also learned that Linck had recently been diagnosed with type 2 diabetes and was going through a divorce. Tr. 160. However, these factors did not influence Summers' conclusions. Tr. 160.

During interviews, Inspector Summers learned that, approximately an hour prior to the fatal accident, Linck had been involved in an incident when the haul truck he was driving struck a berm on the haul road while on his way to the dump site. Tr. 85, 87-89, 100, 104-105. Although mine personnel asked Linck if he and the truck were okay, to which Linck responded "yes," nothing else was done. Tr. 86. 105. Matt Wilson,[13] the mine's foreman, who was not on site when the berm brush incident occurred, confirmed that mine personnel made contact with Linck after the incident and that Taylor felt that it was okay to allow Linck to continue working. Tr. 185.

Wilson testified that, with regard to the chain of command, Linck reported to Neilo Taylor who in turn reported to Wilson. Tr. 175. He averred that Linck was a model employee who had worked at the mine for four months, dumping in the same area, without any issues. Tr. 175, 183, 187-188. His driving skills were carefully monitored during his first month of driving to make sure he could safely perform the job. Argyle admitted that Linck was no longer permitted to drive a vehicle on public highways on behalf of Staker because his driver's license had been revoked the day prior to the accident.[14] Tr. 215-216. At some point after the fatal accident Wilson learned from Linck's family that Linck suffered from diabetes and was going through a nasty divorce. Tr. 192. Prior to that Staker had no knowledge of any health concerns with Linck. Tr. 191. Wilson explained that he was involved in the accident investigation and believed that the accident may have been an intentional act because Linck was a well-trained and competent truck operator, Linck's son told Wilson that he thought his father did it on purpose, and Linck was on medication with potential side effects such as blurred vision, mood and mental

[13] Wilson started working at Staker in 1999. Tr. 173. He has worked as a laborer, road crew foreman, and was a quarry foreman at the time of the accident. Tr. 173-174.

[14] Argyle testified that Linck's loss of his license had no bearing on his ability to lawfully operate a haul truck on the mine property. Tr. 217. Had Staker been aware of the moving violations that resulted in the revocation of Linck's license, it would have taken it into account. Tr. 214. However, he explained that the operation of a haul truck is vastly different from a personal vehicle and haul truck operators are subject to driving tests, evaluations, and continuous monitoring by peers. Tr. 214-215.

changes, and suicidal thoughts. Tr. 186-187, 192-193, 210; RX-25 and 26. Moreover, Wilson believed that it would have taken a serious and intentional effort on Linck's part to get through or over the berm. Staker built a berm of the same size on level ground to see how difficult it would be to travel over the berm.[15] Tr. 193-194. He agreed that the rubber and ruts on the ground near the berm indicate that the truck's accelerator had been pressed all the way down. Tr. 191.

Wilson explained that the mine conducts daily inspections and safety meetings. Tr. 183-184. Argyle testified that Staker maintains an employee driven safety culture, as evidenced by completed initial and refresher training, risk assessment tools utilized by the employees and weekly "toolbox talks" to discuss different safety processes and ensure that the employees are "constantly staying on top of any outcoming processes or procedures." Tr. 201-202.

Wilson explained that Staker's seatbelt policy requires operators to wear seatbelts,[16] equipment operators are trained on the policy, and employees are not allowed to operate equipment until they have shown they can do so correctly. Tr. 177. Argyle testified that, although the policy had been violated in the past, no citations had ever been issued and appropriate disciplinary action had been taken. Tr. 199, 211-212. According to Wilson, Linck always wore his seatbelt, was a safe driver, was properly trained on the equipment, as evidenced by the certificate of training,[17] and never had any disciplinary problems at the mine. Tr. 177-180; RX-20.

Citation No. 8942614

Citation No. 8942614, issued under section 104(a) of the Mine Act on April 26, 2016, alleges a violation of Section 56.9101 of the Secretary's safety standards and asserts that the haul truck driver failed to maintain control of the haul truck when the vehicle traveled through a berm and off a dump site into a partially flooded pit. The citation further alleges that there were no signs of evasive or corrective actions taken by the driver to maintain control of the truck. Section 56.9101 requires that "[o]perators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of

[15] Wilson testified that Staker conducted two tests in which an operator drove an identical truck into a simulated berm. Tr. 188. The berm was constructed to the same measurements as the berm Linck's truck went through. Tr.189. During the first test, for which MSHA personnel were present, the truck stopped when it ran into the berm at the required low speed. Tr. 189-190, 195. Summers confirmed that the test revealed a berm would be minimally disturbed if it were struck by a truck. Tr. 59. During the second test, when MSHA was not present, the truck was unable to breach the berm in reverse even while traveling at a higher speed. Tr. 190.

[16] The haul trucks are equipped with orange seatbelt straps so it is easy to see from outside of the cab whether an operator is wearing it. Tr. 177-178, 203.

[17] Wilson said that 40 hours of training was provided, after which equipment operators must sit down with Wilson and go over safety procedures until Wilson feels that they are safe to run the equipment, at which point the operator signs the certificate of training and keeps a copy in their wallet. Tr. 180

roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." 30 C.F.R. § 56.9101.

Inspector Summers determined that a fatal injury had occurred, the condition was S&S, affected one person, and was the result of Respondent's moderate negligence. The Secretary proposed a penalty of $3,876.00 for this alleged violation,

Inspector Summers testified that he determined the standard had been violated because Linck deviated from normal procedures, he was not aware of the surroundings and he backed up into an area outside of the designated dump site and powered through the berm. Tr. 90. As a result, he did not have full control of the truck. Tr. 89-90. He explained that, in order to be in control of the truck the operator must be trained and know the operating conditions (i.e., the load, the surroundings, what equipment and personnel are in the area, and where and how you are going to dump). Tr. 91-92. Because Linck did not have control while the truck powered through the berm, which required a significant amount of force, Inspector Summers determined there was a violation of the standard. Tr. 92-94. Moreover, he explained that because it required a significant amount of force to get through the berm, he did not believe the operating speed that Linck's truck was traveling was consistent with the condition of the roadway and grade. Tr. 94-95.

Inspector Summers testified that it does not matter why Linck failed to maintain control and stated that even if Linck had been mistaken about his location, was suffering from a medical condition that caused him to lose control, was on medications that affected his knowledge of the surroundings, or accidentally stepped on the accelerator instead of the brake, he nevertheless failed to maintain control, thereby violating the standard. Tr. 98-100, 155-156. Moreover, he noted that while he could not be sure if Linck intentionally tried to power over the berm, intent is not a factor to consider when determining whether there was a violation. Tr. 153-154, 61.

I find that the Secretary has proven a violation of the cited standard. The cited standard requires that equipment operators maintain control of the equipment. Respondent argues that in order "[f]or the Secretary to meet its evidentiary burden it must prove by a preponderance of the evidence that Linck's failure to maintain control of the Vehicle was the only plausible cause of the Accident." Staker Br. 16. I disagree. I must determine whether Staker violated the safety standard not whether the violation caused the accident. Given the strict liability nature of the Mine Act, whether Linck purposefully powered through the berm or accidently did so is not dispositive. The Commission, in *Daanen v. Janssen, Inc.*, 20 FMSHRC 189, 196 (Mar. 1998) confirmed that the "reasons for a loss of control are irrelevant to consideration of whether control over moving equipment was maintained." Rather, in order to sustain a violation the Secretary need only prove that Linck lost control of the truck at some point. Even if I were to assume that Linck intentionally drove through the berm, thereby "controlling" the vehicle as it powered through the material, there can be no question that he was not in control of the vehicle as it tumbled down the embankment. Moreover, it is clear that, in powering through the berm outside of the designated dumping area Linck was not following the mine's proscribed dumping and truck handling procedures, which call for the truck operator to dump between the two large guide piles and not make contact with a berm. Accordingly, I find that Linck did not maintain control of the truck.

Notwithstanding the above analysis, I would also find a violation under the second part of the cited standard, which requires that the truck be operated at a speed consistent with conditions of the area. In order for the truck to have powered through the berm it had to have been traveling at a very high rate of speed. Wilson agreed that the rubber and ruts on the ground near the berm that the truck went through were evidence that the truck's accelerator had been pressed all the way down. Tr. 191. Moreover, the low speed testing conducted by Staker with MSHA present as well as the subsequent higher speed testing make clear that the truck must have been traveling at an exceptionally high rate of speed in order to break through or travel over the berm. Because the truck was clearly operating at a speed in excess of that which was appropriate, I find that a violation has also been proven under the second part of the standard.

Gravity and S&S

A S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id*. at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id*. The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

Inspector Summers designated the citation as S&S because the failure to maintain control of the truck could cause a crash that would result in serious and potentially fatal injuries such as, bruising, contusions, broken bones, and internal injuries to both the driver and others in the area. Tr. 100-101. He noted that the medical examiner's report, while indicating drowning as the cause

of death, also referenced lacerations, abrasions and contusions on Linck's body. Tr. 102-103. Inspector Summers characterized the injuries as blunt force type injuries that would be expected on a haul truck driver when they have an accident. Tr. 104.

I find that the violation was S&S. I have already found that a violation existed. Here, the hazard to which the violation allegedly contributes is a crash or other accident that results from failure to maintain control of the truck. Assuming that control of the truck is lost, as it was here, a multi-ton vehicle tumbling out of control down an 80 foot embankment into a 14 foot deep pond is reasonably likely to result in very serious injuries. Consequently, I find that the violation was S&S and the gravity was high.

Negligence

Inspector Summers designated the citation as being the result of Staker's moderate negligence. Tr. 106. He noted that while Linck was properly trained and knew how to operate the truck, Staker management did not take action to ascertain whether Linck was physically and mentally capable of operating the truck, or on any medication that might impair his driving, after he brushed against the berm earlier in the shift. Tr. 105-106, 161. On cross-examination Summers agreed that Staker did everything right with regard to training, equipment maintenance, and testing. Tr. 127-129. Moreover, Inspector Summers agreed that Staker prohibited trucks from coming into contact with a berm. Tr. 154-155.

Negligence is not defined in the Mine Act. The Commission determines negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining,* 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory standard carries a requisite duty of care. *Id.* In making a negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically" and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining,* 37 FMSHRC at 1703).

I find that Respondent exhibited only very low negligence. Inspector Summers agreed that Linck was properly trained, the condition of the truck was not a contributing factor, and Staker's training and safety policies were good. However, I find that Staker management's failure to conduct even a cursory investigation of the berm brushing incident prior to the fatal accident nevertheless warrants a finding of at least some negligence. Rather than conduct a brief investigation, Staker personnel instead only asked Linck if he and the truck were okay. Although the berm brush event was rather inconsequential, at the very least it put Staker on notice that Linck had failed to comply with one of Staker's own internal safety policies to never come in contact with a berm and also on notice that Linck might not have been in condition to drive that night. Citation No. 8942614 is **MODIFIED** to low negligence. I find that a penalty of $1,000 is appropriate.

Citation No. 8942613

Citation No. 8942613, issued under section 104(a) of the Mine Act on April 26, 2016, alleges a violation of Section 56.14131(a) of the Secretary's safety standards and asserts that the haul truck driver was not wearing a seatbelt at the time of the accident. Section 56.14131(a) requires that "[s]eat belts shall be provided and worn in haulage trucks." 30 C.F.R. § 56.14131(a).

Inspector Summers determined that a fatal injury had occurred, the condition affected one person and was S&S, and was the result of Respondent's moderate negligence. The Secretary proposed a penalty of $3,876.00 for this alleged violation.

Inspector Summers testified that the standard was violated because Linck was found without his seatbelt on, floating face down in the water. Tr. 108. He explained that the standard requires that belts be worn at all times when in haulage trucks. Tr. 110. On cross-examination he agreed that it would have gone against Linck's training for him to have not worn his seatbelt. Tr. 164.

In order for the Secretary to establish a violation of the cited standard he must prove by a preponderance of the evidence that Linck was not wearing his seatbelt while operating the haul truck. Respondent asserts, and I agree, that the Secretary has failed to establish that the Linck was not wearing his seatbelt while operating the haul truck. While there is no dispute that when Staker personnel found Linck's body he was not wearing a seatbelt, there were no witnesses to the accident, and the evidence before me is far from conclusive as to when Linck detached his seatbelt. The Secretary asks the court to infer, based on indirect evidence, that Linck was not wearing his seatbelt while operating the truck. I decline to do so for two reasons.

First, I credit Wilson and Argyle's testimony that Linck was well trained in the use of his seatbelt, Staker enforced its seatbelt policy, and Linck had never been seen operating a vehicle without wearing a seatbelt. Moreover, Inspector Summers agreed that Linck was properly trained by Staker to wear a seatbelt and taking the belt off at any time would have been contrary to his training.

Second, the physical evidence suggests that Linck may have in fact been wearing his seatbelt while the truck fell down the embankment. Inspector Summers testified that, although Linck was found face down with his head in the water towards the passenger side, he was nevertheless still in the operator station of the truck. Had Linck not been wearing his seatbelt, I find it less than likely that he would have been in the position in which he was found, especially given that windows of the operator station had broken out, and the truck had clearly been violently tossed about and likely rolled, as it tumbled down the embankment. Moreover, I agree with Respondent that the medical conclusions documented in the autopsy report do not seem to support the Secretary's theory that Linck was unbuckled during the accident sequence. Staker Br. 13-14. The report documents lacerations to the head and superficial blunt force injuries to the

torso and extremities. Notably, no broken bones or internal injuries were found.[18] Had Linck been unbuckled during such a violent tumble down the embankment, it is likely he would have sustained greater injuries. Given the above analysis, I find that it is just as likely that Linck unlatched the seatbelt when the truck came to rest at the bottom of the pit or just prior to that time. Consequently, I find that the Secretary has failed to meet his burden of proof. Citation No. 8942613 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's website Staker worked approximately 40,000 hours during 2015 and during 2016, which correlates with a small to medium size operator. 30 C.F.R. § 100.3 Table III; Exhibit A to Penalty Petition. Exhibit A to the penalty petition indicates that Staker's controller worked over 7,000,000 hours, which correlates with a large controller. 30 C.F.R. § 100.3 Table IV. Respondent has not argued that the penalty will affect its ability to remain in business. Respondent's violation history indicates four 104(a) citations, only one of which was designated as S&S, in the 15 months preceding the issuance of Citation No. 8942614. The gravity and negligence are discussed above. Citation No. 8942614 was timely abated. Based on the penalty criteria I assess a total penalty of $1,000.

III. ORDER

For reasons set forth above, Citation No. 8942613 is **VACATED** and Citation No. 8942614 is **MODIFIED** to low negligence. Staker & Parson Companies is **ORDERED TO PAY** the Secretary of Labor the sum of $1,000 within 40 days of the date of this decision.[19]

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

[18] Summers testified that broken bones and internal injuries would be expected in an accident like this. The autopsy report concludes that these types of injuries were not present. This evidence supports a conclusion that Linck was likely wearing his seatbelt as his truck tumbled down the.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 5, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HANSON AGGREGATES SOUTHEAST, LLC , Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. SE 2017-0062 A.C. No. 31-00074-424547 Docket No. SE 2017-0063 A.C. No. 31-00074-424547 Docket No. SE 2017-0137 A.C. No. 31-00074-433046 Docket No. SE 2017-0175-M A.C. No. 31-00074-436078 Mine: Neverson Quarry

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

Before the Court is the Secretary's Joint Motion to Approve Settlement ("Motion"). The Motion seeks a combined reduction for the four dockets from the Part 100 proposed figure of $33,756 to $11,801, a 65% reduction overall. For the reasons which follow, the Motion must be denied.

Most prominent among the alleged violations in these dockets is that a fatality was involved. According to the Section 104(d)(1) Order, No. 8816532, issued November 2, 2016, which is the lone matter in Docket No. SE 2017-0175-M, a haul truck operator died when the truck he was operating (a CAT 773E Haul Truck S/N BDA01082) drifted across the haul road, as he was descending the road's 9% grade, and went over a 201 foot highwall, landing upside down.[1] The Order asserts that the truck operator did not maintain control of the truck while traveling down the haul road and relates that there were no signs of evasive or corrective actions taken by the truck operator to maintain control. The Order also states that "[m]anagement engaged in aggravated conduct, constituting more than ordinary negligence by not ensuring that the victim could operate the truck safely knowing that he had only a few hours of sleep the night before. The violation is an unwarrantable failure to comply with a mandatory standard."

[1] For reasons which will become apparent, the alleged violations are not discussed chronologically.

Unsurprisingly, the Order was marked as S&S and with high negligence. The cited standard, 30 C.F.R. § 56.9101, titled, "Operating speeds and control of equipment," provides that "[o]perators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used."

Though discussed in more detail *infra*, it is noted that this Order, No. 8816532, was regularly assessed (i.e. there was no special assessment) under 30 C.F. R. Part 100 at $12,075 and is proposed under the motion to be settled for $3,578, a 70.3% reduction.

Also issued that November day was a Section 104(d)(1) Order, No. 8816533, which is in Docket No. SE 2017- 0137-M. It too is the only matter in that docket. The Order repeats a good measure of the text from the Order just discussed above, No. 8816532, but adds that the "haul truck operator was not wearing a seat belt and was ejected from the truck." The Order then asserts that "[m]anagement engaged in aggravated conduct, constituting more than ordinary negligence by not ensuring the truck operators were wearing their seat belts and *by not correcting the altered state of harnesses in the haul trucks*." (emphasis added). The standard cited in this Order, 30 C.F.R. § 56.14131(a), is titled "Seat belts for haulage trucks," and provides "Seat belts shall be provided and worn in haulage trucks." As with Order No. 8816532, this Order also asserts that the violation was an unwarrantable failure to comply with a mandatory standard, and was marked as S&S and high negligence. As discussed further, *infra*, No. 8816533 was regularly assessed under Part 100 at $13,417 and proposed to be settled for $3,578, a 73.3% reduction.

The Court considers it to be significant that, less than two months before the fatality-related Orders described above were issued, MSHA cited Hanson Aggregates, on September 14, 2016, with two vehicle-related alleged violations, one of which involves a subject directly associated with the fatality described above. These alleged violations are part of this decision denying this settlement motion. From Docket No. SE 2017-0062, involved is a section 104(d)(1) citation, No. 8910208, alleging a violation of 30 C.F.R. § 56.14131(b). As noted, that standard is titled, "Seat belts for haulage trucks," but in this instance the subsection cited provides that "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

It is unclear if the identical haul truck involved in the fatality was cited, but it was the same truck model, a CAT 773 E haul truck, identified as No. 652252. The (d)(1) citation states that the "haul truck has a rag tied to both the lap and shoulder belt. This condition prevents its automated mechanical retraction to function as designed and will not allow the seat belt to fit firmly against the operator as intended by the manufacture [sic]. The seat belt in this truck has been used in this manner for at least three years and does not provided [sic] protection to the operator [adding, presciently] which could result in fatal injuries." The citation concluded with the statement that "[m]anagement has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard." Citation No. 8910208. For this alleged violation, the proposed penalty was regularly assessed under Part 100 at $2,398.00, while the motion seeks a penalty to $722.00, a 69.9% reduction.

Following that, issued on the same September 14, 2016 date, and also part of Docket No. SE 2017-0062, was a 104(d)(1) order, No. 8910209, which order again invoked the same seat belt subsection, 30 C.F.R. § 56.14131(b). In this instance another haul truck, also a CAT 769 D, identified as No. 231508, was alleged to have the same rag arrangement tied to the lap and shoulder belt. The Order makes the same assertions about the safety hindrances created by the rag ties on the lap and shoulder belt and reaches the same conclusions about the length of time the rag arrangement had been in use and that it constituted aggravated conduct beyond ordinary negligence and was an unwarrantable failure to adhere to the standard. This alleged violation met the same result; originally proposed at $2,665.00, the motion seeks to have it settled for $722.00, representing a 72.9% reduction. [2]

Armed with that background information, the Court reviewed the Secretary's Motion. Once past the Secretary's customary boilerplate language that he has "evaluated the value of the compromise, the likelihood of obtaining a better settlement … etc." the Secretary presents empty

[2] The Court has an issue with one of the two alleged violations within Docket No. SE 2017-0063, Citation No. 8910212, which alleges a violation of 30 C.F.R. § 46.7(a). The cited standard is titled "New Task Training." Subsection (a) provides "You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task."

The section 104(g)(1) citation alleges that four miners received their task training from a person who did not meet "the requirements of a competent person capable of performing the required task training." For that citation the settlement retains the proposed penalty but reduces the negligence from "High," to "Moderate." The motion relates, in part, that the Respondent asserts that the records, though admittedly labeled as "Task Training," were actually "an internal company record of an annual observation by the quarry foreman." Per usual, the Secretary offers nothing in support of, nor even in reaction to, the Respondent's claims. Instead, the Secretary only offers its familiar, empty, response that "[w]hile not admitting the relevance or significance of Respondent's arguments, [he] agrees to modify the negligence to moderate and maintain the original penalty of $803.00." Motion at 6.

The Court has no issue with the other alleged violation in this docket, No. 8910210, which is a section 104(a) citation alleging a violation of 30 C.F.R. §56.3130. That standard requires that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes." The Citation alleges that the benches were not sufficient to prevent falling material from reaching the roadway and work area below. Assessed at $2,398.00, the Motion settles that citation for the amount proposed and with no changes to the inspector's evaluation.

language in support the motion. Therefore, as the Motion fails to satisfy section 110(k) of the Mine Act, it is rejected.

Discussion

Beginning with the fatality-related issuances, the Section 104(d)(1) Orders, Nos. 8816532 and 8816533, the Respondent contends that at a hearing, for Citation No. 8816532, the standard requiring one to maintain control of equipment, "it would present evidence that it is *likely* that the miner suffered a cardiac incident while operating the haul truck which *might* have caused him to drift across the road and berm and fall 200 feet into the pit below. Respondent would also argue that the symptoms of a cardiac incident *may* also account for his having removed his seatbelt. Respondent would further argue that the miner was a properly trained, experienced haul truck operator and that the physical evidence shows that the miner left the haul road suddenly and there were no signs of corrective steering or breaking. Respondent would also offer evidence to show that the road and berms were in good condition, the weather played no role in the incident, there were no other vehicles in the area, and the truck was in good operating condition." Motion at 6. (*italics* added). The Secretary endorses none of it, "not admitting the relevance or significance of Respondent's arguments." *Id.* Yet, for reasons unknown, he "agrees to reduce the negligence from high to moderate and reduce the penalty [by 73.3%] to $3,578.00."

The Secretary's vacuous responses to the Respondent's assertions do not permit the Commission to meet its Congressionally directed duty under Section 110(k) of the Mine Act. The Secretary's non-responses also fly in the face of his claims of "transparency" in settlement motions. Apart from the lack of any response to the Respondent's claims, as presented, those claims amount to nothing more than speculation. In fact, those claims are speculation upon speculation, as the Respondent, without supporting information, such as an autopsy report, speculates further that a cardiac incident may also have caused the deceased miner to remove his seat belt.

Though nearly unimaginable, the rationale offered up for Order No. 8816533, the seat belt requirement and the duty to wear such belt, is less than that of just discussed Order No. 8816532, and it adds a mysterious aspect. The Motion repeats the Respondent's claim that "the miner likely suffered a cardiac while operating the haul truck which might have caused him to remove his seat belt," this time adding that "mine management had no reason to know the miner was not wearing his seatbelt." Motion at 7. Disconcertedly, given MSHA's September 2016 twin citations to the Respondent for the unsafe rag-ties on the lap and shoulder belt arrangement, as discussed above, the Respondent asserts that the rags "did not interfere with the function of the seatbelt." *Id.*

The mysterious element is that the Motion inaccurately represents that "[*t*]*he Order* further alleges that there was dirt on the latch plate of the seatbelt and when coupled with the rags tied around the seatbelt that prevent retraction, indicate that the miner had not worn his seatbelt for some length of time." *Id.* (emphasis added). The *Order* only refers to the uncorrected altered state of harnesses in the haul trucks; it makes no specific mention of rags tied around the seatbelt and it makes no mention of the dirty seat belt latch plate. Thus, this had to come from some other source, likely the inspector's notes.

To all of this the Secretary only robotically repeats "[w]hile not admitting the relevance or significance of Respondent's arguments, the Secretary agrees to reclassify the violation to a 104(a) S&S violation, reduce the negligence from high to moderate, and reduce the penalty [by more than 73%] to $3,578.00." *Id.*

Thus what has been presented here is a fatality, with very large settlement reductions, coupled with citations issued before this fatality addressing the same seat belt concerns and all of that with the absence of any substantive comment from the Secretary's representative about the Respondent's facially speculative claims in support of the motion's significant penalty reductions. In addition, there is the unidentified reference to dirt on the seatbelt latch plate, and the continued use of rags on the seatbelt.

Is the Court suggesting that no reductions could ever be justified for these violations? Absolutely not. The point is that reductions must be explained and that the only information offered in this instance is speculation from the mine operator and *no* useful information from the Secretary.[3] Given the recent history involving alterations to seat belts at this mine, the motion is particularly troublesome.

It is any wonder that, in circumstances such as these, Congress created section 110(k) to ensure that facially questionable settlements be explained to the Commission. The settlement motion being denied, the parties are directed to participate in a conference call to set this matter for a hearing. Further, the Secretary is directed to provide all of the inspector's notes (Inspectors Phillips and Caudill) for these citations/orders.

Accordingly, the Joint Motion to Approve Settlement and to Dismiss Civil Penalty Proceeding is **DENIED**.

SO ORDERED.

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

[3] Although the Court has, on occasion, in the context of a settlement motion, requested that the Secretary provide the inspector's notes and inquired whether the Secretary has conferred with the issuing inspector, regarding claims in support of mitigation made by a mine operator, often the Secretary has declined to provide the information. These reactions strike the Court as odd because, as to the former, one would think that the Secretary would, in the name of transparency, be eager to provide the notes. The same observation applies to the latter, as the issuing inspector is the only individual for the Secretary with firsthand knowledge of the violations. Therefore, it seems odd that the Secretary would be reluctant to inform that the respondent's contentions have been raised before the inspector. Unilateral acceptance of a respondent's claims would likely discourage inspectors from diligently performing their safety and health inspections duties.

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February 7, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-327-M A.C. No. 05-04822-432228
v.	Pueblo Plant & Quarry
GCC RIO GRANDE, INC., Respondent	

ORDER ACCEPTING APPEARANCE
ORDER GRANTING SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION
ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION
DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against GCC Rio Grande, Inc., ("GCC") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties settled six of the seven citations included in the docket and filed simultaneous cross-motions for summary decision to address the single remaining citation, Citation No. 8838556. For the reasons set forth below, the Secretary's Motion for Partial Summary Decision is **GRANTED**, Respondent's Motion for Partial Summary Decision is **DENIED**, and the Motion to Approve Partial Settlement is **GRANTED**.

I. BACKGROUND FOR CITATION NO. 8838556

On January 5, 2017, MSHA Inspector Hanna Hurst issued Citation No. 8838556 to Respondent under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.11003 of the Secretary's safety standards. 30 C.F.R. § 56.11003. The citation states as follows:

> The ladder accessing the deck on the west side of the additives grizzly had been damaged. The ladder and part of the handrail connected to it had been hit with a loader, resulting in broken welds and incorrect positioning of the ladder. Ladders shall be maintained in good condition. A miner attempting to use this ladder to access the deck would be exposed to slip, trip, and fall hazards because the ladder is not straight. Various injuries could occur.

Inspector Hurst determined that it was unlikely an injury or illness would be sustained as a result of the violation, but that any injury could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was not of a significant and substantial nature, would affect only one person, and was a result of Respondent's low negligence. The Secretary proposed a penalty of $116.00 for the alleged violation.

II. STIPULATED FACTS

The parties submitted joint stipulations along with their respective motions. The stipulations are as follows:

1. GCC Rio Grande, Inc., owns and operates the Pueblo Plant & Quarry (the "Mine"), in Pueblo County, Colorado.
2. The Pueblo Plant & Quarry is a "mine" as that term is defined by § 3(h) of the Federal Mine Safety and Health Act of 1977.
3. The operation and products of the Mine affect commerce and the Mine is subject to the Mine Act.
4. On January 5, 2017, Inspector Hanna Hurst performed a regular E01 Inspection of the Mine.
5. Inspector Hurst issued Citation No. 8838556 to GCC on January 5, 2017, alleging a violation of 30 C.F.R. § 56.11003. Exhibit B.
6. Citation No. 8838556 alleges that a loader damaged the ladder on the west side of the additives grizzly, breaking welds and forcing the ladder into an incorrect position.
7. The ladder at issue is the only access to the west side of the additives grizzly.
8. Miners access the west side of the additives grizzly infrequently, only to clean spillage.
9. The ladder is only used to access the west side of the additives grizzly.
10. The cited ladder existed in the condition pictured in Exhibit C when Inspector Hurst issued Citation No. 8838556.
11. Red danger tape was placed across the only access point to the ladder.
12. Both ends of the red danger tape were secure.
13. The red danger tape showed no signs of falling.
14. The red danger tape existed as pictured in Exhibit C when Inspector Hurst issued Citation No. 8838556.
15. GCC's Safety Handbook outlines its safety policy.
16. GCC trains and requires its miners to follow the requirements of its Safety Handbook.
17. GCC's Safety Handbook includes use of red danger tape under the section that describes methods of barricading.
18. The Handbook defines Barricading as a method to limit or prevent access to potentially hazardous areas and to increase employee awareness.

19. Specifically, the Handbook states that red barrier tape labeled "Danger Do Not Enter" is utilized to prohibit admittance or passage through an area, except by authorized personnel who are working on the project requiring the barrier.
20. The Handbook requires that Barricades that represent no admittance (Ex. Red "Danger Do Not Enter" tape) be provided to prevent entry into areas that may present hazards such as falling materials, falling hot materials due to overhead cutting/welding/grinding, being struck by equipment operating in the area, etc.
21. Before entering a taped-off area, the Handbook requires miners to contact the Control Room or the individual that taped the area off.
22. Use of the ladder would require a miner to intentionally disregard GCC's red danger tape policy.
23. No evidence exists that miners used the cited ladder or crossed the red danger tape in the cited area to access the barricaded area.
24. GCC did not assign any miner to perform any duties that required use of the ladder or access to the west side of the additives grizzly.
25. GCC did not have a work order in place to repair the ladder when Inspector Hurst issued Citation No. 8838556.
26. The Parties believe that there is no disputed issue as to any material fact and stipulate that this issue can be decided via motion based upon these stipulated facts.

III. SUMMARY OF PARTIES' ARGUMENTS

The Secretary argues that GCC violated section 56.11003 when it failed to maintain a ladder that provided the only access to an area of the mine. Sec'y Mot. 3. There is no dispute that the ladder was damaged and had separated from the concrete to which it had been attached. *Id*. Accessing the ladder would have endangered the health and safety of a miner. *Id*. Although GCC had strung red danger tape several feet away from the access to the ladder, miners could easily duck under the tape to access the damaged ladder, GCC policy still allowed access to the area, and there were no plans to repair or remove the ladder. *Id*. 3-4. Contrary to GCC's argument, the use of red danger tape does not defeat the violation, and its reliance on *Essroc Cement Corp.*, 33 FMSHRC 456 (Feb. 2011) (ALJ) is misplaced, as that case is easily distinguished. Sec'y Mot. 5. The Secretary asserts that the gravity and negligence are not at issue, and notes that, while the operator had failed to schedule the replacement or repair of the ladder, the low negligence designation is supported by the procedure the operator had in place to recognize and correct hazards by using the red danger tape until the hazard could be addressed. *Id*. 6-7. Finally, the Secretary argues that the proposed penalty of $116.00 is appropriate and requests that the citation be affirmed as issued. *Id*. 8.

Respondent argues that Citation No. 8838556 should be vacated because the cited ladder had been barricaded to prevent its use. GCC Mot. 2. It avers that barricades which comply with section 56.20011 of the Secretary's regulations, like the Secretary's lockout/tagout procedures, remove areas from eligibility for MSHA inspection. *Id*. 5. Here, citing this court's decision in *Essroc Cement Corp.*, 33 FMSHRC 456 (Feb. 2011) (ALJ), it argues that the red tape was a

barricade, noting that it was secure, physically obstructed the only possible access to the ladder, and informed miners that they should not enter the area. GCC Mot. 7-8. Moreover, GCC trained its miners so that they would never intentionally break or remove red tape and its internal handbook policies indicate that miners cannot access areas barricaded with red tape. *Id*. 8.

IV. DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

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

29 C.F.R. § 2700.67(b).

The Commission has long recognized that "summary decision is an extraordinary procedure." *Energy West Mining Co.,* 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471(Nov.1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The subject citation was issued under section 56.11003 which requires that "[l]adders shall be of substantial construction and maintained in good condition." 30 C.F.R. § 56.11003. The parties have stipulated that "[t]he cited ladder existed in the condition pictured in [Sec'y Mot.] Exhibit C when Inspector Hurst issued Citation No. 8838556." Jt. Stip. 10. Respondent does not dispute that the ladder presented a hazard and that the ladder had separated from the concrete to which it had been attached. I agree that the conditions depicted in Sec'y Mot. Ex. C clearly indicate that the ladder had not been maintained in good condition.

Respondent asserts that by stringing red caution tape across an area in front of the ladder it "barricaded" the ladder. In doing so, it argues that, just as MSHA's lockout/tagout procedure removes equipment from service such that MSHA cannot cite it for hazardous conditions, "barricading" the ladder removed it from service with the result that MSHA should not have issued the subject citation. I find that the red danger tape used here was not a "barricade" as that term has been defined by the Secretary.

Section 56.20011, states in pertinent 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." 30 C.F.R. § 56.20011. The safety standard further states that warning signs must "display the nature of the hazard and any protective action required." Respondent does not argue that the red danger tape was a "warning sign" under section 56.20011. Moreover, the red danger tape did not display the nature of the hazard, with the result that the tape did not meet the requirements of the standard.

"Barricaded" is defined as "obstructed to prevent passage of persons, vehicles, or flying materials." 30 C.F.R. § 56.2. Although the red danger tape suggested that miners not enter the area, it was not capable of *preventing* passage of persons. The Secretary's regulations do not define "prevent passage." The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines "prevent," as relevant to this analysis, as "to deprive of power or hope of acting or succeeding . . . [,] to keep from happening or existing . . . [,] to hold or keep back[.]" *Webster's New Collegiate Dictionary* 905 (1979).

A reasonable interpretation of the cited standard requires that the barricade do far more than put miners on notice of the hazard, but also must also act to hold them back and keep them from being able to access the hazard without at least some effort. It must impede travel into the hazardous area. The red danger tape was not capable of doing this. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thomson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Human behavior can be erratic and unpredictable. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]" *Great Western Electric Co*., 5 FMSHRC 840, 842 (May 1983). I have previously applied these principles to a violation of section 56.20011. *Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 345 (Feb. 2011) (ALJ). As noted by the Secretary, a miner could easily duck below the tape. Consequently, I find that this red danger tape was not a barricade. Decisions of other Commission judges are consistent with this analysis.[1]

Finally, I agree with the Secretary that Respondent's reliance on my decision in *Essroc Cement Corp.*, 33 FMSHRC 459, 474-75 (Feb. 2011) (ALJ) is misplaced. In that decision, I made clear that I was vacating the guarding citation at issue primarily because the cited area was more than seven feet from the walking or working surface, thereby satisfying an express exception in the Secretary's standards. 30 C.F.R. § 56.14107. Issues involving the adequacy of the tape as a barricade were not sufficiently explored by the court in *Essroc.* Indeed, the operator's argument in that case was based erroneously on the Secretary's definition of the term

[1] In *J.S. Redpath Corp.*, Judge Priscilla Rae determined that a strand of rope running from rib to rib, along with PVC pipe and orange plastic snow fencing was not an adequate barricade because, among other things, it was poorly constructed, had gaps, and was attached to the ribs in a "non-permanent unsecure manner" such that it would not have prevented entry of "persons, vehicles or flying materials." 35 FMSHRC 2629, 2642 (Aug, 2013) (ALJ). In *Newmont USA Limited*, 34 FMSHRC 146, 161 (Jan. 2012) (ALJ) Judge John Lewis held that that a rope strung from rib to rib was incapable of preventing the passage of persons, vehicles or flying materials.

"barrier." 30 C.F.R. § 56.2. The Secretary's definition of "barrier" specifically allows the use of "a warning sign or tape" to demarcate a hazardous area.[2] As a result, I find that *Essroc* is distinguishable from the matter at hand.

I find that there are no genuine issues as to a material fact and that the Secretary is entitled to summary decision as a matter of law. Respondent violated section 56.11003, as alleged in the citation. Accordingly, I **AFFIRM** Citation No. 8838556 as issued.[3]

I must assess a civil penalty for the violation based on the six penalty criteria set forth in the Mine Act. 30 U.S.C. § 820(i). GCC did not dispute the Secretary's evidence of record regarding the application of the penalty criteria to the citation. Consequently, I accept the Secretary's determinations. *See* 29 C.F.R. § 2700.67(d). The Secretary's low gravity and negligence designations are affirmed. Exhibit A to the Petition for Penalty demonstrates that GCC abated the violation in good faith and that GCC is a medium sized operator with approximately 155,000 operator hours worked, while its controlling entity worked approximately 800,000 hours. In addition, data from MSHA's Mine Data Retrieval System at its website shows that the Pueblo Plant & Quarry had a history of 89 violations in the 15 months preceding the issuance of the subject citation, 16 of which were significant and substantial. Based on the above, I find that the originally proposed penalty of $116.00 is appropriate for this violation.

[2] "Barrier" is defined in section 56.2 as "a material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape." 30 C.F.R. § 56.2.

[3] The Secretary's motion for partial summary decision and motion to approve settlement were filed by Dennis J. Bellfi, a conference and litigation representative with MSHA. An attorney with the Department of Labor's Office of the Solicitor has not entered an appearance in this case. Mr. Bellfi has been authorized by the Secretary to "represent the Secretary in all pre-hearing matters in this case, including representing the Secretary at a hearing without an attorney from the Office of the Solicitor present." (Notice of Unlimited Appearance). This authorization is not binding on the Commission and such representation is not a matter of right. *See e.g. Carter Machinery Co. Inc.,* 40 FMSHRC ___, slip op. at 8-9, No. VA 2017-104 (Jan. 9, 2018) (ALJ); *Cyprus Emerald Resources Corp.,* 16 FMSHRC 2359 (Nov. 1994) (ALJ). Mr. Bellfi has appeared in other cases before me and, based on his experience, I hereby determine he is a competent representative. Consequently, I hereby permit him to represent the Secretary in this case under Commission Procedural Rule 3(b)(4). 29 C.F.R. § 2700.3(b)(4).

V. SETTLED CITATIONS

The parties offered the following settlement proposal for the remaining citations in this docket:

Citation/Order No.	Modification	Proposed Penalty	Amended Penalty
9304013	Accept as Issued	$116.00	$116.00
8838557	Accept as Issued	$129.00	$129.00
8838564	Modify to "Low" Negligence	$116.00	$116.00
8838565	Modify to "Unlikely" & "Non S&S"	$305.00	$116.00
8838561	Modify to "Low" Negligence	$116.00	$116.00
9304016	Accept as Issued	$116.00	$116.00
Totals		**$898.00**	**$709.00**

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

VI. ORDER

For the reasons set forth above, GCC Rio Grande Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of **$825.00** within 30 days of the date of this decision.[4]

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

[4] This decision and order resolves all issues in this docket. Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

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February 20, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0120 A.C. No. 12-02295-397991
v.	Docket No. LAKE 2016-0140 A.C. No. 12-02295-400067
PEABODY MIDWEST MINING, LLC, Respondent.	Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Emelda Medrano, Esq. and Kevin Wender, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Arthur Wolfson, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Owensboro, Kentucky on November 7, 2017. For the reasons which follow, the Court upholds each of the Orders and imposes the penalties sought by the Secretary. [1]

Violations at issue in Docket No. LAKE 2016-0120

At issue in Docket No. LAKE 2016-0120 is one 104(d)(2) order, **Order No. 9036624**, with a proposed penalty of $4,000.00.

[1] On November 2, 2017, the Court approved a partial settlement for three citations involved in Docket No. LAKE 2016-0120; Citation Nos. 9036721, 9036722 and 9036832. Order No. 9036624 was the only remaining violation from that docket for which evidence was presented at hearing. Also, at the hearing the Court announced that it was approving the partial settlement for LAKE 2016-0140 for Order Nos.9036701, 9033599, and 9033600, leaving Order Nos. 9036623 and 9036625 for decision. The Decision approving partial settlement for LAKE 2016-0140 is being issued on the same day as this Decision and Order.

Order No. 9036624 alleged a violation of 30 C.F.R. § 75.364(b).[2] The MSHA inspector assessed the gravity reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

> The examination conducted on the entire M.S. primary escapeway (35 crosscuts) and from crosscut #1-26 of the 2nd South West primary escapeway have been found to be inadequate. When inspected, there were at least 7 loose ribs that were pulled down along the primary escapeway in this short distance. The last exam of this area was conducted on 10/28/2015. These loose ribs were gapped from the rib and were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036624.

As a subsequent action, the operator retrained all examiners on 30 C.F.R. 75.202(a), "with an emphasis on loose rib maintenance." *Id*.

Marked as S&S, an unwarrantable failure, and high negligence, it was regularly assessed at $4,000.00.

Violations at issue in Docket No. LAKE 2016-0140

At issue in Docket No. LAKE 2016-0140 are two 104(d)(2) orders, Nos. 9036623 and 9036625. Order No. 9036623 was marked as S&S, an unwarrantable failure, and high negligence and was specially assessed at $15,900. Order No. 9036625 marked as *non*-S&S, but as an unwarrantable failure, and with high negligence was regularly assessed at $4,000.00.

[2] § 75.364, titled, "Weekly examination," provides at subsection (b), in relevant part: "Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations: (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled. (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled. … (5) In each escapeway so that the entire escapeway is traveled. … (8) Weekly examinations shall include examinations to identify violations of the standards listed below: (i) §§ 75.202(a) and 75.220(a)(1) - roof control …"

Order No. 9036625

Order No. 9036625 alleged a violation of 30 C.F.R. § 75.202(a).[3] The MSHA inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected. The condition or practice alleged is:

> The ribs along Main South Primary escapeway, crosscut 7-8, entry #6 are not being adequately supported to protect miners from falls of the rib. There are 3 loose ribs in this area. The largest of these ribs was approximately 6 feet in length, and appproximately [sic] 8 inches thick, and gapped from the rib approximately 3 inches. The rib on the off belt side is approximately 4 feet long and up to approximately 6 inches in thickness. This loose rib was gapped away from the rib approximatley [sic] 1 inch. The mine operator immediately pulled these ribs down. Standard 75.202(a) was cited 30 times in two years at mine 1202295 (30 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036625.

The operator pulled the ribs down in order to terminate the order. *Id*.

Order No. 9036623:

Order No. 9036623 alleged a violation of 30 C.F.R. § 75.202(a). The MSHA inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

> The Ribs along the 2nd South West primary escapeway are not being adequately supported to protect miners from falls of the rib. The rib between entries number 6-7, crosscut number 13, on the inby side are gapped away from the rib approximately 2 inches in length. There are 2 ribs on the outby side of this entry that are also gapped from the rib. The largest of these ribs measured approximately 10.5 feet in length and up to 10 inches thick. There are also 2 loose ribs at crosscut 25-26, entry #6, in the primary escapeway. The largest of these ribs measures approximately 10 feet long up to 10 inches in thickness. This area had was examined prior to inspection on 10/28/2015. The mine operator immediately pulled these ribs down. Standard 75.202(a) was cited 29 times in two

[3] 30 C.F.R. § 75.202, titled, "Protection from falls of roof, face and ribs," provides at subsection (a), "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

years at mine 1202295 (29 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036623.

The operator pulled down the loose ribs to terminate the order. *Id*. The Secretary proposed a civil penalty of $15,900.00.

Findings of Fact [4]

Testimony began with MSHA Inspector Stephen William Tisdale. He was at the Respondent's Francisco Underground Pit on October 28, 2015 for an E01 (aka a "regular quarterly") inspection. With him was MSHA inspector trainee John Hohn. The mine's compliance manager, John Schwartze, accompanied them. Tr. 26. Shown Exhibit P 3, Tisdale identified it as the mine's exam records for that day relating to the mine's primary escapeway. Referring to that exhibit, Tisdale noted that the examiner did not note any hazards, nor any actions for hazards. Tr. 28.

When Tisdale entered the mine that day he "directly entered the primary escapeway in the intake air course and the group proceeded to inspect inby on the main south, and from there then to the second southwest. Tr. 28. Tisdale identified Exhibit P 4 as the Order he issued that day to Schwartze concerning "the ribs along the main south primary escapeway." Tr. 29. Tisdale wrote the order because of "[t]he amount of loose ribs that [he] found on this particular air course and the size of them, and how they fell." Tr. 29. By using the term "how they fell," Tisdale explained that the ribs were pried down while they were present, so he watched them fall. Tr. 30. It was noted that Tisdale's description of the conditions was an approximation of the length and thickness of the ribs. This was because it was too dangerous to take an actual measurement. Tr. 30. Despite his observations, Tisdale informed that he knew the area had been recently examined. This was because he found DTI (date, time, and initial) tags on the intake air course when they entered it. Thus, it was evident that the mine's Mr. Meador had been there that morning. Tr. 31-32. The DTI reflected a time after 12:00 a.m. and Tisdale was then there a short time thereafter, at 7:00 a.m.

Returning to his observations associated with the order, Tisdale informed, he observed "several loose ribs at crosshead 7A and entry 6. There were at [least] three loose ribs in this one

[4] As noted, portions of these two dockets were settled prior to the hearing's commencement and the Court announced that it was approving those settlements. Remaining for disposition at the hearing from Docket No. LAKE 2016-0140 are Orders Nos. 9036623 and 9036625 and, from Docket No. LAKE 2016-0120, is Order No. 9036624. Tr. 10.

area that were obvious. They were gapped from the rib and were not addressed." [5] Tr. 33. Tisdale stated that the ribs identified in Order No. 9036625 were from the floor to the roof, and therefore were about five feet high. *Id.* When Tisdale made his estimates, he used a tape measure and, upon informing Schwartze of his numbers, the latter agreed. Tr. 34. Finding that the conditions presented by the number of loose ribs created a safety hazard, Tisdale cited the Respondent under 30 C.F.R. §75.202(a), a standard speaking to control of ribs.

The inspector listed the gravity as unlikely "because of the way that they fell and the amount that fell in the actual travel way. [He did not] believe that it would have been real likely that someone would have been injured severely with that." Tr. 35. He added, the ribs "fell on the sloughage for the most part. [However] [t]he tops did fall in the primary escapeway underneath of the lifeline, which was the walk route by the examiner and anyone who would have been following the lifeline in the same scenario." Tr. 35-36. The height of the ribs was another factor he considered, affirming the obvious that "the bigger they are, the -- the more room they have to fall. The higher they are, the more they can fall on you. The farther they're going to come out, the more damage they're going to do." Tr. 36. Tisdale listed 1 person as being affected, essentially anyone who would be traveling through the area, or performing functions such as attending to a loose roof bolt, or rock dusting . Not to be overlooked, the cited area was an escapeway. *Id.* In terms of the expected injury, in the Court's view, Tisdale again displayed his reasonableness, listing "contusions, scrapes, slips, trips, falls, and anything associated with the falls of ribs," which would include the potential for broken bones. Tr. 37.

Negligence, however, was another matter, as he marked that as "high," because "the examiner had been through this area nine hours prior to [his] inspection examining this area for exactly these conditions." Tr. 37. He added that the "examiner had been trained on this as required, according to Mr. Schwartze, for this standard [ ] because it's required every quarter. Also this mine had been put on heightened enforcement for this standard due to other citations being issued for exactly this, so another reason for them to have -- be aware that this was something they needed to pay attention to. And by the sheer number and obviousness of them all." *Id.*

The Court inquired of the inspector whether "there [was] any possibility that the conditions that you observed developed in the interval from when the mine examiner was last there and when you appeared during that approximate nine hours." Tisdale answered, "I don't believe so, sir, because [of] how wide the gaps were on these and how big these ribs are. It's not something that's going to happen in nine hours. It typically takes quite a while for it to trade that kind of gap as material falls behind it and pushes it away from a rib." However, he added that

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[5] Indicative of the Inspector's reasonableness, Tisdale added that "[t]here were several other ribs as well that were loose, but with the way they fell and everything, I did not put them in the citation." Tr. 33. He did not include those conditions in the order because "[t]he way that they fell, they would have fell in the sloughage, where is not where miners would normally travel …" *Id.* However, when questioned by the Court about these other conditions which he elected not to include in his order, Tisdale advised that if he had only observed those conditions, they would still have constituted a violation of 75.202(a). Tr. 40. Further, all of the uncited ribs were pried down as the inspection proceeded. Tr. 42.

"[t]here was nothing showing me anything that there was movement at that time while I was inspecting it." Tr. 38.

In terms of how long the conditions he observed had existed prior to his viewing them, Tisdale responded that "they existed at least three weeks, if not more." Tr. 39. The cited conditions could've been more expansively included, as they were obvious too, but because of the way they fell, he didn't include them in the citation. *Id.* As he summed it, these conditions do "not happen in a short period of time." Tr. 39. The Court asked for additional information, inquiring why, for example, his estimate was not two weeks or only two shifts. Tisdale responded that his estimate was based on his experience.[6]

Tisdale also informed that the mine was put on heightened notice in July and August 2015 because MSHA had been finding a lot of 75.202(a) and 75.364(b) violations. Tr. 41. In terms of Tisdale listing the violation as an unwarrantable failure, he reiterated that an examiner for the mine had been in that area about nine hours before his inspection and the conditions were obvious. Tr. 43. Yet no action had been taken and the exam records noted nothing either. Tr. 43. Tisdale considered whether he could just issue 104(a) citations, and *verbally* stated he would do so, but then, upon reflection, given all that he observed, he decided an order was necessary. Tr. 43-44. The conditions were both obvious and not hard to detect. Tr. 46. As noted, several ribs had to be pulled down during the course of inspection that day, and Tisdale observed those actions being taken. Tr. 48-49.

Still referring to Order No. 9036625, involving the main south primary escapeway,[7] Tisdale informed that "These [ribs] specifically fell where miners would be traveling, evidenced by traffic through the area. They also fell underneath of the lifeline or the escapeway, which would be traveled by anyone trying to escape the mine and also where the examiner is normally traveling." Tr. 50. His measurements also factored into his assessment of the conditions, because, "[r]ocks that size hitting you are going to cause an injury." Tr. 50.

Directed to Exhibit P 5, Order No. 9036623, Tisdale identified it as the order he issued on October 28, 2015 for the second southwest primary escapeway. *Id.* As with the order just discussed, this order was issued because of "[t]he number of loose ribs that were found, the size of them, and the -- the obviousness of them." *Id.* The conditions he observed were similar to those he found on the main south primary escapeway, as he advised that the second southwest primary escapeway was "[a] lot of what we seen on the main south primary escapeway, more loose ribs that are not being controlled or being prevented from hurting miners, no indication that any of them had been identified. The examiner had traveled that area also. They put tags about

[6] Tisdale added that his estimate of three weeks was derived, because of their size and his] mining experience, informing, "[t]ypically they will grow -- if they're tight, you can try to pry on them and they won't move and you can -- you can almost steadily watch them get bigger and bigger." Tr. 39.

[7] Although the two cited escapeways have separate air courses, they are related as they "are connected to each other … Once the main south stops, then it continues on as the second southwest air course." Tr. 60.

every ten crosscuts and we were able to see that he had been through there at a pretty good pace." Tr. 51. These conditions were examined by the same mine examiner that had examined the main south primary escapeway, resulting in Order No. 9036625 being issued. *Id.* Thus, two separate escapeways had these problems.

As with the previous order, Tisdale found for Order No. 9036623 "several loose ribs again that were obvious. Obviously gaps in the rib that were not being controlled." [8] Tr. 52. It is also important to note the inspector's information about where these ribs fell, as he informed, he "believe[d] these fell directly underneath the lifeline. On the second southwest, the mine operator had done some rehab work and had scooped a lot of the second southwest, and this particular area was one of those, so there was not a lot of sloughage. The ribs fell where miners had obviously traveled evidenced by their foot tracks, and it also fell directly underneath the lifeline." Tr. 53. Not to be lost among these findings, and to be plain, the hazard was again loose ribs. Tr. 54. Marking the gravity as "reasonably likely," Tisdale identified the likely injury to be "[w]ith ribs this size, [he]put down bruises, scrapes again, just like on the main south. But with this size, you're going to have broken bones again. We've had fatalities with smaller ribs of the same thing. It's a rules to live by standard [9] just for that reason. There are many, many different injuries that can occur from bad ribs like this." [10] *Id.* Tisdale expressed that the size of the ribs falling on a miner would cause a severe injury. Again, as expressed before, the miners exposed to this hazard would be anyone traveling through the area or working in it or those needing to use it as

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[8] Referring to his order, Tisdale provided specifics about the locations for these problem ribs, stating, "The rib between entries 6 and 7, crosscuts number 13 on the inby side are gapped away from the rib approximately two inches. There are two ribs on the outby side of this entry that are also gapped from the rib. And the largest of these ribs measured approximately ten and a half feet in length and up to ten inches thick. The ones that were on the outby side of this that are described were where a miner had cut and left notches in the rib, and these were also very large and very thick, but were not quite as long and large as the one that's noted here as far as the measurements." Tr. 52. In this instance, Shwartze again told Tisdale that he agreed with the inspector's measurements. Tr. 53.

[9] Though well known, Tisdale reminded that the "Rules to live by" involve standards that are so identified because there are "so many fatalities for that specific violation -- for that specific hazard in a mine, that we try to raise awareness. … There are ten of them [i.e. ten rules], and we try to make sure all miners are aware of them." Tr. 54-55.

[10] The Court asked about Tisdale's noting a two inch gap, positing that it did not seem to be a very significant gap and that it would be difficult to spot such a small gap. Tisdale informed, "[m]y best example of that would be just like sitting in this courtroom, … If you seen a crack in the wall that was approximately two inches wide in a -- in a difference of what you see in this area, would you -- would you notice it? I mean, you -- because it's going to be jagged. It's going to be dark inside of it. Your -- it's going to stand out to you. We were walking the same way as the examiner and your light is going to shine right on that rib and it's going to create a shadow right behind it as well. It's going to stand out just like it would in this room if there was a crack either in the ceiling or if it was on the wall." Tr. 55-56. Tisdale stated that with only a cap lamp, such a two inch gap would still be obvious to detect. Tr. 56.

an escapeway. Tr. 58. The same rationale used for the prior order, applied to this one. The examiner had recently been in the area and the conditions were obvious. *Id.* This reasoning applied to his unwarrantable failure designation as well. As before, Tisdale's estimate was that these conditions had existed for at least three weeks. Tr. 60.

Tisdale was then directed to Exhibit P 6, Order No. 9036624. This Order, very much associated with the other orders just discussed, was for an inadequate exam. As he expressed it, the order was issued because of "[t]he apparent lack of care to – to specifically check for loose ribs through this whole area just was not finding them, not looking for hazards in this area -- for the -- both the areas that were orders on." Tr. 62. Thus, the mine examiner failed to adequately look for loose ribs, which conditions were obvious, in both the southwest primary escapeway and the main south primary escapeway. Tr.63. Though he could not give an exact number, Tisdale found at least seven hazardous ribs.[11] *Id.*

In determining that the gravity was "reasonably likely," Tisdale explained that was "[b]ecause of what we found with the ribs being that large and falling on someone, and that the sheer number that there are, they're going to cause an injury." Tr. 67. One person was marked as being affected. In the inspector's view, the mine offered no cognizable mitigating factors, as weather and the assertion that this was not a (d) citation or (d) order mine were not persuasive to him. Tr. 69-70.

Under cross-examination, Tisdale agreed that there are two examination records noted within Ex. P 3., October 12th and October 26th. Tr. 72. It was pointed out by the Respondent that the exhibit did not include the exam for the week between those dates.[12] The inspector agreed that for the week of October 26th, a condition was listed at line 5 and for the week of October 12th, a hazard was noted at line 12, the condition being exposed bolts. Tr. 72-73.

Regarding the height of the ribs for Order No. 9036625, Ex. P 4, pertaining to the main south escapeway, the inspector agreed that his order did not list the rib height. Tr. 73. The same was true for Ex. P 7, no rib height was listed. Tr. 74. The inspector also agreed that beyond the

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[11] Though the order was based on the ribs, the examiner's failure to see the obvious conditions made the inspector worry "what else [the examiner is] not identifying." Tr. 65. However, the Court made it explicit that any violations which may be upheld would be based on what the inspector observed, not on speculation about other safety conditions which may have been overlooked. Tr. 67.

[12] The Court later inquired about the missing exam week, because there was at least a hint that perhaps the Secretary did not want it included. As it developed this was not the case; the Secretary *did request* the missing information. The Court noted initially, "[w]e've got the week beginning of 10-26. We've got the week beginning of 10-12, and it was pointed out that there's a missing week. Can either counsel, as officers of the court, explain to me this --." The Secretary informed that it did not believe it had the missing page but that it had been requested. Tr. 160. Respondent's Counsel then informed that it had not provided the missing page to the Secretary. Tr. 161. He then advised that the missing page would be provided during the hearing, as part of a planned exhibit for the Respondent covering two months of such exam records. *Id.*

primary escapeways he cited, a mine is required to have a secondary escapeway. *Id*. That secondary escapeway is the mine's travel way, meaning the road used in normal mining operations and on which miners drive in and out of the mine using rubber tired vehicles. *Id.* The inspector agreed, and there is no dispute, that the rather obvious idea behind having two escapeways is to deal with the situation if one cannot be used during an emergency. *Given a choice*, the inspector also agreed that the roadway escape would be the preferred exit. [13] Tr. 75.

The Court notes that, as to the import of that argument, that an escapeway would rarely be S&S, because there are two of them, and a second escapeway would only be needed if the first escapeway could not be used, little needs to be said. The idea behind the two escapeway requirement is just for such an eventuality. It is noted that even motels, hardly dangerous places, have two stairway exits for escape.

Regarding the inspector's statement that the mine had been put on notice, the inspector agreed that such notice is broad, applying to any type of inadequate examination.[14] Tr. 76. Also, although the inspector knew that the mine had been put on notice regarding 75.202(a) on August 12, 2015, he did not know the circumstances which led to that notice.[15] Tisdale agreed that knowing of that prior notice created an additional factor that might more readily lead him to issue heightened negligence, as it informed him that the mine "had reason to know." Tr. 78. Further the mine is not trapped in purgatory forever by receiving such a notice as, upon not receiving new citations for that specific condition, they would be lifted from the heightened awareness admonition . Tr. 79. While the mine protested that it had been "doing better," Tisdale informed that he didn't know *what* they had been doing better, as there had not been any air course inspections subsequent to that notice. Tr. 79-80.

Turning to Ex. P 5, Tisdale stated that he did not "measure" the ribs referred to in that exhibit as both the inby side in crosscut 13 and the outby side of the crosscut were identified. Instead, as he expressed earlier, he estimated the ribs on the outby side, measuring only the rib on the inby side. Tr. 81-82.

On redirect, Tisdale was asked to read from Ex. P 7, his inspector notes, stating from those notes, "[t]hese ribs were from the mine floor to the mine roof. The largest loose rib at the

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[13] Later in the hearing the mine's Schwartze would testify about travel frequency in the escapeways in normal mining operations, as "[a]ll miners are required to travel the escapeways -- the primary escapeway twice a year in practice just so they know how to get out, and they travel the secondary escapeway twice a year. *Actually* (referring to the secondary escapeway) *they travel it all the time*, but it's -- record is kept of it twice a years." Tr. 140 (*italics* added).

[14] The Court does not find this argument persuasive. The fact that there are many types of exams required; pre-shift, belts, weeklies of escapeways and air courses, seals and permissibility exams, is an odd, and ineffective, way to defend the failures identified in these two orders.

[15] Again, the Court does not find this argument persuasive. The fact that the notice pertaining to 75.202(a) applies to roofs, as well as ribs, hardly constitutes any shortcoming of the notice. Following that line of logic would mean that the specific area would need to have been cited before. The "notice" is meant to wake up the mine to be attentive to all roof and rib issues.

second southwest was approximately seven feet tall. The top strata fell with it that was measured for thickness. It was measured at what would have been the top when it was standing, ten inches thick." Those notes, he confirmed, reflect what he observed at that time. Tr. 83-84. Though he could not state the exact time when he made the notes, they were written at the site of the observed conditions and while he was still underground. Tr. 85-86.

In response to a hypothetical question from the Court inquiring if the inspector were to put aside the issue of the mine being "on notice," if he would still have issued these orders as he did, Tisdale answered, he "would have marked the negligence exactly the same as [he] did whether they were put on notice or not because of everything that [he had previously] stated [in his testimony]. They had reason to know. [The] [e]xaminer was there. The -- these are conditions that have lasted for quite a while and they were obvious and extensive. Even if they weren't put on notice, [he believed it would] support the negligence on it regardless of whether they were already on [notice] or not." Tr. 90. Tisdale affirmed that also would be his position regarding the inadequate exam. Tr. 91.

Turning around the question about Tisdale's view that the conditions had existed for three weeks, the Court asked if, based upon his same mining experience, the condition could have lasted for less than a shift. Tisdale informed it would not have existed for less than a shift. Tr. 92.

The Secretary also called MSHA Inspector John N. Hohn. Prior to his employment with MSHA he had a little more than eight years of mining experience, all of it in underground mining. Tr. 97, 121. At the time of the matters in issue in this proceeding he was an MSHA trainee. *Id.* Interestingly, as a trainee, Hohn was instructed *not* to point out anything to the inspector he was accompanying that day. Tr. 98. Directed to Ex. P 3, he identified it as the weekly examiner's records of what they observed that day and whether they took any corrective actions. Tr. 100. Essentially, Hohn confirmed observing the same conditions that Tisdale saw. He stated that there were large gaps in the ribs and "[w]hen Schwartze pried them down, they fell solid, falling across where the walk path would be. They were then measured as they were sitting on the ground." Tr. 103-104. Tisdale then took the measurements and called them out to him and he (i.e. Hohn) then recorded them in his notes. Hohn's notes appear in Exhibit P 8.[16] Tr.104-105. Hohn stated that the problematic ribs were not difficult to see. Tr. 106. It was his estimate that one could detect these conditions from a distance of approximately 40 feet. *Id.*

[16] Hohn, looking at his notes, remarked that for those ribs he had "one that was six foot long, four foot tall, and eight inches thick. And … one recorded that was four foot tall, three-and-a-half foot by six inches thick." Tr. 105. During this time Schwartze at times held the freestanding end of the tape measurer and at other times was prying down ribs. Tr. 106.

Asked if Schwartze challenged the accuracy of any of the measurements, Hohn related that Schwartze stated, "How can I argue with the tape measurer?"[17] Tr. 107. The Court would note that it is a fair and accurate summation to state that Hohn's testimony corroborated that of Inspector Tisdale's. Hohn related that Schwartze's expressed grounds for mitigation were that "[h]e was asking Inspector Tisdale not to write these as orders. 'Orders are for bad mines. We are not a bad mine. We try hard. We have been fixing things on belt lines and travel roads. We've retrained our engineers and are doing a lot better.'" Tr. 116. These were not mitigating factors, Hohn informed, because "[m]itigating circumstances means that you've done something to prevent this from happening, or you've -- you've got some reason that's valid that it happened. This statement [i.e. Schwartze's]sound[ed] just like begging." Tr. 117.

Hohn then added that Tisdale gave the mine several opportunities to present mitigating circumstances to him, informing, "There were a number of times that Inspector Tisdale was offering Schwartze to provide some kind of mitigating circumstances. And Tisdale stated that with the recent history, past violations, the mine being placed on notice of higher negligence, examiners having been retrained, and that the area being cited had been examined this morning, he couldn't see any way out of writing a D [order] without mitigating circumstances." [18] *Id.*

Under cross-examination, Hohn agreed that he did not know what, specifically, the mine had been put on notice about, other than for section 202(a) roof and rib control. Tr. 123. Respondent's point was that such a notice is broad and covers a number of roof and rib matters, including roof spacing, and roof bolts. Tr. 123-124.

The Respondent's defense began with John Schwartze. He was the mine's compliance manager, at that time of these orders and occupied the same position at the time of the hearing. Tr. 137. He has about 30 years of coal mine experience. Tr. 138. Questioned about the events of October 28, 2015, Schwartze informed that the primary escapeway is traveled by an examiner once a week. Tr. 140. Schwartze stated that the main south escapeway "starts in the pit or the surface area, and extends due south for 34-35 crosscuts" and that "the second southwest escapeway starts at the inby end of the main south." Tr. 140-141. The second southwest starts where the main south ends. Tr. 141. He stated that these areas are subject to changing conditions due to weather, humidity and temperature. *Id.* These areas also function as air courses. These factors, he stated, can have an effect on roof and rib conditions and that those conditions were present in October 2015. Tr. 142.

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[17] Tisdale's measurement process was also explained by Hohn: "[o]nce they were pried down, the ones that fell, they were still a big solid piece. He'd – Inspector Tisdale measured the solid piece and said that as far as he saw it, measuring the extra broken around the perimeter was a bit of benefiting, and that would just give the operator something to argue about, so he measured the solid slab of the rib." Tr. 107. Measurements were not taken before the ribs were pried down because of the obvious safety hazard of such an action. *Id.*

[18] In fact, Hohn stated that he overheard Schwartze tell another miner who asked what Tisdale was expecting of the examinations, that " 'These were not small, unnoticeable cracks. These were obvious. We dropped the ball. It is what it is. We have to do better.'" Tr. 119, and Hohn's notes, Exhibit P 6 at p. 38.

Regarding the orders in issue, Schwartze was asked about his notes associated with them. Tr. 143. Exhibit R 3. The notes reflect his summary of the day, which he wrote when he returned to the surface. *Id.* The inspection, he related, began with the main south. Focusing on the area at crosscut seven to eight, and whether Tisdale alleged any loose ribs, Schwartze remarked that "Tisdale stated he was going to issue a non S and S citation for loose ribs, crosscut seven to eight, entry six. And he made that decision because if nothing fell onto the walkway, it was unlikely that anyone would be hit." Tr. 144-145. Schwartze advised that he pulled down the rib with his walking stick. He did not "remember anything" about the size of the material that came down. Tr. 145. Schwartze informed that if one does need to apply a lot of pressure when taking down a rib it will "most generally will fall straight to the ground." Tr. 146. To the Court, rather than diminishing the hazard, Schwartze's testimony indicates how susceptible the rib was to coming down.

Contradicting the earlier testimony of both MSHA inspectors, Schwartze stated that he did not observe either inspector taking measurements. Tr. 146. However, as to whether either inspector related "numerical values related to estimates or measurements of the rib size" to him, Schwartze informed only, "[n]ot -- not that I recall." *Id.* Attempting to support his lack of recollection, he maintained that if such estimates had been stated, he would have entered them in his notes.[19] *Id.*

Schwartze agreed that the inspection then continued to the second southwest primary escapeway. Referred to Ex. P 5 and a reference within that to crosscut number 13, Schwartze acknowledged that the inspector pointed out conditions involving ribs in that area, but he could not recall how many problem ribs were identified, responding, "[n]o, I just know that a citation was issued." Tr. 148. For this too, he pulled the ribs down, but he had no recollection about their size and he didn't take any measurements, nor could he recall how the ribs fell. Tr. 148, 150. As before, he did not remember either inspector taking notes. Tr. 150. Similarly, he asserted that if that had occurred, that would have been in his notes. *Id.* Schwartze added that the inspector made no mention that an order would result. Tr. 151.

Referring to Exhibit E 5, and that exhibit's reference to "two loose ribs at crosscut 25 and 26," Schwartze agreed that ribs were pointed out to him at that location. *Id.* However, he could not remember how many ribs were involved. He was asked to pry them down and informed that in this instance they were hard to pull down, breaking his walking stick in the effort. Tr. 152. He

[19] The Court did express that it found Schwartze to be honest and candid. However, that said, he had no useful memory of the events at all. As stated during the hearing, the Court remarked it, "appreciate[d] [ ] [Schwartze's] candor, that you're being honest in your answers. I have the impression that in many respects you don't remember the details of these three matters and that you have to rely almost entirely upon your notes as opposed to on your own; is that fair? Is that accurate?" Schwartze responded, " I -- I think it is, sir." Tr. 154. As discussed later, against the credible testimony of Inspector Tisdale, primarily, and as augmented by trainee inspector Hohn, when evaluated upon consideration of Schwartze's testimony and the other witnesses for the Respondent, as set forth below, the Secretary established the violations under the applicable burden of proof.

opined that, because of that, the rib was not loose enough to fall on its own. Tr. 153. The Court would comment that there is no suggestion that a walking stick is the equivalent of a rib pry bar.

Schwartze's notes contained no information about the size of that rib, and he did not recall either inspector taking measurements there either and reiterated that had they called any measurements out to him, he would have recorded that in his notes. *Id.* Schwartze disclosed that the inspector then advised that another citation would be issued and still another for an inadequate examination. Tr. 153. No mention was made then that an order would instead be issued. Tr. 154. As discussed below, the Court does not find that an inspector must be wedded to his initial determination. Certainly, an inspector is entitled to further contemplate the appropriate paper to be issued for a violation. This works both ways; if an order was contemplated first and then the inspector reconsidered his initial view, perhaps upon being provided with mitigating circumstances, it would not make sense to suggest that no reduced violation could be entertained.

Schwartze, still reading from his notes, not on any independent recollection, stated that upon reaching the surface Tisdale was going to issue a citation, not an order, adding that "if things had been any worse, he would be considering a D order, but not -- did not want to do that." Tr. 155. However, he then acknowledged that upon reaching the surface and while then in Schwartze's office, Tisdale told him he was issuing (d) orders. Tr. 156. Thus there was no extended delay associated with Tisdale's ultimate decision. Certainly within that short a time frame an inspector is entitled to contemplate the correct action to take regarding observed violations. Further, Schwartze admitted that Tisdale raised the issue of a (d) order while they were still underground. Tr. 176.

The Respondent elicited from Schwartze that significant distances were involved within the main south and the second southwest escapeways and that Schwartze knew of no reportable injuries resulting from adverse rib conditions. Tr. 158.

Not exactly helping the Respondent's case, when Schwartze was asked about Hohn's statements in Ex. P 8, at pages 37-38, and whether Schwartze actually made the remarks attributed to him, he answered, he "probably would have participated in the pre-shift meeting, but [he did not] remember saying this." Tr. 159. So that the import of his answer was made clear, the Court then inquired, "[s]taying on that page you were just on there, it's -- you know by looking at, particularly on page 38,that this Inspector Hohn has put quotation marks asserting that you said effectively -- or part of it is 'We dropped the ball. It is what it is. We have to do better.' It's my understanding from your testimony just a moment ago that you're not claiming that Inspector Hohn has made this up, it's just that you don't recollect. You might have said it. You might not have said it. You just don't recall; is that fair?" To his credit, Schwartze responded candidly, "That is correct." Tr. 159-160.

Upon cross-examination, Schwartze stated that as the compliance manager he is not ever required to review weekly exams to determine if any hazards are needed to be addressed. Tr. 163. In terms of his earlier testimony, that he didn't see Tisdale take measurements of the ribs, Schwartze undercut his earlier assertion, as he confirmed that he couldn't recall if he saw Tisdale take measurements or not. Tr. 167. Schwartze confirmed that he did recall pulling down a number of ribs during the inspection, but about their size, when asked if some were big and some

were small, he could only state, "[s]ome were bigger than others, yes." Tr. 167. The Court inquired further about this and Schwartze's decision not to take measurements, as per his remark the he "didn't think it was necessary." Tr. 169. When then asked why he felt it was not necessary, Schwartze's answer was only he "just didn't." Tr. 169-170.

Asked about his notes, made that day on October 28, 2015, Schwartze stated that he made them because an order had been issued. This is his practice whenever an order is issued and he is involved, as he was for these matters. Tr. 170-171.

Schwartze also agreed that MSHA has told him that the mine is under heightened awareness for 75.202(a). Tr. 177. However, consistent with his general lack of recollection about these matters, except for his notes, he could not recall if the mine was on heightened awareness for inadequate examinations before October 2015. Tr. 178. This is an appropriate point to note again that while the Court found that Mr. Schwartze was candid, that does not mean that his testimony was informative or persuasive on the issues before the Court.

The Court inquired further about the essence of Schwartze's testimony, first referring to the rib issue along the main south primary escapeway and asking if it was fair that his problem was that an order was issued. It asked whether Schwartze essentially agreed that there was a violation, but it never should have warranted an order being issued. Schwartze agreed. Tr. 184. Turning to the next order, and posing the same question, Schwartze agreed there were problems with the ribs along the second southwest primary escapeway, but that a citation, not an order should have resulted. Tr. 185. However, he parsed that response by adding "if that." *Id.* This, he explained, was because "some of the ribs [the mine] pulled down "already had timber set in front of them." *Id.* With that qualification, however, Schwartze agreed that, for the ribs described in Ex. P 5, there were problems for those ribs. *Id.* He then conceded that, just based on that, and apart from the unidentified areas he said were timbered, the remaining areas would be a violation of 75.202(a). Tr. 185-186. Following that exchange, Schwartze then agreed that he did not dispute that the order ending in 625 [Order No. 9036625] was also a violation. Tr. 186.

Though he conceded the first two orders at least reflected violations of 75.202(a), Schwartze did not agree that necessitated a finding that the examination had been inadequate. Tr. 186. His reasoning was that "[w]hen -- when the examiner would have traveled this area, he would have been by himself. Maybe he focused on ribs, maybe he focused on something else. Two sets of eyes, we had six sets, so there was more of us. We had time for a more thorough examination." Tr. 186-187. Pressed about his perspective, the Court inquired if he was contending that "it is reasonable that an examiner would have missed all of the locations identified in those two orders and, therefore, it still would be considered an adequate examination?" Schwartze affirmed that was his view, and that it was based on two considerations; that an examiner has only one set of eyes and that "maybe some of them didn't exist when the examiner was there." Tr. 188. The Court does not buy into the multiple sets of eyes argument, nor the suggestion that *maybe some* of the bad ribs weren't present. This is because of the number of hazardous ribs found as expressed through the credible testimony of Tisdale.

The Respondent then called Bill Sheffer who, in October 2015, was the compliance supervisor at the mine. Tr. 191. He has some 38 years of mining experience. *Id.* On the day in issue, Sheffer was working the second shift, meaning he would be at the mine by 2 p.m. Upon his arrival he was advised of the three orders and was directed to take pictures of the rib rolls. Tr. 193. The locations were identified to him as "[t]he second southwest, the crosscut 13, and I thin[k] 25 to 26. And also in the main south, there was a seven to eight crosscut." Tr. 194. Exhibit R 4 reflects photos Sheffer took that day. Asked if that represented all the pictures he took that day, he answered, "That's all I can remember."[20] *Id.* Photos 1 – 3 were from the second southwest at crosscut 13.[21] Tr. 195. Asked if he saw any evidence of cleanup, Sheffer stated he didn't remember any cleanup there. Sheffer identified a lifeline in Photo 3, in the top center, which appears as a thin rope or cable. By his estimate, the height of the roof in this area was about six feet. Sheffer maintained that the material that had been pried down did not extend into the area where the lifeline was located. Tr. 197. Photos 4, 5 and 6 were then discussed. Those were taken at the same location, "[o]n the second southwest. The crosscut was 25, 26, 24 or 25 or something." Tr. 198. He could not recall the exact location. *Id.* He also could not recall how many ribs there was evidence of being pried down.[22]

Continuing with his testimony associated with those photos, he identified the lifeline in photo 6, and stated that the material came right to the edge of the lifeline. Tr. 199. The Court questioned Sheffer's description in that regard, stating that it appeared that the material was directly beneath the lifeline cone. The Court offered Sheffer an opportunity to correct the Court's perception of the photo, if it was inaccurate but he only responded, "I'm mis -- this right here, I don't know if that's just part of a bad picture or if that actually is the rib right in the center." Tr. 201. He added that, though from his own photo, he did not recall. Tr. 201. However, Sheffer stated that the majority of pried down material was between the rib and the water line, a point made because he had earlier stated that miners don't usually travel in the space between the rib and the water line. Tr. 199. Again, referring to those photos, Sheffer stated that he did not remember any evidence of cleanup "on the second southwest, crosscuts 25 and 26." Tr. 201. Moving to Photo 7, Sheffer identified it as "on the main south at seven to eight," [and therefore relating to Order No. 9036625, the non-S&S order] stating that there had been evidence of cleanup there. Tr. 202.

Upon cross-examination, Sheffer stated that the photos represented all of the areas listed in the orders. Tr. 203. He admitted that he had not seen any of the cited ribs prior to them being pulled down. *Id.* For the first six photos, he did not know if anyone had been down to those locations after the orders had been issued and the time when he arrived. In contrast, with regard

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[20] When asked by the Court if he took other photos of the ribs that day, Sheffer again stated that he didn't recall taking other photos, but admitted it was possible other pictures were taken. Tr. 212-213.

[21] All three of those photos are of the same location and the same rib. The arrow depicted pointing right is outby. The rib shown is on the inby side of the crosscut. Tr. 195-196.

[22] Looking at photo 4, he believed there was rib down on the left. For Photo 6 he stated it was both ribs, "more or less the center of the entry," he could not tell if a rib had been recently pried down from that photo. Tr. 198.

to photo 7, he had been told that someone had been on the main south. *Id.* He took no notes of the locations that he walked, nor of the locations that he photographed and he was by himself when he took the photos. Tr. 204. Regarding the water and power lines displayed within photos 4, 5, and 6, Sheffer stated that there would be no maintenance associated with those lines, unless the water line were to blow or if there was a problem with the power on the line. Tr. 206-207.[23]

When compared to the testimony of Inspector Tisdale (and secondarily to trainee Hohn), the Court was not persuaded by Sheffer's testimony. Neither the circumstances of his role and more particularly his testimony regarding the photos aided the Respondent's case.[24]

The Respondent then called Aaron C. Meador, a mine examiner for the Respondent's mine. Tr. 222. He has been an examiner since 2008. Tr. 225. Meador works the third shift, from 11 p.m. to 7 a.m. *Id*. He does pre-shift exams and weekly exams. Tr. 223. The weekly exams involve the air courses. As noted, at this mine there were entries that served both as escapeways and air courses. *Id.* Two separate records were required to be made for those exams. Turning to the Main south escapeway and the second southwest primary escapeway, both also are air courses. Tr. 224. In the course of his exams, Meador will look for "[a]ny and all hazards, specifically loose ribs,exposed bolts, loose roof, slipping and tripping hazards, man door signs not up, lifeline being connected all the way, oxygen deficiency, methane accumulates, ventilation short circuits, adequate rock dust, things like that." Tr. 225. Meador stated that, if he comes upon a loose rib, he will try and pry it down, using his walking stick. If that doesn't accomplish the task, he will "flag it out" using red danger tape and he will also report it. Tr. 226.

Focusing then upon his exam of October 28, 2015, he was asked about Exhibit R 1 at page 9 and R 2. For the former, Meador identified it as the weekly examination of emergency escapeways. Line 7 of R 1 reflects the exam for the main south and the second southwest up to crosscut 84. Tr. 229. R 2 is the "weekly examination for hazards, conditions, violations, including test for methane. It's the regular air course book ." Tr. 229. Line 4 reflects a listing in the air course records that also accounts for this main south and second southwest to the crosscut 84 area. Tr. 229. That line records, "[i]ntake air course, pit to northwest main, crosscut 10." *Id.* Other locations he examined that day are also recorded on the exhibit. Tr. 230.

Asked if he observed any hazards from those exams, Meador affirmed, "Yes, on line 2 in the second southwest right return, I found a hazard of an exposed bolt, entry number 11 to 12, crosscut 86," on the second southwest, right intake. Tr. 231. And that was it, Meador found nothing else in terms of hazards. Tr. 233.

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[23] When Sheffer was asked whether at that time, he was aware of Peabody being placed on heightened notice or heightened enforcement for 202(a) for rib conditions, he responded that he did not remember. Similarly, when asked if he recalled if the mine was on heightened notice or heightened enforcement for inadequate examinations, he did not remember. Tr. 207.

[24] At the conclusion of his testimony, the Court noted that Sheffer was "a nice gentleman" and wished him well. Those comments, while sincere, did not mean that the Court found his testimony persuasive.

Then, directed to the first eight pages of R 1, Meador stated they reflected the other times he had done escapeway exams. Tr. 233. For the week beginning September 1, 2105, Meador stated that exam reflects hazards he had found. At that time he found, "no double cones for a branch line, and that was entry 6, crosscut 79 … [and he] found where there was no man door sign, entry 6,crosscut 88." Tr. 234. For the week of September 8th, he found a hazard at the primary escapeway, crosscut 84, second southwest to unit 3, in that there was a walkway needing cleraring. Tr. 235. Meador cleared the walkway. *Id.* For the week of September 14th Meador found in the first northeast entry for crosscut 79 that there were no double cones for a branch line and in the first northeast entry 4, crosscut 75, crosscut 82, and crosscut 85, there were no spears on the lifeline. He corrected those deficiencies. Tr. 237. For the week of September 21, 2015, he found that there was a curtain left up. This presented a ventilation issue, which he rectified by taking the curtain down. Tr. 238. For the week of October 12th, at the secondary escapeway from the second southwest crosscut 81 to unit 3, he found some exposed bolts at the southeast entry 4 to 5 to crosscut 57 and entry 4 to 3, crosscut 82. Tr. 238. He corrected that hazard. *Id.* For the week of October 19th, Meador found another exposed bolt and the absence of a man door sign in an entry, and he addressed those hazards. Tr. 239-240.

Meador confirmed to the Court that in reviewing his examinations, as discussed during his testimony, he did not find a single instance of a problem with any rib. Tr. 242. The Court considered that to be notable. Cross-examination continued that theme. Directed to Exhibit R 1, and page 9 and line 7, Meador read that the location was "the primary escapeway from the pit to second southwest crosscut 84," and that he found no conditions or hazards there. Tr. 244. Further, he agreed that he examined the primary escapeway of entries 6 and 7 and that had he pulled any ribs down in that location he would have noted that in his weekly exam log, and that no such notations about ribs were made. Tr. 244-245. Though he could not be specific about a date, Meador conceded that he was told about being more alert for rib problems prior to October 2015. Tr. 248.

Applicable Law

Unwarrantable Failure violations

As the Commission has noted, "The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2002-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are

necessary for compliance. *Consolidation Coal Co*., 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co*., 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co*., 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co*., 22 FMSRHC 340, 353 (Mar. 2000)." *American Coal,* 39 FMSHRC 8, *9, (Jan. 2017).

Related to that is the subject of negligence, the Commission has noted that it "evaluates the degree of negligence using 'a traditional negligence analysis.' *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). Id. at 1263-64." *Id.* at *14.

"Significant and substantial" violations

As the Commission has stated, [a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., 6 FMSHRC 1 (Jan. 1984), the Commission further explained: In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. **6 Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, *1899 (Oct. 2017).

Discussion

In addition to determining whether violations were demonstrated for these three matters, something the Court finds was clearly established for each, the other key issues involve whether unwarrantable failures were present for all three orders and, for two of them, whether the violations were significant and substantial. The Court, as noted at the outset of this decision, affirms all three and in all particulars.[25]

The Respondent maintains that no violation of the adequate examination standard, occurred, as alleged in Order No. 9036624. Respondent notes that "[d]etermination of compliance with Section 75.364(b) is an objective inquiry that asks whether the operator acted reasonably prudently and conducted an adequate examination for hazardous conditions and

[25] While the Court read and fully considered the parties post-hearing briefs and the reply briefs, it does not believe it is necessary to discuss with particularity each contention raised.

certain violations [and that] [t]he 'reasonably prudent person' test considers whether 'a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have recognized [the condition at issue as a] hazardous condition that the standard seeks to prevent.'" R's Br. at 11. To support its contention, Respondent asserts that Meador checked for "myriad hazards and conditions," and if a loose rib was encountered he would either pry it down or flag the condition. *Id*. at 12.

The problem is Meador's professed diligent examination does not square with the conditions Tisdale found. Though examiner Meador's testimony went through the few hazards he found, they were relatively isolated discoveries and not a one involved loose ribs. Accordingly, the Court finds that Meador's testimony actually supported the Secretary's case. The multiple weeks of his escapeway exams during September and October of 2015 were notable for how little he found wrong over that extended period of time. Though the Respondent argued that gaps in the ribs can be difficult to discern, the inspector's order asserted that the loose ribs "were obvious to the most casual observer." Order No. 9036624. The Court which finds Tisdale's testimony to have been credible overall, finds that the ribs were as described by the inspector. It must be remembered that this was not simply one missed loose rib. The inspector found, credibly in the Court's determination, at least seven loose ribs that day. The violation is therefore affirmed.

Addressing the unwarrantable failure and high negligence determinations in the inspector's evaluation, as supported by his credible testimony, Respondent contends that neither finding was proper. R's Br. at 14. To support these arguments, Respondent contends that the conditions were not extensive. The evidence shows otherwise. Further, that the ribs were pried down in short order does not address either unwarrantable failure or the high negligence determinations made by the inspector. The Court has already addressed the argument that the inspector reconsidered his initial view that a citation, not an order, was appropriate.

Respondent then moves to the issue of examining whether there is a high degree of danger in deciding if a violation constitutes an unwarrantable failure, contending that no such high degree was present in this instance. R's Br. at 17. For this the Respondent points to relatively infrequent travel in the cited areas and because of testimony that some of the rib material did not fall into the walkway. R's Br. at 17-18.

The Respondent also contends that the claim that the conditions existed for an extended time was speculative. R's Br. at 19. Arguing that the conditions were not shown to have been growing over the three week period, Respondent contends that the Secretary's evidence was only the inspector's "testimony in support of [the] point." *Id*. at 21. The Court would comment that the inspector's opinion was derived from his considerable mining experience. It is simply not serious to suggest that the numerous loose ribs the inspector found all developed in the approximate nine hours that elapsed between the mine examiner's examination and the inspector's observations.

It is also contended by the Respondent that the "Secretary's witnesses' bald assertions that Peabody was 'on notice' does not support the unwarrantable failure findings." R's Br. at 21. To support that assertion, the Respondent notes that the notice was nonspecific and that the

standard involved, 30 C.F.R. § covers more than ribs as it also addresses roof and face support. *Id.* But, it must be noted that ribs, roof and faces are of the same family of concerns; each address areas where persons work or travel and are aimed at protecting persons from falls from each of the three. Indeed, the standard's title itself informs that it addresses "[p]rotection from falls of roof, face and ribs." Beyond that observation, the inspector testified, credibly, as noted in the findings of fact that, putting aside the prior notice issue, he still would have issued his unwarrantable failure findings, irrespective of that notice. Further, when given the opportunity to present mitigating factors, the Respondent came up empty.

Respondent's contentions regarding the S&S and "reasonably likely" determinations for Order Nos. 9036623 and 9036624, the rib support and inadequate examination.

Those orders, the reader will recall, relate to the rib conditions found by the inspector along the two cited escapeways and the claim that the ribs were not adequately supported to protect miners from rib falls. However, the Court notes at the outset that, while Inspector Tisdale found that Order No. 9036623 was S&S, he also found that his other order for inadequate support, per Order No. 9036625, was not S&S. In the Court's estimation these speak to the inspector's discernment that the conditions did not present identical risks and it dispels the idea that the inspector simply reflexively designated all such instances as S&S.

In any event, speaking to the third prong of *Mathies*, the Respondent contends that "[i]n the context of a Section 75.202(a) violation, '[t]he likelihood of an injury producing event must be evaluated by considering the likelihood of two specific events occurring simultaneously, a rock or other material falling from the roof [or rib] and the presence of a miner directly underneath it.'" R's Br. at 27. Reduced to its essence, the Respondent has in essence argued that infrequent travel in the cited area negates an S&S finding. R's Br. at 27-28. The Respondent also contends the material which fell "did not substantially extend to the center of the entry, where miners would be expected to travel." *Id*. at 29. Further, the Respondent maintains that the inspector's testimony "does not support that any injury was reasonably likely [as there was no evidence] … to demonstrate the likelihood that a rib would fall at such a time when someone would be present." *Id* at 29. Thus, Respondent argues that there was "no explanation to support that a fall of rib that would affect a miner would be reasonably likely." *Id* at 30.

Last, the Respondent urges that the penalties sought by the Secretary are excessive, observing that "[t]he Secretary proposed a specially assessed penalty of $15,900 for Order No. 9036623, and penalties of $4,000 each for Order Nos. 9036624 and 9036625, which represented the statutory minimum for a Section 104(d)(2) enforcement action at the time of their issuance." *Id.* at 30. After noting that, when before the Commission, penalties are imposed *de novo* and therefore that it is not bound by the Secretary's proposed penalties, Respondent adds that substantial divergences from the proposed penalties require that the basis for such changes be explained. *Id*. at 30-32.

In each instance, the Respondent notes that the burden remains with the Secretary to establish the appropriateness of the penalties sought and "when the Secretary petitions for penalties above the normal formula or statutory minimum, … he has the burden of establishing the existence of aggravating factors to justify such an increase." R's Br. at 32. Focusing upon

Order No. 9036623, for which the Secretary has sought a special assessment of $15,900.00, instead of the statutory minimum of $4,000.00, the Respondent contends that "[t]he Secretary has offered no evidence that would show the propriety of penalties beyond [the regular, in this instance, statutory minimum, assessment] amounts [and accordingly] [w]hen the Secretary produces no justification for a specially assessed penalty, it should be rejected." *Id*. at 33-34. If the Court were to agree with the Respondent that "the unwarrantable failure and high negligence findings for all three Orders are inappropriate [and consequently that] … the unwarrantable failure findings were deleted, [ ] the statutory minimum [would] no longer [be] applied.[26] *Id*. at 34.

The Respondent's arguments in support of lower penalties only apply if the Court agrees that aggravating factors were not demonstrated, and that the unwarrantable failure and high negligence designations are not appropriate. The Court does not agree with the Respondent's perspective.

The Secretary's post-hearing brief

The Secretary asserts that the uncontroverted evidence establishes that five loose ribs were identified during the inspection of the 2nd Southwest Primary escapeway, which were gapped from the rib and that three loose ribs were identified at the Main South Primary escapeway which were gapped from the rib. Sec. Br. at 18-19. Ostensibly, these areas had been examined only 9 hours earlier. Also, as the Secretary notes, no rib hazards were identified by the Respondent in the previous two months of examinations. *Id.* at 19. The Court finds that, rather than helping the Respondent's position, those examination records, with so few problems identified, detract from it.

The Court is in agreement with the Secretary's observation that the Respondent's objection was directed more to the issuance of orders, instead of citations, with the latter being more palatable.

Regarding the S&S finding for the 2nd Southwest Primary escapeway, as the Secretary notes, those ribs, when pulled down, fell under the lifeline. As for the S&S finding for the inadequate examination, the Secretary correctly observes, quoting from *Mach Mining, LLC*, 32 FMSHRC 1375, 1381 (Sept. 2010) (ALJ) ("*Mach*"), "[I]f the condition of the escapeway was itself a significant and substantial violation, then for the same reasons the failure to document and report such conditions constitutes a significant and substantial violation." Sec. Br. at 23. The Court agrees with the reasoning of the administrative law judge in that decision and that these violations go hand in hand.

Continuing with its S&S analysis, the Secretary, and working from the Court's finding that all three violations were established, the second element, the measure of danger to safety – contributed to by the violation, the twin failures – the failure to support the ribs and the failure to

[26] The Respondent's contends that if its arguments were adopted, "Order No. 9036623 would have been assessed a penalty of $3,493, Order No. 9036624 would have been assessed a penalty of $2,976 and Order No. 9036625 would have been assessed a penalty of $705." *Id.*

note their presence – "resulted in the mine not addressing hazardous conditions and therefore exposing miners to those conditions. By allowing the hazardous rib conditions to continue in an area that had not been adequately examined, Peabody put its miners at risk for harm." *Id*. at 24.

As for the third prong of *Mathies*, a reasonable likelihood that the hazard contributed to will result in an injury, the inspector credibly testified in support of that element. As the Secretary contends, "[t]he failure to identify loose ribs in examinations and the failure to control them are reasonably likely to contribute to an injury." *Id.* at 25.

For the fourth *Mathies* element, that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, the Secretary notes that falling material, or falls and tripping on material on the ground constitute such a reasonably serious injury. *Id.* In the Court's view, applying the *Mathies* analysis, establishes the S&S nature of the two orders which made those assertions. While *Mathies* was met simply based on the limited regular travel along these escapeways, it is also independently satisfied when viewed from the use of these areas should the need for an escape occur. One cannot predict when the need for an escapeway will arise. There is nothing in this record which would suggest that, under continued normal mining operations, the unsupported ribs would have been addressed, especially given that no such problems were noted, even 9 hours earlier. Again, the inspector displayed both reasonableness and discernment in assessing the unsupported ribs by finding that only one of the two unsupported rib violations was S&S.

As for the unwarrantable failure designations, which were applied to each of the matters heard, the Secretary asserts that on the basis of Inspector Tisdale's observations of "obviously gapped ribs across two different escapeways, which had not been discovered and corrected despite Peabody's heightened notice regarding ongoing issues it was having with respect to rib control [and considering that] Inspector Tisdale reviewed Peabody's inspection reports and found the examiner had not identified these hazards a mere nine hours prior to the MSHA inspection [and also that] …. the hazards had not been identified at any time during the previous two months," such confluence of factors requires the Court to affirm the 'unwarrantable failure' classification." Sec. Br. at 26-27. Although the Secretary points to the issuance of "30 citations over the past two years for violations under 75.202(a)," in support of its unwarrantable failure contention, the Court considers that aspect of the analysis to be potentially problematic, as the status of those citations is unclear. Instead, the Court looks to the testimony that the Respondent was put on notice about the issue of roof, face and rib issue, per 30 C.F.R. § 75.202, not long before the orders in this case.

Beyond the history/notice issue, the Secretary points out the importance of examinations in general, as a fundamental for safe mining. The Court agrees, seeing this as an obvious but equally important responsibility, which is important to call out. As the Secretary states, miners "rely on the information recorded in the examination books to ensure that everything is safe for the oncoming shifts. Examiners are charged with a unique and singular responsibility to protect miners from identifiable hazards, and it is paramount that mine examiners report these hazards on the books so that mine management can eliminate the hazards and minimize the potential for accidents." Sec. Br. at 28-29.

Conclusions and Penalty Determinations

The three violations involved here are obviously interrelated. Two involved inadequately supported ribs along connected escapeways, while the other pertained to the concomitant obligation to have the weekly inspections of those areas adequately performed. Because all three were closely so related, it would be logically inconsistent to determine that only one or two were unwarrantable failures. The conditions should have been observed during the examinations, as they existed for a considerable period of time, certainly over multiple shifts, if not weeks. Such conduct clearly constitutes a serious lack of reasonable care.

The same is true for the two orders involving a failure to adequately support the ribs, as a serious lack of reasonable care occurred. The credible testimony from Inspector Tisdale was clear – there were multiple instances of ribs, at least seven, which had to be taken down. The inspector watched them being pried down and then made reasonable tape-measured estimates of their size. As MSHA trainee inspector Hohn credibly recalled, Schwartze remarked that the mine "dropped the ball" and it had to do better. Later, Schwartze did not fully deny that he made that admission.

Among the seven factors the Commission has identified to determine if conduct is "aggravated," as set forth above, the Court finds that six were present. The lone factor that could be debated was "whether the violation posed a high risk of danger." This factor requires some parsing. Given the critical nature for mine safety that examinations play, the Court finds that, as to the inadequate exam charge, there was a high risk of danger, given the number of inadequately supported ribs and the length of time those conditions existed. As for that factor's application to the inadequate supported ribs themselves, the inspector drew distinctions between the two, finding the ribs along the 2nd South West primary escapeway to be "reasonably likely" to result in an injury, while determining that the ribs along the Main South primary escapeway, was unlikely to result in an injury.

However, there is no suggestion that the Commission has required all seven factors to exist for an unwarrantable failure. Instead, that determination is to be made "by looking at all the facts and circumstances of each case." That is the approach the Court took. The Court found that Inspector Tisdale was knowledgeable, articulate and reasonable in his assessment of the two areas where he found inadequately supported ribs. His testimony was credible on those matters, whereas the evidence presented by the defense was unpersuasive. Given the Court's findings of unwarrantable failure for all three orders, the "high negligence" determinations are similarly sustained.

As for the S&S determinations, applicable to the inadequate examination and the inadequately supported ribs along the 2nd South West primary escapeway, the violations have been established. The discrete safety hazard, a measure of danger to safety, contributed by the violation, inadequate exams being a linchpin to effective safety, provides such a measure when an exam fails to note conditions "obvious to the most casual observer." Regarding the last two factors, the reasonable likelihood that the hazard contributed to will result in an injury; and that the injury in question will be of a reasonably serious nature, the Court finds that Inspector Tisdale's testimony was persuasive on those scores. *Harlan Cumberland* Coal, 20 FMSHRC

1275, 1278 (Dec. 1998). The idea that infrequent travel along the cited escapeways is inconsistent with an S&S finding is rejected.

Summary

Having found that the violations identified in the Orders were each established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure were demonstrated and no cognizable mitigation advanced,[27] the Court therefore finds, that upon application of the statutory criteria, the penalties proposed by the Secretary should be applied.[28]

Order No. 9036623 $15,900.00
Order No. 9036624 $ 4,000.00
Order No. 9036625 $ 4,000.00

Total penalty imposed: $23,900.00

ORDER

It is hereby **ORDERED** that the three Orders in this decision are **AFFIRMED** as written. Respondent is **ORDERED** to pay civil penalties in the total amount of $23,900.00 within 30 days of this decision.[29]

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

[27] The Secretary proved all elements of the alleged violations by a preponderance of the evidence. *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (Sept. 2000)

[28] The other statutory factors were duly considered. From the parties' stipulations, it is noted that the Francisco Underground Pit mine site worked 2,935,577 tons during the period of January 1, 2015 to December 31, 2015 and that the Respondent had 515 previous violations in the 15 month period ending October 28, 2015.. (Stipulations 6 and 7; Sec'y Ex. P-1). 7. The factors of good faith and ability to continue in business did not impact the penalty determination.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

January 9, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BLANCHARD MACHINERY COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2017-236-M A.C. No. 38-00600-443931 (1BU) Mine: Haile Gold Mine

ORDER GRANTING SECRETARY'S MOTION TO AMEND PLEADING
AND
ORDER ACCEPTING APPEARANCE

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. It is hereby **ORDERED** that Conference and Litigation Representative ("CLR") Brandon E. Russell be accepted to represent the Secretary in accordance with the Notice of Limited Appearance he filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

I. Procedural Background

On November 1, 2017, Chief Administrative Law Judge Robert J. Lesnick notified the parties that Docket No. SE 2017-236-M had been designated for Simplified Proceedings and was assigned to me. On November 14, 2017, I discontinued Simplified Proceedings and issued my Prehearing Order requiring the parties either to settle this matter or position it for hearing by April 3, 2018.

On December 7, 2017, the CLR on behalf of the Secretary filed a Motion to Amend Citation requesting amendments to Citation No. 8792386. (Mot. at 1–4.) Respondent timely filed a response on December 15, 2017, asserting that the Secretary's motion to amend should be denied as futile. (Resp. at 1–4.)

II. Principles of Law

The Commission has held that modification of a citation is analogous to the amendment of pleadings under Federal Rule of Civil Procedure 15(a), which states that leave for amendment "shall be freely given when justice so requires." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Accordingly, amendments are to be liberally granted unless one of the following factors justifying denial is present: (a) undue delay; (b) bad faith by moving party; (c) repeated failure to cure deficiencies by previous amendments; (d) undue

prejudice to the opposing party; or (e) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see Wyoming Fuel Co.*, 14 FMSHRC at 1290 (citing *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); 3 J. Moore & R. Freer, *Moore's Federal Practice* ¶ 15.08[2], 15–47 to 49 (2d ed. 1991)).

An amendment is futile if it could not survive a motion to dismiss for failure to state a claim. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (citing *Glick v. Koenig*, 766 F.2d 265, 268–69 (7th Cir. 1985)). The Commission's Procedural Rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission Judges have treated such filings as motions for summary decision. *See, e.g.*, *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (Aug. 2014) (ALJ); *Sec'y of Labor on behalf of Chaparro v. Comunidad Argricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ); *Sec'y on behalf of Brewer v. Monongalia Cnty. Coal Co.*, 38 FMSHRC 1876 (July 2016) (ALJ). Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 20 C.F.R. § 2700.67(b).

III. Discussion and Analysis

In his motion, the Secretary requests that the cited standard be modified from "30 C.F.R. § 47.41(a)(1)" to "30 C.F.R. § 56.4402." (Mot. at 2.) Section 56.4402 provides that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402. Additionally, the Secretary proposes to amend Section 8 of the citation to now read:

> A five (5) gallon safety can was observed was sitting in rear of the International service truck without labeling containing the appropriate information on it. The 1/3 full contained had what appeared to be oil based substance (Gasoline Fuel) in it. The purpose of the label is to reduce the possibility of injury or illness by ensuring that each miner is provided correct information about *the hazardous properties of the contents* and appropriate protective measures to be taken. Should a miner *allow gasoline vapors to contact any ignition source, it would result a flash fire and potential burns.*

(Mot. at 2) (emphasis notes changed language.) The Secretary states that the proposed amendments more accurately depict the violation that occurred, but do not substantively change the factual basis of the violation alleged by the Secretary. (*Id.*) The Secretary asserts that the amendments would not prejudice Respondent because the facts and witnesses remain the same, the parties have not yet completed discovery, and a hearing date has not yet been scheduled. (*Id.* at 3.)

In its response to the motion, Respondent contends only that the proposed amendments are futile. (Resp. at 3.) Respondent argues that it did not violate the proposed amended standard,

30 C.F.R. § 56.4402, because it is exempted from coverage by 30 C.F.R. § 47.44. (*Id.*) Respondent claims that amending the citation to allege a violation of section 56.4402 instead of section 47.41 is futile because Respondent meets an exception to both sections, and therefore did not violate either. (*Id.* at 4.)

In order to establish that the Secretary's proposed amendments are futile, Respondent must prove it would be entitled to summary decision as a matter of law, even if the proposed amendments were accepted. *See Perkins*, 55 F.3d at 917; *see, e.g.*, *Kerlock*, 36 FMSHRC at 2405; *Chaparro*, 32 FMSHRC 1517; *Brewer*, 38 FMSHRC 1876. In this regard, Respondent asserts that the alleged facts of the violation fit an exception to the container labeling requirements provided in section 47.44. Section 47.44 states that "[t]he operator does not have to label a temporary, portable container if he or she ensures that the miner" using the portable container "[k]nows the identity of the chemical, its hazards, and any protective measures needed," and "[l]eaves the container empty at the end of the shift." Respondent claims that section 47.44 applies because the gasoline was kept in a "temporary, portable container," the operator of the vehicle where the container was kept knew of the container's contents, and the container was emptied at the end of his shift. (Resp. at 3–4.)

Despite Respondent's arguments, there remain genuine issues of material fact as to whether the "five (5) gallon safety can" that the Secretary identified in Citation No. 8792386 was a "temporary, portable container" and thus covered by the exception found in section 47.44. As such, Respondent has not established that the proposed amendments would not survive a motion for summary decision at this juncture and are thus futile.

Respondent has not offered any arguments that the Secretary's proposed amendments would unduly delay the hearing, are motivated by bad faith, fail to cure deficiencies by previous amendments, or would unduly prejudice Respondent. I therefore see no reason to disallow the Secretary's proposed amendments.

IV. Order

Accordingly, the Secretary's Motion to Amend Pleading is **GRANTED**. It is hereby **ORDERED** that the pleadings in Citation No. 8792386 are **AMENDED** in accordance with the Secretary's motion, as indicated in the motion and in my discussion *supra* Part III.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 9, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v.	CIVIL PENALTY PROCEEDING Docket No. VA 2017-0104 A.C. No. 44-07355-430464
CARTER MACHINERY CO INC, Respondent.	Mine: Surface Mine No. 1

ORDER ON MOTIONS FOR SUMMARY DECISION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Respondent filed a motion for summary decision ("Respondent's Motion") and Brief in Support thereof ("Respondent's Brief"). Thereafter, the Secretary of Labor, acting through a non-attorney, a conference litigation representative, or "CLR," filed a response to that motion and, in the same response, included a cross-motion for summary decision. ("CLR Response and Cross-Motion"). For the reasons which follow, the Court DENIES both motions. The Court further finds that the CLR, a non-attorney, is attempting *de facto* to practice law without a license, and therefore, as explained below, the CLR is DENIED permission by the Court to practice before it in such a manner.

Background

This docket involves a single section 104(a) citation alleging a violation of 30 C.F.R. §77.1104.[1] The cited standard titled "Accumulations of combustible materials," provides "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

The Citation alleges that the Respondent allowed combustible material, namely motor oil, to accumulate in the engine compartment of a front-end loader. In particular, the Citation, which was issued on December 19, 2016, alleged that "[a]ccumulations of combustible material in the form of engine oil was [sic] located on the right side of the engine of the Kenworth maintenance truck c/n 1357, tag 149087. The oil was covering the engine block behind the turbo and alternator. The accumulations were being caused by an oil leak at the filter housing. Oil had

[1] Part 77 sets forth mandatory safety standards for surface coal mines and surface work areas of underground coal mines.

puddle[d] under the truck due to this oil leak. Oil leaks near the turbo and electrical components such as the alternator are reasonably likely to cause a fire resulting in serious injuries.[2]

SUMMARY DECISION

The Commission's procedural rules speak to Summary decision of the Judge at 29 C.F.R. § 2700.67 which, in pertinent part, provides

> (b)Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.
>
> (c) Form of motion. A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and *a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.*
>
> (d)Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.
>
> (e)Affidavits. Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The judge shall permit affidavits to

[2] The Citation also stated that "Standard 77.1104 was cited 8 times in two years at mine 4407[355] (0 to contractor BZ5)." It was marked as "Reasonably Likely," "lost workdays or Restricted Duty," "Significant and Substantial," of "Moderate" negligence, with 1 person affected.

> be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

29 C.F.R. § 2700.67 (emphasis added)

In *John Richards Construction*, 39 FMSHRC 959, May 2017, the Commission noted that it "has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.,* 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy West Mining Co*., 16 FMSHRC 1414, 1419 (July 1994)." *Id.* at *960. When the record shows disputed material facts, summary decision is inappropriate. *Id.*

In *Sec. of Labor v Sunbelt Rentals,* 39 FMSHRC 1183 May 2017, ("*Sunbelt*") Judge McCarthy noted that in "[a]pplying these rules, the Commission has long recognized that summary decision is an extraordinary procedure analogous to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co*., 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co*., 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); *see also Lakeview Rock Prods., Inc*., 33 FMSHRC 2985, 2987-88 (Dec. 2011) (reiterating the Commission's summary decision rules). In reviewing a record on summary decision, a judge must evaluate the evidence in the light most favorable to the party opposing the motion. *Hanson Aggregates New York, Inc*., 29 FMSHRC 4, 9 (Jan. 2007); *see also Poller v. Columbia Broadcasting Sys., Inc*., 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962))." *Sunbelt* at *1185

As noted in *Crown Resources v Sec. of Labor*, "Summary judgment should not be granted 'unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.' *Campbell v. Hewitt, Coleman & Assocs., Inc*., 21 F.3d 52, 55 (4th Cir. 1994) ... For summary judgment to be appropriate, the evidence must do more than allow the court to find in the movant's favor, it must '*require* that the court do so.' *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.; Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-55 (1986). Disposition by summary decision is appropriate provided: (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §2700.67(b). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Mo. Gravel Co*., 3 FMSHRC 2470, 2471 (Nov. 1981). If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision when the motion is inadequately supported. *See Adickes v. S.H. Kress & Co*., 398 U.S. 144, 159-61 (1970) (summary judgment must be denied where the evidence in support of the motion does not establish the absence of any genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell*, 21 F.3d at 55-56. 39 FMSHRC 1536, *1537, *Crown Resources v. Sec of Labor*, July 2017 Judge Gill

Respondent's Motion for Summary Decision and Brief in Support[3]

The Respondent contends that the Secretary cannot establish any of the three elements for the cited standard: combustible material; which material was allowed to accumulate; in an area where the accumulation can create a fire hazard. Respondent asserts there is no genuine issue of material fact because the Secretary has no evidence as to the quality of the substance on the engine block, nor its quantity, nor the temperatures to which such substance would be exposed. Because the Secretary took no samples of the material, nor did he take measurements of its quantity or the temperatures involved, there is no evidence to support the alleged violation. Respondent's Motion at 2.

Pointing to the Secretary's responses to the Respondent's requests for admission, Respondent notes that the Secretary admits he did not take any temperature readings of the truck, Requests for Admission ("RFA") 5 and 9, nor take such readings while the truck was in operation after 15 minutes, nor after 30 minutes, 1 hour, 2 hours or 3 hours, *Id.* at 3, RFAs 10-14. Respondent asserts that Secretary cannot demonstrate that the material was motor oil, nor that it was allowed to accumulate, nor that such amounts created a fire hazard. *Id.* at 4. Respondent contends that the evidence does not show that the surface temperature of the equipment was high enough to cause an auto ignition of the accumulation, arguing that, if that were true, other engine parts would be subject to combustion.[4] *Id*. at 5. Respondent also argues that, even if the motor oil is assumed to have a flashpoint between 399 and 445 degrees, that does not establish the presence of a fire hazard because it has not been shown that the location of any such accumulations was sufficient to create a fire hazard. *Id.* at 6. In sum, the Respondent maintains that a violation of the cited standard cannot be established simply because of the alleged presence of motor oil on an engine when coupled with the fact that an engine produces heat.

The non-attorney conference litigation representative's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision[5]

Conference litigation representative David Steffey filed the Secretary of Labor's Response to Carter Machinery Co. Inc.'s Motion for Summary Decision and Cross-motion for Summary Decision. December 8, 2017 ("CLR Response and Cross-Motion"). Speaking to the standard cited, the CLR refers to "[c]ase law" that sets forth the elements of the standard at issue,

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[3] Respondent's Motion for summary decision was submitted by an attorney. The same attorney also filed the Respondent's Reply in Opposition to the Secretary's cross-motion for summary decision.

[4] In making this argument, Respondent takes issue with an article about turbochargers, asserting that it does not advance the Secretary's case. The Court views this issue as one best resolved through testimony and, if such testimony is permitted, then followed by cross-examination.

[5] The CLR also opines about the Respondent's reference to the term "prevailing party" offering his thoughts about the Equal Access to Justice Act. CLR Response and Cross-Motion at 2. In this setting of litigation, such expressions constitute the practice of law.

30 C.F.R. §77.1104. In doing so, the CLR cites *Maxxim Rebuild Co., LLC,* 35 FMSHRC 3261, 3268 (Oct. 2013) (ALJ) and *Northwestern Resources*, 21 FMSHRC 431, 438 (Apr. 1999) (ALJ) and other ALJ decisions. CLR Response and Cross-Motion at 2-3. The CLR then proceeds to present his views of case law interpretation of the terms "combustible material," "accumulations," and the meaning of "can" in the context of whether material *can* cause a fire hazard. From there, citing another ALJ decision, the CLR addresses the Secretary's burden where an accumulation of combustible material on an engine was involved. Each of the CLR's references to and legal interpretations of the cited cases, constitute, in the opinion of the Court, the unauthorized practice of law.

From that display of erudition, the CLR makes a host of contentions, including that "[t]he normal operating temperature may be relevant to whether a fire was reasonably likely to occur but it is not determinative of whether a fire 'can' occur," that the issuing inspector stated that oil leaks where located as alleged by the inspector are reasonably likely to cause a fire, that the Secretary need not prove his allegations beyond a reasonable doubt, and that the inspector, as a duly authorized representative of the Secretary, made observations about the combustibility and the quantity of the oil. CLR Response and Cross-Motion at 4, 5. As such, applying the framework and definitions provided by the Commission, and using logic and common sense, the CLR asserts that it has been established that there was oil, that the oil was combustible and in sufficient quantity to cause a fire. *Id.*

Given the above, that leaves, according to the CLR, only the issue of whether the accumulation was in a location where it could cause a fire. *Id.* at 5. The CLR points to turbo chargers as a significant ignition source, citing a 2004 fatality where hydraulic oil sprayed on a turbo charger and the flash point of hydraulic oil. *Id.* In this instance, the CLR contends, the normal operating temperature of the engine "goes to the likelihood of a fire and not whether a fire was possible." *Id.*

The CLR winds up his Response and Cross-Motion by asserting that the reasons he has presented support denial of the Respondent's Motion. *Id.* at 6.

The CLR then devotes only a single paragraph of his Response and Motion to his own cross-motion for summary judgment, wherein he contends

> Because a preponderance of the undisputed evidence demonstrates that combustible material was allowed to accumulate where it could create a fire hazard, summary decision should be granted in the Secretary's favor and the judge should find that §77.1104 was violated. The parties agreed during settlement negotiations that an injury causing event was unlikely and that the violation would be modified to Non S&S and the Respondent would accept the citation being modified to Non S&S and pay a penalty of $345.00. The Secretary does not intend to present evidence or argument that an injury was reasonably likely to occur or that the violation was S&S. As such, there are no further issues to be decided. The parties previously agreed that a penalty of $345.00 was appropriate given the factors set forth at Section 110(c) of the Act. The affidavit of Inspector Clevinger sets forth the basis for the negligence determination. The

administrative law judge should find that the violation was not S&S and should assess a penalty of $345.00.

CLR Response and Cross-Motion at 6.

The CLR's cross-motion for summary judgment fails, completely, in form and substance to meet the requirements of Commission procedural rule 29 C.F.R. § 2700.67. Further, as Respondent notes in its Reply to the cross-motion, the CLR's invoking claims about the parties agreements in their settlement negotiations lays bare, starkly, the hazards of having non-attorneys practice law.

Respondent Carter Machinery's Reply in Opposition to the Secretary's cross-motion for summary decision.

Respondent Carter Machinery filed a Reply in further support of Respondent Carter Machinery Co. Inc's Motion for summary decision and memorandum in opposition to Petitioner's Cross-Motion for summary decision.[6] ("Carter Reply")

Carter contends that although the issuing inspector's affidavit asserts that "oil leaks near high heat sources such as the exhaust turbo and alternator can cause a fire," such an assertion is not the equivalent of a fact. Carter Reply at 3. The same is true, Carter asserts, with a host of other claims by the inspector.[7] On that basis, Carter asserts that the inspector's affidavit "is nothing more than the self-serving *ipse dixit* of an interested party." *Id.*

Similarly, Carter asserts that the Secretary's reference to an MSHA report involving a fatality from hydraulic oil spraying onto a turbocharger is not relevant because, among other distinctions, a different machine and a different combustible material were involved in that instance. *Id.* at 4.

Of more significance, in the Court's estimation, Carter notes that the Secretary's filing fails to comply with the provision in the Commission's rule addressing summary decision that such motions are to be accompanied by "a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the

[6] In reviewing the submissions from both sides, this Order only addresses contentions that pertain to the issue of the appropriateness of summary decision. Thus, legal theories in support of such motions, asserting that one is entitled to summary decision as a matter of law, are not addressed until the prerequisites are present. Thus, it must first be determined that there is no genuine issue as to any material fact.

[7] Some of the assertions made by the inspector, for which Carter asserts there is a lack factual support, include his claims that oil leaks near high heat sources such as the exhaust turbo and alternator can cause a fire, that the flash point of engine oil is far less than the temperatures of the turbo or arc at the alternator, that the approximate flash point of the oil is approximately 420 degrees Fahrenheit and that the turbo and arc at alternator can exceed 1500 degrees Fahrenheit. Carter Reply at 3.

statement shall be supported by a reference to accompanying affidavits or other verified documents." 29 C.F.R. § 2700.67(c), Carter Reply at 6.

DISCUSSION

Summary Decision is not appropriate

In order to prevail on a motion for summary decision, the initial hurdle requires showing that there is no genuine issue as to any material fact. One does not advance to the second step, establishing that the moving party is entitled to prevail as a matter of law, until the first hurdle, no genuine issue of material fact has been crossed. Upon review of the motions, the Court concludes that there are issues of material fact and therefore summary decision is inappropriate.

The material facts involve three elements, establishing: the presence of combustible material; an accumulation of such material; and an accumulation of a degree that it can create a fire hazard. Considering the submissions, the Court finds that genuine issues of material fact remain for each of these elements. Whether the Secretary will be able to establish each of the elements for the alleged violation of 30 C.F.R. §77.1104, absent an *appropriately substantiated* settlement, requires a hearing.[8]

[8] In the Court's October 6, 2017 Decision Denying Settlement, it was noted that the Secretary's original motion to approve settlement, dated July 7, 2017, presented no relevant information to support the proposed settlement. Rather, the motion simply made an autocratic pronouncement to the Court that "[t]he Secretary has determined that the S&S and gravity determinations in the citation at issue shall be modified as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc*., 18 FMSHRC 877 (1996). The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a $147.00 reduction in the penalty from $492.00 to $345.00 is appropriate and supported by the reduction in the gravity findings. The parties agree that the agreed-upon penalty amount is reasonable given the circumstances surrounding the violation." Motion at 2-3. The Court reminded the CLR that Commission Procedural Rule 31(b), titled, "Content of motion," and subsection (b)(1) subtitled "Factual support," require that all motions to approve settlement "include . . . facts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b)(1). The CLR's statement departs from Rule 31(b), and challenges the scope of the Commission's authority to approve settlements under section 110(k) of the Mine Act." The Court continued, informing that "[w]hen Commission judges approve settlements, they are required under Procedural Rule 31 to set forth the reasons for approval of settlements and those reasons shall be supported by the record. 29 C.F.R. § 2700.31(g) [and that it is] therefore improper for this Court to issue an order approving a settlement in the absence of any factual information in the record to support the proposed settlement." Decision Denying Settlement at 2.

The CLR's Motion violates Commission Procedural Rule 29 C.F.R 2700.3(b) in a number of particulars.

The Secretary's non-attorney representative, conference litigation representative David Steffey filed a notice of limited appearance. That notice asserts "The undersigned is authorized to represent the Secretary in all **pre-hearing** matters in this case. The undersigned may appear at a hearing on behalf of the Secretary ***if*** **an attorney from the Office of the Solicitor is also present**. In the event that the undersigned becomes authorized to appear at a hearing on behalf of the Secretary without an attorney from the Office of the Solicitor present, an Unlimited Notice of Appearance of Secretary's Representative will be filed prior to the hearing." March 14, 2017, Notice of Limited Appearance of Secretary's Representative at 1 (emphasis added).

The CLR is apparently of the "limited" representative category. There are several problems with the Notice of Limited Appearance ("Notice"). First, as the title of "conference litigation representative" informs, he is a conference representative. It is true that in its October 6, 2017 Decision Denying Settlement, the Court accepted the CLR but that acceptance was only applicable to that limited appearance. When confined to that role, acting as an MSHA conference rep, the Court does not take issue with that limited capacity. Typically, in such circumstances, if a settlement motion is presented to the Court, the motion is focused on facts, not law, in support of penalty reductions.

However, in this instance the CLR went far beyond that legitimate role of presenting factual information. In the CLR's filing of his "Notice" he acknowledges that he is limited to pre-hearing matters and that if a hearing ensues an attorney from the Office of the Solicitor will be present. However, merely filing a "Notice," does not mean that one is accepted to practice before the Commission. Commission Procedural Rule 29 C.F.R 2700.3(b) does not leave that decision to a non-attorney filing such a Notice. That subsection provides under the subject "Other persons" that "A person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is: (1) A party; (2) A representative of miners; (3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or (4) Any other person *with the permission of the presiding judge* or the Commission." 29 C.F.R 2700.3(b) (emphasis added).

Only subsection 4 of the procedural rule applies to the CLR and the Court has *not* given permission for the CLR to practice before the Commission in this matter.

In the Court's estimation the non-attorney CLR is attempting to practice law without possessing a law license.

In filing his Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision, the CLR's submission does not list any attorney for the Office of the Solicitor on the submission. Plainly, the CLR is not licensed to practice law, and he does not make any claim that he holds such a law license. By filing a motion, a legal document, and by making arguments as to the applicability of summary decision, the CLR has engaged in the

practice of law without a license. Besides the schooling and licensing requirements, prerequisites for the practice of law, though such absences are sufficient to establish a serious transgression, the Secretary's CLR has provided a practical example of the tendency of the non-licensed to, as it were, step in it. Carter correctly observes in its Reply that the non-attorney has referenced that the parties have engaged in settlement negotiations, noting that "settlement discussions are not considered by the Court, or by courts generally, when deciding the merits of a case for many reasons, not the least of which is that considering statements made in settlement negotiations would discourage the parties in any case from discussing settlement at all." Carter Reply at 5. In fact, the transgression by the CLR was egregious, as the CLR disclosed in his Response and Cross-Motion that "[t]he parties agreed during settlement negotiations that an injury causing event was unlikely and that the violation would be modified to Non S&S and the Respondent would accept the citation being modified to Non S&S and pay a penalty of $345.00." *Id.* at 6.

Licenses are required for many occupations including such diverse field as auctioneers, projection operators, security guards, makeup artists, massage therapists and manicurists, to name a few. Licensing is important to help ensure competence. *A fortiori,* this is especially true in complex professions such as law, medicine and accounting. The ability to practice the profession of law requires considerable schooling beyond the attainment of a college degree. To help ensure competence, all states have licensing requirements and nearly all require that a bar exam be passed before a license is issued.

Unlicensed to practice law and out of his depth, the non-attorney conference litigation representative's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision motion should only have been filed by an attorney. The Court wishes to make it clear that it is sympathetic to the unnecessary position the Secretary has placed the unfortunate CLR.

The Secretary is on notice that henceforth the Court will only consider motions which contain legal arguments when signed by a licensed attorney.

Absent an appropriately supported amended motion to approve settlement, and the Court's approval of such motion, this matter, as previously noticed, remains set for hearing on February 20, 2018.

SO ORDERED.

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 10, 2018

MICHAEL WILSON, Complainant, v. ARMSTRONG COAL COMPANY, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. KENT 2016-0319-D MSHA Case No. MADI-CD-2016-02 Mine: Parkway Mine Mine ID: 15-19358

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding is properly before me upon a Complaint of Interference ("Complaint") filed by counsel for Michael Wilson ("Wilson" or "Complainant") on April 18, 2016, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act" or "Mine Act"). 30 U.S.C. § 815(c)(3). Armstrong Coal Company, Inc., ("Armstrong") is subject to the Act and to the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission"). The Administrative Law Judge ("ALJ") has the authority to review this case and issue a decision.

The Record

Attached as exhibits to the Complaint filed by Wilson's counsel on October 29, 2015, were copies of the original Discrimination Complaint, MSHA Form 2000-123, and Discrimination Report, MSHA Form 2000-124, (Exhibit A); A letter from MSHA to Wilson dated March 18, 2016, declining to file a discrimination case with the Commission, with distribution to Armstrong and to counsels Tony Oppegard and Wes Addington (Exhibit B); and Mine Citation No. 9045905, issued to Armstrong on October 21, 2015, under 30 CFR §§ 40.4, 40.3 for failure to post a listing of Miners' Representatives that included their addresses and telephone numbers (Exhibit C).

On July 26, 2017, Respondent Armstrong, by counsel, filed a Motion for Summary Disposition pursuant to Commission Procedural Rule 67, 29 CFR § 2700.67, requesting that the case be dismissed as a matter of law. ("Armstrong's Motion"). Attached were five exhibits:

Exhibit 1: Letter of October 29, 2015, from MSHA to Parkway mine personnel transmitting the discrimination complaint, with a copy of the Discrimination Report only, MSHA Form 2000-124;

Exhibit 2: Letter of February 17, 2016, from MSHA to Michael Wilson declining to file a discrimination case with the Commission with distribution of a copy only to Armstrong;

Exhibit 3: Emails between attorneys on March 15, 2017;

Exhibit 4: A copy of mine information from the MSHA Mine Data Retrieval System showing the status of the Parkway mine as abandoned as of April 4, 2017;

Exhibit 5: Affidavit of Steven James DeMoss dated July 24, 2017.

In early August 2017 the parties in the instant case, and representatives in several other discrimination cases scheduled for hearing in the same time frame, requested a continuance based on pending cross-motions for summary decision, the desirability of settlement discussions, and to complete discovery in two of the dockets. On August 8, 2017, the scheduled hearings were continued.

On August 19, 2017, Wilson's Response in Opposition to Armstrong Coal's Motion for Summary Decision ("Wilson's Opposition") was filed. Attached were eight exhibits:

Exhibit 1: Another copy of the Citation No. 9045905;

Exhibit 2: Responses of Michael Wilson to Armstrong Coal's 1st Request for Admissions, served via electronic mail on July 10, 2017;

Exhibit 3: Answers of Michael Wilson to Armstrong Coal's 1st set of Interrogatories, served via electronic mail on July 10, 2017;

Exhibit 4: Responses of Michael Wilson to Armstrong Coal's 1st request for Production of Documents, served via electronic mail on July 10, 2017;

Exhibit 5: Supplemental Response of Michael Wilson to Armstrong Coal's 1st Request for Production of Documents served via electronic mail on August 2, 2017;

Exhibit 6: Notice of Deposition of Michael Wilson;

Exhibit 7: Notice of Deposition of Steve DeMoss; and

Exhibit 8: Listing of Armstrong mines from MSHA's Mine Data Retrieval System as of August 19, 2017.

On August 21, 2017, Armstrong's Reply to Wilson's Response in Opposition to Armstrong's Motion for Summary Disposition ("Armstrong's Reply") was filed. This was followed on August 22, 2017, by the Sur-Reply of Michael Wilson ("Sur-Reply"). By email on September 20, 2017, counsel for Wilson announced the intention to file a cross-motion for summary decision.

Wilson's Cross-Motion for Summary Decision ("Cross-Motion") was filed on October 6, 2017. Attached were the depositions of Steven James DeMoss ("Dep. DeMoss") and Michael "Flip" Wilson ("Dep. Wilson"). Also attached were eleven exhibits; only the following had not been attached to other filings:

Exhibit 4: Statement of Interview, Michael "Flip" Wilson, dated November 2, 2015;

Exhibit 5: Armstrong's Response to Complainant's First Set of Interrogatories served electronically on July 13, 2017;

Exhibit 6: List of Miners Representatives designated by MSHA Form 2000-238 dated May 19, 2014;

Exhibit 8: List of Miners Representatives with handwritten notation "Per verification by MSHA 10/16/15";

Exhibit 9: Representation of Miners Designation Form of Mike Wilson, MSHA Form 2000-238;

Exhibit 10: Letter dated October 16, 2015, from MSHA District Manager to Armstrong listing the names of Miners Representatives for Armstrong Coal Company operations, including the Parkway Mine; and

Exhibit 11: Letter dated February 28, 2014, to Armstrong with the determination that Mike Wilson had been properly and lawfully designated as a miners' representative at the Parkway Mine.

Armstrong's Response to Wilson's Cross-Motion for Summary Decision ("Response to Cross-Motion") was served electronically on October 16, 2017. Wilson's Reply to Armstrong's Response to Cross-Motion for Summary Decision ("Wilson's Reply") was served via electronic mail on October 25, 2017.

Issues

The pleadings and evidence of record raise the following issues:

- Timeliness of responses to discovery requests for admissions;
- Timeliness of filing the Complaint of Interference;
- Whether the relief sought is moot;
- The legal test for interference; and
- Whether Respondent interfered with Complaint's statutory rights as a Miners' Representative.

Relief Sought

In the Discrimination Report of October 29, 2015, Complainant requested:

> I want Armstrong Coal to be fined for violating section 105(c); I want the FMSHRC to issue a cease and desist order requiring the company to stop interfering with my statutory rights as a representative of miners; and I want all management personnel at the Parkway mine to have to take training from MSHA on the statutory rights of miners' reps.

Complaint, Exhibit A, P. 2.

In the Complaint of April 18, 2016, filed by Wilson's counsel the relief requested was:

1. Find that the action of Armstrong Coal in removing the addresses and telephone numbers of the miners' reps at the Parkway mine, and the company's failure to correct this error when it was brought to its attention by Wilson, interfered with Wilson's statutory rights as miners' reps and violated the Mine Act's anti-discrimination provision.

2. Order Armstrong's mine management to keep current the contact information for all miners' reps at the Parkway mine, as required by 30 CFR §40.4.

3. Impose a civil money penalty against Armstrong for its act of interference found herein.

4. Order Armstrong Coal to reimburse Wilson for all expenses incurred in the institution and litigation of this case, including attorney fees.

5. Order Armstrong Coal to post the Commission's decision in this case at the Parkway mine – and at all of Armstrong's other mines in western Kentucky – in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 consecutive days.

6. Order any additional relief which may be necessary to make Wilson whole, and such other relief as the Commission deems just and proper.

Complaint, p. 5.

Subsequently, the Parkway mine was abandoned as of April 4, 2017. (Armstrong's Motion, pp. 1, 3-5; Exhibits 4, 5). The relief was then amended:

- That Armstrong post the Court's decision at all of its other mines and facilities;

- That DeMoss and other Armstrong management personnel be required to take training in the statutory rights of miner's reps;

- That Armstrong comply with the requirements of 30 CFR §40.4 at all of its mining entities (this could also be styled as a "cease and desist" order);

- That Armstrong reimburse Wilson for all expenses incurred in the institution and litigation of this case, including attorney fees; and

- That Armstrong pay a civil penalty for its violation of § 105(c)(1).

Wilson's Response, pp. 6, 7.

Applicable Law and Regulations

Section 105(c) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners* or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (*emphasis added*).

Part 40, Representative of Miners provides, in pertinent part:

§40.4 Posting at mine.

A copy of the information provided the operator pursuant to §40.3 of this part shall be posted upon receipt by the operator on the mine bulletin board and maintained in a current status.

§40.3 Filing procedures.

(1) The name, address and telephone number of the representative of miners.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

30 C.F.R. §§ 40.3 (a)(1)(5), 40.4.

Summary Decision Standard

Commission Procedural Rule 67 provides, in pertinent part:

Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

A material fact is defined as "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). The record herein must be considered "in the light most favorable to…the party opposing the motion." *Hanson Aggregates New York, Inc.,* 29 FMSHRC 4, 9 (Jan.2007) (citations omitted). Any inferences drawn from the facts contained in the record must also be viewed in the light most favorable to the party opposing the motion. *Id*. "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc*., 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted).

I. Timeliness of Response to Discovery Request for Admissions

On June 13, 2016, Respondent served discovery requests upon attorneys for Complainant, which included requests for admissions. One request was: "Request No. 2: Admit that you and/or your attorney(s) received a letter from MSHA dated February 17, 2016 regarding MSHA's investigation of your Complaint." (Armstrong's Motion, p. 2).

On February 27, 2017, Respondent' counsel notified, via electronic mail, Complainant's counsel that the discovery responses were not received. (*Id*.). After receiving no response, Respondent's counsel again inquired on March 15, 2017, and Counsel for Complainant responded: "Sorry for the delay in getting back with you…Somehow your discovery got misplaced (and forgotten), but I have them now…I will get our answers/responses to you next week." (*Id;* Exhibit. 3).

Complainant responded to Respondent's discovery requests, including the 1st Request for Admissions, on July 10, 2017. (Wilson's Opposition, Exhibit 2; Armstrong's Motion, p. 2). The

response to Request No. 2 was: "Wilson is without sufficient knowledge to admit or deny this request for admission. Therefore, it is denied." (Wilson's Opposition, p. 4; Exhibit 2.).

Contentions

Respondent contends that Complainant failed to timely respond to the requests for admission of June 13, 2016, about the date the first MSHA denial letter was received, and thus receipt of the February 17, 2016, letter must be deemed admitted as of July 8, 2016, under 29 CFR § 2700.58(b) and Rule 36(a)(3) of the Federal Rules of Civil Procedure. (Armstrong's Motion, p. 3; Armstrong's Reply).

Complainant argues that while its discovery request answers were untimely, they were served more than two weeks before Respondent filed its motion for summary decision, that Respondent never filed a motion to compel, that Respondent was not prejudiced by the delay, and that depositions were taken after Armstrong's Motion for Summary Disposition was filed. (Wilson's Opposition, p. 4, 5). Complainant also argues the late discovery response is not an admission under the Commission's Procedural Rule 58(b), since the Rule also provides that the Judge may order a shorter or longer time period for responding. (Sur-Reply, pp. 1, 2).

Analysis

The Commission has held that summary decision is an extraordinary procedure, and the judge should view the record in the light most favorable to the non-moving party. *Energy West Mining* Co., 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Commission Procedural Rule 58(b) governs requests for admission in §105(c) proceedings. 29 C.F.R. § 2700.58(b). Rule 58(b) does not state that requests for admission are deemed admitted if there is not a timely response. In fact, Rule 58(b) provides that a judge may order a shorter or longer period of time for response. Thus, it is within the judge's discretion to determine when a party may respond. *Id.* This provision of the Rule gives Commission ALJs flexibility in making determinations on the basis of fairness; the Commission's Procedural Rule is adequate on its own. Here, neither party requested leave of the court to shorten or lengthen the time for this discovery. Instead, after the Complainant's response, Respondent moved for summary disposition, depositions were taken, and the above-listed pleadings were filed. It is unnecessary to look to the Federal Rules of Civil Procedure to fill in a perceived "gap" in Commission Rule 58(b). Since either party may petition the Court for a shorter or longer time for a response, and as a result a date certain could be established by an order of the Court, there is no need for a "deemed" admitted provision in the Rule. Accordingly, no admission regarding receipt of the letter of February 17, 2016, will be deemed by Complainant's late response to the request for admissions.

II. Timeliness of Filing the Complaint of Interference

The Discrimination Complaint of October 29, 2015, MSHA Form 2000-123, Section E, contained this instruction:

> If you desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g. Union representative, attorney, etc.) please give his/her name and address to the right.

To the right of this instruction were listed the names, addresses and telephone numbers of Wilson's co-counsel, Tony Oppegard, Esq., and Wes Addington, Esq. (Complaint, Exhibit A, p. 1).

The same day, MSHA by letter notified Legal Counsel at the Parkway Mine of Discrimination Complaint Case Number MADI-CD-2016-02. (Armstrong's Motion, Exhibit 1, p. 1). Attached to this letter was Form 2000-124, the Complaint Report signed by attorney Tony Oppegard on behalf of Michael Wilson. (*Id.,* p.2).

On February 17, 2016, MSHA sent a form letter to Wilson that contained the following notices:

> Based on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish by a preponderance of the evidence that a violation of Section 105(c) occurred. For that reason, the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("Commission") in this matter.
>
> However, you continue to have the right to file a discrimination case on your own behalf with the Commission. If you decide to file your own case, you must do so within 30 days of this letter by sending a discrimination complaint to the Commission…

A copy of this letter was sent to Armstrong Coal Company. (Armstrong's Motion, Exhibit 2). Wilson was without sufficient knowledge to admit or deny whether he or his attorney(s) received the February 17, 2016, letter. (Wilson's Opposition, Exhibit 2, p.1).

On March 18, 2016, a second form letter was sent to Wilson containing the same information as the letter of February 17, 2016, as set forth above. Copies of this letter were sent to Armstrong Coal Company, Tony Oppegard, Esq., and Wes Addington, Esq. (Complaint, Exhibit B). This letter was received by Wilson's attorney on March 21, 2016. (Wilson's Opposition, Exhibit 3, p. 4).

On April 18, 2016, Wilson, through counsel, filed his Complaint of Interference. (Complaint, pp. 1-5.).

Contentions

Respondent contends Wilson's complaint was untimely filed on April 18, 2016, approximately 60 days after the MSHA letter of February 17, 2016, declining to prosecute this case. (Armstrong's Motion, pp. 1-2).

Complainant argues his filing was timely because a second MSHA negative determination letter was sent dated March 18, 2016, and this letter was received by his attorney on March 21, 2016. (Wilson's Opposition, p. 4; Exhibit 3, p. 4).

Analysis

The failure of MSHA to provide proper notice of the Secretary's negative Section 105(c) determination to Wilson's attorney by the February letter was a mistake. This was most likely an inadvertent administrative error, since the Discrimination Complaint of October 29, 2015, clearly listed Wilson's co-counsel in Section E of the form as the attorneys to receive a copy of "all correspondence addressed to you from MSHA". Wilson's attorney was first notified of MSHA's negative 105(c) determination when he received the March 18, 2016 letter on March 21, 2016. Responding to this notice, the Complaint of Interference was filed on April 18, 2016. This is within the 30 day time limit for filing under Section105(c)(3). Thus, in viewing the facts in a light most favorable to Complainant, the complaint was timely filed.

Assuming *arguendo* that the first, February 17, 2016, letter controls as the date of notice, the factual circumstances nevertheless establish that the 30 day delay in filing was excusable. The Act's legislative history instructs that the time limits are not jurisdictional. S. Rep. No. 95-181, 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. On Human Res., *Legis. Hist. of the Fed. Mine Safety and Health Act of 1977* at 37 (1978). The Commission interprets the 105(c) time limitations as non-jurisdictional and subject to equitable tolling, and this interpretation has been upheld by the Tenth Circuit Court of Appeals. *Olson v. Fed. Mine Safety & Health Review Comm'n,* 381 F.3d 1007, 1012 (10th Cir. 2004). A failure to meet these filing time limitations does not result in a dismissal absent material legal prejudice. *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov. 1994) citing *Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). The decision to permit or reject an untimely 105(c) filing is determined on a case-by-case basis, "taking into account the unique circumstances of each situation." *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999) citing *Hollis v. Consolidation Coal Co.,* 6 FMSHRC 21, 24 (Jan. 1984).

The Section 105(c)(3) filing period can be equitably tolled when there are "justifiable circumstances" for a late filing that do not cause prejudice. *Morgan*, at 1386. Justifiable circumstances have been found in instances of "ignorance, mistake, inadvertence, and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996). However, if even if there is an adequate excuse for late filing, material legal prejudice may require dismissal. *Perry*, 18 FMSHRC at 1921-22 citing *Hale,*at 908. Material legal prejudice must "affect issues necessary to a meaningful opportunity to defend," and can include "tangible evidence that has since disappeared, faded memories, or missing witnesses." *Farmer v. Island*

Creek Coal Co., 13 FMSHRC 1226, 1231 (May 1991); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

Since the claimed filing delay was due to an administrative error, even if the letter of February 17, 2016, controls the date of notice, there were justifiable circumstances for such late filing. MSHA's administrative error was a circumstance that did justify the delay in filing the discrimination complaint. While Wilson did not know whether his attorney received the February letter, the fact remains that MSHA did not send notice of the negative determination to Wilson's attorney until the second letter was sent in March. If the February letter had been distributed as required by the names and addresses entered in the complaint form, then the 30 day limit would have been tolled as Respondent contends. But there was a failure of proper, written notice to Wilson's legal representative until the second, March letter was sent, apparently to correct the error of omission of the first, February letter. If the 30 day limit were considered tolled, a delay of only 30 days is nevertheless considered negligible. And, material legal prejudice by this short delay has not been established by Respondent. No facts have been alleged showing that witnesses cannot appear, evidence no longer exists, or that this short delay has prejudiced Respondent's meaningful opportunity to defend.

I find dismissal of the Complaint of Interference on the basis of untimely filing is not warranted.

III. Whether the relief sought is moot

The status of the Parkway Mine was changed to abandoned on April 4, 2017. (Armstrong's Motion, Exhibit 4). After that date, there were no Miners' Representatives for that mine, and no regulatory postings on the bulletin board. (*Id*., Exhibit 5).

Contentions

Respondent contends that this matter is moot because the Parkway mine has been abandoned, there is no bulletin board, Complainant is no longer a Miners' Representative at the mine, Complainant and a number of former Parkway employees are no longer employed by Armstrong, and the non-S&S citation has been paid. (Armstrong's Motion, p. 4; Exhibits 1, 4, 5).

Complainant argues that Armstrong Coal is still in operation, and Steve DeMoss ("DeMoss") who was named in Wilson's original complaint is still employed as Manager of Safety at Armstrong's Kronos mine. (Wilson's Opposition, p.6; Complaint, Exhibit A). Armstrong has five active operations, and the relief sought can still be ordered. (Wilson's Opposition, pp. 6, 7; Exhibit 8). Further, upon a finding of interference, the case must be referred to the Secretary of Labor for imposition of a civil penalty. *(Id.,* p. 7).

Analysis

So long as *any* relief could potentially be granted, this matter will not be considered moot. Armstrong has other active coal operations, including the Kronos mine where DeMoss is employed as Safety Manager. There is no evidence that postings could not be accomplished at

the active coal sites. Costs and attorney fees are capable of being determined. Indeed, Respondent admits that the *possibility* of a civil penalty and attorney's fees remains in this matter. (Armstrong's Reply, p. 2). Dismissal on the basis that no relief could be granted is not warranted.

IV. Test for Interference

The Commission has not settled on a single test for interference violations. However, a two-part test was endorsed by two Commissioners. Under this test an interference violation occurs if:

1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP, 36 FMSHRC 2088, 2108 (Aug. 2014). This *Franks* test has been applied by the undersigned and other Commission judges in interference cases. *Lawrence Pendley v. Highland Mining Co. & James Creighton,* 37 FMSHRC 301 (Feb. 12, 2015)(ALJ Andrews); *Scott D. McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (Jun. 11, 2015)(ALJ); *Sec'y of Labor obo Greathouse et. al. v. Ohio County Coal,* 37 FMSHRC 2892 (Dec. 30, 2015)(ALJ).

One Commission judge has found that the word *because* in section 105(c)(1) of the Act requires the complainant to prove the interference alleged was *motivated* by the exercise of protected rights. *Sec'y of Labor obo Mindy S. Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1450-51, n. 11 (Jun. 6, 2016)(ALJ). Since under this view a motivational intent must be shown, the second part of the test was changed to:

2) Such actions were motivated by the exercise of protected rights.

Id. at 1453-54.

Contentions

Respondent contends that the factual issue turns on both what was done and why it was done, and there are no facts established about the motive behind the removal of the phone numbers and addresses of the Miners' Representatives. (Armstrong's Response, pp. 1-3). Also, since neither DeMoss nor Wilson was told why the contact information was removed, Complainant has not identified a factual intent or motivation on the part of anyone at Armstrong. (*Id*., pp.2, 3). Further, to prove interference in this case, the *Pepin* test must also be used. (Armstrong's Response, pp. 6, 7).

Complainant argues a Miners' Representative need not prove a company's motivation for interfering with his statutory rights in order to prevail in an interference proceeding under the Mine Act, citing *Secretary of Labor o/b/o Gray v. North Star Mining & Brummett,* 27 FMSHRC 1 (Jan. 2005). Complainant, in effect, argues for application of the *Franks* test. (Wilson's Reply, pp. 5, 6).

Analysis

In his cogent analysis of the two tests, Judge Lewis explained that the motivational requirement was in conflict with the first prong of both the *Franks* test and the *Pepin* test:

> The phrase "tending to interfere" indicates that the employer's conduct is inclined to interfere with future miner conduct. However, the second prong in *Pepin* requires a predicate exercise of protected rights that the conduct be in reaction to. *If a mine operator is interfering with a miner's statutory rights, why should the Complainant who is in a worse position to make a showing of the operator's motivations be required to show why the operator is acting in such a manner?* Instead, the operator should be required to show why the interference with a miner's statutory rights was due to "a legitimate and substantial reason whose importance outweighs the harm cause[d] to the exercise of protected rights," as required by the *Franks* test. If it cannot, then the conduct should be prohibited under Section 105(c).

Wilson, Greenwell & Shemwell v. Armstrong Coal Company, Inc., 39 FMSHRC 1072, 1093 (May 9, 2017)(ALJ Lewis)(*emphasis added*)[1].

I agree with this analysis. Further, the Commission has held that the totality of circumstances must be analyzed, not just the intent or motive in the alleged violative behavior. Interference under the Act in this case does not turn on the operator's motive, but whether its conduct reasonably tended to interfere with the statutory rights of the Miner's Representatives. *Sec'y of Labor o/b/o Gray v. North Star Mining & Brummett,* 27 FMSHRC 1, 9, 10 (Jan. 2005) citing *American Freightways Co*., 124 NLRB 146, 147 (1959). The future miner conduct under the facts and circumstances in this case is the ability to easily make a telephone contact, in private, with a Miners' Representative. In order to interfere with the right of a miner to communicate with one of the Miners' Representatives, the burden is properly on the operator to justify making a discussion between a miner and one of the representatives, like Wilson, more difficult. I find that under all of the facts and circumstances in the instant case, it is the operator's conduct that is important. The operator's *motive* for the conduct is relevant only in so far as there is a claim of a legitimate and substantial reason whose importance outweighs the harm caused to the protected rights of the Miners' Representatives, as contemplated by step two of *Franks*. No argument of a reason meeting this test is advanced here; and, the person most likely to have

[1] Currently on review before the Commission.

knowledge of intent, Safety Director Rick Brothers ("Brothers"), DeMoss's boss, was not deposed.[2]

I will again apply the *Franks* test.

V. Interference

Prior to October 16, 2015, a list dated May 19, 2014, in the upper right hand corner and entitled "Miners Representatives designated by MSHA Form 2008-238", that included the names, addresses and telephone numbers of each Miners' Representative was posted behind glass on the bulletin board in the bathhouse at the Parkway mine. (Cross-Motion, Exhibit 6; Dep. DeMoss, pp. 29-33; Dep. Wilson, pp. 25-28). DeMoss took a photo of this list. (Dep. DeMoss, pp. 24, 25).

The name, address and telephone number of Mike Wilson, Complainant, was included in the list dated May 19, 2014. (Cross-Motion, Exhibit 6). Wilson had been properly designated a Miners' Representative at the Parkway mine. (Cross-Motion, Exhibits 4, 6, 9, 10, 11; Dep. DeMoss, pp. 58, 59, 67). He was a non-employee Miners' Representative until the Parkway mine closed. (Dep. Wilson, pp. 11-13, 53).

On October 16, 2015, a modified list of Miners' Representatives was posted behind glass in the bathhouse by DeMoss on the instruction of Brothers; this new list had no addresses or telephone numbers for any of the Miners' Representatives, including Wilson.[3] (Cross-Motion, Exhibit 5, Response to No. 8; Dep. DeMoss, pp. 13, 14, 21, 32, 36, 43, 45-47, 49).

The new list with no addresses or telephone numbers was posted for about 6 days, from October 16, 2015 to October 21, 2015. (Dep. DeMoss, pp. 36, 44-47, 49-51).

On or about October 20, 2015 Wilson noticed that the list behind glass in the bathhouse had been replaced with a list with all the Miners' Representatives' names, except the addresses and telephone numbers were gone. (Dep. Wilson, pp. 27, 28). Wilson called the MSHA hotline and reported that the addresses and phone numbers were off the paper. (Dep. Wilson, pp. 33, 34).

Wilson testified he remembered telling Chad Baldwin that as many as five people working at the mines had been calling him early in the morning and at night before the list was changed. (Dep. Wilson, pp. 35-37). Wilson had also told Brothers that miners at the mine called him and reported safety and health issues to him. (*Id.,* pp. 57-59; Complaint, p. 4, No.15). Wilson believed Brothers made the decision to put up the new list because of what Wilson had told him about people calling. (*Id.,* pp. 60-62).

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[2] Brothers was not deposed because in another case scheduled to be heard in the same time frame as the instant case, Brothers claimed an unspecified medical condition resulting in virtually no recollection of his employment with Armstrong. (Cross-Motion, pp. 2, 3).

[3] A photocopy or photograph of this list is not of record. (Dep. DeMoss, p. 49; *but see* Dep. Wilson, p. 43).

On October 21, 2015, Citation No. 9045905 was issued at 1510 hours for a violation of 30 CFR §§ 40.4, 40.3 since the listing of Miners' Representatives posted on the mine bulletin board did not include the addresses and telephone numbers of the Miners' Representatives. (Complaint, Exhibit C; Armstrong's Motion, Exhibit 5, No. 4; Wilson's Response, Exhibit 1). The Citation was abated at 1520 hours by DeMoss when he updated and reposted the prior list with the addresses and telephone numbers of the representatives. (*Id.;* Dep. DeMoss, pp. 39, 53-56; Dep. Wilson, pp. 43, 44; Cross-Motion, Exhibits 7, 8).

The updated list was no longer dated May 19, 2014; in the upper right hand corner was handwritten "Per verification by MSHA 10/16/15". (Cross-Motion, Exhibit 8; Dep. DeMoss, pp. 53-56).

Armstrong has five active coal operations in the state of Kentucky. (Wilson's Response, Exhibit 8). Since January 2017 DeMoss has been Safety Manager at Armstrong's Kronos mine. (Armstrong's Motion, Exhibit 5, No. 1; Dep. DeMoss, p. 15).

Contentions

Respondent contends the primary factual issue turns on what was done and why it was done. Therefore, both tests for interference must be considered, or the legal analysis would be incomplete and Complainant would not be entitled to summary decision as a matter of law. (Armstrong's Response, pp. 1, 5).

Complainant argues operators are required to post contact information of Miners' Representatives so other miners will know how to contact a representative about matters that affect their health and safety. Therefore, the removal of the contact information tended to interfere with the Complainant's statutory rights as a Miners' Representative. Also, the company has not and cannot justify its removal action with a legitimate and substantial reason whose importance outweighs the harm caused to Complainant's protected rights. (Cross-Motion, pp. 14, 15). Further, a Miners' Representative need not prove a company's motive for interfering with his statutory rights to prevail under Section 105(c)(1). (Wilson's Reply, p. 3).

Analysis

It was Brothers who provided the new list of Miners' Representatives to DeMoss and instructed DeMoss to post this list with the names of the representatives but with none of their addresses or telephone numbers. The list that had been on the bulletin board behind glass in the bathhouse did have the address and telephone number for each of the representatives. The actions of Brothers and DeMoss constituted the removal of contact information important to the health and safety of miners. Viewed from the perspective of both the Miners' Representatives and other miners the absence of this information, in particular the telephone numbers, did tend to interfere with the exercise of their protected right to report safety and health concerns freely and confidentially.

Consider, for example, the alternative presented to a miner who wished to report a safety concern. This miner would need to find a Miners' Representative, most likely at the mine site,

and personally convey the concern. This might, or might not, take place out of "earshot" of other miners or supervisory personnel. Another alternative would be for a miner to find and approach Wilson or another representative at their address. Either alternative would place an unreasonable burden on the miner with a safety concern to report, and potentially expose the miner to risk of reprisal. Even to require a miner to search for an address or telephone number in order to be able to privately report a safety concern imposes a burden. When compared with simply noting a telephone number and making a call at any time and in confidence to a Miners' Representative, it becomes clear that removing the contact information was an act of interference under the first prong of the *Franks* test.

Respondent has not established an important reason justifying the removal of the contact information. Any such reason must be "legitimate and substantial" and outweigh the burden imposed on miners with safety and health concerns but with no readily available, private and confidential method of making a report to a Miners' Representative. The one person who could shed light on the removal reason, Brothers, was not deposed; therefore, the reason why the violative action was taken remains unknown, and is perhaps not ascertainable.

I find that by removing the contact information for the Miners' Representatives, including Wilson's, Respondent did interfere with the statutory rights of Wilson and the other Miners' Representatives.

Respondent relies on the second prong of the *Pepin* test to require proof of the motivation of the operator in removing the contact information. If the motivation for the removal of the contact information was the exercise of protected rights, such as presented here in the potential expression of safety and health concerns by a miner to a Miners' Representative, then the second prong of the *Pepin* test could be satisfied and interference established. However, Complainant Wilson is in a much worse position to discover motivation on the part of the operator, especially where the management official who most likely knows the reason for the removal apparently could not be deposed. This would mean, as Judge Lewis pointed out, the requirement of a predicate exercise of protected rights that was reacted to by removing the addresses and telephone numbers of the Miners' Representatives. See, *Wilson, et. al., v. Armstrong*, Supra.

It is noteworthy that Wilson testified before the list was changed he told Baldwin people had been calling him at night and early in the morning; he also told Brothers miners had been calling him. Wilson testified to his belief Brothers took the phone numbers and addresses down because of what he had told Brothers. DeMoss testified he did not know why the list was changed, he was just following instructions. Brothers would be the person able to contradict Wilson's testimony, but he was not deposed, reportedly due to a memory deficit. Wilson's testimony that he told Brothers and Baldwin about the calls he was receiving and Wilson's belief that Brothers removed the contact information on purpose because people had been calling him is evidence that protected rights were responded to by the violative act of removing the contact information for all listed Miners' Representatives at the Parkway mine. While I have applied the *Franks* test in this case, there is evidence that the second prong of the *Pepin* test is also satisfied.

Based on review of the entire record and the applicable law, I find there is no dispute of material fact and that Armstrong violated Section 105(c) of the Mine Act by interfering with

Wilson's statutory rights as a Miners' Representative. I further find relief can be granted and this matter is not moot, the delay in discovery responses is not cause for dismissal, and the Complaint of Interference was timely filed. Therefore, Complainant is entitled to summary decision as a matter of law.

ORDER

Respondent's Motion for Summary Disposition is **DENIED** and Wilson's Cross-Motion for Summary Decision is **GRANTED**.

It is further **ORDERED** that Armstrong will immediately:

1) Post the Court's decision at all of its active coal operations and facilities, at places where notices to employees are customarily posted for a period of 30 days;

2) Require Armstrong management personnel at its active operations and facilities to take training in the statutory rights of Miners' Representatives; and

3) Comply with the requirements of 30 CFR §§ 40.4 and 40.3 at all of its active coal operations and facilities.

The undersigned ALJ retains jurisdiction of this matter until all of the specific remedies to which Wilson is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting any further specific relief, including costs and attorney's fees, as well as any civil penalty to be assessed, has been entered.

Accordingly, the parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas of further, specific relief and any penalty amount on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

Pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision will be sent to the Office of the Regional Solicitor having responsibility for the area in which the Parkway Mine was located so that the Secretary may take the actions required by the rule.

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

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January 16, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEVIN R. SHAFFER, Complainant v. THE MARION COUNTY COAL COMPANY, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2018-117-D MORG-CD-2018-01 Marion County Mine Mine ID: 46-01433

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on December 4, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(c)(2), seeking an order requiring The Marion County Coal Company ("Marion County Coal") to temporarily reinstate Kevin R. Shaffer to his former position of mobile equipment operator at Marion County Coal's Marion County Mine, at the same rate of pay and benefits. Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The Application is supported by the Declaration of MSHA Special Investigator Clarence Moore, III, and a copy of the Discrimination Complaint filed by Shaffer with MSHA on November 1, 2017. The Application alleges that Shaffer was terminated by Marion County Coal because he made safety complaints to management about mobile equipment that he had been operating, and requested alternative work due to the unsafe condition of the equipment.

Based on Marion County Coal's election to brief the issue in lieu of a hearing, the parties agreed to an effective date for temporary reinstatement of December 31, 2017, and filed simultaneous briefs on January 9, 2018. The Secretary's Brief in Support of the Application for Temporary Reinstatement ("Secretary's Brief") is supported by a copy of Special Investigator Clarence Moore's Declaration. Marion County Coal's Brief Opposing Temporary Reinstatement ("Opposition") is supported by copies of the following: arbitration transcript of November 17, 2017 (Attachment A), and associated arbitration Decision and Award of December 11, 2017 (Attachment H); Marion County Coal's Employee Conduct Rules (Attachment B); statement of Marion County Coal supervisor Adam Bond of October 19, 2017 (Attachment C); statement of Wheeling Diesel Shop mechanic Paul Dixon, undated (Attachment D); notes of Adam Bond regarding an August 14, 2017 Verbal Warning issued to Shaffer, undated (Attachment E);

Disciplinary Notice to Shaffer of August 10, 2013 (Attachment F); and letter of suspension with intent to discharge Shaffer of October 23, 2017 (Attachment G).

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), which limits the inquiry to a "not frivolously brought" standard by providing that "[i]f no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement." 29 C.F.R. § 2700.45(c).

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources, Inc. v. FMSHRC*, the 11th Circuit Court of Appeals explained the standard as follows:

> The legislative history of the Act defines the 'not frivolously brought' standard as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.'
>
> . . .
>
> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his workforce under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

920 F.2d 738, 747-48 n.11 (11th Cir. 1990) (citations omitted) (footnotes omitted).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. § 815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act, and that he suffered adverse action as a result of the protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev'd on other grounds sub*

nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Secretary's allegations are based on the findings of the Special Investigator and, according to his Declaration, the following chronology of events occurred. Sec'y Br. at 1-3. On October 18, 2017, Kevin Shaffer complained to his supervisor, Adam Bond, that the transmission of the No. 4 ejector truck that he was operating, twice jumped out of neutral into reverse, and he requested alternative work due to the truck's unsafe condition. Bond reassigned him to a different piece of equipment. Later that shift, Bond told Shaffer that Wheeling mechanic Paul Dixon had reported to him that he saw Shaffer driving without headlights. Shaffer responded by denying Dixon's claim, and Bond, in turn, responded "I'm tired of this fucking shit on this equipment." The next day, Bond recounted the confrontation in an email that he sent to Marion County Coal's human resources department, alleging that Shaffer had cursed at him and made physical threats. That day, Marion County Coal suspended Shaffer pending an investigation, and then, on October 23, suspended him with intent to discharge. Moore concluded that Shaffer's Complaint, alleging that he was discharged for engaging in protected activity, was not frivolously brought. Sec'y Br. Attach. A at 2-3.

Marion County Coal's Opposition cites to portions of the arbitration testimony and written statements to establish that the operator was not motivated by Shaffer's safety complaints or refusal to operate unsafe mobile equipment when it terminated him and, therefore, that the Complaint was frivolously brought. According to Bond's testimony and written statement, on October 18, 2017, Shaffer radioed him that the No. 4 truck that he was operating was malfunctioning. Resp't Br. Attachs. A at 51; C. Bond further averred that, consistent with the manner in which he routinely handles such complaints, he told Shaffer to stop operating the truck, he called mechanic Dixon to service it, and he assigned Shaffer to a different truck. Resp't Br. Attachs. A at 51-52, 55; C. Shaffer's testimony corroborates that Bond did, indeed, take those actions. Resp't Br. Attach. A at 253. Later that shift, according to Bond's and Dixon's testimony and written statements, Dixon notified Bond that he saw Shaffer driving a truck downhill at high speed, without headlights. Resp't Br. Attachs. A at 64, 139; C; D. According to them, when Bond confronted Shaffer about Dixon's claim, Shaffer told Bond repeatedly "fuck you." Resp't Br. Attachs. A at 65-66, 138-42; C; D. Bond further testified that Shaffer also told him "I'm going to whip your ass; I'm going to take you to the gate," which is generally consistent with his prior written statement. Resp't Br. Attach. A at 68; C. Dixon testified that he recalled Shaffer yelling at Bond about "taking it to the gate," although his written statement makes no reference to Shaffer challenging Bond to a fight offsite. Resp't Br. Attach. A 138-42; D. According to Bond, he felt threatened by Shaffer, and the next day, he reported him to human resources. Resp't Br. Attachs. at 76; C.

Marion County Coal contends that it terminated Shaffer because he threatened Bond in violation of its insubordination policy, and because he had similar discipline in his personnel record. Resp't Br. at 8; Resp't Br. Attachs. B; G. It relies on *Fletcher v. Frontier-Kemper Contractors, Incorporated,* for the proposition that a complainant's violation of company policy supports a finding that his complaint is frivolous. 34 FMSHRC 2189 (Aug. 2012) (ALJ) (denying an application for temporary reinstatement where uncontradicted testimony

demonstrated that the complainant violated the operator's policy prohibiting working under unsupported roof). Resp't Br. at 7.

The operator's reliance on *Fletcher* is misplaced here because the parties' supportive documentation set forth differing accounts of events precipitating the Complaint, which are not appropriately resolved at this stage of the proceedings; nor is the arbitration Decision binding on this Commission. *See Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252 (June 2012); *Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085 (Oct. 2009). The Secretary has set forth allegations of adverse treatment, close in proximity to the protected activity, so as to create a nexus sufficient to raise an inference of discrimination. Moreover, I note that Marion County Coal expressly asserts that it does not dispute that Shaffer engaged in protected activity, and that Bond had knowledge of it. At best, Marion County Coal has shown its intent to defend its actions at hearing on the basis of legitimate business-related, non-discriminatory reasons. At this juncture, it is emphasized that the Secretary ultimately bears the burden of proving discrimination by a preponderance of the evidence, in order to sustain a violation under section 105(c). Accordingly, since the allegations of discrimination, as set forth in the Secretary's Application, have not been shown to be clearly lacking in merit, it must be concluded that they are not frivolous and, therefore, satisfy the lesser threshold in this proceeding.

WHEREFORE, the Application for Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that The Marion County Coal Company **TEMPORARILY REINSTATE** Kevin R. Shaffer to the position of mobile equipment operator at its Marion County Mine, at the same rate of pay and benefits, effective December 31, 2017.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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January 24, 2018

PEABODY TWENTYMILE MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. WEST 2017-0247-R Order No. 9025723;02/19/2017 Docket No. WEST 2017-0248-R Citation No. 9025724;02/19/2017 Foidel Creek Mine Mine ID 05-03836
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. PEABODY TWENTYMILE MINING, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-553 A.C. No. 05-03836-439555 Foidel Creek Mine

ORDER GRANTING THE SECRETARY'S MOTION TO QUASH SUBPOENAS

Before: Judge Manning

These cases are before me upon notices of contest filed by Peabody Twentymile Mining, LLC, ("Twentymile") and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Twentymile pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). On January 22, 2018 the Secretary moved to quash two subpoenas issued for the trial testimony of Tracy Santistevan and Robert Teeter which is scheduled for February 13, 2018. For reasons that follow the Secretary's motion is granted.

On January 5, 2018 counsel for Twentymile requested two subpoenas for the trial testimony of Tracy Santistevan and Robert Teeter. Subsequently, on January 8, the court issued the requested subpoenas. On January 22 the Secretary emailed the court and moved to quash the subpoenas. The following day the court convened a conference call during which the parties presented their positions on the Secretary's motion.

These cases involve one section 104(d)(1) citation and a corresponding imminent danger order. The citation alleges a violation of 30 C.F.R. § 75.1725(c) and states, in part, that the issuing inspector observed a "miner with a piece of roof bolter steel with a metal hook attached to the end removing wood and metal from the moving feeder conveyor." (Citation No. 9025724). During the conference call, Twentymile argued that the subpoenaed individuals previously worked for Twentymile and are needed to provide testimony regarding the practice of "fishing," i.e., the removal of materials from a conveyor via the use of a metal hook. The Secretary, in response, argued that the testimony of the subpoenaed individuals is not relevant given that the individuals are no longer employees of Twentymile and, rather, are now MSHA inspectors who were not present at the time the subject enforcement actions were issued and have never observed the practice of "fishing" as inspectors.

The Commission's procedural rules grant its judges discretion to regulate discovery "to prevent undue delay or to protect a party or person from oppression or undue burden or expense" for "good cause shown." 29 C.F.R. § 2700.56(c). Judges have utilized that discretion to "limit needless, speculative, overly broad, or duplicative discovery." *North American Quarry and Constr. Services LLC*, 38 FMSHRC 583, 586 (Mar. 2016) (ALJ) (citations omitted). Judges are, similarly, afforded considerable discretion when it comes to regulating the course of a hearing and determining what to receive into evidence. 29 C.F.R. § 2700.55. Moreover, a judge may revoke a subpoena "for any other reason it is found to be . . . unreasonable." 29 C.F.R. § 2700.60(c).

I find that the testimony sought from the subpoenaed individuals will be unreasonably cumulative or duplicative and can be obtained from witnesses currently employed by Twentymile. There has been no showing that the testimony of the two inspectors would present facts that only they possess. The subpoenaed individuals were not present at the time the subject citation and order were issued. Any testimony they could offer would relate to their general knowledge of the "fishing" process based on their time working at the mine prior to becoming MSHA inspectors. That same testimony can be obtained from others who are working at the mine, as evidenced by Twentymile counsel's statement during the conference call that other witnesses would be called to testify about the practice of "fishing." Counsel for Twentymile also argues that the inspectors may be able to offer information relevant to issues surrounding the high negligence and unwarrantable failure determinations set forth in the citation. I find that testimony concerning "fishing" and the inspector's negligence and unwarrantable failure determinations "can better be obtained directly from individuals who have first-hand knowledge of those matters and who undoubtedly occupy positions of responsibility in the operator's own organization." *Martin Marietta Aggregates*, 20 FMSHRC 1239, 1240 (Oct. 1998) (ALJ) (Order quashing subpoena of MSHA special investigator in training).

It is important to note that in issuing the unwarrantable failure citation and imminent danger order, MSHA Inspector Rufus Taylor relied upon specific conditions that he observed at the time of his inspection. Even assuming that the two subpoenaed MSHA inspectors engaged in or had knowledge of "fishing" when they worked at the Foidel Creek Mine, they have no knowledge of the specific conditions that Inspector Taylor relied upon when issuing the citation and the imminent danger order.

It is quite apparent that Twentymile only seeks the testimony of these individuals because they are presently MSHA inspectors. If these same individuals had left the mine to start a business together, for example, Twentymile would not be seeking their testimony. Twentymile is also not seeking to call them as expert witnesses. Requiring these individuals to testify would take them away from the important work they do as inspectors and would be of no value to the court given that the same facts can be obtained from other witnesses.

For the reasons discussed above, the Secretary's motion is **GRANTED** and the subpoenas issued on January 8, 2018 for the hearing testimonies of Tracy Santistevan and Robert Teeter are **QUASHED.**

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20004

January 31, 2018

MARSHALL JUSTICE, Complainant, v. ROCKWELL MINING, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2018-48-D PINE-CD-2016-07 Mine: Gateway Eagle Mine Mine ID 46-06618

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION TO DISMISS

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on December 4, 2017. On November 22, 2017, Respondent filed a Motion to Dismiss Marshall Justice's Complaint.[1] Complainant filed a response on December 1, 2017. On December 11, 2017, the Secretary of Labor ("Secretary") filed both a motion to intervene and a response to the motion to dismiss. I hereby **GRANT** the

[1] Respondent incorrectly filed the motion in Docket No. WEVA 2018-10-D, which involves a section 105(c)(2) complaint filed by the Secretary on behalf of Justice. Likewise, Complainant also incorrectly filed his response to the motion in Docket No. WEVA 2018-10-D. On January 5, 2018, my law clerk emailed the parties for clarification, whereby the parties confirmed that Respondent's motion and Complainant's response should be withdrawn from Docket No. WEVA 2018-10-D and re-filed in Docket No. WEVA 2018-48-D.

Secretary's motion to intervene and consider his response.[2] On December 21, 2017, Respondent filed a motion for leave to file a reply, which I also hereby **GRANT** and consider the reply.

I. Factual and Procedural Background

A. Justice's Discrimination Complaint to MSHA

On July 20, 2016, Marshall Justice ("Complainant" or "Justice") filed a discrimination complaint with MSHA using the agency's standard form and naming Rockwell Mining, LLC ("Respondent" or "Rockwell").[3] (Compl., Ex. A.) The MSHA Form 2000-123 Discrimination Complaint ("MSHA Form 2000-123") alleges that Rockwell interfered with Justice's rights as a miner's representative by failing to provide him copies of documents with proposed changes to the mine's ventilation plan, which miners' representatives are entitled to receive notice of five days before the changes are submitted to MSHA. (*Id.* at 2.) In addition, the complaint alleges that Rockwell required Justice to operate a caged scoop, which Justice refused to operate because of safety concerns, claiming it greatly diminished his field of vision. (*Id.*) Justice's MSHA Form 2000-123 complaint sought an injunction to prevent Rockwell from interfering with his rights as a miners' representative and an injunction compelling Rockwell to recognize his valid refusal to

[2] Under the Commission's Procedural Rules, motions for leave to intervene may be filed before the start of a hearing and shall set forth (1) the interest of the movant, (2) the reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding, and (3) a showing that intervention will not unduly delay or prejudice the adjudication of the issues. 29 C.F.R. § 2700.4(b)(2)(i). Such intervention is not a matter of right but of the sound discretion of the Judge. 29 C.F.R. § 2700.4(b)(2)(ii).

The Secretary states that he has an interest in ensuring the issues in the proceeding he initiated under section 105(c)(2) in Docket No. WEVA 2018-10-D are not litigated in the proceeding initiated by Complainant under section 105(c)(3) in Docket No. WEVA 2018-48-D. (Mot. to Intervene at 2.) The Secretary further argues that none of the other parties can represent the Secretary's interest and that intervention for the limited purpose of responding to Respondent's motion to dismiss would not unduly delay or prejudice the adjudication of the issues. (*Id.*) The Secretary's motion states that Respondent does not object to the Secretary as intervenor but that Complainant does. (*Id.*) Yet Complainant did not file a response to the Secretary's motion explaining its objection. Considering all the above, I grant the Secretary's motion to intervene for the limited purpose of filing a response to Respondent's motion.

[3] Justice has previously alleged discrimination against Rockwell in another matter before the Commission. On August 10, 2015, Justice filed a complaint of discrimination under section 105(c)(3) against Gateway Eagle Coal Company ("Gateway Eagle"), Docket No. WEVA 2015-924-D, and later moved to add Rockwell as a party under a theory of successorship liability. In that proceeding, Administrative Law Judge David P. Simonton entered a default judgment against Gateway Eagle, but denied Justice's motion to amend his complaint to add Rockwell as a party. *Justice v. Gateway Eagle Coal Co.*, 38 FMSHRC 2341, 2345 (Aug. 2016) (ALJ). Judge Simonton dismissed the proceeding after Justice failed to submit a claim for personal relief against Gateway Eagle. Unpublished Order dated Sept. 15, 2016.

operate the caged scoop. (*Id.*) In regard to the scoop, Justice demanded "to be made whole for any and all losses that arose due to [his] refusal" to operate the scoop. (*Id.*)

Justice also states that he provided MSHA a supplemental statement on August 10, 2016, in addition to his MSHA Form 2000-123 complaint. (*See* Compl. at 5, Ex. B; Justice Resp. at 3.) The supplemental statement provides a timeline of events related to Justice's allegations. (Compl. at 5, Ex. B.) According to the timeline, the mine ventilation plan was revised on or around June 7, 2016, and Justice was not provided a copy of the revisions in advance of the company submitting the revisions to MSHA. (*Id.* at 1.) On June 21, 2016, Justice purportedly filed a safety grievance about workers being ordered by foreman Rondale Gillespie to haul supplies over long distances using Scoop #874, which was enclosed and allegedly restricted an operator's view. (*Id.*) On June 28, mine management allegedly posted a list of miners who could work during vacation and did not include Justice on that list. (*Id.*) From late June to July 19, 2016, Justice described several instances where he worked with two enclosed scoops (#874 and #882) and expressed his concerns over the equipment's safety. (*Id.* 1–2.) On July 19, 2016, Justice claims that he also attempted to exercise his walk-around rights as a miners' representative, but was ordered by mine management to return to work. (*Id.* at 2–3.)

B. MSHA's Determination on Justice's Complaint and Section 105(c)(2) Proceeding

On September 14, 2017, MSHA notified Justice that the agency had investigated Justice's discrimination complaint and determined that a violation of section 105(c) of the Mine Act had occurred. (Compl., Ex. C.) On October 3, 2017, the Secretary filed a complaint with the Commission under section 105(c)(2), which is contained in Docket No. WEVA 2018-10-D. The Secretary's section 105(c)(2) complaint alleges that Rockwell interfered with the exercise of Justice's statutory rights as a miners' representative by failing to provide Justice with notice of revisions to the mine's ventilation plans. (Sec'y Compl. at 1–3.) However, the Secretary's section 105(c)(2) complaint does not pursue Justice's claim regarding his refusal to work in an allegedly unsafe scoop nor any other claims by Justice. (*See id.* at 1–5.)

C. Justice's Section 105(c)(3) Complaint

On October 30, 2017, Justice filed his own complaint of discrimination under section 105(c)(3) of the Mine Act. The complaint alleges that Respondent (1) interfered with Justice's rights as a miner's representative by not providing notice of changes to the mine's ventilation plans, (2) interfered with Justice's right to complain of unsafe mine equipment, and (3) imposed retaliatory discipline against Justice which was motivated by Justice's protected activity, including his refusal to operate the unsafe equipment and his attempt to exercise his walk-around rights as a miner's representative. (Compl. at 2–5.)

In regard to the third allegation, Justice's section 105(c)(3) complaint alleges that Rockwell retaliated against Justice by notifying him on or around November 3, 2016, that Justice would be subject to discipline if he were to leave early on Friday and arrive late on Saturday, in observance of the Sabbath, which Justice alleges mine management had previously accommodated. (Compl. at 3–4.) The complaint also claims that the mine attempted to "demote"

Justice from his position as miners' representative after Justice tried to exercise his walk-around rights. (*Id.* at 4–5.)

Justice also attached to his section 105(c)(3) complaint copies of his MSHA Form 2000-123 complaint, his supplemental statement to MSHA with his timeline dated August 10, 2016, and MSHA's September 14, 2017, determination letter. (Compl., Exs. A, B, C.)

II. Respondent's Motion to Dismiss and Issues

On November 22, 2017, Respondent filed its Motion to Dismiss Marshall Justice's Complaint. Respondent argues that Justice's allegations of interference—with (1) his rights as a miners' representative and (2) his right to refuse unsafe work—both lack merit as a matter of law. (Mot. at 1–5.) First, Respondent notes that the Secretary filed a section 105(c)(2) complaint on behalf of Justice regarding the alleged interference with a miners' representative's rights and argues that Justice may not file a separate section 105(c)(3) complaint on that issue. (*Id*. at 3–4.) Second, Respondent argues that Complainant's work refusal allegation lacks merit because Complainant exercised his right to complain about the allegedly unsafe scoop and his belief that this equipment is unsafe is unreasonable. (*Id.* at 2–5, n.12; Reply at 3, n.8.) Respondent also argues that Complainant added several new issues to his complaint, including claims of retaliation, which are impermissible because they were not initially presented to the Secretary in MSHA's investigation. (Mot. at 3–6, n. 16; Reply at 3–4.)

Complainant filed his response on December 1, 2017. Complainant first asserts that he is permitted to intervene in the Secretary's section 105(c)(2) proceeding and would not oppose dismissal of his section 105(c)(3) claim insofar as it relates to the alleged interference with the rights of a miners' representative and would be duplicative. (Justice Resp. at 1.) Second, Complainant argues that he presented claims regarding unsafe work to the Secretary and submitted arguments to the Secretary regarding loss of vacation days, imposition of discipline, and other retaliatory measures. (*Id.* at 2–4.) Because the Secretary found that no violation occurred in regard to the alleged unsafe work, Complainant asserts that he may proceed under section 105(c)(3) on that claim. (*Id.*)

The Secretary in his December 11, 2017, response to the motion to dismiss argues that Justice's claim of interference with his rights as a miners' representative should be dismissed from this section 105(c)(3) proceeding because it duplicates the interference claim set forth in the Secretary's section 105(c)(2) proceeding, Docket No. WEVA 2018-10-D. (Sec'y Resp. at 3–4.) The Secretary further asserts that Justice should be permitted to pursue his interference claim regarding the unsafe scoop as this allegation was raised in his complaint to MSHA, but was not further pursued by the Secretary. (*Id.* at 4.) However, the Secretary argues that Justice's claims of retaliation should be dismissed because Justice did not raise any claim regarding retaliation in his initial complaint to MSHA. (*Id.* at 5–6.)

Accordingly, the following issues are before me—(1) whether Justice's interference claim regarding his right as miners' representative to receive notice of mine ventilation plan revisions should be dismissed; (2) whether Justice's interference claim regarding the unsafe mine

equipment should be dismissed; and (3) whether Justice's other claims, including those alleging retaliation, should be dismissed.

III. Principles of Law

A. Initiating Section 105(c) Proceedings

The Mine Act provides that upon receipt of a discrimination complaint, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . ." 30 U.S.C. § 815(c)(2). Pursuant to section 105(c)(2), "[t]he complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing. . . ." *Id.*

Section 105(c)(3) of the Mine Act provides that if the Secretary determines that no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination occurred. *Hatfield v. Colquest Energy*, 13 FMSHRC 544, 545 (Apr. 1991).

In order for the statutory prerequisites for a section 105(c)(3) complaint to be met, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated by MSHA and considered in the Secretary's determination of whether the Mine Act has been violated. *See Hatfield*, 13 FMSHRC at 546 (vacating order denying dismissal and remanding for consideration of whether alleged protected activities were part of Secretary's investigation). However, the Commission has recognized that it is the scope of the Secretary's *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

B. Dismissal of a Discrimination Complaint

The Commission's Procedural Rules do not provide formal guidance on motions to dismiss. However, Commission Judges have treated such filings as motions for summary decision. *See, e.g.*, *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (Aug. 2014) (ALJ) (denying motion to dismiss section 105(c)(3) complaint); *Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ) (denying motion to dismiss section 105(c)(2) complaint); *Sec'y on behalf of Brewer v. Monongalia Cnty. Coal Co.*, 38 FMSHRC 1876 (July 2016) (ALJ) (denying motion to dismiss 105(c)(3) complaint based on timeliness of filing). Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law."

20 C.F.R. § 2700.67(b). A "material fact" for the purposes of defeating summary decision can also be an inference, drawn from evidence on record, as to a factual element of a claim. *KenAmerican Res.*, 38 FMSHRC 1943, 1946 (Aug. 2016).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.[4] *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The Commission also noted that a party moving for summary judgment bears the initial burden of showing that there is no genuine dispute as to material facts. *KenAmerican Res.*, 38 FMSHRC at 1946 (citing *Celotex Corp.*, 477 U.S. at 323; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party carries its burden, then the burden shifts to the non-movant to establish a genuine dispute as to material fact. *Id.* However, in determining whether facts are disputed, Commission Judges should not solely rely on the parties' claims, but should conduct an independent review of the record. *Id.*

C. Section 105(c): Tests for Discrimination and Interference

Section 105(c)(1) of the Mine Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act]." 30 U.S.C. § 815(c)(1).

Under the traditional *Pasula-Robinette* framework, a complainant establishes a *prima facie* case of section 105(c) discrimination if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in

[4] Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

In regard to claims of interference, the Commission has not settled on a single framework. Two Commissioners have supported the two-prong *Franks* test advocated by the Secretary whereby a violation of interference occurs if: (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights. *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs).

Several Commission Judges have applied the *Franks* test. *See, e.g.*, *McNary v. Alcoa World Alumina LLC*, 39 FMSHRC __, slip op. 44–46, No. CENT 2015-279-DM (Dec. 21, 2017) (applying *Franks* test in determining complainant did not prove interference), *appeal granted*, (Jan. 30, 2018); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301 (Feb. 2015) (ALJ) (applying *Franks* test to determine that operator interfered with complainant's miners' representative rights); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ) (applying *Franks* test in granting complainant's motion for summary decision); *Sec'y of Labor on behalf of Greathouse v. Ohio County Coal*, 37 FMSHRC 2892 (Dec. 2015) (ALJ) (reasoning that the *Franks* test is consistent with Commission precedent and the Mine Act's legislative directive). Although a majority of the Commission has not formally adopted the *Franks* test as the single test for interference, it has confirmed that the test is consonant with Commission precedent. *Sec'y of Labor on behalf of McGary et al. v. Ohio Cnty. Coal*, 38 FMSHRC 2006, 2011–12 (Aug. 2016); *see Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985) (finding interference because conduct would "chill the exercise" of protected rights, but recognizing that an operator may have legitimate and substantial reasons for its conduct); *Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005) (analyzing whether conduct reasonably tended to interfere with the free exercise of protected rights).

Yet, the wording in section 105(c)(1) has also been interpreted to require the complainant to prove the interference alleged was *motivated* by the exercise of protected rights. *Sec'y of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1450–51, n.11 (June 2016) (ALJ); *see McGary*, 38 FMSHRC at 2012 n.11 (declining to adopt single interference test and noting that the elements of both the *Franks* and *Pepin* tests would be met under the facts of the case). Under this view, a motivational intent must be shown, thus altering the second part of the test to: (2) such actions were motivated by the exercise of protected rights. *Pepin*, 38 FMSHRC at 1453–54 (ALJ).

IV. Discussion and Analysis

A. Interference with Miners' Representative Right to Notice of Mine Ventilation Plans

Respondent argues that Complainant's claim that Rockwell interfered with his rights as a miners' representative by refusing to provide notice of mine ventilation plan revisions should be dismissed because the Secretary has initiated a section 105(c)(2) proceeding on the claim. (Mot.

at 3–4.) The Secretary concurs that the claim should be dismissed from this section 105(c)(3) proceeding as the adjudication of the related issues would be duplicative of the proceeding contained in Docket No. WEVA 2018-10-D. (Sec'y Resp. at 2–4.) Complainant has expressed that he would not be opposed to the dismissal of his section 105(c)(3) claim insofar as it relates to interference with his right as a miners' representative to receive notice of mine ventilation plan revisions. (Justice Resp. at 1.)

Pursuant to section 105(c)(2), Complainant may present additional evidence regarding interference with his rights as a miners' representative[5] on his own behalf during the hearing in Docket No. WEVA 2018-10-D. 30 U.S.C. § 815(c)(2). Because of the parties' agreement on the issue, the on-going section 105(c)(2) case before me, and the lack of prejudice to Complainant in dismissing the duplicative interference claim, I therefore conclude that dismissal of Justice's interference claim regarding his right as a miners' representative to receive notice of mine ventilation plan revisions from Docket No. WEVA 2018-48-D is appropriate.

B. Interference with Right to Refuse Unsafe Work

Respondent asserts that Complainant's interference claim regarding the unsafe scoop fails as a matter of law because Justice did in fact complain about the scoop, and therefore Rockwell never interfered with his right to do so. (Mot. at 2, n.12; Reply at 3, n.8.) Respondent also argues that Complainant's work refusal allegation lacks merit due to Complainant's unreasonable belief that the caged scoop was unsafe. (Mot. at 4–5; Reply at 3, n. 8.) Complainant asserts that the caged scoop obscured the driver's field of vision and that operating the scoop over long distances had caused accidents. (Justice Resp. at 4.) Complainant claims that despite expressing his safety concerns, Rockwell continued to assign him to work in the caged scoop. (Compl. at 3.) The Secretary has no objection to Complainant pursuing this claim under section 105(c)(3) in Docket No. WEVA 2018-48-D. (Sec'y Resp. at 4.)

First, to prove interference, a claimant must demonstrate that a person's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights. *See Franks*, 36 FMSHRC at 2108; *Pepin*, 38 FMSHRC at 1453–54 (ALJ); *McGary*, 38 FMSHRC at 2011–12,

[5] I acknowledge that Complainant also "seeks to establish that the Respondent interfered with his right to refuse work in unsafe conditions" and therefore wishes to intervene in the section 105(c)(2) proceeding to present evidence related to this allegation. (Justice Resp. at 1.) However, the Secretary's section 105(c)(2) complaint in Docket No. WEVA 2018-10-D involves only Justice's claim of interference with his right as a miners' representative to receive notice of mine ventilation plan changes. (Sec'y Compl. at 1–5.) All other claims of discrimination or interference by Justice should therefore be litigated and addressed pursuant to section 105(c)(3) in Docket No. WEVA 2018-48-D.

n.11.[6] Because this first part of the test focuses on the *tendency* to interfere, actions that could reasonably chill the exercise of protected rights may qualify as acts of interference even if the miner has not been actually prevented or deterred from exercising his rights. *Pepin*, 38 FMSHRC at 1454 n.15 (ALJ).[7] I therefore reject Respondent's argument that because Justice exercised his right to refuse unsafe work, no interference could have occurred. Complainant states that he expressed safety concerns about the caged scoop to mine management, yet Rockwell continued to assign Justice to work in the caged scoop. (Compl. at 3.) Repeatedly assigning work that a miner reasonably believes to be unsafe despite the miner's objections could chill the exercise of protected rights by discouraging the miner from continuing to report the unsafe conditions, thus allowing an operator to ignore and eventually suppress legitimate safety concerns. I determine that such acts could form the basis of a plausible claim of interference.

In regard to Respondent's second argument, a miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463 (Dec. 1993); *Sec'y of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066 (July 1986); *Robinette*, 3 FMSHRC at 808–12. Here, Rockwell asserts that it is undisputed that the safety cage on the scoop was installed by the manufacturer, that MSHA approved the scoop's safety cage, that the scoop's safety cage was inspected and never cited, and that other miners who have operated the scoop have never complained about its safety cage. (Mot. at 5.)

Nevertheless, Complainant alleges that "[w]hile this type of scoop may be used safely for various maintenance tasks and heavy duty wench work," Respondent forced Justice "to operate [the scoop] in other, unsafe circumstances on a daily basis[,]" including operating the scoop alone in the mine during regular long distance coal haulage. (Compl. at 3.) Complainant asserts that he could be trapped inside the cage and could also run over obstructions because the scoop did not have a proximity detection system. (*Id.*)

After review of the parties' submissions, I find that there remain genuine issues of material fact as to whether a miner could reasonably believe the circumstances under which Justice was assigned to operate the scoop were hazardous. Although Rockwell avers the safety scoop was inspected and approved by MSHA, Complainant has alleged facts that the scoop was being used for tasks other than its intended use. Rockwell has not presented undisputed evidence

[6] Although it has not adopted a single interference test, the Commission appears to agree that to establish interference, a complainant must first prove: a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights. This element is the first part of the *Franks* test, which two Commissioners supported. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). It is also the first part of the *Pepin* test, which another two Commissioners suggested may be an appropriate framework for finding interference. *Pepin*, 38 FMSHRC at 1453–54 (ALJ); *McGary*, 38 FMSHRC at n.11 (Young & Althen, Comm'rs).

[7] Although the Commission Judge's decision I cite herein is not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find the decision's reasoning persuasive.

that the equipment had been inspected while being utilized for the purpose of hauling coal over long distances underground and is thus objectively safe under these conditions.

Viewing the facts in the light most favorable to Complainant, I conclude that Respondent has not established a right to summary decision as a matter of law. Therefore, I determine that dismissal of Justice's claim of interference with his right to refuse unsafe work is inappropriate.

C. Discriminatory Retaliation and Other Claims

Respondent lastly argues that Complainant has added several new issues to his section 105(c)(3) complaint including allegations of retaliation, which were not initially raised in his complaint to MSHA. (Mot. at 3–6, n.16; Reply at 3–4.) According to the Secretary, the allegations regarding retaliatory discipline was not considered or investigated by the agency because Justice did not raise such claims. (Sec'y Resp. at 4–6.) In contrast, Complainant argues that he alleged both protected activity and adverse action in his MSHA complaint and submitted arguments to the Secretary regarding loss of vacation days, imposition of discipline, and other retaliatory measures. (Justice Resp. at 2–4.)

In order to meet the statutory prerequisites for a section 105(c)(3) complaint, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated and considered in the Secretary's determination. *Hatfield*, 13 FMSHRC at 546. Nevertheless, the scope of the Secretary's *investigation*, rather than the initiating complaint, governs the permissible ambit of the complaint file with the Commission. *Pontiki*, 19 FMSHRC at 1017. In *Hatfield*, the Commission vacated an order denying summary dismissal of a section 105(c)(3) complaint and remanded the matter to the judge, stating that a complainant should be afforded an opportunity to demonstrate that the allegations in his section 105(c)(3) complaint were investigated by the Secretary in connection with his initial discrimination complaint to MSHA. *Hatfield*, 13 FMSHRC at 546.

Here, Complainant attached to his section 105(c)(3) complaint a copy of his MSHA Form 2000-123 complaint, as well as a supplemental statement that Justice states he also submitted to MSHA. (Compl. at 5, Exs. A, B; Justice Resp. at 3.) Although his MSHA Form 2000-123 complaint only generally refers to "any and all losses that arose due to [his] refusal," his supplemental statement outlines specific dates of events concerning his allegations. (Compl., Exs. A, B.) Specifically, he provides several dates when he expressed his safety concerns about two caged scoops (#874 and #882). (Compl., Ex. B at 1–2.) He also provides the date he was not given an opportunity to work during vacation when other miners had been. (*Id.* at 1.) Lastly, he lists the date he allegedly attempted to exercise his walk-around rights, but was denied and ordered to return to work underground. (*Id.* at 2–3.) Furthermore, Justice's section 105(c)(3) complaint alleges that Justice suffered retaliation in the form of a threat that he would be disciplined for observing the Sabbath. (Compl. at 4.) This threat allegedly occurred on November 3, 2016, which was after Justice filed his July 20, 2016, MSHA Form 2000-123 complaint, but before MSHA concluded its investigation and notified Justice of its determination on September 14, 2017. (Compl. at 4, Exs. A, C.)

Complainant's timeline in his supplemental statement describes matters that could form the elements of a discrimination claim, which Justice's section 105(c)(3) complaint alleges: protected activity (work refusal), adverse action (loss of opportunity to work during vacation), and motivational nexus (proximity in time). Moreover, post-complaint adverse actions alleged to have been motivated by protected activity previously investigated by the Secretary may be proper subjects of a section 105(c)(3) proceeding. *Womack v. Graymont Western U.S. Inc.*, 25 FMSHRC 235, 248 (May 2003) (ALJ) (holding that because complainant's protected activity was investigated by the Secretary, any adverse action allegedly stemming from that protected activity come within the permissible ambit of a section 105(c) complaint) (citing *Pontiki*, 19 FMSHRC at 1017).[8] Although Justice did not mention that he was threatened with discipline for observing the Sabbath in his MSHA Form 2000-123 complaint, this alleged retaliation occurred during the period MSHA was conducting its investigation of the protected activity that Justice alleges motivated the retaliation. However, the supplemental statement and time frame do not conclusively establish that the Secretary investigated and considered these allegations as part of his determination of whether section 105(c) had been violated, especially considering the Secretary's denial that he was made aware of such claims. (Sec'y Resp. at 5.)

Nevertheless, in considering a motion to dismiss, I must view the facts in the light most favorable to the party opposing the motion. At this juncture, there remain genuine issues of material fact over whether the statutory prerequisites for a section 105(c)(3) complaint have been met in regard to Justice's other claims. Per the Commission's precedent in *Hatfield*, Complainant should be afforded the opportunity to demonstrate that such allegations were investigated by the Secretary and/or considered in the Secretary's determination. *Hatfield*, 13 FMSHRC at 546. I am cognizant that such evidence, including interviews, notes, or statements made during the investigation, may only become available to Complainant after engaging in discovery. But given that the Secretary has undertaken a section 105(c)(2) case in which Justice is a party, there should be ample opportunity to obtain information on the scope of the Secretary's investigation. Therefore, Complainant should have the opportunity to present additional evidence at hearing that such claims meet the statutory requirements for a section 105(c)(3) complaint.

Accordingly, I determine that Rockwell is not entitled to summary decision as a matter of law and that dismissal of Justice's other claims, including those alleging retaliatory discrimination, is inappropriate.

[8] Although the Commission Judge's decision I cite herein is not binding precedent, *see* 29 C.F.R. § 2700.69(d), I find the decision's reasoning persuasive.

V. Order

Based on the preceding discussion, Respondent's motion to dismiss Justice's interference claim regarding his right as a miners' representative to receive notice of mine ventilation plan revisions is hereby **GRANTED**. It is hereby **ORDERED** that this claim be **DISMISSED** from Docket No. WEVA 2018-48-D, as such claim will be the subject of the upcoming hearing in Docket No. WEVA 2018-10-D. Respondent's motion to dismiss Justice's other claims is hereby **DENIED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ORIGINAL SIXTEEN TO ONE MINE INC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0546 A.C. No. 04-01299-437883 Docket No. WEST 2017-0685 A.C. No. 04-01299-445257 Docket No. WEST 2018-0100 A.C. No. 04-01299-450097 Mine: Sixteen to One Mine

ORDER

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.[1] On January 29, 2017 the parties informed the Court of a dispute that has arisen during the discovery process.

On that date, the Conference and Litigation Representative, ("CLR"), Mr. Randy Cardwell,[2] sent an email to the Court informing that he "requested the following information from Mr. Miller, per the Prehearing Orders as described under § 2700.105 Disclosure of Information by the Parties:

> Citation No. 8785581: Please provide the Respondents policies and procedures regarding the use of self-rescuers, and any training documentation, which would indicate that miners were trained in the use of self-rescuers.
>
> Citation No. 8785582: Please provide any information the Respondent may have regarding any requests made to have the Speedair air compressor inspected.

[1] These matters are currently set to be heard commencing April 17, 2017 in Nevada City, California. All three dockets have been designated for simplified proceedings pursuant to 30 C.F.R. § 2700.102.

[2] It is the Court's understanding that Attorney Isabella M. Finneman has or will file a notice of appearance for these dockets, as the CLR has not sought the Court's permission to practice regarding these dockets, per 29 C.F.R. §2700.3(b)(4). The Court construes the CLR's informal request as seeking factual information from the Respondent.

> In looking at the termination for the Speedair air compressor, the compressor was removed from the mine site, was there a reason as to why the Respondent chose to remove the compressor? Instead of having it inspected.
>
> Citation No. 8879879: Please provide any records which would show when the W65 Self- Rescuer unit EN8047 was weighed, dating back to when it was assigned.
>
> Citation No. 8879886: Please provide any information which would indicate how the inside of the magazine was kept suitably dry.
>
> Citation No. 8879887: Please provide any information indicating when the Cobra blasting caps and the Dyno Nobel Nonel shock tube detonators were purchased and delivered to the mine site.

Cardwell email to the Court January 29, 2018

Each of these dockets has been designated for Simplified Proceedings. The provision cited by the CLR, § 2700.105, titled, "Disclosure of information by the Parties," provides, in relevant part,

> (a) Within 45 calendar days after a case has been designated for Simplified Proceedings, the parties shall provide any information in a party's possession, custody, or control that the disclosing party or opposing party *may use to support its claims or defenses*. Any material or object that cannot be copied, or the copying of which would be unduly burdensome, shall be described and its location specified. Materials required to be disclosed include, but are not limited to, inspection notes from the entire subject inspection, rebuttal forms, citation documentation, narratives, photos, diagrams, preshift and onshift reports, training documents, mine maps, witness statements (subject to the provisions of § 2700.61), witness lists, and written opinions of expert witnesses, if any.

29 C.F.R. § 2700.105 (emphasis added).

The Court, noting that, per 29 C.F.R. 2700.107, discovery is not permitted except as ordered by the administrative law judge, finds that the information sought by the CLR constitutes discovery.[3]

[3] For example, the CLR's request for any information the Respondent may have regarding any requests made to have the Speedair air compressor inspected will only come into play if the Respondent is asserting this as a defense or in mitigation. Several of the requests, such as the information how the magazine was kept suitably dry, may simply be addressed through the Secretary's cross-examination, if such matters come up. The Respondent (and the Secretary) are again advised to pay attention to the caveat in this Order.

That said, the Court advises the Respondent that the determination in this Order comes with an important caveat. Through experience in other hearings, the Respondent is well aware of the importance of each side disclosing information intended to be used at the hearing. In the past, with this Respondent, the Court has been lenient in permitting the Respondent to submit documents in its defense at, or very near to, the commencement of the hearing. However, it will not allow that practice to continue to occur. Therefore, it is in the *Respondent's interest* to disclose any such information per the prehearing exchange date. Of course, this applies to both sides. As the Court has informed the Respondent on other occasions, modern litigation avoids such late disclosure of information in order to prevent surprise. The idea is that both sides put their cards "face up" so to speak, in order to provide for a fairer and more accurate determination of the issues in dispute. Both sides are hereby **ORDERED** to respond to the Court acknowledging receipt of this Order and to their understanding of the consequences of failing to provide to one another information intended for their respective petition or defense.

SO ORDERED.

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

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/KP